Neutral Citation Number: [2021] EWHC 673 (Admin)

Case No: CO/4023/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 March 2021

Before :

MR DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

THE QUEEN (On the application of PETER KANE)

Claimant

- and –

THE INDEPENDENT ADJUDICATOR

Defendant

- and –

THE SECRETARY OF STATE FOR JUSTICE

Interested Party

- -

Mr Michael Bimmler (instructed by Coninghams Solicitors) for the **Claimant**
No appearance by the **Defendant**.
Mr Myles Grandison (instructed by the Government Legal Department) for the **Interested Party**

Hearing date: 18 March 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10.30am on 23 Match 2021.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

1. This is a renewed application for judicial review on behalf of a serving prisoner, Mr Peter Kane, who seeks to challenge the decision of the Independent Adjudicator, District Judge (Magistrates' Court) Ms Deborah Wright following a hearing on 31 July 2020 in which Judge Wright accepted pleas to 2 charges of breaches of Prison Rules by the Claimant and found that 2 further breaches were proven and imposed sanctions of a cumulative total of 18 additional days to the Claimant to serve in prison.

2. The Claimant is serving a sentence of 14 years imprisonment for supplying heroin. He has a bad record on disciplinary matters with 28 previous findings of guilty on adjudication, but none of the previous adjudications were for assault. Three were for damaging property, two were for threatening and abusive words or behaviour and two were for endangering health and safety.

3. The events which led to the hearing which is the focus of this challenge occurred on 7 June 2020 at about 11am. Those events led to a hearing before Judge Wright on 31 July 2020. The Claimant is a serving category A prisoner at HMP Whitemoor. Governor Wood spoke to the Claimant regarding a letter that he proposed to send. The Governor explained that she was not prepared to permit him to send the letter because it contained material which she considered to be abusive. The Claimant became upset at this decision and verbally abused the Governor using florid and wholly unacceptable language. He exited the room where this conversation took place and threw himself over a railing onto netting which was in place to prevent prisoners harming themselves. He also picked up a wooden item described as an "applications box" and threw it at a window causing it to smash. He then threw a piece of wood in the direction of

Governor Wood's head. She ducked and the piece of wood did not hit her. Unsurprisingly, the Claimant was the subject of prison discipline charges for these events.

4. The Claimant appeared before a Governor on 8 June 2020 charged with 4 matters namely:

   a. Assaulting Governor Wood;
   b. Endangering health and personal safety of others;
   c. Damaging prison property; and
   d. Threatening, abusive or insulting words or behaviour.

5. The Governor referred these matters to the police because of the Governor's concern about the seriousness of the matters. However, it appears that a prompt decision was made by the police not to investigate, thereby leaving the matters to be dealt with under the prison discipline system.

6. Rule 51 of the Prison Rules 1999 provides that a prisoner is guilty of an offence against discipline if he commits any assault or otherwise acts in breach of any of the provisions set out in that rule. Rule 53A provides:

> *"(1) Before inquiring into a charge the governor shall determine—*
>
> *(i) whether the charge is so serious that additional days should be awarded for the offence if the prisoner is found guilty, or*
>
> *(ii) whether it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator.*
>
> *(2) Where the governor determines:*
>
> *(a) that it is so serious [or that it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator], he shall:*
>
> *(i) refer the charge to the adjudicator forthwith for him to inquire into it;*
>
> *(ii) refer any other charge arising out of the same incident to the adjudicator forthwith for him to inquire into it; and*
>
> *(iii) inform the prisoner who has been charged that he has done so;*

(b) that it is not so serious [or that it is not necessary or expedient for some other reason for the charge to be inquired into by the adjudicator], he shall proceed to inquire into the charge"

7. This rule gives a wider power for a Prison Governor to refer a charge to an adjudicator so that the adjudicator is the decision maker rather than the Prison Governor. It provides that, in the event that the Prison Governor determines that a charge is "so serious" that, if the charge were to be proved, the Prison Governor considers a sanction of additional days imprisonment should be awarded for the offence, the Prison Governor is obliged to refer the charge for trial by an Independent Adjudicator. In other cases, the Prison Governor has a power to refer the charge to an adjudicator if he considers that it is necessary or expedient to do so for some other reason. There is no requirement for the Prison Governor to give reasons for his decision or even to indicate which limb of the rule is relied upon when a charge is referred to an adjudicator.

8. On 10 June 2020, a decision was made by a Governor at HMP Whitemoor to refer these charges to an Independent Adjudicator. No challenge is made by the Claimant to the lawfulness of that decision. It thus has to be accepted that it was reasonably open to a reasonable Prison Governor to reach the decision that either the charges were so serious that added days would be an appropriate sanction or that he considers that it was necessary or expedient to do so for some other reason. The paperwork is not entirely clear but it appears to have been a decision based on the "so serious" test. In any event, it is not disputed that a lawful decision was made by a Prison Governor to refer these charges to an Independent Adjudicator.

9. Judge Wright was appointed as the Independent Adjudicator. There were then a series of hearings before a substantive hearing was held before Judge Wright on 31 July 2020. At that hearing a preliminary point was taken on behalf of the Claimant by his solicitor, Mr Julian Coningham, a lawyer who has considerable experience of acting for prisoners. The preliminary objection centred on "Question F" on the pro forma which the Independent Adjudicator was required to complete at the outset of the hearing. The question on the form was as follows:

"F. Is IA satisfied that the Governor gave proper consideration to whether the charge is so serious that added days should be awarded if the prisoner is guilty (i.e., the offence poses a very serious risk to order and control of the establishment, or the safety of those within it)

NB the corrosive effect upon order and control of repeat offending by an individual may satisfy this criteria.

☐ No – dismiss

☒ Yes – go to G below"

10. The point taken by the Claimant's solicitor before the Independent Adjudicator was that there was no information before the Independent Adjudicator to satisfy her that the Prison Governor who was the decision-maker in this case had given proper consideration to whether the charges met the "so serious" test. Mr Coningham thus submitted that Judge Wright could not properly tick the box to say that she was satisfied that this decision had been taken properly. The Claimant's solicitor therefore suggested that all charges against his client should be dismissed without consideration of the merits because Judge Wright could not properly tick the box to say that she was satisfied that this transfer decision had been taken properly.

11. That submission was not accepted by the Judge. The record of her decision states as follows (complete with typos):

"One preliminary point. Procedure followed when matter referred to me. Does the charge meet the seriousness criteria. Noted in the record due to the nature of the police returning it to the IA. Requirted by the PSI. says I do not have jurisdiction.

I am satisfied that the matter is serious enough for referral. First there are certain types of matter which are considered serious enough for referral in the light of Covid 19 hearings and the new regulations. Second although the governor does not explicity say so, he felt that the matter was serious enough

for referral to the police. I have jurisdiction because the Governor was perfectly entitled to refer to me and in any event I am not bound by the PSI"

12. It is correct, of course, to say that the Judge did not have material before her to explain why the Prison Governor had made the decision that the "so serious" test was satisfied. Ground 1 in these judicial review proceedings advanced a case on behalf of the Claimant that the Judge acted unlawfully in refusing to dismiss the disciplinary proceedings *ab initio* and without regard to their merits because there was insufficient material before the Judge for her to be able to conclude that the Prison Governor had made a proper decision that the "so serious" test was met. However, I do not consider that this absence of information undermines the lawfulness of decisions reached by the adjudicator.

13. The central flaw in ground 1 is that there is no requirement under the Prison Rules 1999 for an Independent Adjudicator to investigate the factual basis upon which a decision was made by a Prison Governor that either the "so serious" test was met on the facts of an individual case or that it was necessary or expedient for some other reason for the charge to be inquired into by the adjudicator. If the Independent Adjudicator was under no legal duty to inquire into the reasons that the charges were transferred to her, in my judgment she cannot be said to have acted unlawfully in failing to do so. An Independent Adjudicator cannot have her decision undermined by failing to take a step that she had no duty to take.

14. The power to make the decision to refer disciplinary charges to an Independent Adjudicator is solely given to a Prison Governor. Once the decision has been made, responsibility for adjudicating on the merits of the disciplinary charges passes from the Prison Governor to the Independent Adjudicator. In legal terms, the Prison Governor becomes *functus officio* in respect of the charges because the Prison Governor has made a final decision that the Independent Adjudicator should hear and determine whether the disciplinary charges are proved and, if so, what sanctions should be imposed.

15. There is a limited power under Rule 53B for the charge to be referred back to a Prison Governor "*because of the effects of coronavirus*". That power is not relevant for present purposes. In all other circumstances, once a decision is made by a Prison

Governor to transfer the matter to an Independent Adjudicator, the Independent Adjudicator has a legal duty to consider and adjudicate fairly on the substance of the charges. Accordingly, it seems to me that under this statutory scheme the Independent Adjudicator is not given any role to review the reasons why the matter was referred to her by the Prison Governor in the first place. She has a duty to carry out an adjudication function and would be acting in breach of that duty if she acceded to the submission that she should dismiss the charges without considering their merits.

16. In this case, as Mr John Howell QC observed when refusing permission, the facts speak for themselves. This was plainly a case where the "so serious" test was met. I agree. Indeed, the Claimant pleaded guilty to 2 out of the 4 charges and was sanctioned with additional days imprisonment by the Independent Adjudicator for those charges. No challenge has been made or could be made against that sanction decision. It thus demonstrates that, even on the matters which the Claimant admits, it was entirely proper for a Prison Governor to have made the decision to refer this case to an Independent Adjudicator. That shows that there was never any merit to the claim that the charges had been improperly referred to the Independent Adjudicator.

17. However, even in another case where a question could be raised in the mind of the Independent Adjudicator as to why a case had been referred to her by a Prison Governor under either of the limbs of Rule 53A(1), it does not seem to me that this is a matter which should properly be examined by the Independent Adjudicator unless she was on notice of something seriously improper in the referral. Unless there was some clear impropriety in the referral, the Prison Governor's reasons for the referral are irrelevant because they cannot affect the statutory function which the Independent Adjudicator is required to discharge.

18. It follows that, unless the decision to refer the case to an Independent Adjudicator is challenged by way of judicial review proceedings, the transfer decision takes effect to transfer the adjudication function from the Prison Governor to the Independent Adjudicator. Accordingly, I do not consider that it is arguable that the Independent Adjudicator acted unlawfully by failing to dismiss these disciplinary proceedings because she was provided with insufficient reasons to support the original transfer decision of the Prison Governor. Notwithstanding the provisions set out in the pro

forma, in my judgment possibly absent a clear case that the transfer decision was unlawful, there is no role for the Independent Adjudicator in reviewing the reasons why the case was transferred to her. It follows that this Independent Adjudicator cannot have acted unlawfully in refusing to dismiss the proceedings in response to the preliminary point raised by the Claimant's solicitor.

19. It may be sensible for the Prison Authorities to look at the pro forma. At present it requires Independent Adjudicators to complete this question and thus appears to invite adjudicators to undertake a function which is wholly outside the statutory scheme. It seems to me that the only question adjudicators need to ask themselves is whether they are satisfied that a decision has been made by a Prison Governor under Rule 53A(1) to transfer the adjudication function from the Governor to the adjudicator. Once an adjudicator is satisfied that a decision has been made, it seems to me that the adjudicator comes under a statutory duty to perform the adjudication function. Whilst I make it clear that nothing I say would be relevant to a case where the transfer decision is vitiated by obvious unlawfulness, in all other cases it does not seem to me to be any part of that function for the adjudicator to enquire why the decision was made by the Prison Governor or to satisfy himself or herself that there were proper grounds for making the decision.

20. By ground 2, the Claimant submits that the Independent Adjudicator acted unlawfully by finding that the assault charge was proven in circumstances where there was no specific finding by the Independent Adjudicator that Governor Wood was, in fact, assaulted. The relevant factual findings were as follows:

> *"[The Claimant] hurled a piece of wood in her direction and it nearly hit her. Mr Kane accepts that he did this and it came very close to her. I did not accept Mr Kane's suggestion that he did not appreciate the risk that it could have hit her. In fact, I am sure he intended to hit her with the wood"*

21. It was common ground between counsel that an "assault" for the purposes of rule 53(1) of the Prison Rules 1999 is committed by a prisoner when he intentionally or recklessly causes another to apprehend immediate and unlawful violence. It is not necessary for the victim to suffer physical violence. The essence of the disciplinary offence is that

the prisoner does something which he knows causes someone else to apprehend immediate and unlawful violence or that he is reckless as to whether a person would apprehend immediate and unlawful violence. In this case the Judge found as a fact that the Claimant intentionally threw a piece of wood at the head of a member of prison staff. The only reason that Governor Wood was not injured was, as she explained to the adjudicator, that she ducked to avoid the piece of wood when it was thrown at her.

22. It is correct to note that the Independent Adjudicator made no explicit finding that Governor Wood feared that she may be injured in this incident. The Claimant's argument is that, in a case where there was no actual violence, it is essential for a factual finding to have been made by the Independent Adjudicator that the victim apprehended that she may have suffered immediate and unlawful violence. I do not accept the submission that the absence of this specific factual finding gives rise to a ground for judicial review for 3 separate reasons. First, it seems to me that the *actus reus* and the *mens rea* of the disciplinary charge are made out if the Claimant is found guilty of conduct where he either intended to put somebody in fear of violence or was reckless as to whether a person did apprehend immediate unlawful violence. The finding of fact that the Claimant intentionally through a piece of wood at Governor Wood's head in order to inflict harm to Governor Wood gives rise to both the *actus reus* and the *mens rea* of the disciplinary charge.

23. Secondly, it seems to me entirely obvious that anyone who has a piece of wood thrown at their head and has to duck to avoid injury is doing so because the person apprehends that he or she will be injured if they do not take evasive action. Accordingly, it is such an obvious point that the contrary is frankly unarguable. I do not consider it was necessary for the Independent Adjudicator to have made a specific finding of the blindingly obvious, namely that Governor Wood feared that she may be injured in this incident. That was plainly the basis upon which she made her findings of fact and is the only reasonable inference from the evidence which she found proven.

24. Thirdly, even if there was a technical flaw in the findings of the Independent Adjudicator, given the other findings she made I consider that it is highly likely that she would have reached the same decision. Accordingly, I am required to refuse permission on this ground under section 31 of the Senior Courts Act 1981. I make it

clear that I have reached this decision without having to rely upon the helpful witness statement put in by the Independent Adjudicator which amplified her reasons. However, if there was any question as to whether the test under section 31 was satisfied, the contents of this witness statement put the matter beyond doubt.

25. Ground 3 concerned a challenge to the finding that the Claimant was guilty of the offence of endangerment and is not persisted with on renewal.

26. Ground 4 is a complaint that the Independent Adjudicator acted unlawfully by relying upon unpublished Guidance on sanctions issued by the Chief Magistrate. Paragraph 2.67 of Annex A of Prison Service Instruction 05/2018 recommends that adjudicators take account of any "*punishment guidelines issued by the Senior District Judge*". Guidelines on sanctions have been produced by the Chief Magistrate to assist adjudicators. The Claimant complains that it was unlawful for this adjudicator to impose the sanctions that she did because in making those decisions, she took into account this unpublished Guidance. He submits that it would only be lawful for an Independent Adjudicator to take the Guidance into account after the Guidance has been made freely available to all individual prisoners by publication on a government website.

27. In making this submission the Claimant relies upon §38 of *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 where Lord Dyson JSC said:

> *"What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made"*

28. It seems to me that this ground has no substance whatsoever for 4 reasons. First, it is important to interpret the observations of Lord Dyson within the context of the facts of that case. The Supreme Court held that the Home Secretary's unpublished policy was unlawful because it was a blanket policy which admitted of no exceptions and was inconsistent with the published policy. In those circumstances the Court held that the Home Secretary had a duty to publish the real, current policy and to follow that published policy so that a person who was affected by it could make informed and

meaningful representations before a decision was made. However, I do not read that case as suggesting that a public body acts unlawfully in following a policy in any circumstances where the policy is not available to everyone potentially affected by the policy on a website. I do not read *Lumba* as going anywhere near that far when it talks about the desirability of policies being "*published*". It seems to me that the observations in *Lumba* about the need for publication arise in relation to policies that are deliberately kept secret by public bodies and are in conflict with published policies.

29. The evidence in this case demonstrates that there is nothing "secret" about the Guidance on Sanctions issued by the Chief Magistrate. It is publicly available guidance which is well known to members of the Association of Prison Lawyers and is available on demand to anyone who enquires from the office of the Chief Magistrate. I do not accept the Claimant's submission that *Lumba* can be treated as authority for the proposition that a public body cannot follow a policy unless that policy is publicly available on a website. It simply does not go that far.

30. Secondly, any concern about the Guidance does not arise on the facts of this case. It is clear that the Claimant's solicitor was well aware of the Guidance and would have been able to draw the attention of the Independent Adjudicator to any part of the Guidance which he considered relevant to the instant case and of assistance to his client. Accordingly, as between this particular Claimant and this particular Independent Adjudicator, there was no lack of transparency. Both were fully aware of the fact that the Chief Magistrate had issued the Guidance. Accordingly, if there was any deficiency in wider circulation of the Guidance, that was completely irrelevant on the facts of this case.

31. Thirdly, there is no evidence from the written record of the decision made by the Independent Adjudicator that her decision was influenced to any material degree by any part of the Guidance. Counsel for the Claimant urged me to assume that the Guidance must have played a part in her decision making. However, it does not seem to me appropriate to make that assumption in the absence of any direct evidence that the Guidance was considered by the Independent Adjudicator to be relevant to any decision that she made. The Independent Adjudicator has denied that she relied on the Guidance in her unsigned statement and I see no reason to go behind that statement.

32. Fourthly, there is no suggestion that any sanction imposed by the Independent Adjudicator based upon the Guidance was either excessive or was otherwise unlawful. Accordingly, there is no real case that can be advanced that the existence of the Guidance in the background made any difference to the outcome in this case. In that case, permission should be refused under section 31 of the Senior Courts Act 1981.

33. Accordingly, it seems to me it is unarguable to suggest that the sanctions imposed by the Independent Adjudicator were unlawful by reason of any failure to make the Sanctions Guidance issued by the Chief Magistrate more widely available. It may be sensible for the Prison Service to publish the Guidance on its website in order to promote transparency but I do not accept that the failure to do so undermined the lawfulness of decisions made in this case.

34. I therefore refuse the Claimant permission to proceed to judicial review on all grounds.

ORDER

BEFORE Mr David Lock QC, sitting as a Deputy High Court Judge

UPON hearing from Counsel for the Claimant, Mr Michael Bimmler, and Counsel for the Interested Party, Mr Myles Grandison, on 18 March 2021

It is ORDERED that:

1. Permission to apply for judicial review be refused.

2. The Claimant shall pay the Interested Party's costs of preparing the Acknowledgement of Service, subject to the Claimant having the benefit of costs protection under section 26 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, so that the amount that he is to pay (if any) shall be determined on an application (if any) by the Interested Party under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013.

3. There shall be a detailed assessment of the Claimant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.