IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2876 (Admin)

CO/1853/2020

Royal Courts of Justice

Tuesday, 25 October 2022

Before:

MR JUSTICE LANE

B E T W E E N :

THE KING
on the application of
SHELDON POMMELL

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

- and -

METROPOLITAN POLICE SERVICE

Interested Party

THE CLAIMANT appeared in Person (via video link).

MR R COHEN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

MISS R SPEARING (instructed by Metropolitan Police Service) appeared on behalf of the Interested Party

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J U D G M E N T

MR JUSTICE LANE:

1 This is an application for a judicial review of the defendant's decision on 6 December 2019 to place the claimant on the form of prison supervision known as "E-list-Heightened". The significance of this designation is explained in the first witness statement of Mr Stuart Freed of the defendant's Category A team.

2 Mr Freed tells us that the Prison Service Instruction PSI 10/2015 sets out a list of procedures for the management and security of E-list prisoners. The E-list procedures are designed to ensure that appropriate security measures are put in place for the small number of prisoners who are identified as presenting a risk of escape. Prisoners must only be placed on the E-list when security processes, additional to those normally applied at the establishment, are necessary in order to manage the identified risk of escape. Section 2 of the PSI sets out three levels of E-list classification. First, there is E-list Standard for those prisoners assessed as presenting a risk of escape both from a closed establishment and from escort. Next there is E-list Escort, which is for those prisoners not assessed as possessing the ability or determination to escape from a closed establishment but who require increased security during escort outside of the establishment. Thirdly, there is E-list-Heightened. This is for the very small number of prisoners who do not meet the criteria for Category A restricted status, but the nature and extent of their escape risk require that they are held in the high security estate. Prisoners in this group must be referred to the Category A team in high-security prisons group for consideration for E-list-Heightened. If accepted as E-list-Heightened by the Category A team, prisoners will be transferred to an appropriate high-security or restricted status prison and subject to the additional security processes provided by the high-security estate, including escorts using Category A resource.

3 The level of restrictions on prisoners who have been placed on the E-list are determined by their E-list classification. Those prisoners, such as the claimant, who have been classified as E-list-Heightened, are subject to the security measures set out in sections 4 and 5 of the PSI in order to manage their escape risk in the establishment. For E-list Heightened prisoners, these measures include the placement of photographs of the prisoner at security points around the prison, simultaneous monitoring of telephone calls, monitoring of incoming and outgoing correspondence, planned escorts for all movements around the prison and supervision at all times, intelligence gathering in line with local security threat, management to minimise the risk of escape, full searches after key events, such as induction, after visits or wing work, recorded checks throughout the night and the wearing of high visibility clothing whenever they are outside their cell. Additional security measures are also required on escort to and from the prison.

4 Mr Freed says that the decision to place a prisoner on the E-list must be proportionate to the nature of the risk. The initial assessment must be completed using any additional sources of information available or intelligence as necessary.

5 Section 3 of the PSI deals with the identification of prisoners who pose an escape risk. The relevant subsections are as follows:

> "3.3. The following circumstances must trigger an assessment for E-list:
>
> PER warning marker for escape; indication of increased risk of escape on reception; incident of escape or attempted escape from escort or establishment; find of escape related equipment; history of escape or attempted escape (e.g. previous sentence); or, escape related intelligence.

…

3.9 The assessment of escape risk must consider the following (this list is not exhaustive):

What was the nature of the escape or attempt? Are there any triggers that have previously been identified that are relevant now (e.g. anniversary, domestic circumstances)? If intelligence is available, how reliable is it? If the prisoner has made previous escape attempts, do similar circumstances now apply? Does the prisoner have access to resources to aid escape? Does the prisoner have a history of using weapons, or close associates not in custody who do? Does the prisoner have the resources and motivation to mount an escape from a closed establishment? Does the prisoner's behaviour and offending indicate opportunist or sophisticated risk? Is risk of escape managed by the security conditions at the current establishment or requires additional security? Could the risk of escape be managed by move to a more secure establishment? Can the risk be managed by other control measures or processes? Does the prisoner meet the criteria for referral for E-list-Heightened?"

6 Pursuant to section 7 of the PSI, a prisoner's E-list classification is required to be reviewed within 35 days of the initial decision or sooner if new information or intelligence comes to light. This applies equally to information which may result in removal from the E-list or to information which might indicate that a change to the E-list classification is required.

7 I take the relevant facts from the defendant's detailed grounds of defence. From these, we learn that, upon his arrival at HMP Wormwood Scrubs, the claimant was categorised as requiring referral for consideration as a potential Category A prisoner and placed in segregation consistent with PSI 9/2015.

8 It is said that he, seemingly, attracted this preliminary categorisation on the basis that he had arrived at the Prison from Isleworth Crown Court under armed police escort. Armed police escorts are not standard issue in transporting remand prisoners to and from court.

9 On 6 December 2019, the Category A team classified the claimant as E-list-Heightened. The classification was based on information provided by MPS to the Category A team concerning the intelligence that they had received. The claimant was informed of the decision to place him on the E-list the same day.

10 The reason given for the decision was that "Information was received that you may attempt to escape from court with the assistance of outside associates". The claimant was informed that his communications, telephone and email, would be monitored for the interests of public safety.

11 The defendant says that the decision of 6 December was taken by Mr Freed. In reaching that decision, Mr Freed considered and took into account the seriousness of the charges against the claimant at that time and the nature of the incident from which the charges arose, including that this involved the possession of a firearm. He also considered the information that the claimant had associates with the ability to source firearms. Finally, he noted the fact that the claimant would have advance notice of his court appearances and the information from the police that he had links with organised crime gangs with the sophistication and means to effect an escape.

12 Permission to bring this judicial review was granted on 30 July 2020. Thereafter, COVID-19 restrictions and court appearances by the claimant have much delayed the substantive hearing.

13 In the meantime, there have been a number of important developments. These are described in the second witness statement of Mr Freed. According to Mr Freed, on 26 June 2020, a mobile phone was found in the possession of the claimant. The defendant says that the claimant had tried to flush the mobile phone down the toilet when staff entered his cell. There then ensued what is described as a violent struggle, as the claimant attempted to get the phone back. The claimant was charged with possession of an unauthorised item under Prison Rule 51, as well as using threatening, abusive or insulting words or behaviour under Prison Rule 51(20).

14 The charges were heard before an independent adjudicator on 17 September 2020, who found that the charges were made out. The claimant received punishment in respect of those offences. Importantly for our purposes, this incident was a reason for the defendant to be classified as E-list-Heightened at that time.

15 On 28 March 2022, the claimant's E-list-Heightened classification was downgraded to E-list-Standard. This was as a result of the claimant having been transferred from Her Majesty's Prison in Belmarsh to Her Majesty's Prison Frankland in County Durham. This is in a part of the country where the claimant is said by the defendant not to have known external criminal associates who might assist his escape. The defendant also noted that the claimant's criminal trial had been put back, meaning there was no predictable need for court escorts at that time.

16 On 3 June 2022, the claimant was transferred back from HMP Frankland to HMP Belmarsh in London in order to attend a criminal trial. On 18 July 2022, while in Belmarsh, the claimant was reclassified as E-list-Heightened. The decision refers to intelligence, including that which suggested the claimant was trying to arrange an assault on another prisoner and that during a routine search bank details and mobile phone numbers were found. It was said that the claimant's television had been tampered with. A USB was not found but one was said to have recently been inserted. It was also considered that the claimant has access to other prisoners' PIN accounts and that the claimant and another prisoner shared the mobile phone.

17 On 10 August 2022 at the end of the criminal trial, the claimant returned to HMP Frankland. On 16 August, in the light of that return and the hearings of the criminal trial having finished, the claimant was downgraded from E-list-Heightened. However, on 17 September 2022, the claimant was again returned to E-list-Heightened after a scanner identified what was said to be a foreign object secreted inside him. This was believed at the time to be a mobile phone.

18 The claimant was informed that information suggested that he might be in possession of a mobile phone and that it was, therefore, reasonable to suspect that he posed an increased risk of escape.

19 On 28 September, however, the claimant was again scanned, this time without any possible foreign objects being identified. At a review on 18 October, the claimant was again downgraded from E-list-Heightened.

20 The defendant says that the challenge to the decision of December 2019 is now academic or, in any event, otiose, so far as these proceedings are concerned. Since then the claimant has

been downgraded from E-list-Heightened. He has been returned to E-list-Heightened for other reasons, which are different from the reason underlying the original placing of the claimant in that category.

21 The defendant says that permission has not been granted to bring judicial review in respect of those later decisions. The claimant cannot use the present judicial review, says the defendant, in order to challenge those other decisions and so bypass the procedural requirement for permission to bring judicial review.

22 In his statement of 19 October 2022, the claimant says that the original decision is still having an effect on the way in which he is regarded by the defendant.

23 There might at first blush be something in the claimant's point. In Mr Freed's second witness statement, he talks about the decision of 18 July 2022. Having noted the new intelligence that I have described, Mr Freed also points to the original decision as playing at least some part in the decision to return the claimant to E-list-Heightened.

24 The claimant developed this point in his oral submissions to me. He contends that the original decision of December 2019 continues, as I have said, to have an effect upon his treatment, including decisions taken to place him in the E-list-Heightened category. It was, however, clear to me from the claimant's submissions that his complaints about the subsequent decisions to put him in the E-list-Heightened category involve what are, in fact, legally different matters. Amongst these are the claimant's argument that, having an unauthorised mobile phone should not, according to the defendant's own practice, automatically lead to a person being treated as at heightened risk of escape; that, after some two years and ten months, the justification for the December 2019 decision should no longer play a part in the defendant's assessment of risk; and that the more recent decisions are unlawful because Mr Freed has no authority to take them in respect of a Category B prisoner, such as the claimant.

25 All these complaints serve, in my view, to emphasise the fact that the original decision has indeed been overtaken by events: in particular, by the June 2020 and September 2022 mobile phone incidents, which are a key and current matter of contention between the claimant and the defendant. The claimant says that he cannot be expected to bring judicial reviews against each and every decision of the defendant to place him in the E-list-Heightened category. I fully understand the practical difficulties, especially for somebody in the position of the claimant, but the claimant can still, and in my view should, put his case to the defendant following any future decision that places him in the heightened category. If putting that case is unsuccessful, then the procedural requirements of judicial review are plain: the claimant must apply for permission to bring judicial review of the relevant decision, explaining why that decision, not some earlier superseded decision, is wrong in law.

26 This court is reluctant to become involved in determining issues that have become academic in nature or which otherwise do not bear upon the reality of the present situation.

27 In the present case, an adjudication on the issue of the legality of the December 2019 decision will not provide a definitive answer to the question of whether any or all of the subsequent decisions were lawful, particularly given the issues concerning the mobile phones. Furthermore, the present proceedings cannot be used as a vehicle to determine the lawfulness of those decisions to put the claimant on E-list-Heightened. To attempt to do so would subvert proper procedure, since it would bypass the requirement for permission to be sought and to be granted in respect of a judicial review of those later decisions.

28 For these reasons, I would not grant the claimant any substantive relief in these proceedings, even if there were unlawfulness in the original decision. I am, however, satisfied that, in any event, the decision of December 2019 was legally sound. The decision was a risk assessment made on the basis of intelligence. I was referred to the judgment of the Supreme Court in *R (on the application of Bourgass and Another) v. Secretary of State for Justice* [2015] UKSC 54. *Bourgass* involved decisions taken under rule 45 of the Prison Rules 1999 to segregate prisoners. The Supreme Court held that the reasons given to both Mr Bourgass and Mr Hussain for their respective segregations were inadequate. At para.100, Lord Reed said this:

> "A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought. That will not normally require the disclosure of the primary evidence on which the governor's concerns are based: as I have explained, the Secretary of State is not determining what may or may not have happened, but is taking an operational decision concerning the management of risk. It is however important to understand that what is required is genuine and meaningful disclosure of the reasons why authorisation is sought. The reasons for continued segregation which were provided by the prison staff involved in the present cases gave, at best, only the most general idea of the nature of their concerns, and of why those concerns were held. More could and should have been said - and was said, in the witness statements filed in these proceedings - without endangering the legitimate interests which the prison authorities were concerned to protect. The imposition of prolonged periods of solitary confinement on the basis of what are, in substance, secret and unchallengeable allegations is, or should be, unacceptable."
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> ….
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> 102. Similar criticisms apply in Hussain's case. He had been provided with information as to the basis on which he was believed to have assaulted another prisoner. It was not explained why, several months later, his suspected responsibility for that assault was still considered to require his segregation, not as a punishment, but for the maintenance of good order and discipline. It was only in the present proceedings that further allegations against him were disclosed, namely that he was suspected of having attempted to convert other segregated prisoners to Islam. Once that was disclosed, he was able to provide a response."

Importantly for our purpose, Lord Reed said this at para.103:

> "It has to be recognised, however, that authority under rule 45(2) will often be sought on the basis of information which cannot be disclosed in full without placing at significant risk the safety of others or jeopardising prison security. Considerations of that kind were relevant in both of the present cases. There may also be cases where other overriding interests may be placed at risk. In such circumstances, fairness does not require the disclosure of information which could compromise the safety of an informant, the integrity of prison security or other overriding interests. It

> will be sufficient to inform the prisoner in more or less general terms of the gist of the reasons for seeking the authority of the Secretary of State."

29 The reasons given to the claimant for the December 2019 decision were, as I have said, described by Mr Freed in his witness statement. To reiterate, on 6 December, information was provided by the Metropolitan Police to the Category A team that the police had received intelligence that the claimant's associates were planning to assist him to escape while on route to or from his appearance at Isleworth Crown Court. The Category A team was further informed by the police that, due to the credibility of the intelligence and nature of the threat, the claimant's court appearance had been immediately adjourned and the claimant transported to HMP Wormwood Scrubs under armed police escort.

30 As I have said, but as I shall reiterate, the reason given at that time to the claimant for his placement on the E-list Heightened was that "Information was received that you may attempt to escape from court with the assistance of outside associates".

31 The claimant was therefore informed of the following matters. He was told that the decision was based on information received. The claimant knows this information came from the Metropolitan Police. The claimant was also told the gist of the information: specifically, it was about the claimant's attendance at Isleworth Crown Court. The claimant was told that he might attempt to escape from that court. He was told that this would be with the assistance of outside associates.

32 In his oral submissions to me, the claimant explained in detail why he says that the decision was wrong. He disputed that the Metropolitan Police had supplied the defendant with reliable information. In particular, as I understand him, he said that, since the allegations amounted to the assertion of criminal offences, it was noteworthy that no action had been taken by the police against those alleged to be involved.

33 At this point, it is important to bear in mind the basis on which Linden J granted permission to bring this judicial review. He did so on the ground alleging a breach of a duty to act fairly by not providing the claimant with sufficient information to respond to the decision to place him in the heightened category. But, as the claimant's own submissions today show, the defendant has provided sufficient information. The claimant has been able to respond. The fact that his response is to the effect that the defendant should not have reacted as he did to the intelligence from the Metropolitan Police is, in my view, its own answer to the ground upon which permission was granted. The information was, in short, legally sufficient.

34 For these reasons, this judicial review is dismissed.

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