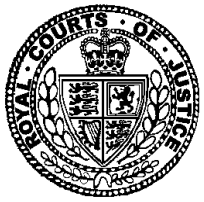

Neutral Citation Number: [2024] EWHC 333 (Admin)

Claim No: AC-2023-LON-002554

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2024

Before:

MATTHEW BUTT KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

THE KING

on the application of

MN

Claimant

-and-

SECRETARY OF STATE FOR JUSTICE

Defendant

- -

Jesse Nicholls (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimant**
Tom Leary (instructed by **the Government Legal Department**) for the **Defendant**

Hearing date: 16 January 2024

- -

Approved Judgment

This judgment will be handed down remotely at 10.00am on 16 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Matthew Butt KC:

I. Introduction

1. This claim concerns the requirements of Article 2 when there is an independent investigation into a near suicide by a prisoner which causes life changing injuries to that person. The Claimant seeks to challenge the Defendant's decision to leave important questions as to the procedure to be adopted for the independent investigator to recommend, rather than requiring public hearings with powers of compulsion from the outset. Permission to bring this claim was refused by Roger ter Haar KC sitting as a Deputy High Court Judge on 27 September 2023. This is my judgment in relation to the renewal of that application for permission.

2. The Claimant, "MN", was on 10 June 2022 a prisoner at HMP Hewell. On that day he repeatedly banged his head against a solid object and *potentially* inserted a sharp object through an open skull wound into his head. Whilst the precise mechanism of injury is not presently known, it is clear that the Claimant was exposed to a real and immediate risk of death whilst in the care of the state and it is certainly arguable that the injuries he sustained are permanent and life-changing. I proceed on that basis.

II. Legal Principles

3. It is accepted that the state's Article 2 investigative duty is engaged and that any investigation must comply with Article 2 of the Convention.

4. The requirements of such an investigation are set out in *R (on the application of Amin) v SSHD* [2004] 1 AC 653 at [31]. These can be summarised thus: (i) the investigation must be initiated by the state (ii) it must be prompt and carried out with due expedition (iii) it must be effective (iv) it must be independent (v) there must be a sufficient element of public scrutiny and (vi) the next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. None of this is controversial.

5. Both parties have referenced the Court of Appeal's judgment in *R (D) v Secretary of State for the Home Department* [2006] 3 All ER 946 "*D*" and the guidance issued by the House of Lords in *R (on the application of JL) v Secretary of State for the Home Department* [2009] 1 AC 588 "*JL*" as being of importance to this claim.

6. *D* was a *shocking* case involving a man aged 22 at the date of his attempted suicide. He had been remanded in custody where he was noted to be a self-harm/suicide risk. D caused harm to himself on three occasions before he attempted suicide for the first time and was placed on suicide watch. Later a broken razor and noose were found in his cell. He then became more distressed upon learning that his daughter had been taken into care. An entry was made informing staff to be extra vigilant that day, yet the same afternoon he hanged himself in his cell using bed linen. He suffered permanent and irreversible injuries as a result of the brain injury he suffered [4]. Of great concern was the fact that some of the most important documents in relation to the Claimant's suicide had been lost or destroyed by the prison service. The Court of Appeal agreed that this was profoundly disturbing, suggests an alarming level of carelessness and

incompetence not merely in a major prison but also in Prison Service Headquarters and was simply not acceptable [6].

7. The Court of Appeal held in *D* that (i) the High Court had been justified in ordering that the independent investigator take evidence in public [25], (ii) the Claimant's representatives were entitled to be present during that evidence [42] and (iii) in the unlikely event that it were thought necessary to compel the attendance of a witness, the investigator should be afforded statutory powers under the Inquiries Act 2005 [44]. The Court of Appeal also stated that each case turns on its own facts and that it will be for the person conducting the investigation to decide what oral evidence to call [23] and indeed whether they wish to hear oral submissions [24].

8. Whilst the Court of Appeal held that on the facts of *D*, Article 2 required the level of scrutiny set out above, it was unclear in what other circumstances this might be necessary in the future. It was for this reason that the Secretary of State sought guidance from the House of Lords in *JL*. The guidance in *JL* is applicable to prison suicide attempts which result in serious and lifelong injuries and so is on its face applicable in this case.

9. In their Lordships' speeches, the following guidance was provided*:*

   i. *Per* Lord Phillips at [45] where the initial investigation discloses serious conflicts of evidence a "D" type investigation may be called for. There will be other circumstances in which the person carrying out the initial investigation will decide to recommend a D type investigation but this cannot be prescriptive.

   ii. *Per* Lord Rodger at [76] once the independent investigation has been established with the powers and resources it needs it is very much up to the investigator to decide how to proceed in order to achieve the objectives for which it was set up.

   [77] the Secretary of State's anxieties may have been fuelled by an impression that, whenever article 2 requires an independent investigation to be set up, that investigation has to have all the bells and whistles of the full blown public inquiry described by the Court of Appeal in *D*, nothing could be further from the truth.

   [78] the steps which the investigator needs to take to fulfil the Article 2 requirements will inevitably depend on the circumstances of the individual case. There neither is, nor can be, any single off the peg model that is suitable for use in all cases.

   [79] At the beginning of the inquiry the investigator will not know what he will find so he will usually be in no position to say how elaborate the inquiry will have to be or what form it will take. He may have a better view once he has studied the materials produced by his initial inquiries.

   [83] in the present case as in any other it will be for the independent investigator to decide once he has become familiar with the issues, whether there needs to be a public hearing and if so what shape it should take.

iii. Lord Walker at [96] agreed with all of their Lordships that not every investigation would require a "D style" investigation. It would be for the independent investigator to make a recommendation to the prison service (to hold such an investigation) and they would do so in the confident expectation that their recommendation would be accepted.

iv. Lord Brown at [104] said that a public inquiry of the type ordered in *D* goes far beyond what can be judged reasonably necessary to satisfy the Article 2 procedural duty arising in any save the most exceptional near suicide case. He added at [107] the following which was approved by Lords Rodger, Walker and Mance:

> *Generally speaking I can see no need for inquiries into near-suicides to take place in public…If, of course, any particular problems come to light during the investigation if, say, witnesses prove uncooperative, or egregious failures become manifest (again one cannot be prescriptive about the circumstances which might occasion a change of course), the person conducting the investigation might feel it necessary to expand it into something akin to a D type inquiry. For my part, however, I would expect that to be a comparatively rare event….*

III. The independent investigation

10. At the time of his attempted suicide, MN was suffering from serious and complex mental health issues. He had a history of self-harm and presented with a significant risk of suicide and self-harm at the prisons he was held at.

11. The Defendant has commissioned an investigation into the circumstances in which the Claimant sustained life-threatening injuries. Funding has been made available to enable the Claimant to be involved through his legal representatives to the extent necessary to safeguard his interests. An experienced investigator, Mr Robert Allen, has been appointed to conduct the independent investigation. Mr Allen's terms of reference set out the scope of his investigation which includes the circumstances in which the Claimant suffered life threatening injuries, his management at HMP Birmingham and HMP Hewell, the relevant policies and procedures, mental health assessments and clinical care and lessons to be learned from the incident.

12. Of significance within the commission letter is the following at [27] under the heading "public scrutiny":

> *The State's investigative obligation under Article 2 of the ECHR includes an element of public scrutiny. In most cases publication of the investigator's final report will be sufficient to satisfy this obligation, but in exceptional circumstances a public hearing may be needed. This may be the case if, for example, there are serious conflicts in the evidence or questioning witnesses in a public setting is necessary to test the credibility of their evidence. Similarly, if the investigation uncovers convincing evidence of widespread or serious systemic failures, a public hearing may be warranted. Your draft report should include your views as to what you consider to be an appropriate element of public scrutiny in all the circumstances of this case. The Secretary of State will take your views into account*

> *and consider any recommendation made on this point when deciding what steps will be necessary to satisfy the State's investigative obligation under Article 2 of the ECHR.*

13. The Defendant later wrote again to Mr Allen with further information in relation to public scrutiny in his investigation in the following terms:

> *Paragraph 27 explains that the Secretary of State will take your views into account and consider any recommendation that you make about the appropriate level of public scrutiny, such as the need for a public hearing. It asks that you include a view on this in your draft report, and whilst in many cases you may not form that view until the conclusion of an investigation, I want to clarify that this does not prevent you from alerting me at any point during the investigation that it is your view that a public hearing is necessary for the purposes of Article 2.*

14. The Claimant has advanced six grounds of claim. Whilst I address each of these below, by the time of the renewal hearing the focus seemed to be very much on the following two submissions (i) this is an *exceptional* case such that a public hearing with powers of compulsion is required and (ii) the discretion of the independent investigator was unlawfully fettered by the terms of the commission letter at [12] above.

IV. The level of severity in this case

15. Key to the Claimant's application is his submission that this case is at the uppermost end of the level of severity for near suicide cases and that the facts are "even more serious than *D* [and *JL*]*"*. As such it is submitted that this is one of the cases which requires a "D style investigation" from the outset. The Defendant does not accept this and submits that the independent investigator in this case is better placed to make such an assessment once he is familiar with the facts of the case.

16. I have carefully considered the matters set out in the Statement of Facts and Grounds (SFG) at [66] as to why this case is put at the uppermost end of severity. The Claimant puts forward 11 reasons why this is (in his words) an exceptional case in which there is *evidence of widespread or systemic failures*. The SFG raises *inter alia* failures to assess the Claimant's mental health, evidence of staff treating mental health issues as behavioural issues, evidence that the Claimant has spent exceptional periods of time in segregation, use of force even when hospitalised, a failure to transfer to hospital under section 47 of the Mental Health Act 1983, failure to keep sharp and hard objects from the Claimant and a failure to prevent self-harm on the day of the apparent suicide attempt. The Claimant concludes at [67]: "*Put simply, therefore, this is plainly a case in which there is evidence of "widespread or serious systemic failures", which is an example of when the Defendant accepts that a public hearing may be warranted."*

17. In my judgement whilst the above (and the other matters raised) are all serious allegations, I do not consider it arguably the case that the evidence paints a case of such severity that this court should require a public hearing now rather than allowing the independent investigator to make that judgement once he is familiar with the facts. I remain of that view having read a quantity of the underlying evidence after the hearing concluded (see below). I also consider this to be contrary to the guidance of the House of Lords in *JL* for the reasons set out below.

18. The Claimant has sought to compare this case to *R (Mousa) v SSHD* [2013] EWHC 2941 (Admin) and *R (MA) v SSHD* [2019] EWHC 1523 (Admin) where public hearings were required to satisfy Article 2 and Article 3 respectively. Because these cases turn on their own facts, comparing them to the instant case does little to advance the analysis. Given the early stage the independent investigation has reached to date, a factual comparison is particularly difficult to perform. In my judgement, however, the allegations in *Mousa* and *MA* were materially different to the Claimant's case. *Mousa* concerned allegations that Iraqi citizens had been deliberately ill-treated and killed by British Armed forces. *MA* concerned *appalling* abuse of vulnerable detainees at an immigration centre. The matters raised in this case are not of the same order as *Mousa* and *MA.* None of this should diminish the serious nature of this case or the obvious concerns the Claimant's family will have about what occurred during his detention.

19. I now turn to each of the 6 grounds of claim.

V. Ground 1: insufficient public scrutiny

20. Under this ground, the Claimant broadly submits that this court is bound by *D* which is said to be a case of lower comparative severity. It is submitted that *D* indicates the approach that must be taken in any case at the upper range of severity. For the reasons set out above, I do not agree that this case is arguably of such a level of severity that this court should require public hearings now. No specific guidance has been identified in the judgment of *D* requiring such a course to be taken. As *D* makes clear, each case must be considered on its own facts [23]. This court is being asked to intervene before the relevant decision has been made by the independent investigator who is in a better position to make an assessment of the facts and what will be required of his investigation, which he can keep under review. As Lord Rodger stated in *JL* at [83]: *in the present case as in any other it will be for the independent investigator to decide once he has become familiar with the issues, whether there needs to be a public hearing and if so what shape it should take.*

21. The Claimant also submits that the Defendant has fettered the independent investigator's discretion by the terms of the letter at [12] above which is said to (a) impose a test of exceptionality for public hearings and (b) permit the investigator to merely provide his views to the Secretary of State with no guarantee that they will be accepted. The Claimant submits that this alone is sufficient for permission to be granted. I do not consider this ground is arguable. The House of Lords in *JL* made clear that public hearings in near suicide cases would be comparatively rare. Lord Brown stated that a public inquiry of any sort would go far beyond the requirements of Article 2 in any *save the most exceptional near suicide case* [104]. It is important to look at the examples given in the commission letter to the investigator as to what circumstances could require a public hearing. These include (i) serious conflicts in the evidence, (ii) a need to test the credibility of the evidence and (iii) if the investigation uncovers convincing evidence of widespread or serious systemic failures. These are precisely the sort of circumstances which the Claimant submits would require a public hearing and are consistent with the guidance issued in *JL*. This claim has been brought before the independent investigator has been able to make such an assessment.

22. As to the letter empowering the investigator to make recommendations only, such a procedure is consistent with the speech of Lord Walker in *JL* who said that the independent investigator could make a *recommendation* for public hearings, confident that it would be accepted at [96] and Lord Phillips who said albeit regarding the person conducting the initial investigation that they could *recommend* public hearings [45]. Ultimately it would be for the Secretary of State to amend the terms of reference to allow public hearings to take place. As Lord Walker stated, the independent investigator should be confident that his recommendation would be accepted. Should a recommendation be made which was unreasonably refused, that would of course give rise to a public law cause of action.

VI. Ground 2: inadequate participation of MN and his family

23. It is submitted that as there will be no public hearings, the family will not be present when evidence is taken. This is said to offend *Amin, Edwards v UK* (2002) 35 EHRR 19 and other domestic and European authorities. I do not agree that the investigation is arguably unlawful on this basis. Ground 2 adds little to ground 1.

24. There is no rule of law requiring that the Claimant's family must be present when evidence is taken, even in an Article 2 investigation. It is well established that the level of involvement is fact specific and flexible. It is for the person conducting the independent investigation to decide what Article 2 requires in a given case. For the reasons set out above it is premature for this court to rule that the family must be present when evidence is heard (or similar).

VII. Ground 3: effectiveness of investigation

25. The Claimant submits that the investigation will not be effective because the independent investigator will not have power to compel witnesses, require statements to be taken or order documents to be produced.

26. There is no evidence that witnesses (be they from the prison service, NHS or elsewhere) will not cooperate with this investigation. In the event that there were a lack of co-operation, the person conducting the investigation will be able to consider whether they need to request powers of compulsion from the Defendant.

27. The Claimant relies upon the investigator having powers of compulsion in *Mousa* but this was a case in which *the overwhelming probability* was that soldiers would be reluctant to give evidence [15]. Similarly, the Claimant relies upon the fact that powers of compulsion were deemed necessary in *MA* but again, this was a case in which there was *very good reason to believe* the perpetrators of abuse and other former G4S staff would not attend voluntarily [62] (3). There is no such reason to anticipate a refusal to cooperate in the instant case.

28. I also note that in *D* the court did not consider it necessary that the independent investigation had powers of compulsion. It was thought sufficient that a request could be made for the Minister to use powers under the Inquiries Act 2005 in the event that cooperation was not forthcoming. That is an option open to the investigator in the instant case.

29. I do not consider it arguable that Article 2 requires that powers of compulsion be granted at this stage.

VIII. Ground 4: "wait and see"

30. The Claimant argues under ground 4 that it is unlawful to leave the scope of the investigation to the independent investigator. This is said to be an impermissible "wait and see approach". The Claimant's various arguments under this ground centre upon a submission that compliance with Article 2 is a matter for this court and not the Defendant and the alleged risk that it will be too late to conduct an effective investigation if the decision is delayed until the independent investigator is more familiar with the facts.

31. The difficulty with this argument is that it runs counter to the clear guidance provided by the House of Lords in *JL* (see above). Of course it is right that this court will supervise compliance with Article 2 by the state, but that does not require interference with decision making before proper grounds of challenge have arisen. This claim assumes that public hearings are necessary before the independent investigator has turned his mind to the facts.

32. I do not consider it arguably unlawful to leave this decision with the independent investigator. This is to do no more than to follow the guidance in *JL*. The effect is not to deprive this court of supervisory jurisdiction. If the independent investigator unreasonably fails to request a public hearing or the Defendant unreasonably fails to grant him such powers upon request then a claim can be brought at that stage. The Claimant's approach requires this court to make an initial judgement on the facts of the case which the investigator is better placed to perform in this case.

IX. Ground 5: JL is not determinative

33. The Claimant submits that *JL* was (a) primarily concerned with whether **any** investigation was required in certain near suicide cases and as such the guidance summarised above is not determinative of the claim, (b) in consequence of (a) the guidance set out above is "strictly speaking *obiter dicta"*, (c) involves speeches which were expressed with "considerable caution", (d) involves speeches which do not "speak with one voice" and (e) contains *obiter dicta* which pre-date authorities such as *Mousa* and *MA* which reflect a more modern approach to Article 2.

34. I do not consider it arguable that the guidance in *JL* could or should be ignored by this court. In *JL* the House of Lords was providing guidance of general applicability to cases such as this. Even if strictly *obiter dicta,* the guidance in *JL* is the strongest of persuasive authority. There is no proper basis to submit that the guidance is inconsistent nor that the careful manner in which the speeches were phrased diminishes their applicability. The relevant guidance from *JL* has been applied since including recently in *R (EA) v Chairman of the Manchester Arena Inquiry* [2020] HRLR 23.

X. Ground 6: The Court's role in assessing Article 2 ECHR Compliance

35. The Claimant seeks to argue that by allowing the independent investigator to assess whether Article 2 requires public hearings, the court's supervisory role is ousted. I do

not agree that this is arguable, broadly for the reasons I have already given under ground 4.

36. This clam (under ground 6 and elsewhere) cuts across the House of Lord's guidance in *JL* in which their Lordships agreed that it would be for the independent investigator to decide the exact nature of the investigation, including the important question as to whether public hearings would be required.

37. The type of hearing the Claimant contends for will be comparatively rare. The independent investigator is in a far better position than this court to decide whether there are for instance serious conflicts in the evidence, a need to test the credibility of the evidence or if the investigation uncovers convincing evidence of widespread or serious systemic failures.

XI. Post-Script

38. On 23 January 2024 (a week after the renewal hearing) I received an application from the Claimant to rely on further evidence. The evidence in question being the Claimant's prison and healthcare records for the relevant period. The Claimant sought to adduce this evidence in response to discussion at the hearing in which I said I would have read these records had they been provided. The Defendant does not agree to the application. The records in question run to 510 pages. Whilst I do not agree that the discussion at the renewal hearing "opened the door" to the admission of further evidence, in all of the circumstances I considered that I should read these records. This has delayed judgment. In the event there is nothing in the records which alters my view expressed above that this is not arguably a case of such severity that requires this court to order public hearings at this stage, rather than to leave that matter to the independent investigator.

XII. Conclusion

39. I do not consider that any of the grounds are arguable nor that there is any wider issue of public importance raised in this claim. I therefore refuse permission to apply for judicial review.