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Case No: CO/4332/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2016

Before :

THE HONOURABLE MR JUSTICE SINGH

- -

Between :

The Queen (on the application of Joanne Dennehy)	**Claimant**
- and –	
Secretary of State for Justice	**First Defendant**
- and -	
Sodexo Limited	**Second Defendant**

- -

Hugh Southey QC and Richard Reynolds (instructed by **Duncan Lewis**) for the **Claimant**
Tom Weisselberg QC and Sarah Hannett (instructed by **the Government Legal Department**) for the **First Defendant**
Jenni Richards QC and Jamas Hodivala (instructed by **Devonshires**) for the **Second Defendant**

Hearing dates: 10 and 11 March 2016

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Approved Judgment

Mr Justice Singh :

Introduction

1. The Claimant is a convicted prisoner at HMP Bronzefield, one of only two prisons in this jurisdiction which can accommodate women prisoners who have restricted status: this is equivalent to a man who is a Category A prisoner. HMP Bronzefield is privately run by the Second Defendant, Sodexo Limited.

2. On 28 February 2014 the Claimant was sentenced by Spencer J to life imprisonment for three offences of murder; life imprisonment for two offences of attempted murder; and two concurrent determinate sentences of 12 years' imprisonment for offences of preventing burial. The victims were all men. In respect of the offences of murder the Claimant was given a whole life order. This has the consequence in law that she can never be considered for parole. She is currently one of only two women in this jurisdiction who are subject to a whole life order.

3. Since 19 September 2013 (at a time when she was still on remand) the Claimant has been in what is commonly called "segregation" (strictly "removal from association"). The Claimant submits that her segregation has been unlawful on a number of grounds.

4. Both Defendants concede that the segregation of the Claimant between 21 September 2013 and 4 September 2015 was unlawful because it was not authorised by the Secretary of State, as was required by the Prison Rules 1999 (SI 1999 No. 728) at that time. That concession is made in the light of the decision of the Supreme Court in R (Bourgass) v Secretary of State for Justice [2016] AC 384. Otherwise the Defendants resist the claim for judicial review.

5. I should say a little about the procedure adopted in the present case.

6. This is a claim for judicial review brought with the permission of Collins J, granted on the papers on 15 October 2015. Collins J refused permission in relation to one ground, which concerns alleged discrimination, to which I will return. As will become apparent later, the Claimant's grounds have evolved over time, up to and including the skeleton argument filed on her behalf. The Claimant applies for permission to amend her grounds so as to reflect what is submitted in the skeleton argument. I grant that application so that the Claimant has permission to advance all of the grounds raised in the skeleton argument, including the ground based on alleged discrimination.

7. In these proceedings, initially, the prison itself was named as a defendant but, at the hearing before me, it was agreed by the parties that the appropriate person which should be a defendant is the company which runs the prison.

8. In the present case not all matters of primary fact are undisputed. As Lord Reed JSC observed at paras. 124-126 of Bourgass, although judicial review does not usually require the resolution of disputes of fact or cross-examination of witnesses, that is not because they lie beyond the scope of that procedure. "Judicial review is a sufficiently flexible form of procedure to enable the court to deal with the situation before it as required." However, all parties before me agreed that in the present case it was not necessary for the resolution of the issues to have cross-examination of witnesses or to

resolve such issues of fact as are in dispute. At the hearing before me, it was made clear by counsel for the Claimant, Mr Hugh Southey QC, that he did not wish to apply for permission to cross-examine any of the Defendants' witnesses.

Relevant legislation

9. What is commonly known as segregation is referred to in the relevant legislation as "removal from association". The version of the Prison Rules, made pursuant to section 47(1) of the Prison Act 1952, which was in force from 1 January 2010 to 3 September 2015, provided, in rule 45 as follows:

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the Governor[1] may arrange for the prisoner's removal from association accordingly.
>
> (2) A prisoner shall not be removed under this rule for a period of more than 72 hours without the authority of the Secretary of State and authority given under this paragraph shall be for a period not exceeding 14 days but it may be renewed from time to time for a like period …"

10. In Bourgass the Supreme Court held that rule 45(2) requires that decisions to authorise continued segregation beyond 72 hours must be made by the Secretary of State for Justice and cannot be made by the prison governor acting in the name of the Secretary of State. However, as was common ground before me, this does not mean that the decision must be made by the Secretary of State in person. In accordance with well-established principle, the decision can be made by an appropriate official in his department acting in his name: Carltona v Commissioners of Works [1943] 2 All ER 560.

11. Following Bourgass, the First Defendant amended rule 45, so that it now provides:

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the Governor may arrange for the prisoner's removal from association.
>
> (2) Removal for more than 72 hours may be authorised by the Governor in writing who may authorise a further period of removal of up to 14 days.

[1] In the case of a privately run prison, the equivalent of the Governor is the Director of Custodial Services.

> (2A) Such authority may be renewed for subsequent periods of up to 14 days.
>
> (2B) But the Governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the prisoner was removed under paragraph (1).
>
> (2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State …"

12. The amendments came into force on 4 September 2015, with the exception of paras. (2B) and (2C), which came into force on 16 October 2015: see the Prison and Young Offender Institution (Amendment) Rules 2015 (SI 2015 No. 1638).

Relevant policies

13. I turn to the relevant policies on segregation. The policy which was in place at the relevant time was Prison Service Order ("PSO") 1700. In its introduction that policy stated that:

> "Segregation should be used only as a last resort whilst maintaining a balance to ensure it remains an option for disruptive prisoners, this does include prisoners on an open ACCT[2] plan, but only when they are such a risk to others that no other suitable location is appropriate and where all other options have been tried or are considered inappropriate."

14. The policy made it clear (at p. 7) that the question of possible alternative arrangements, such as transfer to another wing, closer supervision on an ordinary location and transfer to another establishment should be kept under consideration.

15. On behalf of the Claimant, Mr Southey emphasised that, at p. 18, the policy recognises that research which has been done into the mental health of prisoners indicates that for most prisoners there is a negative effect on their mental wellbeing and in some cases the effects can be serious.

16. He also emphasised that, at p. 19, the policy recognised that:

> "A prisoner on an open ACCT plan must only be kept in segregation under exceptional circumstances whereby they are such a risk to others

[2] Assessment, Care in Custody and Teamwork.

> that no other suitable location is appropriate and where all other options have been tried or are considered inappropriate."

17. He also observed that, at p. 22, at para. 4.2, the policy recognised that the safety of the prisoner whilst in segregation is of paramount importance.

18. The Court has before it a witness statement from Lesley Cuthbertson, who works at the security policy unit of the National Offender Management Service ("NOMS"). She outlines the various policies which have been in force at the relevant times.

19. At paras. 6-10 of his witness statement Ms Cuthbertson explains that the rules and the policy order were amended after the judgment in Bourgass to expand the role of the Secretary of State. In practice, as she explains at para. 6, the Secretary of State's function is discharged by Deputy Directors of Custody in relation to prisons in the public sector and by the Deputy Director of Custodial Services in relation to private prisons. These are known as "DDC reviews."

20. In addition to that DDC review, a review must be carried out by the Director of Commissioning and Contract Management – Custodial Services (for private prisons in England) after a prisoner has been in continuous segregation for a period of 6 months: see para. 7 of the witness statement.

21. In the revised PSO 1700, Mr Southey emphasised para. 2.20, which appears in the section headed "Explaining reasons to continue segregation to the prisoner". This states that:

> "Where the SRB[3] decides in principle to continue segregation, the reasons must be explained to the prisoner at the Review Board. The prisoner must be given the opportunity to make meaningful representations before a final decision is made. Where a final decision is made to continue segregation, the chairperson must ensure that the prisoner is informed of the substance of the reasons on which the decision to continue segregation was based and ensure that the prisoner is informed, both orally and in writing, of meaningful reasons for the decision. This will not normally require the disclosure of the primary evidence on which the decision to continue segregation was based, but the reasons must:
>
> - Provide a clear justification for the prisoner's continuing segregation; …"

The Facts

22. The Claimant was first remanded to HMP Bronzefield on 18 April 2013.

[3] Segregation Review Board.

23. As I have mentioned, she was placed in segregation on 19 September 2013. From 21 September 2013 and at intervals not exceeding 14 days her continued segregation has been authorised by a Segregation Review Board ("SRB").

24. On 26 October 2013 a consultant forensic psychiatrist, Dr Farnham, reported that the Claimant was fit to plead. However, in his opinion, she had a number of mental disorders: in particular she suffers from a psychopathic disorder.

25. In late 2013 the Claimant pleaded guilty to the offences alleged against her. However, a trial had to take place of her co-defendants. That trial took place before Spencer J and a jury at the Crown Court at Cambridge in early 2014.

26. On 28 February 2014 the defendants, including the Claimant, were sentenced by Spencer J at the Central Criminal Court. In sentencing the Claimant Spencer J described her as "a cruel, calculating, selfish, and manipulative serial killer." He observed that the three murders had involved "a substantial degree of premeditation or planning." He also considered it "very significant" that the Claimant's criminal violence had escalated from a single stab to the heart, which had killed her first victim, to a "frenzied attack" on her last victim, which had involved stabbing him more than 30 times, although, thankfully, he did not die. Spencer J concluded, by reference to Sch. 21 to the Criminal Justice Act 2003, that this case was of "exceptionally high seriousness and one of the rare cases which requires a whole life order." I have already mentioned the other sentences that were imposed.

27. On 15 July 2014 there was granted a director's approval for the Claimant's continued segregation.

28. The Claimant was on an open ACCT plan between 26 March and 21 May 2015 because she was self-harming on a regular basis.

29. On 16 June 2015 a psychological report was prepared by Dr Lockwood and Dr Allen.

30. On 29 July 2015 the Supreme Court gave judgment in Bourgass.

31. The Claimant was on another open ACCT plan between 28 August and 29 September 2015. This was because again she was self-harming.

32. On 12 October 2015 the Secretary of State conducted a review of segregation following the adoption of new policies in the light of the decision in Bourgass.

33. On 30 November 2015 a "wellbeing report" on the Claimant was written by Dr Lockwood and Dr Patel. Dr Lockwood is a clinical psychologist. The report noted that, although the Claimant had stopped engaging with the Mental Health In-reach Team, she had over 50 weekly sessions with them between 2 December 2013 and 8 October 2015. She had "not displayed any symptoms of severe and enduring mental illness." The report went on to say that the Claimant had been reviewed by the team care co-ordinators on a bi-weekly basis since 16 November 2015. The report stated that there had been "no evidence of deterioration in mental state of late". It concluded that: "At each segregation review board a safety screen is completed to ensure Ms Dennehy is fit to remain in segregated conditions. To date she has not failed the safety screen assessment."

34. On 7 December 2015 Dr Murphy, a consultant forensic psychiatrist instructed by the solicitors acting for the Claimant, also wrote a report.

35. In January 2016 it was decided that the Claimant should not be transferred to HMP Low Newton because she is part of the Highly Complex Needs Pilot ("HCNP"). The overall aim of the HCNP is to assist women with highly complex needs in progressing to a point where they are able to access more mainstream services; an outcome of this work might be transitioning from segregation to a normal location.

The evidence filed on behalf of the Defendants

36. On behalf of the Second Defendant there has been filed a witness statement by Victoria Robinson. She is a Senior Operational Manager at HMP Bronzefield and is currently the head of security at that prison.

37. She explains that the Claimant was initially transferred from HMP Peterborough to Bronzefield on 18 April 2013. She was on a normal location until 19 September 2013. Although the nature of the Claimant's offences were known to the prison at that time, the extent of her risks had not yet been fully identified.

38. On 27 August 2015 the Claimant was provided with a detailed reintegration plan, based on the assessments there had been of her static and dynamic risks: see para. 27 of Ms Robinson's witness statement.

39. At para. 28 of her witness statement Ms Robinson explains this in relation to the static risk:

> "The Claimant's level of static risk because of the nature of her offences and personality disorders is almost unprecedented in the women's prison estate. … To my knowledge, only two previous women prisoners have served/are serving life sentences of this nature, being Myra Hindley and Rose West. The Claimant's static risk within the prison estate is higher than that of Myra Hindley and Rose West because the nature of their offences mean that they were/are a risk to children, which can be completely controlled within the prison environment, whereas the Claimant is a risk to adults, in particular male adults and adults who form an unnatural attachment to her, which is necessarily more difficult to manage within the prison estate than a risk to children."

40. As Ms Robinson goes on to explain in her witness statement, at paras. 31-39, the Claimant is perceived to pose a particular risk because of her ability to develop relationships with others, including both prison staff and other prisoners, which she may be able to exploit to her own advantage.

41. At para. 16 of her witness statement Ms Robinson explains what the terms of the Claimant's initial segregation were. It is clear that the Claimant was far from being in complete isolation or even solitary confinement. For example, she was permitted to have domestic visits and to have access to a library on the unit. At that time the

Claimant was not permitted access to a gym, because of the nature of the intelligence relating to her escape plan, but that changed later.

42. As Ms Robinson explains at paras. 40-55 of her witness statement, the Claimant's segregation was then reviewed by an SRB every 14 days in accordance with the old PSO 1700. Often the Claimant attended the meetings of the SRB although at times she refused and on very rare occasions she was unable to attend because of a conflict with another appointment. After the PSO 1700 was amended in September 2015, the Claimant's segregation has continued to be reviewed by the SRB at least every 14 days. Ms Robinson explains the procedure at paras. 56-64.

43. At paras. 65-89 of her witness statement, Ms Robinson describes the nature of the regime to which the Claimant has been subject in her period of segregation. At para. 70 she describes the access that the Claimant has always had to various facilities. That regime has gradually been extended, including access to the gym.

44. On 14 November 2013, the Claimant was given a part-time job as an orderly on the Separation and Care Unit ("SCU"). In January 2014 this became a full-time position.

45. Although there is some dispute about the circumstances in which the Claimant ceased to be an orderly on the SCU, Ms Robinson states, at para. 85, that she decided that she no longer wanted to do the orderly work because she had become increasingly frustrated with seeing other prisoners coming and going from the SCU and with what she perceived to be their attitude and the disruption caused to the SCU. She requested that she should no longer carry out the orderly role in April/May 2015.

46. The Claimant was performing well and the prison had no issues with her carrying out the orderly role. With encouragement, the Claimant now has the opportunity to carry out that role for a couple of days a week and it is now arranged on more of an *ad hoc* basis.

47. Ms Robinson accepts that the Claimant is locked in her cell for "a significant proportion of the day" but denies that it is for over 23 hours a day, unless the Claimant chooses not to participate in any activities such as going to the gym.

48. At para. 87 Ms Robinson describes the opportunities that the Claimant has to speak to other people and the visits that they make to her.

49. As I have mentioned, from 27 August 2015 a formal reintegration plan has been in place for the Claimant, to commence on 31 August. Ms Robinson describes the contents of that reintegration plan at paras. 90-108 of her witness statement.

50. The reintegration plan was informed by the experiences of prison staff in engaging with the Claimant and following detailed risk assessments carried out by psychologists, who have engaged regularly with the Claimant.

51. As well as the reintegration plan there is a detailed SCU care plan/action plan. This has been updated on a number of occasions.

52. The reintegration plan is broken down into four phases. Phase 1 was anticipated to take 5-6 weeks: see paras. 92-94. Phase 2 was anticipated to take 6-12 weeks: see

paras. 95-97. Phase 3 was anticipated to take 12-24 weeks: see paras. 98-105. Phase 4 was anticipated to take place between weeks 20 and 24: see paras. 106-108.

53. At paras. 109-132 of her witness statement, Ms Robinson describes the consideration which has been given to alternatives to the segregation of the Claimant, in particular the Primrose Project at HMP Low Newton and also to the Highly Complex Needs Pilot at HMP Bronzefield.

54. At paras. 133-140 of her witness statement, Ms Robinson explains the various contacts that the Claimant has had with psychologists and others.

55. The Court also has before it a witness statement from the Director of HMP Bronzefield, Charlotte Pattison-Rideout.

56. She describes in particular the consideration which has been given to possible alternatives to segregation of the Claimant while she remains at HMP Bronzefield. The only alternative solutions were Healthcare Inpatients or one of the main residential units.

57. Healthcare Inpatients was not deemed to be appropriate as the Claimant has no physical medical conditions that required her to be located there. It was also not considered conducive to the Claimant's wellbeing and progression because of the high proportion of mentally unwell women located there, which can be unsettling and disruptive to other people.

58. The main residential units were not considered to be a viable solution. House block 1 is designated as a recovery unit for those with substance misuse issues. House block 2 serves as the first night/induction unit. House blocks 3 or 4 were considered to be the most likely residential units for the Claimant as they hold a more settled population. However, the risk presented by the Claimant meant that this would not be considered a viable option until her location to those house blocks could be managed safely.

59. At para. 17 of her witness statement, the Director explains that consideration was also being given to the fact that the mobilisation of the Highly Complex Needs Pilot at HMP Bronzefield was imminent. It was noted that the Claimant would be provided with additional support, motivation and case formulation to help her progress if she became a part of that new pilot program.

60. The Court also has before it a witness statement from Kayleigh Holden, who is employed by the Second Defendant as the manager of the Highly Complex Needs Pilot at HMP Bronzefield. That Pilot has been named EOS, after a goddess in Greek mythology.

61. On 15 February 2016 Ms Holden submitted the prison's referral of the Claimant to the Primrose Project at HMP Low Newton.

62. At para. 15 of her witness statement, Ms Holden explains that EOS and the Primrose Project differ in that the Primrose Project is a very structured established treatment programme focussed on behaviour. EOS is a new project and is at a very early stage at the moment: it is scheduled to run for two years.

63. At para. 16 she explains that her view is that work done through EOS will be a pre-cursor to work done as part of the Primrose Project, as it should assist the Claimant to manage relationships with others so that she can have the opportunity to access those services. She would expect that the Claimant would need to demonstrate that she is able to reside on a house block on normal location and engage/interact with other prisoners over a period of at least a few months in order for the Primrose Project to be accessible to her.

64. Ms Holden concludes her witness statement at para. 21 as follows:

> "In our view it is very important that the Claimant becomes more comfortable on house block 4 and with associating with other residents but that it would be destabilising for the Claimant if she was to be moved suddenly to house block 4 full-time without the phased approach that has been planned by Prison."

65. In accordance with the amended policy from September 2015, reviews have been done in this case on behalf of the Secretary of State (the First Defendant) by Paul Kempster, who is the Deputy Director, Custodial Services Contract Management, for NOMS. His experience includes having been the governor of two prisons in the past. He became responsible for the privately managed prisons on 27 April 2015.

66. In this case Mr Kempster has conducted reviews on 16 October 2015, 27 November 2015 (amended on 3 December 2015) and, most recently, on 8 January 2016.

67. As he explains in more detail in his witness statement he has been satisfied at all times of the continuing need for the Claimant's segregation.

68. He has also taken into account evidence in relation to her mental health. He states at para. 11 of his witness statement that there was no evidence that the Claimant's mental state had deteriorated as a result of her segregation.

69. At para. 12, Mr Kempster explains that the reintegration plan was progressing at the time of his most recent review in January 2016. He took the view that the Highly Complex Needs Pilot had become more relevant as its launch date approached. He continues:

> "The significance of this pilot project for the Claimant is that it would provide her with new treatment options not currently available which amongst other things will improve the health and wellbeing of those women involved. The clinical input will address specific risk related behaviours (to self and others) and/or offence paralleling behaviours which have prevented women progressing through their sentence and more specifically have resulted in high harm behaviours in custody to both self and others rendering management on normal prison location or within mainstream treatment programmes unsuitable. Given this pilot, whilst I have considered alternatives to HMP Bronzefield, I felt a move for Ms Dennehy could be a missed opportunity to progress with the support of the pilot project. It also occurs to me that moving Ms

> Dennehy to another prison may not actually help Ms Dennehy move forward. The new prison would still need to assess her suitability for residing on normal location and would want to consider their own integration plan and this would actually delay and hinder progress. While Ms Dennehy remains at HMP Bronzefield I believe she has the correct professional, multi-disciplinary support in place to help her to progress to residing on normal location. The reintegration plan is progressing, but clearly if this changes, I will review my position as to whether a move to another prison is appropriate."

70. For reasons which are more fully explained in the witness statements before the Court, the professional view has been taken by those responsible that a move to HMP Low Newton, which is where the Primrose Project Unit is located, would not be appropriate at this time, although the Claimant is now being considered for that.

The Claimant's grounds

71. The Claimant's grounds have undergone some development during the course of these proceedings, including in the skeleton argument filed on her behalf and at the hearing before me. Furthermore, the way in which submissions were presented makes it clear that there is some overlap between the grounds as they were originally formulated. Accordingly, I propose not to refer to the grounds as they were originally numbered but address instead the substance of the submissions that have been made to this Court. For that purpose I will refer to each of the main issues in turn, using my own numbering.

Issue 1: Was the Claimant's segregation lawfully authorised under the Prison Rules?

72. As I have mentioned, it is common ground that the Claimant's segregation was unlawful in the period from 21 September 2013 to 4 September 2015. That concession is made by both Defendants in the light of the decision of the Supreme Court in Bourgass. The Claimant submits that a declaration should be granted by the Court to acknowledge this.

73. The First Defendant does not object to the making of a suitably worded declaration. I did not understand the Second Defendant to object either.

74. The jurisdiction to grant a declaration is a discretionary one. It is "extremely broad" and "has the advantage of being uniquely flexible, in that the courts may in their own words identify and particularise what is objectionable in legal terms." (Lewis, Judicial Remedies in Public Law (5^{th} ed., 2015), paras. 7-009 and 7.010).

75. In the circumstances of the present case I think it right in principle to grant a declaration to record the fact that, as is conceded by the Defendants, the Claimant's segregation was unlawful in the period from 21 September 2013 to 4 September 2015 in that it was not authorised by the Prison Rules as they stood at that time.

Issue 2: Was the Claimant's segregation procedurally unfair?

76. The Claimant submits that her segregation was procedurally unfair as a matter of administrative law.

77. The question of procedural fairness was the subject of consideration by the Supreme Court in Bourgass. There can be no doubt that, as a matter of principle, the duty to act fairly does apply in this context.

78. At para. 98 Lord Reed JSC said that, whatever the position may have been in the past, the approach in R v Secretary of State for the Home Department, ex. parte Doody [1994] 1 AC 531 and R (Osborn) v Parole Board [2014] AC 115 requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State under rule 45(2) of the Prison Rules.

79. At para. 100 Lord Reed said:

> "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 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."

80. As so often in cases in which it is alleged that the duty to act fairly has been breached, the substance of the dispute between the parties lies not in the statement of the principle but in its application and, in particular, whether the duty has been breached on the facts of the case.

81. On behalf of the Claimant, Mr Southey submits that she was provided only with "the most general idea" of the allegations against her, in particular when the first two authorisations of her continued segregation were granted by the SRB on 21 and 26 September 2013. He accepts that she was informed at that time that intelligence suggested that she was making plans to escape. However, he submits that more could and should have been provided by way of information as to why that was suspected. He observes that, in the course of these legal proceedings, it has been possible for

there to be evidence filed on behalf of the Second Defendant which goes into more detail about the suspected escape plan.

82. Ms Robinson explains in her witness statement, at para. 12, that the circumstances leading to the initial segregation of the Claimant were that "a credible escape plan involving two other prisoners and a plan to seriously assault or kill a member of prison staff was discovered. An element of the plan was that the finger of an officer would be cut off in an attempt to deceive the biometric security system at the prison." She also states, at para. 20 of her witness statement, that a prison uniform was discovered in the laundry room.

83. Mr Southey also notes that it was possible for the First Defendant to assert in its Detailed Grounds of opposition to the present claim for judicial review, at para. 50, that there was a written plan discovered in the Claimant's cell.

84. However, he submits, none of this detailed information was recorded at the time in the reasons for continuing segregation, nor was it put to the Claimant. He further submits that the Claimant was not given the opportunity to make representations in response to the allegation that she was suspected of planning to escape.

85. On the facts of this case I do not accept that there has been procedural unfairness. It is important to appreciate that there have been different phases in the Claimant's segregation.

86. The initial phase was when she was first segregated from 19 September 2013, at a time when she was still on remand and when there was reason to suspect that she was planning an escape. Ms Robinson authorised the initial segregation of the Claimant and filled in an appropriate form pursuant to the then version of PSO 1700. This authorised segregation only until 1900 hours on 22 September 2013. The reason for her initial segregation was given to the Claimant in writing. She was told that she was being removed from association under rule 45 for good order or discipline, with the details being:

> "We have received significant intelligence suggesting that you are making a plan to effect an escape attempt from custody. Located in SCU to fully assess risks."

87. Furthermore, as the First Defendant has pointed out in submissions, the Claimant says in her first witness statement, at para. 15, that a drawing of the prison had been discovered in her cell: she therefore knew about that part of the intelligence that had led to there being suspicion that she was planning her escape.

88. Also of importance is the report written by Dr Frank Farnham, a Consultant Forensic Psychiatrist, on 26 October 2013. Dr Farnham carried out an assessment of the Claimant at the prison on 20 September 2013 (para. 7 of his report). On that date she told Dr Farnham that "she had recently been placed on close supervision in segregation because there is alleged intelligence that she planned to kill a police officer and take the keys" (para. 70 of the report).

89. In my judgment the Claimant did know of the substance of the allegations against her at that time. As the Claimant accepts, she attended the meetings of the SRB on 21 and 26 September 2013. She had the opportunity to make such representations as she wished on those occasions so as to respond to the substance of the allegations against her in relation to the suspected escape plan.

90. On 4 October 2013 the escape plan was referred to the police, who investigated. It was only recently that the police confirmed to the Claimant and the prison that no further action would be taken. As Ms Robinson explains at para. 22 of her witness statement, this is something over which the prison has no control.

91. However, as Ms Robinson says at para. 23 of her witness statement, long before this outcome in relation to the police investigation, "the reason for the Claimant's segregation had evolved and developed following detailed and extensive risk assessments". This brings one to the second phase of the Claimant's segregation.

92. For the majority of the period for which the Claimant has been in segregation at the prison, the escape plan has not been the reason for her segregation. Rather the reason for her segregation for the majority of that time has been the significant risks she is assessed as posing to others within the prison: see para. 24 of Ms Robinson's witness statement. She says at para. 26:

> "I have explained to the Claimant on a significant number of occasions throughout her segregation that her segregation is based on the assessment of her risk to others, which is significant, and that her reintegration into the normal prison population is based on her phased integration which allows the Prison to test and assess her risk and also allows the Claimant time to adjust to her change in circumstances. …"

93. Accordingly, in my judgment, the Second Defendant has provided to the Claimant the substance of the reasons for her continuing segregation for a long time. Furthermore, she has been able to attend most of the meetings of the SRB during that time and make such representations as she wished to in response.

94. Finally, there has been a third phase of segregation. Since the Prison Rules and PSO 1700 were amended in September 2015, so as to comply with the decision of the Supreme Court in Bourgass, the Claimant's continuing segregation has been reviewed on behalf of the Secretary of State. It has continued to be authorised. The Claimant has been provided with the DDC and Director reviews in that time.

95. As both Defendants have pointed out, there has in fact been no pleaded ground alleging that there has been procedural unfairness in the period since September 2015 despite there being two stages in these proceedings when the Claimant's grounds were amended. However, even if there had been such an allegation of procedural unfairness, I would reject it on the facts of this case.

96. I conclude that there has been no breach of the duty to act fairly. The Claimant's segregation is not unlawful on this ground.

Issue 3: Has the Claimant's segregation breached Article 3?

97. Article 3 of the Convention rights, which is set out in Sch. 1 to the Human Rights Act 1998 ("HRA"), provides:

> "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment."

98. There is no suggestion in the present case, nor could there be, that the Claimant has been subjected to torture. However, it is submitted on behalf of the Claimant that she has been subjected to inhuman or degrading treatment.

99. Two fundamental features of Article 3 are common ground in this case. The first is that the rights set out in Article 3 are absolute. This means that, where the threshold set by Article 3 has been crossed, it is not permissible for the state to seek to justify its treatment of the person concerned. However, secondly, and very importantly, it is also well established that Article 3 imposes a threshold of a minimum level of severity which must be crossed. As the European Court of Human Rights has often emphasised, this calls for an intensely fact-sensitive inquiry. The Claimant submits that that threshold has been passed on the facts of this case.

100. At the hearing before me Mr Southey placed particular reliance on the factors which were set out by the European Court of Human Rights in Ahmad v United Kingdom (2013) 56 EHRR 1, at para. 178. It should be noted that that case was not directly a case about the treatment of a prisoner in this country; it concerned the proposed extradition of a person to stand trial in the United States, where he would be held in a very high security prison. However, the passage upon which Mr Southey relies does deal with the treatment of prisoners more generally. At para. 178 the Court said:

> "… in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:
>
> - the presence of premeditation;
> - that the measure may have been calculated to break the applicant's resistance or will;
> - an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
> - the absence of any specific justification for the measure imposed;
> - the arbitrary punitive nature of the measure;
> - the length of time for which the measure was imposed; and
> - the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. …"

101. Mr Southey accepts that there is no specific minimum period of segregation which will lead to a finding of a breach of Article 3. The length of time for which a measure

such as segregation is imposed on a detainee is one of the relevant factors to be considered but is not decisive under Article 3. Conversely, as the Defendants accept, even a short period of segregation might constitute a breach of Article 3 if there were other factors present to lead to such a conclusion: for example if there was an intention to debase or humiliate the detainee and there was no objective justification for the use of segregation. Everything depends on all the facts.

102. At para. 206 of its judgment in Ahmad the Court of Human Rights said:

> "Complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."

103. It is common ground before me that the Claimant has not been subjected to complete sensory isolation or total social isolation. However, as Mr Southey submits, the European Court of Human Rights has not stopped there.

104. At para. 207 of its judgment in Ahmad the Court said:

> "Other forms of solitary confinement which fall short of complete sensory isolation may also violate Article 3. Solitary confinement is one of the most serious measures which can be imposed within a prison and, as the Committee for the Prevention of Torture has stated, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities. Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is."

105. The Court went on to say at para. 208:

> "At the same time, however, the Court has found that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. In many states parties to the Convention more stringent security measures, which are intended to prevent the risk of escape, attack or disturbance of the prison community, exist for dangerous prisoners."

106. At para. 209 the Court said:

> "Thus, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

107. At para. 210 the Court said:

> "In applying these criteria, the Court has never laid down precise rules governing the operation of solitary confinement. For example, it has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for Article 3. The Court has, however, emphasised that solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely."

108. At para. 211 the Court said:

> "Equally, although it is not for the Court to specify which security measures may be applied to prisoners, it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly; to restrictions which cannot be reasonably related to the purported objective of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk."

109. At para. 212 the Court said:

> "Finally, in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. First, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in para. 53.1 of the European Prison Rules. Secondly, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Thirdly, the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by. Fourthly, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances. Lastly, it is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."

110. As I understood his submissions Mr Southey accepts that the ability and role of this Court in proceedings for judicial review provides the relevant "independent judicial authority" for this purpose.

111. Mr Southey also reminds this Court of the fact that Article 3 can, in appropriate circumstances, impose a positive obligation to protect vulnerable persons in detention. In that context he relies upon the following passage in R (Munjaz) v Mersey Care NHS Trust [2006] 2 AC 148. At para. 78 Lord Hope of Craighead said:

> "The European Court has repeatedly said that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment' … This standard is to be judged in the light of the circumstances, as the Court has held that in order for an arrest or detention in connection with court proceedings to be degrading within the meaning of the article, it must be within a special level and it must in any event be different from the usual degree of humiliation that is inherent in arrest or detention … It has also made clear that, while the absolute prohibition is not capable of modification on grounds of proportionality, issues of proportionality will arise where a positive obligation is implied as where positive obligations arise they are not absolute. In Osman v United Kingdom (1998) 29 EHRR 245, 305 para. 116 the Court recognised that such obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Nevertheless, as the Court said in Z v United Kingdom (2001) 34 EHRR 97, 131, para. 73, states must take measures to provide effective protection of vulnerable persons, and these must include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."

112. In Ramirez-Sanchez v France (2007) 45 EHRR 49, at para. 117, the Court said:

> "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. …"

113. At para. 118 the Court said:

> "The Court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3."

114. The Court went on to say at para. 119:

> "In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in

> any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> In that connection, the Court notes that measures depriving a person of his liberty may often involve such an element. Nevertheless, Article 3 requires the state to ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured. The Court would add that the measures taken must also be necessary to attain the legitimate aim pursued."

115. The Court in the case of Ramirez-Sanchez then subjected the facts to a rigorous examination. At para. 136 it stated that a rigorous examination is called for to determine whether segregation was justified and whether the measures taken were necessary and proportionate.

116. However, as the Court made clear at para. 138, a prisoner's segregation from the prison community "does not in itself amount to inhuman treatment".

117. It should also be noted that, at para. 146, the Court said:

> "It would also be desirable for alternative solutions to solitary confinement to be sought for persons considered dangerous and for whom detention in an ordinary prison under the ordinary regime is considered inappropriate."

118. At para. 150 the Court shared the concerns expressed by the Committee for the Prevention of Torture about the possible long-term effects of the applicant's isolation in that case. Nevertheless, on the facts the Court concluded in that paragraph that there had been no violation of Article 3. This is despite the fact that the applicant in that case, who had been convicted of various offences of murdering police officers in a notorious terrorist campaign, had been placed in solitary confinement for more than 8 years.

119. The fact that Article 3 can include both positive and negative elements in the case of a detained person is perhaps best illustrated by the case of Keenan v United Kingdom (2001) 33 EHRR 38, at paras. 110–115. In that case a relatively short period of segregation was imposed on the prisoner concerned: 7 days segregation plus an additional 28 days to his sentence imposed 9 days before his expected date of release. However, when combined with the other circumstances of the case, including what the Court found to be the lack of effective monitoring of his condition and the lack of informed psychiatric assessment and treatment, which disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk, this led

to a finding that there had been inhuman and degrading treatment and punishment, contrary to Article 3, on the facts of that case.

120. I am also reminded on behalf of the Second Defendant of the decision of the Supreme Court in Shahid v Scottish Ministers [2016] AC 429. Article 3 was considered in the judgment of Lord Reed JSC at paras. 30-37. Again, after subjecting the facts to rigorous examination, Lord Reed concluded that the Claimant in that case had not been subjected to treatment which breached Article 3. This was despite the fact that he was kept in segregation for two periods of 11 months and 45 months, amounting to a total of 56 months, which was exceptional by the standards of prisons in the United Kingdom. There were also respects in which his conditions might have been improved, in particular by making greater provision for the pursuit of purposeful activities. Furthermore, Lord Reed was of the view that the procedural protections available were not as effective as they should have been, particularly as a result of the prolonged delay in obtaining legal aid: see para. 37. Nevertheless he concluded in the same paragraph that comparison with such cases as Ramirez-Sanchez, where the applicant was held for 8 years in solitary confinement, under much more stringent conditions, indicates that segregation of the duration experienced by Mr Shahid, under the conditions in which he was held, did not entail a violation of Article 3.

121. Applying the principles which can be derived from the authorities on Article 3 to the facts of the present case, it seems to me that the following features of this case are of particular importance.

122. First, there is no suggestion that the Claimant has been kept in segregation with the intention of debasing or humiliating her; nor any suggestion that the measure was calculated to break her resistance or will. There has been no element of premeditation in the sense used by the European Court of Human Rights.

123. Secondly, the segregation regime has not amounted to total solitary confinement and has been modified as conditions have permitted. For example, the Claimant has been permitted to communicate with some other people; has been able to do some work as an orderly and has had access to facilities such as a library and a gym.

124. Thirdly, although the Claimant suffers from a mental disorder, the impact of segregation on her health has been monitored by professionals, including psychologists, and it has been certified that she can continue to be kept in that environment at all relevant times.

125. Fourthly, the Claimant's segregation has at all material times had a legitimate aim and has not been imposed for arbitrary reasons. The reality is that the Claimant is in an almost unique position in the prisons of this country. She poses an exceptionally high risk to others, including other prisoners. This is not to say that the Claimant's segregation can be indefinite but that is not what the Second Defendant has sought to do. Rather the evidence before this Court makes it clear that reasonable efforts have been made to facilitate the Claimant's ability to move to another environment within the prison estate but only in a safe and structured way.

126. At the hearing before me Mr Southey conceded that he could not realistically ask the Court to hold that the Claimant's segregation at the present time should be brought to an immediate end. However, he did question whether enough had been done at an

earlier stage in order to facilitate her transfer to another environment such as the Primrose Project. I do not accept that submission. In my judgment, the Second Defendant has acted with reasonable diligence and has been able to get the Claimant to the point where she can realistically move on to the Highly Complex Needs Pilot at HMP Bronzefield. Although that may prove to be a pre-cursor to a transfer to the Primrose Project in the future, the evidence before the Court explains why it would be inappropriate to transfer the Claimant to that project at this stage, since it is located at HMP Low Newton, which would not be a suitable prison for her at this time.

127. Fifthly, the need for the Claimant's continued segregation has been kept under review on a regular basis both by the Second Defendant and by the First Defendant. Those authorities have concluded, in their professional judgment, which is based on extensive experience of prisons, that her continued segregation is necessary. The reasons for those conclusions have been explained to the Court in evidence which is before me and which I have summarised earlier.

128. Finally, the Claimant has had access to an independent judicial authority, namely this Court, which has been able to assess the continuing need for her segregation. On the evidence before this Court I am satisfied that that need has been demonstrated by the Defendants.

129. In all the circumstances, therefore, I have come to the conclusion that the Claimant's segregation is not, and has not been, in breach of Article 3.

Issue 4: Has the Claimant's segregation breached Article 8?

130. Article 8 of the Convention rights, also set out in Sch. 1 to the HRA, provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

131. In the context of Article 8 there is a dispute between the Claimant and the First Defendant as to whether Article 8 is applicable at all. The Second Defendant concedes that it is applicable in this case.

132. On behalf of the First Defendant it is submitted that this court is bound by the decision of the House of Lords in Munjaz, whatever may have been said subsequently

by the European Court of Human Rights in Munjaz v United Kingdom [2012] 1 MHLR 351.

133. The applicability of Article 8 to the segregation of a patient detained in a mental hospital was considered by the House of Lords in Munjaz. The House of Lords allowed the appeal by the hospital authority and dismissed the claim for judicial review, with Lord Steyn and Lord Brown of Eaton-under-Heywood dissenting in respect of Article 8.

134. Lord Bingham of Cornhill dealt with Article 8 in his opinion at paras. 31-36. At para. 32 he said:

> "It is obvious that seclusion, improperly used, may violate a patient's Article 8 right in a serious and damaging way and may found a claim for relief. This appeal, however, is directed to the compatibility of the Ashworth policy with the Convention, assuming it to be followed. I have, for my part, some difficulty in appreciating how seclusion can be said to show any lack of respect for a patient's private and family life, home or correspondence, if it is used as the only means of protecting others from violence or intimidation and for the shortest period necessary to that end. A detained patient, when in his right mind or during lucid intervals, would not wish to be free to act in such a way and would recognise that his best interests were served by his being prevented from doing so."

135. Lord Bingham went on to say at para. 33 that:

> "If, however, it is accepted that seclusion, properly used in accordance with the policy, involves an interference by a public authority with the exercise of the patient's right under article 8(1), it is necessary to consider justification under article 8(2). Seclusion under the policy is plainly necessary for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Properly used, the seclusion will not be disproportionate because it will match the necessity giving rise to it."

136. It is to be noted that Lord Bingham did not finally determine that Article 8(1) could not be applicable to the seclusion of a patient (or, by analogy, a prisoner). He said that he had "some difficulty" with this when seclusion was properly used. Nevertheless, he went on to address the issue which would arise under Article 8(2) if it is accepted that seclusion, even properly used, involves an interference with a right under Article 8(1).

137. Lord Hope dealt with Article 8 at paras. 87-94. At para. 88 he said:

> "…So long as it does not amount to ill-treatment in violation of Article 3, seclusion will not as a general rule result in an interference with the patient's rights under Article 8(1) …"

138. At para. 90 Lord Hope continued:

> "Assuming nevertheless that the policy requires to be justified under Article 8(2), I would conclude that it satisfies these tests. …"

139. In my view, it is clear that Lord Hope did take the view that Article 8(1) was not as a general rule applicable to cases of seclusion of detained patients.

140. Although Lord Scott of Foscote was a member of the majority in the House of Lords in relation to the disposal of the case under Article 8, he expressed his agreement with Lord Brown in relation to whether Article 8 was applicable in the first place: see para. 102. There Lord Scott expressly endorsed what Lord Brown said at para. 118.

141. At para. 117 Lord Brown raised the question whether seclusion pursuant to Ashworth's policy engaged Article 8 at all – whether, that is, it falls within the scope of Article 8(1). He went on, at para. 118, to say:

> "There can surely be only one answer to this question. It is unthinkable that a mental patient can be subjected to seclusion, particularly on a long-term basis as is often the case at Ashworth, without good reason and, in the language of Article 8(2), without such interference with his rights being 'in accordance with the law'. …"

142. Accordingly, at para. 119 Lord Brown said that the case turned on Article 8(2): in other words whether the interference with the right to respect for private life in Article 8(1) could be justified as being both lawful and proportionate in accordance with the requirements of Article 8(2).

143. At para. 42 Lord Steyn said that the only part of the judgment of the Court of Appeal on which he would not adopt its reasoning and conclusion was in respect of seclusion and the applicability of Article 5. Accordingly, it appears to be clear that Lord Steyn was expressing his agreement with the Court of Appeal in relation to Article 8, that it was applicable to the facts of the case.

144. I accept the submission made by Mr Southey in the present case that, although Lord Scott was in agreement with Lord Bingham and Lord Hope as to the result in Munjaz, he agreed with Lord Brown as to the reasoning to be adopted in relation to Article 8. Together with Lord Steyn, therefore, the majority of the House of Lords in fact decided that, in principle, Article 8(1) is applicable to cases of seclusion of detained patients and therefore, by analogy, to segregation of prisoners.

145. When Munjaz went to the European Court of Human Rights, that Court clearly stated that Article 8 is applicable to cases of the compulsory seclusion of a detained patient, even where the interference is only "minor": see paras. 78-82 of the Court's judgment, in particular para. 80.

146. At para. 81 the Court was expressly mindful of Lord Bingham's doubts when the case was before the House of Lords. However, in its view, the considerations which Lord

Bingham had in mind were "more relevant to the question whether seclusion is justified (in the sense of being proportionate to the legitimate aim of protecting the rights and freedoms of others) than to the question whether there has been an interference at all." I would respectfully agree.

147. The duty of domestic courts in this country is to take account of relevant decisions of the European Court of Human Rights: see section 2(1) of the HRA. The domestic courts are not therefore bound by those decisions.

148. Furthermore, it is now well-established that, in the case of conflict between a decision of the European Court of Human Rights and a decision of a higher court in the domestic legal system, courts such as this one are bound by, and must follow, the decision of the higher domestic court: see Kay v Lambeth London Borough Council [2006] 2 AC 465.

149. However, in the present context matters have not rested there. After the decision of the European Court of Human Rights in Munjaz, the issue has been considered more recently by the Supreme Court in Shahid, which (like the present case) was about segregation of a prisoner rather than a detained patient. In particular, at para. 39, Lord Reed JSC said:

> "It is accepted on behalf of the ministers that segregation is an interference with the right to respect for private life guaranteed by Article 8(1), and therefore requires to be justified under Article 8(2). That concession reflects the approach adopted by the European Court in Munjaz v United Kingdom …"

150. The issue is one which has been recently considered by the Supreme Court. Although, as Mr Tom Weisselberg QC stressed on behalf of the First Defendant, the point was the subject of concession, nevertheless Lord Reed expressly endorsed that concession and stated that it reflected the approach taken by the European Court in Munjaz. Furthermore, Lord Reed went on to deal at length with the question of justification under Article 8(2). He would not have needed to do so if he had not been of the opinion that Article 8(1) was in principle applicable to seclusion of prisoners.

151. I therefore conclude that Article 8(1) is applicable to a case such as the present. It follows that the interference with the right to respect for private life has to be justified under Article 8(2). This includes the requirement that it must be in accordance with law.

152. It is common ground before me that, in the present case, there was a breach of the requirement that any interference be in accordance with law for the period from 21 September 2013 to 4 September 2015. This is because there was a breach of domestic law, as held by the Supreme Court in Bourgass.

153. However, there was no breach of Article 8 on this basis from September 2015, since the Claimant's segregation has been in accordance with domestic law from that date until the present day.

154. I turn to the important issue of whether the interference with the right to respect for private life was necessary in a democratic society to serve one or more of the legitimate aims set out in Article 8(2).

155. There is no dispute that the segregation has at all material times had a legitimate aim, for example the prevention of crime and the protection of the rights of others. This is because the Claimant is a very dangerous offender.

156. The nub of the dispute between the parties is whether the segregation has complied with the principle of proportionality. In my judgment it clearly has at all material times done so. This is essentially for the reasons I have set out earlier, in concluding that there has been no breach of Article 3. In my judgment, on the basis of the evidence before this Court, the Defendants have demonstrated that the Claimant's segregation has at all material times been necessary and proportionate.

157. That leaves the question of what, if any, remedy should be granted to the Claimant, since, in my view, there has been a breach of the requirement that any interference with the rights in Article 8 should be in accordance with law. In substance that is the same point as is conceded by the Defendants, namely that the Claimant's segregation was not in accordance with rule 45 as it was in the period before 4 September 2015. As I have already mentioned, I propose to grant a declaration to that effect.

158. In those circumstances, I do not consider it necessary or appropriate to grant a further declaration that there has been a breach of Article 8. In so far as the Claimant wishes to establish that there has been such a breach, the terms of this judgment should suffice. It is appropriate that the Court should leave matters there, since anyone who wishes to know why there has been a breach of Article 8 can read this judgment and can see the limited basis for concluding that there has been such a breach.

Issue 5: Has the Claimant's segregation breached Article 14?

159. Article 14 of the Convention rights, which again is set out in Sch. 1 to the HRA, provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

160. The Claimant makes it clear that she does not rely on alleged sex discrimination but does rely on alleged discrimination alleged on the ground of her disability. Mr Southey contends that her disability is an "other status" for the purposes of Article 14. I will proceed on the assumption that that contention is correct for the purposes of this case.

161. For the avoidance of doubt it should be recorded that the Claimant no longer pursues any argument under the Equality Act 2010.

162. If I understood them correctly, Mr Southey put his submissions under Article 14 on two bases. First, he submits that the Claimant has been discriminated against in the enjoyment of her Convention rights on the ground of her disability. Secondly, he relies on the well-established principle that Article 14 not only requires similar situations to be treated in a similar way but also requires that different situations should be treated in a different way. He submits that the Claimant has been treated in a way which is inappropriate, having regard to the fact that she suffers from a disability, namely her mental illness.

163. I reject those submissions. Even accepting, for the purpose of this argument, that the Claimant suffers from a disability, the fact is that she has not been discriminated against on the ground of that disability. She has been treated no differently than she would have been if she had not had the mental health problems that she does. That disposes of the first submission under Article 14.

164. As for the second submission, the reality is that the Claimant's mental health problems have been taken into account at all material times. The evidence before the Court makes it clear that her mental wellbeing has been the subject of anxious consideration by the professionals who have monitored her health and kept her segregation under regular review. The fact is that the Claimant has been treated in an appropriate way, having regard to her mental state.

165. I conclude that there has been no breach of Article 14.

Issue 6: Was the Claimant's segregation unlawful at common law as being irrational?

166. The Claimant submits that, quite apart from the HRA, her segregation has been unlawful on the ground of irrationality.

167. In a number of recent cases the Supreme Court has said that a flexible approach should be taken to principles of judicial review, particularly where important rights are at stake. This has led to the emerging view that there may not, depending on the facts of a particular case, be any difference in outcome depending on whether use is made of the principle of proportionality or the test of irrationality: see, for example, Pham v Secretary of State for the Home Department [2015] 1 WLR 1591, at para. 60 (Lord Carnwath JSC, with whom Lord Neuberger PSC, Lady Hale DPSC and Lord Wilson JSC agreed). Lord Carnwath cited Lord Mance JSC in Kennedy v Information Commissioner [2014] 2 WLR 808, at para. 51:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle … The nature of judicial review in every case depends on the context."

168. At para. 54 Lord Mance had endorsed the view expressed by Professor Paul Craig, in an academic article in 2013, that:

> "Both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context."

169. In Pham see also paras. 94-96 in the judgment of Lord Mance JSC; para. 107 in the judgment of Lord Sumption JSC (with whom Lord Neuberger PSC, Lady Hale DPSC and Lord Wilson JSC agreed); and paras. 113-119 in the judgment of Lord Reed JSC.

170. These emerging principles were applied by the Supreme Court in the context of segregation of a prisoner in Bourgass.

171. As Lord Reed explained at para. 125, the critical question in such cases is whether the prisoner's continued segregation is justified having regard to all of the relevant circumstances. Those will include "the reasonableness of any apprehension that his continued association with other prisoners might lead to a breakdown in good order and discipline within the prison; the suitability of available alternatives; the potential consequences to the prisoner if authorisation is granted; and the potential consequences to others if it is not. The answer to the question requires the exercise of judgment, having regard to the information and advice from a variety of sources, including the governor, health care professionals and the prisoner himself."

172. At para. 126 Lord Reed said:

> "In proceedings for judicial review, the court has full jurisdiction to review evaluative judgments of that kind, considering their reasonableness in the light of the material before the decision-maker, whether the appropriate test has been applied, whether all relevant factors have been taken into account, and whether sufficient opportunity has been given to the prisoner to make representations. This court has explained that the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, Pham … The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that the decision to authorise its continuation is reasonable. …"

173. In the circumstances of the present case, I am satisfied that, applying those standards of review, the continuing segregation of the Claimant has at all material times been reasonable. In my judgment, there has been shown to be "a cogent justification" for the continuing segregation of the Claimant at all material times. This is in essence for the same reasons as I have concluded that there has been no breach of Article 3 and concluded that any interference with the Claimant's rights under Article 8 has been necessary and proportionate.

Issue 7: What remedies should be granted under the HRA?

174. The parties are in dispute about what, if any, remedies should be granted by the Court, even if it finds that there has been a breach of the Claimant's rights under the HRA, in particular on the question whether any damages should be awarded.

175. The Defendants submit that it is not necessary to award damages in order to afford "just satisfaction" in respect of the breaches, if any, of Articles 3, 8 and 14: see section 8(3) of the HRA.

176. Since I have concluded that there has been no breach of the Convention rights (save for the fact that any interference with the right to respect for private life in Article 8 was not in accordance with law for the period from 21 September 2013 to 4 September 2015), it is unnecessary to consider this issue further. As Mr Southey would accept, if that is the only basis on which there has been a breach of the Convention rights, it is not necessary to award compensation in order to provide just satisfaction in this case.

177. I have already set out earlier the limited terms of any declaratory relief that is, in my view, necessary and appropriate in this case.

Conclusion

178. It is important to recall that everyone within the jurisdiction is entitled to the protection of the law, including the protection of their human rights. That includes even someone who has committed the most serious crimes. This is because ours is a society governed by the rule of law.

179. I have considered carefully the submissions that have been made in this case. For the reasons set out in this judgment I have come to the following conclusions:

(1) As is conceded by both Defendants, the Claimant's segregation was unlawful in the period from 21 September 2013 to 4 September 2015 because it was not in accordance with the requirements of rule 45 of the Prison Rules as they were at that time.

(2) There has been no breach of the duty to act fairly in this case. The Claimant's segregation is not unlawful on that ground.

(3) There has been no breach of Article 3 of the Convention rights in this case. The Claimant has not been subjected to inhuman or degrading treatment.

(4) The Claimant's segregation was not in accordance with law and, for that reason but no other, there was a breach of Article 8 in the period from 21 September 2013 to 4 September 2015. However, the Claimant's segregation has been in accordance with law since that time and has, at all material times, been necessary and proportionate.

(5) There has been no breach of the right to equal treatment in the enjoyment of Convention rights in Article 14.

(6) The Claimant's segregation has, at all material times, been reasonable and therefore lawful at common law.

180. Accordingly this claim for judicial review is dismissed, save that there will be a declaration that the Claimant's segregation was unlawful in the period from 21 September 2013 to 4 September 2015 because (as is conceded by the Defendants) it was not in accordance with the requirements of the Prison Rules at that time.