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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT  
[2020] EWHC 2554 (Admin)



No. CO/515/2020

Royal Courts of Justice

Friday, 31 July 2020

Before:

LADY JUSTICE CARR DBE  
MR JUSTICE FORDHAM

B E T W E E N :

THE QUEEN  
ON THE APPLICATION OF  
JALIL

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

- and -

HM PRISON AND PROBATION SERVICE

Interested Party

MR R. DESAI (instructed by Birnberg Peirce & Partners) appeared on behalf of the Claimant.

MR S. SINGH QC and MR M. FLINN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

THE INTERESTED PARTY did not appear and was not represented.

J U D G M E N T

LADY JUSTICE CARR:

**Introduction and procedural history**

- 1 On 15 June 2007 the Claimant, Mr Abdul Aziz Jalil (“Mr Jalil”), now 47 years old, was sentenced to an extended determinate sentence of 26 years’ imprisonment and a licence period of 5 years, pursuant to s.226A of the Criminal Justice Act 2003. Alongside five other members of an Islamist terror cell, he had earlier been convicted on 18 August 2004 on his guilty plea to conspiracy to cause explosions intending that such acts should be carried out and knowing, when giving help, support and assistance, that such explosions were likely to endanger life contrary to s.2 of the Explosive Substances Act 1883, as extended by s.2 of the Terrorism Act 2000.
- 2 Mr Jalil has been in prison since his arrest in August 2004. He was diagnosed for the first time with autism in 2016. He has been eligible for early release by direction of the Parole Board since August 2017. His automatic release date on licence is 3 December 2021.
- 3 The Defendant, the Secretary of State for Justice (“the SSJ”), is the minister with general superintendence of prisons pursuant to s.4 of the Prison Act 1952 and responsible for the relevant acts and omissions of the officers and staff involved in determining Mr Jalil’s status and location as a prisoner.
- 4 The litigation arises in the context of the terrorist-related events in the United Kingdom in late 2019 and early 2020, and the impact of COVID-19. By proceedings originally commenced in February 2020, Mr Jalil challenged decisions in December 2019 to recategorise him from Category D to Category C and to transfer him from an open prison to a Category B prison (“the December 2019 decisions”).
- 5 The importance of the move to open conditions for Mr Jalil is that without it, in the light of his autism, he is unlikely to be able to demonstrate to the Parole Board that the statutory test for early release, namely that it is no longer necessary for the protection of the public that he be confined, is met. Parole Board panels in 2017 and 2018 recommended his swift release to open conditions. For Mr Jalil it is said that the purpose of the proceedings has at all times been, and remains, to secure his return to open conditions as quickly as possible.
- 6 The outline facts leading to the December 2019 decisions are summarised helpfully in the judgment of Spencer J on 28 April 2020 [2020] EWHC 1151 (Admin) [3]-[8]. On 27 April 2020, the eve of the rolled up hearing that had been directed to take place that day by Eady J, the SSJ accepted that the December 2019 decisions were unlawful. Spencer J set out the passage of events as they unfolded, at [9] to [23] of his judgment. The December 2019 decisions were quashed accordingly by consent. Spencer J made directions for an expedited remedies hearing. For reasons set out in his judgment, those directions included, first, a direction that the SSJ take all proper and reasonably practicable steps, subject to disclosed COVID-19 policies, with a view to securing the return of Mr Jalil, as a Category D prisoner, to open conditions as speedily as possible; secondly, a direction that by 12 May 2020 the SSJ make all further relevant disclosure pursuant to his duty of candour in respect of both the underlying substantive grounds of claim and the issue of further relief.
- 7 Further, albeit still incomplete, disclosure was made by the SSJ on 12 May 2020. This revealed to Mr Jalil and his advisers for the first time, amongst other things, that Mr Jalil had in fact been recategorised as Category D in February and March 2020.

- 8 The expedited remedies hearing came before May J on 4 June 2020. As she commented at the time, the further disclosure provided in many respects raised further questions about Mr Jalil's treatment. Further, by a letter dated 27 May 2020, Mr Jalil's solicitors had been informed that his categorisation was to be reviewed again. It was said that an error had been made previously, in that an Extremism Risk Guidance assessment dated 13 February 2020 ("the 2020 ERG assessment") had not been considered at the time of the recategorisation decision taken in March 2020. Further, there was an assessment addressing ways in which COVID-19 had affected extremism-related factors and the risk posed by prisoners to be considered. This new or additional information was said to be an additional change of circumstance justifying a review. May J was told that this latest review had not been completed by the time of the hearing before he.
- 9 Given the historic delay and the ongoing breaches of the duty of candour, May J laid down a tight timetable, requiring a final decision on categorisation and, if still relevant, transfer to be taken by 4pm on 8 and 15 June 2020 respectively. Further, witness evidence and disclosure to remedy ongoing breaches of the duty of candour were to be served by 15 June 2020. A timetable for the filing of any application to rely on substituted grounds of judicial review and summary grounds of resistance was set. These directions were all made with a view to a further hearing fixed to take place before May J on 1 July 2020.
- 10 In response to that order, witness statements were served (albeit late) on behalf of the SSJ as follows: from Mr Stephen O'Connell, Deputy Director of Her Majesty's Prison and Probation Service ("HMPPS"); Mr Andrew Bettles, National Counter Terrorism Lead for Prisons. Mr Bettles works within the joint extremism unit ("JEXU"); Governor Katie Jefferson, Acting Governing Governor of HMP High Down.
- 11 By this time, indeed the very day after the hearing before May J, on 5 June 2020 HMP High Down had communicated a decision to recategorise Mr Jalil to Category C ("the June 2020 decision").
- 12 On 1 July 2020, May J granted Mr Jalil permission to challenge the June 2020 decision by reference to substituted detailed statement of facts and grounds. The matter was listed for an expedited full hearing, with a further case management conference, on 31 July (today). The full hearing has now been fixed for 2 to 4 September before this constitution.
- 13 On 6 July 2020 consolidated substituted detailed statements of facts and grounds were served on behalf of Mr Jalil. I note that Mr Jalil, amongst other things, challenges not only the June 2020 decision but the process preceding it - in particular, the decision in April 2020 to initiate a recategorization review at all. He further alleges that there has been an ongoing failure to transfer him back to open prison conditions pursuant to his allegedly lawful Category D status contrary to the SSJ's duty to make reasonable adjustments under s.20 and s.29B of the Equality Act 2010 ("the 2010 Act").

### **Grounds of challenge**

- 14 The following grounds of challenge are raised:
- i) Ground 1: Unjustified departure from PSI 40/2011, breach of the principle of consistent treatment and/or regard to irrelevant considerations in revisiting the outcome of previous recategorization reviews in the absence of supervening circumstances.

- ii) Ground 2: Failure to have regard to the reliability gradings of intelligence, dated 3 and 6 January 2020.
- iii) Ground 3: Breach of procedural fairness.
- iv) Ground 4: Breach of the duty of enquiry in failing to gather key relevant information/no fair and balanced picture.
- v) Ground 5(a): Bad faith, improper purpose, operation of unpublished policy running contrary to public policy.
- vi) Ground 5(b): Conspicuous unfairness amounting to an abuse of power.
- vii) Ground 6: Breach of the reasonable adjustment duty.

### **Recent developments**

- 15 May J directed that the SSJ serve detailed grounds of resistance and any further witness evidence by 4pm on 27 July 2020 (ie last Monday). The SSJ has failed to comply with that order. Instead, on Friday 24 July 2020, the Treasury Solicitor wrote to Mr Jalil’s solicitors stating that the June 2020 decision was “withdrawn”. That decision had been taken on behalf of the SSJ by Mr Phil Copple, Director General of Prisons for HMPPS. In summary, as would be confirmed by a statement from Mr Copple, it was considered that there was a risk, or alternatively a reasonable perception, that the June 2020 decision could have been, consciously or subconsciously, influenced by irrelevant considerations, namely a perception that the senior staff at HMPPS Headquarters did not want Mr Jalil to be held in open conditions. Rather than filing detailed grounds of resistance, the SSJ indicated that he would be advancing proposals to compromise the claim.
- 16 The letter further stated that Mr Copple had also decided that another categorisation review was now required due to the fact that, since December 2019 to date, no categorisation decision had been taken and maintained based on a categorisation review carried out by a decision-maker with direct access to all relevant materials, in particular, the 2020 ERG assessment. I refer to this as “the July 2020 decision”. It was stated that, in light of the “unfortunate sequence of events” since December 2019, Mr Copple proposed an independent review by an experienced professional decision-maker, a governor of another prison, who would not be informed of the results of any decisions since 2 December 2019. The governor would be assisted by two independent assessors. Mr Jalil would have the opportunity to provide written submissions to the panel. The fresh decision would be taken and communicated to Mr Jalil by 4pm on 24 August 2020. The SSJ was prepared to undertake that, absent any serious or obvious legal flaw in the fresh decision, or unless and until there was a material change of circumstances within the meaning of PSI 40/2011 or its successor, the security categorisation policy framework, HMPPS would accept and act upon the decision accordingly, including by way of transfer to open conditions on an exceptional basis, if necessary, within fourteen days of that decision. (Mr Jalil’s legal representatives note that this is, in fact, no more than the SSJ would be required to do in any event in discharge of his public law duties.) Mr Jalil’s legal costs of the proceedings would be met by the SSJ. Mr Jalil’s solicitors were invited to respond by 4pm on Monday 27 July 2020.
- 17 Again, the timing of the SSJ’s communications is unsatisfactory and has created another flurry of confusing, last-minute activity before a court hearing. The court has in mind, in due course, to direct the production of a witness statement from Mr Copple explaining when the July 2020 decision was first contemplated and what steps were taken between 1 and 24 July 2020 to prepare detailed grounds of resistance and evidence during that period, given the deadline of 27 July 2020. Mr Singh QC, on behalf of the SSJ, has given us some broad dates but, given the history and background to this matter, I consider that there is a need for a formal witness statement confirming the precise details.

18 A witness statement from Mr Phil Copple, dated 27 July 2020 was served that day, accompanied by a draft order staying the proceedings by consent. At paragraph 14 of that statement Mr Copple states:

“Having reviewed the documentation, I accept that the sequence of decisions that have been taken in regard to Mr Jalil’s security categorisation since 2 December 2019 has been complex and, to be frank, unsatisfactory. In particular, I wish to acknowledge the frustration that Mr Jalil must feel and express my regret at the issues with disclosure which have arisen in these proceedings to date. I would also wish to apologise to the court on behalf of HMPPS for the delays that have occurred in providing full disclosure in this case and complying with the duty of candour obligations which I take very seriously indeed.”

Mr Copple goes on to emphasise the effect of the London Bridge terror attack, starting at Fishmongers’ Hall, on 29 November 2019, followed by a suspected terrorist attack on a prison officer on 9 January 2020 at HMP Whitemoor, and, on 2 February 2020, a terrorist-related knife attack on Streatham High Street. The London Bridge and Streatham attacks involved offenders who had been released from prison on licence. Mr Copple states that it is imperative that HMPPS staff do all they reasonably can to manage the risks arising out of the impossibility of perfection in risk assessment.

19 Mr Copple states that he can see that there is some risk that staff at HMP High Down, Governors Jefferson and Hammersley, were influenced by the strong views expressed by Mr O’Connell in the documentation. It seemed unwise that the same decision-makers were involved on multiple occasions. Further, the categorisation decision should be seen to be fair and not predetermined. Whilst he believed that the actions and communications of his staff were ultimately based on a genuine and proper concern to ensure that the categorisation decision took all relevant information fully into account, and ultimately to ensure the protection of the public, he had concluded that the June 2020 decision should be withdrawn. There was at least the possibility that it was influenced by an inferred understanding or perception of the preferred outcome of more senior colleagues and so the possibility that the decision may not have been taken with the objectivity that he considers to be essential. Mr Copple says that, despite the unsatisfactory history, he considered it essential that a fresh categorisation decision be taken. A review was justified in December 2019, following the London Bridge attack. An updated ERG assessment was necessary and carried out. Reviewers needed to see the assessment. He then sets out his bespoke proposal for the review process.

20 Mr Jalil does not accept the lawfulness of this latest development and seeks to challenge the July 2020 decision. It will be by way of amendment to the consolidated substituted grounds. The July 2020 decision means that there will be a fifth review process since December 2019. Mr Jalil’s Category D status has been repeatedly affirmed, including by different prison establishments, in October 2018, August and December 2019, February and March 2020 and in parallel with two recommendations of the Parole Board. Mr Jalil refers to the troubled history of the proceedings, as set out in the judgments of Spencer J and May J. He contends that the effect at every relevant stage of the SSJ’s actions has been to thwart the prompt and effective adjudication of the SSJ’s conduct and Mr Jalil’s efforts to get judicial assistance to secure his return to open conditions. The option of a stay presented by the SSJ is misconceived and threatens again to delay unacceptably adjudication of points of law.

## **The parties' positions at this hearing**

### *Mr Jalil*

21 Mr Jalil seeks permission to amend his consolidated substituted grounds to challenge the July 2020 decision, together with directions to enable that challenge to be considered at the hearing in September, together with an unless order and a direction that the SSJ ensure its witnesses are available to give evidence if required. He contends that the mere withdrawal of the July 2020 decision does not render the claim academic. Prospective withdrawal is not the same as quashing, which has retrospective effect and is something which the SSJ resists. The claim is every bit as urgent now as it ever has been. It would be wholly unjust for Mr Jalil to have to await the outcome of the further review, foregoing his opportunity to have Ground 1 determined. He is entitled to have his rights on his case vindicated. Moreover, the grounds advanced are the gateway to his claim under Ground 6, and reference is made, in particular, to paragraphs 30 and 31 of the SSJ's Grounds of Resistance which makes that clear. There is no proper basis for a stay, let alone dismissal of the proceedings, something which the SSJ indicated, for the first time in his skeleton argument, was something that he would seek at today's hearing.

22 As for the merits of the proposed amendments, on Ground 1, the basis of the July 2020 decision is fundamentally the same as that behind the impugned decision of April 2020. The Regional Counter Terrorism Team was tasked with providing the specialist input envisaged in PSI 40/2011. That team had the 2016 ERG assessment and the 2020 ERG assessment and had substantial input into the categorisation reviews in February and March 2020. As for Grounds 5(a) and (b), Mr Copple's decision in July 2020 is at least arguably not free of the earlier decision in April 2020 to carry out a review. Mr Copple shared Mr O'Connell's earlier approach. For example, Mr O'Connell noted on 19 April 2020 that both he and Mr Copple did not want a TACT offender, such as Mr Jalil, in the open estate. The simple point is that Mr Copple is, and has at all material times, been Mr O'Connell's superior. This will be a matter for evidence. It would be wrong to bar Mr Jalil at this stage from pursuing Grounds 5(a) and (b) so far as the July 2020 decision is concerned.

### *The SSJ*

23 For the SSJ, Mr Singh QC and Mr Flinn submit that the claim is now academic and should be dismissed, or at least stayed pending the outcome of the fresh review. The SSJ does not accept that the June 2020 decision was unlawful but he has in any event withdrawn it. The challenge to that decision was highly fact-specific, taken in circumstances in which Mr Copple had since assessed, and accepted, that the decision-maker at HMP High Down could have felt under a degree of pressure. The target has now changed. Recent developments have not prejudiced Mr Jalil in any way. The key point is that Mr Copple has now reviewed matters in the round, the bespoke process proposed is reasonable and it is reasonable to expect Mr Jalil to await its outcome. It is submitted that the correct course is to consider whether Mr Jalil should be granted permission to amend. If not, the proceedings should be brought to an end. If so, then the grounds should be directed at the July 2020 decision. Mr Jalil's claim for damages in Ground 6 would not be prejudiced.

24 On the application for permission to amend, Mr Singh makes a number of general points. He emphasises the nature of the July 2020 decision, which was simply a decision for a new review to be carried out. He refers to the overriding objective and submits that amendment would not be consistent with it. He refers to yesterday's judgment in the case of *R (Mohammed Zahir Khan) v SSJ* [2020] EWHC 2084 (Admin) at [78] in particular. He submits that the parties are now in different territory because Mr Copple has personally considered the matter and provided a clear reasoned basis for the July 2020 decision. It is not arguable that that decision was unlawful by reference to Ground 1. It was plainly

rational and within the express terms of PSI 40/2011 (in particular by reference to paragraphs 5.7 and 5.9). Reference is made to the decision in *R (Lowe) v Governor HMP Liverpool* [2008] EWHC 2167 and *R (D'Sane) v Secretary of State for Justice* [2010] EWHC 514 (Admin). A decision may be unsound because of a clear error or for some other "substantial reason". But here, submits Mr Singh, there is a proper basis consistent with PSI 40/2011 for reviewing Mr Jalil's categorisation - since there is new information relating to risk level and/or a concern with an evidential basis that the extant decision is unsound.

- 25 It is submitted that Grounds 5(a) and (b), as proposed to be amended by reference to the July 2020 decision, are also unarguable in the light of Mr Copple's witness statement. The further decision was taken by Mr Copple based on his analysis of material already disclosed in the context of legal advice. Mr Jalil's implication that the SSJ has yet to comply with his duty of candour is not understood and, in the light of the witness statement of Mr Copple, it is unarguable that his decision is tainted in any way.
- 26 The SSJ submits that the proposed challenge to the July 2020 decision by Mr Jalil effectively amounts to an argument that a categorisation review cannot now lawfully occur. That would prevent HMPPS from carrying out its public protection role and entail an impermissible fetter on its security categorisation function and, if correct, would have been correct as of 2 December 2019.
- 27 Finally, the SSJ submits that the court should have regard to the mechanics of the fresh review. The proposals set out and communicated with that timeline in mind would place the parties in the proceedings in an invidious position. The SSJ would be faced with two options. Rather than proceeding to carry out a review, it could choose to await the outcome of these proceedings. That would be undesirable given that a review could be carried out potentially leading to a Category D categorisation before the hearing itself. Or the SSJ could proceed to carry out the fresh categorisation review, notwithstanding the amended challenge. Accordingly, it is said that, where the implementation of the SSJ's proposal could result in the transfer of Mr Jalil to open conditions in early course, the appropriate way forward is to bring the present proceedings to an end now.

### Analysis

- 28 It is logical to start with the application to amend. A formal application has properly been issued on 30 July 2020, showing relatively modest amendments, all of which relate to the latest July 2020 decision. I refer to paragraphs 4, 78, 93, 123, 125 and 139(b).
- 29 Granting permission to take aim at a subsequent decision is a case management decision (see *R (Hussain) v SSJ* [2016] EWCA Civ 1111, [2017] 1 WLR 761 [18] and [20]). It may be the convenient course rather than requiring the commencement of fresh proceedings.
- 30 In my judgment, subject to the question of whether or not there is an arguable case on the merits, as was the case before May J on 1 June 2020, it would in principle be just and necessary to allow the proposed amendments here. The question is whether the challenge to the July 2020 decision is arguable, carrying a realistic prospect of success.
- 31 Having carefully considered the arguments on both sides, and bearing in mind that this constitution will be hearing the full arguments in September, it suffices for me to say that I consider that threshold to be met. Mr Jalil recognises that Grounds 2, 3 and 4 cannot be invoked to impugn the July 2020 decision but argues that Grounds 1 and 5(a) and (b) can be. The opposition to Ground 1 is essentially a re-run of what the SSJ said in opposing the previous amendment to challenge the June 2020 decision (see the Summary Grounds of

Resistance at paragraphs 20 and 23 in particular). May J gave permission to amend and permission to apply for judicial review on this ground because it was arguable that these new circumstances were in substance not capable of amounting to a good reason for review and that Mr Jalil was entitled to a mandatory order. It was arguable and it remains arguable. It is in my judgment an important point.

- 32 As for Grounds 5(a) and 5(b), Ground 5(b), again, is arguable for the same reasons as it was before. As for Ground 5(a), there are a number of strands. The key point is that there is a controversy over what is really driving the decision-making, in which Mr Copple is intertwined. May J gave permission to amend and permission to apply for judicial review on Grounds 5(a) and (b) on the basis that the circumstances mean that Mr Jalil cannot fairly and lawfully now be kept at Category C. This remains the position on arguability. It is true that an independent review decision is designed to be untainted, but the issue is whether the decision by Mr Copple to set up this further review is tainted. Subsequent fairness would not cure that. If the logic is that in law Mr Jalil is entitled to be categorised at Category D and held in open conditions, an independent merits review which recategorises Mr Jalil at Category C is arguably no answer.
- 33 For these reasons, I would grant permission to amend and apply for judicial review on Grounds 1 and 5(a) and 5(b) as sought.
- 34 The next question is whether or not the proceedings should be stayed or dismissed. Once permission to amend has been granted and permission to apply for judicial review given in relation to the July 2020 decision, the proceedings are plainly not academic. Even without amendment, I would consider that the fact that the proceedings provided a gateway through to Ground 6 would be sufficient grounds for the proceedings to continue.
- 35 The SSJ says that it is invidious and disruptive to run the new review in parallel with the judicial review proceedings. This, of course, raises the suspicions of those representing Mr Jalil as to what really lies behind the latest turn of events. I say no more about that for present purposes. I consider it important to stand back and look at the overall justice of the case.
- 36 The SSJ says, mirroring the submissions made on his behalf before May J and which she rejected, that in principle, because of the overlapping nature of the issues, Mr Jalil should wait for the new decision and then start again if necessary.
- 37 “Rolling judicial review” is flexible and allows, in an appropriate case, existing proceedings to deal with an awaited decision (see *SSHD v Said* [2018] EWCA Civ 627 [110] and *R (Spahiu) v SSHD* [2018] EWCA Civ 2604, [2019] 1 WLR 1297 [60]-[62]). Here the logic of the claim is that categorisation at Category C is legally unsustainable and a mandatory order is appropriate. If a decision is made in the forthcoming review to recategorise Mr Jalil as Category C, this claim can and in my judgment should be considered by the court at the three day hearing fixed for September 2020.
- 38 This is essentially what has happened with the decision of 5 June 2020. These proceedings have taken that decision and its legality in their stride. The same has happened with the July 2020 decision. The same can happen with any relevant decision in August 2020.
- 39 As to that, as has been clear from exchanges during the course of submissions, it is my view that every effort should be made to complete the review in sufficient time for that to happen. I see no proper basis why the review should need to take anything like three weeks. The



SSJ must understand, given the history of this matter, that this is now a matter of the utmost urgency.

40 This is a troubling case which raises important issues. Candour on the part of the SSJ is required. In my judgment, there should be a ventilation of all issues and consideration of remedies on the legal merits. For these reasons, I would grant the application for permission to amend and to apply for judicial review on those amended grounds. I would dismiss the application to dismiss or stay these proceedings.

41 If my Lord agrees, we will now hear submissions on directions.

MR JUSTICE FORDHAM: I agree.

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**CERTIFICATE**

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This transcript has been approved by the Judge.