



Neutral Citation Number: [2021] EWHC 1266 (Admin)

Case No: CO/2200/2020

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

Birmingham Civil Justice Centre

Date: 14 May 2021

**Before:**

**THE HONOURABLE MR JUSTICE MORRIS**

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**Between:**

**THE QUEEN (on the application of MA)**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR JUSTICE**

**First Defendant**

**THE GOVERNOR OF HMP WHATTON**

**Second  
Defendant**

**THE GOVERNOR OF HMP STAFFORD**

**Third  
Defendant**

**-and-**

**MB**

**Interested Party**

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**Philip Rule** (instructed by **Duncan Lewis Solicitors**) for the **Claimant**  
**Robert Cohen** (instructed by **Government Legal Department**) for the **the First, Second and  
Third Defendants**

Hearing dates: 11 and 25 February 2021

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**Approved Judgment**

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

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**Mr Justice Morris :**

**Introduction**

1. By these proceedings, MA (“the Claimant”) challenges the decisions of the Secretary of State for Justice (“the First Defendant”), of the Governor of HMP Whatton (“the Second Defendant”) and of the Governor of HMP Stafford (“the Third Defendant”) (together “the Defendants”) to refuse, and to continue to refuse, both telephone and audio contact and any inter-prison visits between the Claimant and her wife, MB (“the Interested Party”). Those decisions were first taken on 5 September 2017, and most recently on 4 March 2020. The Claimant further seeks declarations that prior refusal of any contact (including by written correspondence) between her and the Interested Party was unlawful.

**Factual background**

2. The Claimant and the Interested Party are each serving sentences of imprisonment for public protection for sexual offences. They are currently in different prisons. They are married to each other. They met at HMP Whatton in around June 2015. At the time of sentence, both of them identified as men. Each of the Claimant and the Interested Party now identifies as a woman. The Claimant was formerly known as C. The Interested Party was formerly known as D. On 22 April 2013, she changed her name by deed poll to E. In May 2017 HMP Whatton accepted her change of name to MB. The Claimant and the Interested Party became engaged in 2015 and they married on 29 June 2017. Shortly after they were married, the Claimant was moved to HMP Stafford. Since then they have wished to maintain contact with each other. Initially all contact was refused. Subsequently, consequent upon a report by the Prisons and Probation Ombudsman (“PPO”), they have been allowed contact by written correspondence. However contact by telephone and by inter-prison visit remains refused. By letter dated 4 March 2020 (“the Decision”), the Second Defendant confirmed the position.
3. The position of all three Defendants is aligned. The Second Defendant has taken the lead in the decisions. The current governor is Dr Lynn Saunders. She has given evidence by witness statement. HMP Whatton is a specialist category C prison exclusively for people convicted of sexual offences. The prison runs a number of accredited offending behaviour programmes.

***The Claimant’s challenge***

4. The Claimant challenges, first, the continued refusal of the Defendants to permit any form of telephone or audio contact, or of inter-prison visits, with the Interested Party; and secondly, the past prohibition of written correspondence between July 2017 and 2020 and the ongoing restriction and delay in the exchange of written correspondence. She does so on the grounds that the Defendants’ conduct is in breach of relevant policy as a matter of public law and that it amounts to an unjustified interference with her rights to a private and family life under Article 8 European Convention on Human Rights (“ECHR”). The challenge is supported by the Interested Party, who has brought her own separate application for judicial review (CO/3232/2019), on similar grounds. By consent, those proceedings have been stayed on agreed terms, pending the outcome of these proceedings.

Approved Judgment**The Grounds and the Issues*****The grounds***

5. The Claimant's grounds for judicial review are that the restrictions (both present and past) imposed upon the Claimant are:
  - (1) An unnecessary or disproportionate interference with the protection, by Article 8 ECHR, of the family and private life of the Claimant and/or her spouse; and thus unlawful as being in breach of section 6 Human Rights Act 1998 ("the 1998 Act").
  - (2) Unlawful by reason of public law error, due to failure to comply with rules 4, 34, 35 or 73 of the Prison Rules 1999 and/or to adhere to and apply prison service policy, including PSI 49/2011 and PSI 16/2011.
6. The Claimant seeks declaratory relief, mandatory orders requiring the Defendants to facilitate telephone contact and inter-prison visits; and damages by way of just satisfaction under section 8 of the 1998 Act.

***The Defendants' position***

7. The Defendants contend that:
  - (1) As regards the ongoing restrictions on telephone contact and inter-prison visits:
    - (a) the application is out of time:
    - (b) the Claimant and the Interested Party pose a risk to each other and to the wider community, that the Defendants assessed that risk to be too great to permit face-to-face or telephone contact and that the restrictions on contact between them are necessary and proportionate and thus justified under Article 8(2) ECHR.
    - (c) The restrictions are in accordance with relevant policy - namely paragraph 6.20 of PSI 49/2011 and paragraph 5.15 of PSI 16/2011.
  - (2) As regards written correspondence, in so far as it relates to the earlier prohibition, the challenge is now stale, and was in any event dealt with by the PPO; and further there is no evidence of ongoing delay in receiving and sending mail.

***The Issues***

8. Accordingly, the following issues fall for determination:
  - (1) Is the current prohibition on inter-prison visits and telephone contact in breach of Article 8 ECHR?

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- (2) Does the current prohibition on inter-prison visits and telephone contact breach relevant policy and thus constitute a public law error?
- (3) Is the challenge to the prohibition on inter-prison visits and telephone contact out of time, and if so, should there be an extension of time?
- (4) Does the Claimant have a claim for breach of Article 8 ECHR and/or for breach of policy constituting public law error in respect of the past and/or ongoing restriction in relation to written correspondence?
- (5) If the Claimant establishes unlawful conduct in any of the foregoing respects, what remedy (including by way of mandatory relief and/or damages) should the court grant?

**The relevant legislative framework****Article 8 ECHR**

9. Article 8 ECHR 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.”*

10. A prisoner enjoys rights under Article 8 ECHR. A term of imprisonment inevitably curtails the enjoyment by the person confined of rights enjoyed by other persons. It is an important objective of such imprisonment to curtail such rights. But it does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. It may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights: see *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 per Lord Bingham at §5. It is an essential part of a prisoner’s right to respect for family life that prison authorities assist him in maintaining contact with his close family: see *Ostrava v Moldova* (2007) 44 EHRR 19 at §105.
11. Under Article 8(2), the burden is upon the public authority to justify the interference as being (1) necessary in pursuit of a legitimate aim; and (2) in accordance with the law (which must be accessible in its quality of foreseeable application, and compatible with the rule of law) and (3) proportionate.

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12. As regards proportionality, the following four questions<sup>1</sup> arise:
- (1) whether the interference with the right is for a substantive objective justification, one sufficiently important to justify limiting a fundamental right;
  - (2) whether the decision or measure designed to meet the objective is rationally connected to achieving that aim;
  - (3) whether the decision or measure is no more than is necessary to accomplish that objective; and
  - (4) whether the interference strikes a fair balance between the rights of the individual and the interests of the community.
13. As to the standard of scrutiny to be applied by this Court to the primary decision-maker's assessment, in the context of the issue of proportionality, I have been referred to the speech of Lord Steyn in *Daly*, supra, at §27, to the speech of Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at §§69-76 (and the reliance upon that speech in the recent judgment of Cavanagh J in *R (on the application of Soltany and others) v Secretary of State for the Home Department* [2020] EWHC 2291 (Admin) at §§385-387), and to the more recent Supreme Court decision in *R (on the application of Steinfeld) v Secretary of State for International Development* [2018] UKSC 32 [2020] AC 1 at §§26 to 38. To the extent that there is some difference in approach between the *Bank Mellat*, as interpreted in *Soltany*, and *Steinfeld*, since the latter is the most recent authoritative pronouncement, I adopt the approach of Lord Kerr in *Steinfeld*. From those cases, I derive the following propositions:
- (1) The intensity of review is greater than that applied under traditional rationality grounds of review.
  - (2) The degree of weight or respect given to the assessment of the primary decision maker depends on the context.
  - (3) Where, as I assume to be the case here, the higher hurdle of “manifestly without reasonable foundation” does not apply, the Court is not entitled simply to substitute its own assessment for that of the primary decision maker.
  - (4) On the other hand, in the domestic courts, the concept of “margin of appreciation” does not apply in the same way as it does in the ECtHR. The degree of restraint practised by the domestic national court will depend on the context and reflect national traditions. The approach of the ECtHR to the question of the margin of appreciation accorded to member states is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified. National authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. To that extent the judgment is one for the national authorities. The national court must confront the

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<sup>1</sup> As stated, for example, in *R (on the application of Gunn) v Secretary of State for Justice and others* [2009] EWHC 1812 (Admin) at §40. See also *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 at §33.

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interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid the obligation by reference to a margin of appreciation to be allowed to the Government or Parliament (at least not in the sense that the expression has been used by the ECtHR). The Court may decide that a measure of latitude should be permitted in appropriate cases. In some circumstances, it will be appropriate for the court to recognise that there is an area of judgment within which the judiciary will defer to the considered opinion of the elected body or person. (Although it is not suggested that this applies directly in this case).

14. Mr Cohen submitted that, as on the facts of *Soltany*, the assessment of risk in the present case and the best approach to take to secure the security of a prison and the rehabilitation of offenders is “a specialist one” and involves “operational consideration”. Accordingly “considerable respect” is due to the decision taken by the Second Defendant. By contrast, Mr Rule submitted that the correct approach is that adopted in *R (Wilkinson) v Home Office* [2002] EWHC 1212 (Admin) at §§30 and 31 citing *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139: the court must exercise a tighter review of the restriction and the authority must demonstrate a proper basis for interfering with the Convention right; the court is obliged to “unpick the risk” relied upon by the Defendant and ask whether it can be managed by less than a total prohibition. *Soltany* is to be distinguished on the facts as it did not consider individual decisions to interfere with a particular individual’s family life. In my judgment, the present case is closer to the facts in *Wilkinson*. Whilst a degree of respect is to be accorded to the Second Defendant, that does not mean that this Court should not scrutinise both the risk identified, the necessity of the measures taken to meet that risk, and the consideration given to whether there are less restrictive measures meeting the same risk.

### **Damages and Just Satisfaction: Article 41 ECHR and section 8 Human Rights Act 1998**

15. Section 8 of the 1998 Act addresses remedies which the Court may grant in relation to any act of a public authority which the Court finds to be unlawful under the ECHR. Section 8(3) provides that no award of damages is to be made “unless, taking account of all the circumstances of the case ... the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made”. By section 8(4), in determining whether to award damages or the amount of an award, the Court must take into account the principles applied by the ECtHR in relation to the award of compensation under Article 41 ECHR.
16. In *R (on the application of Faulkner) v Parole Board* [2013] UKSC 23 [2013] 2 AC 254 Lord Reed considered in detail the principles relevant to the remedy of damages under section 8 of the 1998 Act. Whilst that case concerned damages for breach of Article 5.4 ECHR in the context of detention arising from delayed parole reviews, Lord Reed drew on guidance from the case of *Greenfield* as being of general application. Lord Reed summarised his conclusions at §13. From that summary, the position is as follows. Damages under section 8 should reflect levels of awards made by the European Court in comparable cases. Damages may be awarded for feelings of frustration and anxiety, being non-pecuniary loss. Where such feelings can be presumed or shown to have been suffered, a mere finding of violation of the relevant article of the ECHR will not ordinarily constitute sufficient just satisfaction. An award

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of damages should also be made, but on a modest scale. On the other hand, where feelings of frustration and anxiety are “insufficiently severe”, no award should be made.

**Prison Rules**

17. Section 47 of the Prison Act 1952 provides that the Secretary of State may make rules for the regulation and management of prisons. Pursuant to that power, the Secretary of State has made the Prison Rules 1999 (S.I. 1999/728) (as amended) (“the Prison Rules”). Rule 34 of the Prison Rules addresses “Communications generally” and provides as follows:

“34.— *Communications generally*

- (1) *Without prejudice to sections 6 and 19 of the Prison Act 1952 and except as provided by these Rules, a prisoner shall not be permitted to communicate with any person outside the prison, or such person with him, except with the leave of the Secretary of State or as a privilege under rule 8.*
- (2) *Notwithstanding paragraph (1) above, and except as otherwise provided in these Rules, the Secretary of State may impose any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons if he considers that the restriction or condition to be imposed—*
  - (a) *does not interfere with the convention rights of any person; or*
  - (b)
    - (i) *is necessary on grounds specified in paragraph (3) below;*
    - (ii) *reliance on the grounds is compatible with the convention right to be interfered with; and*
    - (iii) *the restriction or condition is proportionate to what is sought to be achieved.*
- (3) *The grounds referred to in paragraph (2) above are—*
  - (a) *the interests of national security;*
  - (b) *the prevention, detection, investigation or prosecution of crime;*
  - (c) *the interests of public safety;*
  - (d) *securing or maintaining prison security or good order and discipline in prison;*



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- (e) *the protection of health or morals;*
  - (f) *the protection of the reputation of others;*
  - (g) *maintaining the authority and impartiality of the judiciary; or*
  - (h) *the protection of the rights and freedoms of any person.*
- (4) *Subject to paragraph (2) above, the Secretary of State may require that any visit, or class of visits, shall be held in facilities which include special features restricting or preventing physical contact between a prisoner and a visitor.*
- (5) *Every visit to a prisoner shall take place within the sight of an officer or employee of the prison authorised for the purposes of this rule by the governor (in this rule referred to as an “authorised employee”), unless the Secretary of State otherwise directs, and for the purposes of this paragraph a visit to a prisoner shall be taken to take place within the sight of an officer or authorised employee if it can be seen by an officer or authorised employee by means of an overt closed circuit television system.*
- (6) *Subject to rule 38, every visit to a prisoner shall take place within the hearing of an officer or authorised employee, unless the Secretary of State otherwise directs.*

...”

*(emphasis added)*

Rule 35 addresses “Personal letters and visits” and provides, by rule 35(2), that a convicted prisoner is entitled to send and receive a letter once a week and to visits, as there specified. By section 35(8) a prisoner is not entitled to receive a visit where subject to a prohibition under rule 73 or, other than in the case of a relative or friend, without the leave of the Secretary of State.

18. Rule 73, headed “Visitors”, provides that, without prejudice to any other powers to prohibit or restrict entry or his powers under rules 34 and 35, the Secretary of State may prohibit visits by a person to a prison or to a prisoner for such periods of time as he considers necessary if the Secretary of State considers that such prohibition is necessary on grounds specified in rule 35A(4) and is proportionate to what is sought to be achieved by the prohibition. The grounds specified in rule 35A(4) (a separate rule dealing with the interception of communications), largely following the qualifications of Article 8(2) ECHR, are as follows:

- “(a) *the interests of national security;*
- (b) *the prevention, detection, investigation or prosecution of crime;*

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- (c) *the interests of public safety;*
- (d) *securing or maintaining prison security or good order and discipline in prison;*
- (e) *the protection of health or morals; or*
- (f) *the protection of the rights and freedoms of any person.*

*(emphasis added)*

**Policies*****PSI 49/2011: Prisoner Communication Services***

19. PSI 49/2011 is entitled “Prisoner Communications Services” and records that Prison rules require prisons to actively encourage prisoners to maintain meaningful family ties. Prisoners also have a statutory entitlement to send and receive letters. “Letters and phone calls assist in sustaining supportive relationships with family and friends” (Executive Summary, §2); and “Being able to communicate with those outside is part of providing a safe and decent environment for prisoners and contributes to a reduction in self-harm and suicide” (Executive Summary, §3).
20. Paragraph 2.23 defines “a close relative” as including a spouse/partner (and also extends to a fiancée and those who intend a civil partnership).
21. Paragraph 2.24 addresses correspondence between convicted prisoners. At times material to this case, it provided as follows:

***“Inter-prison and ex-prisoner mail***

*Correspondence between convicted prisoners requires the approval of the Governors of both the prisons concerned, except where the prisoners are close relatives ... or where they were co-defendants at their trial and the correspondence relates to their conviction or sentence. Subject to the provisions above, approval should be given unless there are reasons to believe that such correspondence will seriously impede the rehabilitation of either prisoner, or where it would be desirable, in the interests of security or good order and discipline, that the prisoners should be prevented from communicating. Accordingly if the Governor of the sending establishment has no objections, the letter should be sent to the Governor of the recipient’s establishment with a covering note inviting them to consider whether it should be issued.*

*(emphasis added)*

Paragraph 2.27 provides as follows:

***“Threats to security***

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*The Governor has the discretion to disallow any correspondence with a person or organisation if there is reason to believe that the person or organisation concerned is planning or engaged in activities which present a genuine threat to security or good order of the establishment or other prisons. This is covered under Prison Rule 34 (2) & (3) and compliant with Articles 8 & 10 of ECHR. If the Governor is disallowing correspondence between a prisoner and a close relative (defined above), this should be done in accordance with the guidance/procedures found in the Local Security Strategy.”*  
*(emphasis added)*

The combined effect of paragraphs 2.24 and 2.27 is that close relatives could not lawfully be prevented from writing to one another, unless there is a genuine threat to prison security under paragraph 2.27 and such prevention had to be in accordance with the Local Security Strategy.

22. Paragraph 6.20 provides:

***“Inter-Prison telephone calls***

*Where prisoners who are either close relatives or partners are detained in different prisons, in order to facilitate regular contact by telephone, the establishments concerned must agree between them that one prisoner may be permitted to receive a call on an official telephone at a time convenient to both prisons. Where appropriate once the number has been added to the prisoners PIN account the outgoing call should be made using a PIN phone. The call will be recorded at the originating establishment, thus meeting any security considerations. The ability to make such calls and the subsequent frequency of any further inter-prison telephone calls will be at the discretion of an Operational Manager.”* *(emphasis added)*

***PSI 16/2011: visits, including “inter-prison visits”***

23. PSI 16/2011 is entitled “Providing Visits and Services to Visitors”. Paragraph 1.2 of the Executive Summary notes that Prison Rule 4(1) requires prisons to actively encourage prisoners to maintain meaningful family ties, as integral to the right to family life, and visits are seen as “crucial” to sustaining those close relationships. Paragraph 1.3 of the Executive Summary provides as follows:

*“...Prison Rules 34 and 73(1) allow the Governor discretion to refuse a social visit or determine the conditions under which it takes place. Such a decision must be necessary for one of the purposes specified in the Rules and should be proportionate to the objective being pursued. These criteria reflect the requirements of Article 8 of the European Convention on Human Rights.”* *(emphasis added)*

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24. Paragraph 3.9 provides that social visits must take place within hearing range and sight of staff. Section 5 addresses types of visit. In particular, paragraphs 5.13 to 5.15 address “Inter-prison visits”. Paragraph 5.13 provides that visits may be allowed between close relatives when both parties are prisoners at separate establishments. Close relatives are defined to include “a spouse/partner”. Paragraph 5.15 then provides:

*“Where a request is made for an inter-prison visit involving two prisoners who would not normally be held in the same type of establishment due to gender or age, Governors should still make reasonable efforts to accommodate the visit subject to security considerations... Subject to security requirements and the availability of transport and accommodation, arrangements may be made for inter-prison visit to take place at three-monthly intervals, and each prisoner must surrender one visiting order. Each visit should last as long as local circumstances permit. Where inter-prison visits prove exceptionally difficult to organise Governors should consider the use of video-linked facilities as an alternative....” (emphasis added)*

25. Section 6 addresses “conduct of visits”. Paragraph 6.3 sets out circumstances in which a visit may be stopped. Paragraph 6.4 goes on to provide:

*“In certain circumstances information about the contents of a conversation during a visit may be disclosed. This may be appropriate for example where such information may relate to the commission of past or future criminal offences, plans to obstruct or pervert the course of justice, threats of violence, et cetera, and may be of interest to the police or the prosecution. The member of staff who overhears the conversation must immediately make a record of what he or she has heard. The information may be disclosed on the authority of the Governor where the content of the conversation made:*

- *affect national security or public safety;*
- *assist in the prevention of an escape from establishment;*
- *help to prevent or detect crime;*
- *assist in the recovery of proceeds of crime;*
- *reveal an intention to self-harm; or*
- *help to prevent or reveal a miscarriage of justice.”*

***PSI 15/2011: Security at visits***

26. PSI 15/2011 addresses “Management of Security at Visits”. Chapter 2 is headed “Visits Management and Control”. Paragraphs 2.8 and 2.9 address “room surveillance”. Paragraph 2.8 provides that the Local Security Strategy must set out procedures to

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ensure systems are in place to prevent the passing of contraband during visits. Paragraph 2.9 provides that Governors/Directors must ensure that a number of matters are in place. These include that social visits take place in full view of staff, and the designated visit manager's workstation must be raised on a raised platform; in the case of high and exceptional risk prisoners the visit rooms must be equipped with CCTV; and if it is decided to target a visit prior to taking place consideration must be given to obtaining a directed surveillance authorisation (i.e. under the Regulation of Investigatory Powers Act 2000).

27. Section 3 addresses "Closed visits". Paragraph 3.1 provides as follows:

*"Closed visits may be imposed as administrative measures where necessary for the grounds specified in Prison Rule 34(3). A ban on a visitor may only be imposed if the grounds within Prison Rule 35A(4) are satisfied..."*

The grounds specified in Prison Rule 34(3) and in Rule 35A(4) are in the same or similar terms: see paragraph 17 and 18 above. In a footnote to paragraph 3.1, "Closed visits" are defined to mean:

*"any form of visit where the prisoner and visitor are prevented from having any form of physical contact and prevented from passing any item. This is most often achieved with a physical screen or barrier but may also be achieved through strict supervision in a "non-contact visit."*

Paragraph 3.2 then provides:

*"In the majority of cases these measures will be imposed to prevent the smuggling of contraband through visits..."*  
*(emphasis added)*

Paragraph 3.3 goes on to provide that closed visits engage Article 8 ECHR and, as such, cases must be considered on an individual basis. Any decision to impose closed visits must be proportionate to the risk that they are meant to be reducing and any measures imposed must be reviewed on a regular basis. Paragraph 3.8 provides that:

*"Closed visits should be applied where prisoners are proved or reasonably suspected of involvement in prohibited item smuggling through visits, or are considered to pose a reasonable risk of involvement: or when the application of closed visits is otherwise necessary for the grounds specified at 3.1 above"*  
*(emphasis added)*

Thus, given the width of the grounds in rule 34(3) and in rule 35A(4), combined with the reference to "majority of cases" in paragraph 3.2, it is clear that closed visits may be imposed for reasons other than preventing the smuggling of contraband.

28. Paragraph 3.16 provides as follows:

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*“The decision to place a prisoner on closed visits should not be the end of the process. Prisons must be alive to the possibility that circumstances can alter, rendering the closed visits no longer necessary or proportionate... “*

29. Paragraphs 3.36 to 3.47 address “banning visitors”, pursuant to Rules 73 and 35A(4) giving the Governor the power to prohibit social visits for a variety of reasons.

***PSI 04/2016: interception of communications in prisons***

30. PSI 04/2016 addresses interception of communications in prisons. Paragraph 1.14 sets out some mandatory requirements. Governors are required to ensure, inter alia, that the arrangements for interception of communications are in accordance with the law, consistent with this PSI and that “local instructions are amended to consider this PSI”; and that there are adequate resources in place to monitor communications allowed for by policy or under an authorisation. Paragraph 2.9 states that all telephone calls made by a prisoner to his or her personal contact on the PIN phone system are recorded and may be monitored. Paragraph 2.75 provides that local instructions on the interception of communications must include a number of items. Under paragraph 2.76, provision is made for simultaneous monitoring of calls made by E-List prisoners, being prisoners who are likely to escape. Such calls are pre-booked.

**The Facts****The chronology**

31. The following description is drawn from the witness statements of the Claimant, the Interested Party and Dr Saunders, and from the documentary material.
32. The Claimant is now aged 45 and the Interested Party is now aged 32. In 1997 the Claimant was convicted of buggery and four counts of indecent assault. The first offence related to the Claimant having consensual anal sex with her then 17 year old girlfriend. The latter was described as having both learning and physical disabilities. The counts of indecent assault involved a number of pre-pubescent girls. Through his relationship with her girlfriend, the Claimant had been able to use psychological and physical duress to manipulate her into bringing child victims into their home.
33. On 21 April 2006 the Claimant was sentenced to imprisonment for public protection (“IPP”) for an offence of sexual assault by touching of a child under the age of 13. The minimum term imposed was 1 year 3 months and 15 days. She became eligible for release, subject to Parole Board direction, on 4 August 2007.
34. On 11 September 2009 the Interested Party was sentenced to IPP for offences of possession of indecent images. She had advertised herself as a babysitting service, attending a maternity ward attempting to gain access and take pictures of children while in hospital. She had paedophilic images on a computer in breach of a previous Sexual Offences Prevention Order. The minimum term imposed was 18 months less time spent on remand. In January 2011 the Interested Party’s tariff expired and she became eligible for release, subject to Parole Board direction.

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35. In August 2012 the Claimant was transferred to HMP Whatton. Three years later, on 16 June 2015, the Interested Party was also transferred to HMP Whatton. As a result, they met.
36. Prior to her transfer, the Interested Party was assessed by psychologist, Dr Eaton, as having clinical features of autism, difficulties in communication, social interaction and flexibility of thought. Dr Eaton considered that she might have a learning disability. On 6 January 2015 she was assessed by a psychologist, Dr Ball, who considered that she had features of a personality disorder, specific learning difficulties and autism spectrum disorder.
37. On 2 September 2015 the Claimant and the Interested Party approached the prison priest to obtain further information about the possibility of getting married and confirmed to other staff and prisoners that they were a couple.
38. On 9 September 2015 they submitted, to HMP Whatton, an application to marry. That was refused on 2 February 2016. The decision had been taken at an Inter-departmental Risk Management Team (“IRMT”) meeting. (HMP Whatton’s own local policy provides that the IRMT is the body convened to agree arrangements for the management of those prisoners who present an actual or potential risk of harm to the public or others). The IRMT had taken views from all partnership agencies, including their respective offender supervisors, offender managers and the police and had concluded that, as the two were both convicted sex offenders, the marriage would increase their risk of re-offending. On 12 February 2016 the decision was confirmed by a senior probation officer who confirmed that the decision was made solely on the basis of risk management, but that future reviews of the risk would be possible. The Claimant contends that neither she nor the Interested Party had been able to attend that meeting or to make representations. The Claimant submitted a complaint.
39. On 10 February 2016 the Interested Party alleged that the Claimant had forcibly taken her ID card for use as sexual gratification at night-time. She alleged that the card was taken without her consent.
40. On 5 April 2016 the Interested Party informed staff that she no longer wanted to be transgender and wished to be referred to as D.
41. On 12 April 2016 the Interested Party alleged that the Claimant was bullying her. These allegations were denied by the Claimant.
42. On 9 May 2016 the Claimant received the reply to her complaint regarding marriage. On 12 May 2016 the Claimant pursued her complaint.
43. On 8 June 2016, the Interested Party told staff that the Claimant had refused to accept her decision to discontinue her gender transition process and had been nagging her about it and was not accepting that he, the Interested Party, was male. On 17 August 2016 the Interested Party informed staff that the relationship had now concluded, stating that she recognised it was not appropriate and that it had completely ended.
44. However by October 2016 it was reported that the relationship had recommenced. In her witness statement, Dr Saunders states that staff discovered that the relationship between the Claimant and the Interested Party had recommenced when envelopes were

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found in the latter's cell. They included love letters from the Claimant and a letter the Claimant had written which argued that 10-year old children were able to consent to sexual relationships with adults.

45. On 4 October 2016 the PPO upheld the complaint and recommended that the Claimant should apply again to marry and that the Governor of HMP Whatton should facilitate the marriage. The PPO found that the Prison Service did not have power to prevent prisoners from entering into marriages with one another.
46. On 30 April 2017 the Claimant informed prison staff about her intent to transition to a woman. She was assisted in this process by prison staff.
47. Between October 2016 and June 2017 the Parties' behaviour appeared to be deteriorating. Both received a number of warnings from staff related to engaging in physical contact in the presence of other prisoners and becoming confrontational when receiving warnings. The Claimant also received warnings for interrupting the Interested Party's classes and workshop sessions.

***Marriage: June 2017***

48. On 29 June 2017 the Claimant and the Interested Party married.

***The Claimant is transferred to HMP Stafford***

49. On 27 July 2017 HMP Whatton transferred the Claimant to a different prison, HMP Stafford. The Interested Party states that she was informed of this by another inmate of the prison and was not permitted any opportunity to say goodbye. In early August 2017 the Interested Party took an overdose of her medication and since then has been prescribed medication for her mental health condition.
50. In August 2017 the Claimant applied at HMP Stafford for inter-prison telephone contact with the Interested Party. On 17 August 2017 HMP Stafford granted that application and indicated that it would seek a response from HMP Whatton. On 30 August 2017 HMP Whatton informed HMP Stafford that it intended to have a meeting to decide the issue on 5 September 2017. The Claimant contends that she was afforded no means to engage in this process. At the same time the Interested Party made a complaint at HMP Whatton seeking a telephone call to the Claimant.

***Decision: 5 September 2017***

51. On 5 September 2017 there was a meeting of the IRMT at HMP Whatton. The note of the meeting records as follows:

*“The IRMT felt that this application should be refused as this contact could be harmful to their well-being and also result in further offending. Intel suggested that prior to starting a program [MA] then [C] disclosed that he had written down offence-related fantasies about children and gave them to [E] now [MB].*

*It was thought likely that HMP Stafford would approve this application. Governor West agreed to arrange a conference with*



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*HMP Stafford staff with the objective of both prisons having full knowledge of all information available regarding their relationship and behaviour in order to reach the same conclusion.”*

52. In her witness statement, Dr Saunders confirms that at this meeting, representatives considered the risks posed by the parties and concluded that contact could harm their respective welfare and heighten their risk of further offending.
53. On 13 September 2017, in response to a complaint by the Claimant, HMP Stafford confirmed that it did not prohibit contact and recognised the couple’s relationship. The Claimant was told to contact HMP Whatton. On the same date the Interested Party was informed by HMP Whatton that she was denied contact with the Claimant.
54. On 3 October 2017 the then governor of HMP Whatton wrote to the Interested Party explaining the reasons for not allowing contact with the Claimant. Those reasons were that the Interested Party is a vulnerable prisoner due to her intellectual difficulties, past sexual trauma and complex personality traits, coupled with a sexual interest in female children and with poor coping strategies. The Claimant was a dominant prisoner with personality traits linked to control and manipulation. She had not responded particularly well to treatment programmes. Cohabitation in prison (although that had not been requested) could lead to sexual contact. As regards the risk of re-offending, both had had adjudications in relation to sharing inappropriate material and therefore it appeared that they were reinforcing each other’s unhealthy sexual interest in children. The Claimant might be preventing the Interested Party from developing and managing her risk of re-offending sexually. The Claimant had completed the healthy sex programme (“HSP”) and her attitudes towards the course might be unhelpful, as she had continued to engage in possessing inappropriate material following completion of the programme. The Claimant points out that, in this letter, no consideration is given to managing risk or monitoring or what forms of control there could be over such contact.
55. In November 2017 probation officer Mark Moore of HMP Whatton informed the Claimant that she was not permitted to communicate with the Interested Party. The prohibition extended to not allowing letters. On 3 January 2018 probation officer Phil Hill wrote to the Interested Party, in response to a formal complaint stating that the various forms of contact she had requested were not allowed. On 22 February 2018 the Claimant submitted a formal complaint to HMP Whatton, requesting contact. On 23 February 2018 the Interested Party was stopped from contacting her mother in law as she was found to be indirectly communicating with the Claimant.
56. On 1 March 2018 the Claimant was supplied for the first time with a copy of the letter from the Governor of HMP Whatton to the Interested Party dated 3 October 2017.

***The first judicial review***

57. On 9 March 2018 the Claimant, acting in person, brought an application for judicial review. At that stage, she sought physical contact, communication by post, and telephone contact. Shortly thereafter, on 14 March 2018, the Claimant wrote to the PPO requesting an investigation of HMP Whatton’s decision to prevent contact.

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58. Although, on 14 May 2018 the PPO wrote to the Claimant advising that the PPO had accepted the application, in August 2018 the PPO said that he would not investigate until the judicial review proceedings were concluded.

***The decision of Mr Justice Jay: 24 October 2018***

59. On 24 October 2018, on the Claimant's renewed application for permission, Mr Justice Jay accepted that the Claimant had an arguable case for judicial review but stated that she needed to pursue the matter with the PPO to exhaust that alternative remedy. On that basis, he refused permission. In his judgment, at [2018] EWHC 3615 (Admin), the learned judge stated as follows:

- “15. *Now, the way that this has been considered at the moment is that according to the formal complaint, there is a stark difference of opinion in the prisons as to whether there should be contact and, if so, of what nature. But that matter has not been resolved satisfactorily. Instead, it was suggested that a formal complaint be made to HMP Whatton. Then, in the letter of 3 October 2017, all that is said, at least in terms, is that there cannot be physical contact because of the concerns as to absence of consent by [MB], who is said to be vulnerable, but that letter does not deign or condescend to address the issues of contact by telephone or contact by postal communication.*
16. *So, looked at in pure judicial review terms, I have to say that there has not been a satisfactory addressing by the prison authorities, that is to say, Her Majesty's Prison Service generally, and these two particular prisons, of the bases on which the application is made.*
17. *Now, I have to say, sitting here, that although I can understand that there is a qualitative, or at least there may be a qualitative difference, in relation to contact between spouses, between on the one hand physical contact and on the other hand communication by post and by telephone, the reasons for preventing communication by post and telephone between spouses would have to be rather different.*
18. *Generalised concerns about the parties fomenting in one another their unhealthy interest in children: I am not sure that those concerns would be sufficiently strong to prevent at least communication by telephone, which could be supervised, or which could be for limited periods; and to prevent communication by post. Or at least there are arguable points about this, which in my judgment have not been properly addressed.*” (emphasis added)

He concluded as follows:

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“25. So, the merits of these complaints, and they are quite complex complaints, will be fully and properly considered by the Ombudsman in line with my judgment. It is not for me, of course, to say or to give any indication to the Ombudsman, beyond what I have said, as to whether the complaints are well-founded. All I have said in the course of my ruling is that the complaints are arguable. I hope that you have understood what I have done, and the reasons for it, but your complaints are now going to be addresses by the Prison & Probation Ombudsman...”.

60. On 12 November 2018 the PPO confirmed the investigation would commence.
61. In early 2019 the Interested Party was considering divorcing the Claimant due to the strain of the lack of contact with the Claimant. According to Dr Saunders, at the time the Interested Party explained that this decision was based on her understanding that the relationship would not assist her in managing her risk of re-offending, saying that, whilst it was not an easy decision to make, it was one that she felt she needed to do.

***Decision: 16 April 2019***

62. On 16 April 2019 HMP Whatton’s IRMT decided that full non-contact would remain in place. The notes of the meeting recorded that for both prisoners, if they were ever released, their licence conditions would not allow them to live together. HMP Stafford was supporting some contact. However it was felt that HMP Whatton would be in a better position to decide as both prisoners were known to them. The Interested Party’s probation officer opposed any contact, but there was no view from the Claimant’s probation officer. The IRMT asked that his view should be sought. It was the unanimous view of the IRMT that contact should not be allowed. (There is no evidence that the Claimant’s probation officer’s view was thereafter sought.) The Claimant contends that this meeting did not involve either the Claimant or the Interested Party. In her witness statement, Dr Saunders states that at this meeting representatives considered that the potential risks that could be posed, should the restrictions on contact be lifted. Those present unanimously agreed that the risks posed by permitting contact between them were such that contact should not be permitted.

***The Claimant moves to open conditions: August 2019***

63. On 16 August 2019 the Parole Board, having considered a very substantial dossier of evidence, noted that the Claimant had made significant progress in addressing the motivations and triggers for her serious offending behaviour. On this basis it recommended that the Claimant should progress to open conditions. The Secretary of State accepted that recommendation and the Claimant was moved to an open prison, HMP North Sea Camp. Subsequently following that transfer, the Claimant was assessed as not meeting the criteria for enhanced behaviour monitoring intervention.
64. On 10 October 2019 the Interested Party informed her Prison Offender Manager (“POM”) that she would be discontinuing divorce proceedings and requested that she be transferred to a prison in Wales.

***The PPO decision: 28 October 2019***

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65. On 28 October 2019 Assistant Ombudsman Neil Mullane partially upheld the Claimant's complaint and required written correspondence between the Claimant and the Interested Party to be permitted. Mr Mullane recommended that the complaint as it related to the exercise of the Governor's discretion not to allow visits or phone calls should be rejected, but upheld the complaint as it related to written correspondence between the spouses on the basis that he believed that these risks could be managed with appropriate supervision and monitoring.
66. As regards telephone contact, after referring to paragraph 6.20 of PSI 49/2011, he stated as follows:

*"14. The investigator asked Whatton whether phone calls between the two parties could be supervised and/or held for limited periods of time, and then terminated if the conversations were deemed to be too risky or unsuitable. Whatton responded to say that they did not consider it appropriate to allow PIN phone contact, as this could not be supervised and calls could only be monitored retrospectively. Whatton said it would not be suitable to allow E.g. a conference call because such calls could not be recorded and if something was deemed to be said that might lead to adjudication, they would not be able to provide evidence.*

*15. Whatton said that under very exceptional circumstances, i.e. life and death situations, they would be able to approve short telephone calls from an office phone.*

*16. In any event, the PSI... states that the Operational Manager has discretion to disallow phone calls between close relatives. Therefore, Whatton's decision to disallow phone calls between spouses is at their discretion and is not in breach of national policy."*

67. As regards inter-prison visits, after setting out paragraph 5.13 to 5.15 of PSI 16/2011, the PPO stated as follows:

*"18. Although the policy states that Governors should make reasonable efforts to accommodate a visit, there is no mandatory requirement to provide such a visit. Given the reasons provided by Whatton for not allowing physical contact, I am satisfied that they have sufficiently considered this request. As there is no mandatory requirement, their decision to not allow physical contact is not in breach of the PSI."*

The PPO added:

*"41. We are satisfied that Whatton's Inter-Departmental Risk Management Team and relevant Offender Supervisors*

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*fully considered the contact question and reached an operational decision based on information known to them”*

The PPO does not appear to address Article 8 ECHR.

68. When addressing the issue of written correspondence, the PPO recorded HMP Whatton’s reasons for refusing to allow such correspondence in the following terms:

*“24. Whatton concluded by stating, “it remains the view of Whatton Public Protection Unit and the two respective Offender Managers that any form of contact is fundamentally wrong.” Whatton said that this was not a decision about whether they could physically monitor the contact (i.e. have the ability to screen calls and letters professionally), it was about the long-term message relating to contact for two IPP prisoners who will not be permitted to live together on release.” (emphasis added)*

This betrays a wider underlying policy basis for the decision of the Second Defendant.

69. In conclusion, the PPO stated as follows:

*“29. HMP Whatton are adamant that contact of any kind between [MA] and [MB] should not be facilitated. I have considered the responses received from HMP Whatton, along with the clinical, professional and operational views of key stakeholders, and have found on balance that their concerns are valid.*

*30. Given the strength of opinion from staff at HMP Whatton, I have concluded that we should respect their professional opinion to exercise their discretion to not allow visits or phone calls. Therefore, this part of the complaint has not been upheld.*

*31. However, I consider that HMP Whatton’s decision to prevent written correspondence between spouses is not compliant with PSI 49/2011. For this reason, I have **upheld** this part of the complaint and made a recommendation below.”*

70. The Interested Party was informed of this decision on 8 November 2019. From late 2019 and early 2020 correspondence between the couple was permitted. On 14 January 2020 Governor Saunders confirmed that written correspondence was now permitted.

71. On 24 January 2020 the Interested Party submitted a complaint. On 31 January 2020 the response to that complaint stated that the refusal of contact was to continue due to her adjudication of passing images of children and breach of rule 39 rules.

72. On 13 February 2020 the probation officer wrote to the Interested Party suggesting that the refusal of telephone contact was “made in the interest of mutual long-term risk

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management concerns for yourself and [MA]”. On 14 February 2020 the Claimant sent a Valentine’s Day card to the Interested Party and a letter to the Interested Party. The Interested Party received that letter on 10 March 2020. On 2 March 2020 the Interested Party issued a complaint, requesting letters.

***Decision: 4 March 2020***

73. On 4 March 2020 following an IRMT meeting at HMP Whatton, by letter from the Governor to the Claimant, HMP Whatton refused contact by telephone or by inter-prison visit. This is the Decision. The letter stated that “all representatives agreed that the risks were too significant for such permission to be granted” and that “concerns have been raised about your previous prison conduct and how the relationship between you and [MB] may increase the risk of sexual harm you pose”. Dr Saunders concluded by saying that “the benefits of maintaining family ties have been weighed against a statutory duty to protect the public and others”.
74. On 15 March 2020 the Claimant’s mother died. Neither telephone nor an inter-prison visit was permitted. As a result, the Interested Party was no longer able to obtain updates from the Claimant’s mother as to the Claimant’s welfare. On 18 March 2020 the Claimant’s solicitors sent a letter before action. On 2 April 2020 they informed the Defendants of the passing of the Claimant’s mother and requested telephone contact be permitted in the light of this. On the next day HMP North Sea Camp stated that the Claimant was able to apply for inter-prison telephone calls. As a result the Claimant duly applied. On 6 April 2020 the Government Legal Department confirmed that the prison services were aware of the Claimant’s bereavement. On 7 April 2020 the Interested Party filed a complaint that no letters have been received from the Claimant. On 12 April 2020 the Interested Party was provided with the Valentine’s Day card that had been sent on 14 February 2020. On 14 April 2020 the Claimant was advised that HMP Whatton had refused the request for a telephone call. On 21 April 2020 the Interested Party was provided with a response to her complaint, repeating the content of the earlier note.
75. On 5 June 2020 the Claimant was granted legal aid, having applied in April 2020.

***Proceedings issued: 19 June 2020***

76. On 18 June 2020 the grounds of claim were settled and this application for judicial review was issued on 19 June 2020. On 23 September 2020 Sir Ross Cranston granted permission on the papers.
77. On 2 December 2020 the Claimant received a letter from the Interested Party dated 21 November 2020. Five days later on 7 December 2020, the Claimant received a letter from the Interested Party dated 15 November 2020, reversing the true sequence of the letters sent in November.

**The parties’ particular circumstances*****The Claimant***

78. In an OASys assessment dated 14 July 2020, the analysis of offences referred to the letter intercepted by security at the prison. It also noted that the Claimant had completed

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the Sex Offender Treatment programme on a sentence prior to the index offence but he had not managed to identify risky situations or if he did understand the risk, he managed to override his concerns in pursuit of sexual gratification. In relation to the completion of the HSP, there were concerns about the Claimant's commitment and engagement. It was considered that the Claimant presented as "changeable" and was seen as "defensive and controlling". A 2008 psychology report had stated very high level of psychopathic traits. Although the Claimant had been assessed to show a significant number of psychopathic traits, that did not amount to a diagnosis of personality disorder. A post HSP review in May 2016 noted some progress but the SARN concluded that significant risk issues remain to be addressed. The SARN had stated that "he often presented as defensive when challenged, was reported to be controlling and dominating, chose not to engage much of the out of session work, self-report was often contradictory and was resistant to practising a number of the new skills introduced [MA] presented as over confident in his ability to manage his risk".

79. In her witness statement, the Claimant states that she would be happy for the prison to monitor phone calls or accompany visits. She has no problem with an officer even sitting in the room. She expresses the hope that the fact that to date all mail has been checked and her focus on addressing risk and her recent move to open conditions show that communication between her and the Interested Party can be managed.

***The Interested Party***

80. The Interested Party's conduct in prison has been a cause for concern. Suicidal thoughts and self harm were reported in March 2016 and March and April 2017. There have been a number of instances of sexualised conduct with other prisoners, leading to adjudications in some cases. The incidents occurred both before and after the Claimant was transferred away from HMP Whatton (in February and July 2016, in April and May 2017, and in March, November and December 2018). On a number of occasions she has been found in possession of photographs of children (some pornographic, some not, taken from newspapers and elsewhere). These instances also occurred both before and after the Claimant was transferred away from HMP Whatton (in April 2016, June and December 2017, February and April 2019, January, June and November 2020).
81. In her evidence, Dr Saunders states that the Interested Party's behaviour upon her admission to HMP Whatton presented significant reasons for concern. She expressed a degree of sexual promiscuity. She also presented with a degree of instability. As a result of events which all took place in June and July 2015 the Interested Party was identified as a potentially vulnerable prisoner. Dr Saunders goes on to say that the Interested Party is also assessed as being a very high risk prisoner. This assessment was based on a long history of sexual abuse against children and remaining preoccupied with the thought of engaging in such activity. She states that her behaviour has continued to present serious concerns in the period from her admission up until the Claimant's transfer.
82. In her OASys assessment, as regards risk in custody, the Interested Party is assessed as a low risk to children, the public and known adults; a medium risk to staff and a high risk to prisoners. As regards risk in the community, she is assessed as a very high risk to children, a high risk to the public and to a known adult and a medium risk to staff.

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83. The Interested Party does not receive regular mail or visits. There is evidence that in the past the Claimant had a calming effect on her. In her witness statement, she describes the effect on her emotional and mental health of the separation and states that without the Claimant's support she has been struggling in prison.

***Dr Saunders' evidence (as to risk and reasons)***

84. Dr Saunders' witness statement addresses the reasons for the restriction. At paragraph 6, she states:

*“Before approving applications for contact with children or vulnerable adults, the views of the POM sought to determine whether any risk could arise if contact were permitted. Applications are also viewed by the Security team, the Public Protection Unit and specialist Police Officers dealing with cases involving sexual or violent crime to determine whether there are any intelligence reports or other reasons why contact should be permitted or restricted. The purpose of such stringent views is to ensure that prisoners do not associate with others who might have a negative impact on their rehabilitation, or to pose a risk to their own well-being (in the case of vulnerable prisoners).”*

85. Then at paragraphs 44 to 51, Dr Saunders explains “the prison's current position with regards to contact”. In summary, Dr Saunders gives the following reasons for refusing to allow telephone contact and inter prison visits:

- (1) Staff are concerned with the Interested Party's continued sexual preoccupation with children. For that reason her telephone calls and correspondence are subject to ongoing monitoring.
- (2) Contact between prisoners with similar offences is not normally permitted on licence and so is only approved in prison in exceptional circumstances.
- (3) As regards contact by telephone, this could be monitored but only listened to after the event. It is not possible to monitor the call whilst it is taking place. That would mean that if “any inappropriate conversations” were to take place nothing could be done to prevent any harmful interactions at the time of the call.
- (4) As regards in-person visits, it would be very difficult “to conclusively manage” the risk posed by the two parties and it would be impossible to monitor. It would require a prison officer to monitor individual conduct and to ensure that no “inappropriate activity took place”. In addition there would be significant costs to the public purse of transporting one to meet the other. It would not be possible or appropriate for a prison officer to sit with the parties to listen to everything that was discussed and that would be very resource intensive.
- (5) The Interested Party is vulnerable and the Claimant's past history in controlling could not be restricted without an “inappropriate level of intervention” by supervising staff.



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- (6) The restrictions were put in place to reflect concern in relation to the IP's welfare.

Dr Saunders does not explain what she means by "inappropriate conversations" or "inappropriate activity", nor, more significantly, as to how such conduct exacerbates the risks that the restrictions are intended to meet.

86. At the Claimant's behest, the Defendants disclosed two further policy documents said to be the policies referred to at paragraphs 6 and 46 of Dr Saunders's statement. (Public Protection and Safeguarding Children Local Policy Arrangements" and "NOMS Public Protection Manual 2016"). I agree with the Claimant that neither of these documents is concerned with protection of the prisoner in question, but rather protection of those that the prisoner has contact with, such as children. There is no published or unpublished policy which suggests that it is only in exceptional circumstances that contact between prisoners with similar offences would be approved in prison.

**Issue (1): Telephone contact and inter-prison visits: Article 8 ECHR**

**The parties' arguments**

87. *The Claimant* contends that, as is clear from their witness statements, the Claimant and the Interested Party are still in a genuine and subsisting relationship.
88. As to the relevant risks, the Defendants have not explained how phone contact or prison visits result in a risk to the public. The case is not concerned with release of a prisoner and risk in the community. The Defendants are only responsible for what happens within the precincts of prisons. Risk in the community is not a matter for the Defendants now. That is a question for the Parole Board when considering suitability for release; and in the case of IPP, that may be a long way off. It is for the prison to consider the risk of any offence during any visit or during any phone call; the risk of the Claimant or the Interested Party or them together offending or causing offences inside prison.
89. Whilst the prison has a duty to facilitate the reasonable opportunity to rehabilitate, it is not under a duty to achieve rehabilitation. It is not for the prison to determine what is good or bad for consenting adults and the relationships they form. Whilst the Defendants disavow any disapproval of the fact of the relationship and any intention to break up the relationship, their approach and reasons – at least at times over the history of the case - all come close to that in practice. The Second Defendant is confusing its views of the wisdom of the relationship or the risk in the community in the future, with the security risk posed by a recorded or live-monitored telephone call, or by a supervised prison visit - whether closed, semi-closed or in open conditions.
90. As regards the Claimant, the Second Defendant's assessment of her and the risks is based on past conduct and takes no account of her significant progress since 2017. It takes no account of the fact and reasons for her move to open conditions at North Sea Camp. At that prison she had been assessed as not requiring further monitoring.
91. As to the Interested Party, there is no evidence to suggest that she does not have capacity to make her own decisions as to family relationships. There is no expert evidence suggesting that contact with the Claimant will be damaging to the Interested Party. Her

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behaviour (including those aspects over which the Defendants have concern) has been consistent over time, regardless of whether or not she has had contact with the Claimant. The risk arising from the Interested Party's interest in child photographs exists in any event. There is no causal relationship between her conduct and contact with the Claimant. The Defendants have failed to consider the impact on the Interested Party's mental state arising from the prevention of contact.

92. As regards "security considerations", into to what occurs or might occur during the proposed contact. It must be what might happen during contact (rather than the mere fact of contact) which might exacerbate the risk that justifies the restriction on such contact. The Defendants have not provided evidence to establish its case for preventing contact whilst they remain detained in prison.
93. The fact that no concerns have been raised about the content of their written correspondence, allowed for over a year, supports the view that both the risks of contact are limited, and, in any event, they can be managed by supervision.

*Measures to deal with risks*

94. As regards the third requirement in *Gunn*, the Defendants failed to consider lesser alternatives to a complete prohibition. They have failed to address measures available for monitoring and supervising contact. They have failed to consider whether any specific risk from the contact itself could be catered for by measures to control telephone or prison visit contact. There are reasonable options to monitor and supervise contact to avoid any risk of harm resulting from contact. Standard measures available are sufficient to meet "security concerns". Alternatively there are other options which are sufficient. Dr Saunders does not address the need to meet the concerns she has identified. She concentrates only on the concerns.
95. *As regards phone calls*, the Defendants have not established why the risk arising from a phone call is so immediate that standard evening monitoring is not sufficient; nor why if that risk is so immediate, there cannot be simultaneous monitoring of calls. Despite what Dr Saunders has said in evidence, the Defendants have subsequently confirmed that simultaneous monitoring of phone calls is possible. Simultaneous monitoring could be arranged, even if it is not a standard procedure at HMP Whatton. There should have been local instructions which covered simultaneous monitoring under PSI 04/2016. There is no reason why simultaneous monitoring could not be put in place in a category C prison.
96. In any event overnight monitoring of calls is fully able to cater for any sudden and unwise conduct on the telephone that might raise a genuine concern. There is currently ongoing monitoring of the Interested Party's telephone calls, with others. The Defendants have not offered any explanation of what risk cannot be mitigated. Finally the burden on the Defendants' resources would be small and in any event is not a primary relevant consideration.
97. As regards to *inter-prison* visits, standard visits must take place in the sight and hearing of an officer and it is also permissible to record visits. The Defendants have not established how standard monitoring of a visit would not meet any legitimate concern. The suggestion of "secret messages" is fanciful. There is no example of such in the written correspondence. Nor is there evidence to suggest that a visit monitored by

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prison officers is liable to undermine the good order of the prison or reinforce offending behaviour. A standard visit can deal with any concerns as to what might be said in the course of the visit. There is no reason why, if necessary, there could not be a small room used for the visit or a higher officer ratio.

98. The Defendants had not considered other options, such as monitoring, heightened monitoring, closed visits or recording visits. There is no explanation as to how a closed visit with staff present could not meet any risk. Closed visits are not confined to addressing concerns about contraband. They can be put in place to address security concerns. There is the alternative of a “semi-closed” visit with strict supervision, but not necessarily a screen.
99. In truth the restrictions have been adopted with the objective of splitting up the relationship and not due to any inability to monitor and prevent offences or escalation of risk whilst in custody.
100. *The Defendants* contend that the key purpose of the prison service includes obligations to protect the public from the risk of crime, to maintain the safety and well-being of serving prisoners and to offer reasonable opportunity to rehabilitate. In the present case the Second Defendant acted within the bounds of those functions in imposing the restrictions on contact. Four principles are central to the Defendants’ case:
  - (1) The Defendants have power to place restrictions on the contact that a prisoner can have with others.
  - (2) The grounds on which contact can be restricted include the need to secure discipline and good order, the prevention of crime or the interests of any persons. The Defendant may consider the risk that contact would pose both in prison and outside the prison.
  - (3) Decisions such as the present fall within the core expertise of the Defendants’ risk assessment.
  - (4) A global assessment is required. The fact that one party may benefit from contact does not mean that such contact should be permitted if the effect on the other party or the wider community is too adverse.
101. The central issue is whether the restrictions are necessary and proportionate. The restrictions are capable of being lawful and the Defendants have apprehended a real risk. The only question is whether the Defendants have misunderstood that risk or given undue or insufficient weight to the factual background. The case raises exceptionally difficult factual issues. First, the Interested Party is highly vulnerable and highly suggestible and she has a continued sexual interest in children. The Claimant has psychopathic traits, is controlling and had a previous relationship with a learning disabled person. The evidence of the prison governor is that phone calls or face-to-face contact would practically be very difficult to monitor and could result in inappropriate messages being passed between them. The spontaneous nature of spoken contact cannot be monitored before it occurs. The Claimant and the Interested Party pose a risk of harm, in the community and to each other. It is not the case that it is only risk within the prison that is relevant. The conduct of convicted prisoners can have a wider impact than within the establishment.

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102. Secondly, the Interested Party continues to seek opportunities to access sexual images of children. Restricting contact will help to reduce the future risk. This will assist rehabilitation to ensure that the prison does not become a more sexualised environment than would otherwise be the case.
103. Thirdly the Interested Party's vulnerability is such that contact with the Claimant would be detrimental to her. The Second Defendant's motivation was not to break up the relationship but to manage the substantial risk which is apparent from the relationship.
104. In these circumstances:
- (1) The interference is for a substantive objective justification, in order to protect the rights of others and the rights of vulnerable people; in oral argument, Mr Cohen explained that the relevant risks are (1) the risk of future offending; (2) the risks of bullying and manipulation; (3) the risks of the chance of rehabilitation being impaired.
  - (2) The measure adopted is rationally connected with the aim of ensuring such protection. The restriction has been imposed on the basis of an understanding of the particular circumstances of the Claimant and the Interested Party. The restriction is directly responsive to the risks that have arisen. The aim of the measure is to reduce and/or not exacerbate the risks which have been identified.
  - (3) As regards lesser restrictions, Dr Saunders has confirmed that the Claimant's alternative proposals are not practical and has given reasons for so saying. The Claimant does not have a reasoned basis for suggesting that other measures would be suitable. The Court should prefer the account of the prison governor. Crucially, monitoring after the event would not allow the Defendants to intercept and stop harmful communications before they are received. The Court should accept Dr Saunders' evidence as to what is possible in a category C prison. Telephone calls cannot be monitored contemporaneously. Closed visits are concerned with preventing contraband being smuggled into prison. That is not the risk in the present case. Furthermore in order to listen into what is being said in the course of a visit there must be appropriate authorisation.
105. The risk arising from a telephone call or visit is much higher than that arising from correspondence, because in the former case it would not be possible to stop immediately content which would be damaging. One call alone can be damaging. Furthermore Mr Cohen went on to submit that the danger is not an open conversation but a more insidious danger of controlling or bullying behaviour by the Claimant in a more subtle way and one which the prison does not recognise.
106. Accordingly the Defendants have demonstrated that the restrictions imposed upon the Claimant are proportionate.
107. In oral argument, Mr Cohen sought to identify, more precisely, first, both the types of harm or risk which the Defendants perceived to exist, and, secondly, what might happen in the course of contact between the Claimant and the Interested Party which might exacerbate those risks
108. As to the former, he identified three categories of risk:

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- (1) The risk that two prisoners can in the course of communication encourage a continued criminal interest in sexual activity with children. That is a risk of future offending not only outside, but also inside, prison through the possession of indecent images.
  - (2) The risk that the Interested Party, a vulnerable individual, will find her suggestible characteristics acted upon to her detriment.
  - (3) The risk that contact will have an adverse impact on both prisoners' rehabilitation.
109. As to the latter, there are three ways in which what might happen in the course of contact could exacerbate the foregoing risks:
- (1) A risk that the Claimant and the Interested Party will share information or share ideas which are directly linked to them having a sexual interest in children and that will encourage the risk of future offending both inside and outside prison. For example, this would happen by way of inappropriate communication encouraging each other to engage in sexual activity with children or to download indecent images.
  - (2) The Claimant and the Interested Party could exchange information as to their understanding of how to obtain that type of unlawful material. Whilst this has not happened in the past, that does not mean that the risk does not arise.
  - (3) The Claimant, as the more controlling partner, could use the opportunity to manipulate and bully the Interested Party, given the past instances of suspected bullying. The risk that the Interested Party is in the thrall of the Claimant can only be exacerbated by further contact.
110. Ultimately, Mr Cohen submitted that a single call could cause irreparable damage or exacerbate the risks to a substantial extent. That single call could significantly change the prisoner's attitude to rehabilitation and make her significantly less likely to embrace programmes to reduce the risk.

**Discussion and analysis**

111. The issue here is whether the Decisions imposing a restriction on telephone contact and inter-prison visits are justified under Article 8(2) ECHR. It is accepted that the restrictions amount to an interference with the Claimant's rights under Article 8(1). The central question under Issue (1) is whether the restrictions are "necessary in a democratic society" for one of the reasons set out in Article 8(2). That involves the Court deciding whether the restrictions are justified as necessary and proportionate. The burden of establishing that they are is on the Defendants.
112. First, I accept that the history, personal circumstances and conduct of each of the Claimant and the Interested Party, including in particular their offending behaviour, are matters of significant concern. Both of them pose challenges for those entrusted with their care within prison. Their history of offending potentially poses serious risk to the public and the most vulnerable people in society. Secondly, the views that Dr Saunders has expressed in her evidence and her expertise are to be accorded significant weight.

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Thirdly however, this Court is required to examine with care and in detail the rationale for the imposition of what are undoubted restrictions upon the private and family life rights of the Claimant and the Interested Party. This, in my judgment, requires a careful examination of the underlying risks that arise and how it is said that those risks are exacerbated by allowing contact and, further, of whether there are other, less restrictive, means of protecting against those risks.

*Questions (1) and (2): necessity?*

113. Under Questions (1) and (2) (in paragraph 12 above) the questions are whether the restrictions on contact are for a substantive objective justification and whether they are rationally connected to achieving that aim. That requires identification of the risks of harm to which the restrictions are directed and whether contact will exacerbate the risks as so identified.
114. As to risk, I recognise and accept the fact that the Claimant and the Interested Party give rise to serious concerns, on the part of the Second Defendant in particular, as to their behaviour both within prison, and in the future upon release. I do not doubt the sincerity with which these concerns are held. However I accept the Claimant's general proposition that risk of future offending outside prison by the Claimant and by the Interested Party is primarily a matter for the Parole Board. Central here is the risk of harm arising whilst they are within the prison. The primary concern of the Defendants whilst the Claimant and the Interested Party remain in prison must be to prevent risk of harm within prison – harm to themselves, to others within the prison and even perhaps harm to those outside prison (such as children in photographs). I accept that it is a proper function of the prison service to encourage rehabilitation, but ultimately the risk of reoffending by either party once back in the community is a matter for the Parole Board.
115. First, turning to the specific risks relied upon, in order to justify the undoubted interference with the Claimant's Article 8 rights, there must be firm evidence of the need for the restrictive measures. The Defendants' explanations of the risk of harm which they seek to prevent by the restrictions have been various and at times vague and inconsistent. The risk of harm to the Interested Party (and to the Claimant) is not supported by any expert evidence. Moreover, whilst grateful for Mr Cohen's more precise elucidation, in oral argument, of the risks said to arise from contact between the Claimant and the Interested Party (see paragraph 108 above), I was particularly struck by the fact that this explanation is not to be found clearly in the evidence of Dr Saunders.
116. By contrast, Dr Saunders' evidence as to the nature of the risk is somewhat vague and unclear. It appears from *her evidence* that the principal concern (and thus risk) is with the Interested Party's welfare and her continued sexual pre-occupation with children.
117. Moreover examination of the risks as identified by Mr Cohen rather suggests that there is an underlying concern on the part of the Defendants that the very existence of the relationship between the two women is detrimental. Whilst disavowing any such intention, it seems to me that by prohibiting phone contact and personal visits, when combined with moving the Claimant to another prison, the Defendants have reduced the nature of the relationship between this married couple to, at best, one of "pen pals". Although I inquired, no explanation has been given in evidence as to why, so shortly after they married, it was decided to move the Claimant to HMP Stafford. I note too the Second Defendant's reasons as recorded in paragraph 24 of the PPO decision (see

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paragraph 68 above) – a “long term message” and what would happen if they were released. This does not appear to relate to risks from contact itself.

118. Secondly, the key issue, even if the circumstances of the Claimant and the Interested Party give rise to certain risks, is to consider how it is said that the content of any visit will exacerbate those risks. On the evidence before the Court, there is no adequate explanation of what would happen in a phone call or a visit which would exacerbate the risk and how it would do so. Dr Saunders does not explain what she means by “inappropriate activities”, nor how they might exacerbate the risk to the Interested Party she has identified.
119. First, the Interested Party has access to photographs of children generally within the prison. HMP Whatton is a prison for sex offenders. The Interested Party apparently mixes with other sex offenders within HMP Whatton in an unmonitored way. To that extent, it is difficult to see that contact with the Claimant will make for a more sexualised environment in the prison. Secondly, given the Interested Party’s consistent behaviour whilst in prison (and regardless of contact with the Claimant), it is not clear how restricting contact with the Claimant is likely to reduce her ongoing sexual interest in children. There is no evidence to suggest that it will. Thirdly, the Defendants have not made clear what it is that they fear will happen, in the course of, say, a 10-minute telephone call or a supervised prison visit with the Claimant, which will exacerbate the Interested Party’s unhealthy interest in children.
120. Insofar as an express conversation can give rise to a risk, then if such a conversation took place, the Prison would be able to stop it happening again (by prohibiting future calls or visits). In any event, as a result of these proceedings the Claimant and the Interested Party will be left in no doubt that should they engage in anything approaching “inappropriate communication” in the course of a visit or call, then in all likelihood such visits and calls would be stopped. In that way, the prospect of such a prohibition is very likely to discourage them from engaging in such communication in the first place. Both the Claimant and the Interested Party have made clear in their witness statements that they are content for surveillance of their calls and visits, including by an officer being present in the room at a prison visit.
121. Insofar as it was suggested that the exacerbation of risk would arise from something *not* said, but rather some insidious danger from the controlling conduct of the Claimant, first there is little evidence to support this. It was not referred to by Dr Saunders. Secondly in my judgment, there is no reason why it could not equally arise in the course of written correspondence, rather than in a call or visit. If the prison is unable to recognise such insidious behaviour in a telephone call, it is equally unable to recognise it in (permitted) letters passing between the two parties. As regards those conversations which might be damaging in a more subtle, insidious (and non-explicit) way, the Defendants were not able to identify a relevant distinction between this happening in a telephone call/prison visit and by way of written correspondence.
122. As regards the risks said to arise from the Claimant’s bullying and domineering behaviour towards the Interested Party, the Defendants have not adequately taken into account the progress that has been made by the Claimant in recent years, enabling her transfer to open conditions. Much of the concerns expressed about the Claimant appear to have been based on allegations of bullying which date back to 2016. In any event, there has been no update on the position expressed in the 3 October 2017 letter.

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123. Further none of the letters to date have been censored or redacted. There is no evidence of inappropriate communication in those letters. This further suggests that the Claimant and the Interested Party are fully aware that they must not communicate inappropriately and that if they do so, future communication will be prevented. That in turn indicates to me that the risk of inappropriate communication (whatever it might be) is not particularly high.
124. Back in October 2018, Mr Justice Jay commented that he was not sure that generalised concerns about the parties fomenting their unhealthy interest in children was sufficient to prevent supervised telephone communication and that the Defendants had not satisfactorily addressed the issues. In my judgment, over two years later, that remains the position.
125. In these circumstances, assuming that the substantive objective justification is to address risks arising out of the Interested Party's welfare and sexual preoccupations I am not satisfied that the Defendants have established that the restrictions on contact is rationally connected to achieving that aim.

*Question (3) Less restrictive measures*

126. However, and in any event, and assuming (contrary to the foregoing) that the Defendants have sufficiently identified some relevant risk which arises from either a phone call or a prison visit, I am not satisfied that the Defendants have established that a total prohibition on calls or visits is necessary to accomplish the objective of preventing that risk i.e. that it is the least restrictive measure to address that risk.
127. On any view, the identified risk must arise from the *content* of what is said or might be said (or possibly done) in the course of a call or a visit. In my judgment, in her evidence Dr Saunders does not engage in sufficient detail with the issue of monitoring measures.
128. As regards *phone calls*, I am not satisfied that monitoring of phone calls will not be sufficient to meet the risk identified. First, I am not satisfied of the need for simultaneous recording of monitoring of calls. Evening monitoring is likely to be sufficient. The Defendants have not established there are immediate risks arising in the course of a call which evening monitoring could not satisfactorily meet. It is significant that the Interested Party's telephone calls to others are currently monitored; presumably that is sufficient to meet any risks arising from the content of those calls. At the most, evening monitoring would not prevent one inappropriate call. The Defendants' position necessarily involves a submission that one telephone call which is not monitored until the evening could cause such irreparable harm as to outweigh the Claimant's and the Interested Party's Article 8 rights. It is hard to see how in the circumstances, one such call could cause such detriment.
129. In any event, even if the Second Defendant could articulate the substantial risk arising from one inappropriate call, then she has not established that that risk could not be met by simultaneous monitoring. On the evidence before the Court, there is the facility to monitor telephone calls simultaneously. I am not satisfied that Dr Saunders evidence is comprehensive in this regard. PSI 04/2016 makes provision for simultaneous monitoring, and there is no reason why it could not be arranged in a category C prison.



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130. As regards *inter-prison visits*, Mr Cohen accepted that it is likely that in the case of an inter-prison visit, the meeting would take place on a one-to-one basis in a single room with at least one officer present and that there is no reason why staff could not monitor what was going on: see Rule 34(5) and (6). Such a visit would not take place in the conditions of the generality of prison visits, where a number of visits might take place in one large room, with a single officer overseeing from a desk. I am not satisfied that a standard visit would not be adequate to guard against the risks. A standard visit has to take place “within the hearing” of a prison officer. In this way, a standard visit can deal with any concerns as to what might be said in the course of the visit.
131. In any event a strict supervision visit and other measures could be taken. Closed visits are not limited to concerns about contraband: see paragraph 27 above. Nor in all circumstances is a closed visit confined to a screen. A closed visit can alternatively be a “semi-closed” visit under “strict supervision”. Overall, I am not satisfied, on the evidence, that an inter-prison visit could not be supervised by one or more prison staff, in a small room, with the ability to listen to the conversation, and to stop “inappropriate activity” should it arise. I do not understand why it would not be “appropriate” for a prison officer to listen to the conversation, nor why that would be particularly more resource-intensive than any other inter-prison one-on-one visit. Further I do not consider that the costs of transporting one to meet the other is an overriding relevant consideration. Under paragraph 5.15 of PSI 16/2011 inter-prison visits are allowed (and encouraged) in principle. Whilst *availability* of transport is there identified as a relevant consideration, *cost* of transport is not. To decline on that basis, would very arguably, be in breach of that policy.
132. I conclude therefore that the Defendants have not established that the outright prohibitions on telephone contact and prison visits between the Claimant and the Interested Party is no more than necessary, and that lesser measures are not available, to achieve its stated objective of avoiding the risks arising from such contact.

**Conclusion on Issue (1)**

133. The prohibition on telephone contact and inter-prison visits between the Claimant and the Interested Party is an unnecessary and disproportionate interference with the private and family life of the Claimant within Article 8(1) ECHR and is not justified under the provisions of Article 8(2) ECHR. The prohibition is therefore unlawful, pursuant to section 6 of the 1998 Act.

**Issue (2): Telephone contact and inter-prison visits: breach of policy****The parties’ arguments**

134. *The Claimant* contends that the Defendants have failed to adhere to, and apply, published policy, namely, rule 34 and rule 73, and, specifically in relation to telephone calls, paragraph 6.20 of PSI 49/2011 and in relation to inter-prison visits, paragraph 5.15 of PSI 16/ 2011.
135. The exception for “security considerations” in paragraph 5.15 PSI 16/2011 is a narrow category and does not cover wider public interest concerns, as suggested by the Defendants. This is confined to risks to security at the time of the visit. Accordingly

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there is an obligation to allow an inter-prison visit and refusing to do so is a public law error.

136. As regards telephone calls and PSI 49/2011 at paragraph 6.20, there is an obligation to allow inter-prison calls and there is no wide discretion in the operational manager to refuse calls. On a proper reading of rule 34 and paragraph 6.20 of PSI 49/2011, there is an obligation to allow calls to be made, with a discretion to disallow under rule 34 which gives guidance as to how the discretion to disallow should be exercised. There should have been local instructions which covered simultaneous monitoring under PSI 04/2016. In any event it is not established that there is a need for simultaneous monitoring in this case.
137. *The Defendants* contend that there has been no relevant breach of policy. First, as regards telephone calls, the policy expressly acknowledges the power of an operational manager not to permit such calls. Paragraph 6.20 has two limbs: the prison must have the facility to make such calls; but there is a discretion as to whether such calls should be allowed to take place. Secondly, as regards inter-prison visits, they should occur, but “subject to security requirements”. Security considerations are a mandatory instruction and include preventing conduct encouraging reoffending in the future. In the present case the Defendant had exactly those requirements in mind when concluding that visits were not appropriate.

### Discussion and analysis

138. I do not consider that the allegations of breach of policy materially add to the Claimant’s case on other issues, and in particular on Issue (1) and Issue (3) below. (Local Security Strategy arises in the context of Issue (3) below, as it relates to the past restriction on written correspondence.)
139. First, as regards telephone calls, I consider that, on the proper construction of paragraph 6.20 of PSI 49/2011, the “Operational Manager” does have a discretion not to permit such inter-prison calls to happen at all. The wording of the policy is not entirely clear; the opening words of paragraph 6.20 “must agree” might suggest an obligation to allow calls in all circumstances. However what the establishments must agree is that such calls “*may* be permitted”; not that such calls “*must*” be permitted. I accept Mr Cohen’s submissions that those words are concerned only with an obligation to provide *the facility* for making such calls. The discretion accorded to the Operational Manager in the closing sentence relates to “the ability to make ... calls” and confirms the existence of the discretion both as to whether, and if so, when and how, such calls can be made. In this regard, I agree with the PPO’s conclusion at paragraph 16 of his decision (see paragraph 66 above). Accordingly I find that an outright ban on all inter-prison calls is not in breach of published policy.
140. Secondly, as regards inter-prison visits, the words, in paragraph 5.15 of PSI 16/2011 “subject to security requirements” or “subject to security considerations” refer to a narrow range of circumstances ensuring the safety and security of persons on the occasion of the visit and does not encompass wider concerns about risks not arising at the time of the visit, but risks of the nature which are said to underpin the restrictions in the present case. In this regard, I refer to a number of provisions in the Prison Rules and the policy documents, dealing with “security”: see, in particular, the terms of Rules 34(3)(d) and 35A(4)(d) and paragraphs 2.24, 2.27 and 6.20 of PSI 49/2011 and

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paragraphs 2.8 and 2.9 of PSI 15/2011. In my judgment, these passages address security, good order and discipline within prisons, and “security considerations” in paragraph 5.15 are to be construed in a like manner. The obligation therefore was to “make reasonable efforts to accommodate” an inter-prison visit. Furthermore, there is nothing in the Decision itself or Dr Saunders’ witness statement to suggest that in the present case inter-prison visits were refused on grounds of “security considerations” nor on grounds that it was not possible to accommodate such visits. I conclude that, by prohibiting such visits, the Defendants were in breach of policy by not making reasonable efforts to accommodate such visits.

141. For these reasons, I conclude that the restriction on telephone calls is not in breach of policy. However, in addition to the Article 8 infringement, the restriction on inter-prison visits is not in accordance with the Defendants' published policy and is thus contrary to public law.

**Issue (3): Delay****The parties’ arguments**

142. *The Claimants* contend that the claim has been brought in time, since it is a challenge to the ongoing violation of the Claimant’s Article 8 rights. Alternatively, time for bringing the claim should be extended, under CPR 3.1(2)(a). There is good reason to do so. The delay was due to awaiting public funding, despite it having been applied for in a timely manner. Once the deadline for a response to the letter before action passed, the Claimant immediately applied for public funding. There was then a two-month wait to obtain that funding. Further the claim raises issues of general public importance; and the Defendants have failed to make regular reviews of the restrictions as required by PSI 15/2011. In any event if this claim is dismissed on grounds of delay, the Interested Party could bring her claim and raise all the same issues.
143. *The Defendants* contend that the claim has not been brought promptly nor in any event within three months. These proceedings could and should have been initiated promptly after the Claimant knew in October 2019 that the PPO had refused her complaint in respect of telephone contact and inter-prison visits. Even if the relevant decision is that of 4 March 2020, the proceedings were not brought within the three month period. Neither awaiting a response to a letter before action nor delay arising from awaiting legal aid is a good enough reason to delay bringing proceedings, nor reason for an extension.

**Discussion and analysis**

144. Apart from the specific decision not to allow telephone contact following the Claimant’s mother’s death, the proceedings have not been brought within the three month limit. That specific decision is now past. The relevant decisions are the decisions not to allow contact on an ongoing basis and in principle. The Decision – being latest relevant decision – was made on 4 March 2020. The proceedings were issued on 19 June 2020. I do not consider that this time limit can properly be ignored by characterising the challenged measure as being an ongoing refusal.
145. Nevertheless, I consider that it is appropriate to grant an extension of time, pursuant to CPR 3.1.2(a) for the following reasons. First, the Claimant applied promptly for public

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funding and was reasonably awaiting that funding, which took over two months to be granted. Secondly, the claim raises points of principle of general importance. Thirdly, the Defendants have sustained no prejudice as a result of the delay. Finally I note that, if this claim were dismissed, then, subject to the precise terms of the agreed stay, the same issues would be very likely to be raised by the proceedings brought by the Interested Party.

**Issue (4): Written correspondence****The parties' arguments**

146. *The Claimant* contends that there never was, and is, no justification for preventing a married couple from writing to one another, subject to the full inspection of the prison service. This was in breach of policy (and in particular paragraphs 2.24 and 2.27 of PSI 49/2011) and in breach of Article 8 and not justified as proportionate.
147. *The Defendants* contend that any challenge to the historic situation in relation to written correspondence is well out of time. Secondly and in any event judicial review should not lie where the alternative remedy has now been successful. Thirdly, there is no clear evidence that the Defendants have sought to delay or interfere with the mail inappropriately.

**Discussion and analysis**

148. On 24 October 2018, Mr Justice Jay refused permission for the Claimant's first judicial review claim on the sole ground that the Claimant should pursue her alternative remedy before the PPO. The Claimant did so, and, in respect of the restriction on correspondence, successfully obtained that remedy. The PPO ruled that written correspondence must be allowed. To allow a party in these circumstances to come back to the Court by issuing fresh proceedings seeking the same relief fundamentally undermines the principle that judicial review proceedings are a last resort and alternative remedies should be sought. For this reason, I consider that no useful purpose is served by this Court now declaring the historic prohibition on written correspondence to have been unlawful under Article 8 ECHR and/or in breach of policy. I add that even if some purpose could be served by a claim brought following the obtaining of an alternative remedy, such a claim could and should have been brought shortly after the PPO decision in October 2019. Such a claim is out of time, and, in this case, I see no good reason for granting an extension.
149. Secondly, as regards allegations that there has been, on the part of the Defendants, improper delay and interference with the written correspondence allowed since November 2019, I am not satisfied that this is established on the evidence.
150. For these reasons, in so far as the Claimant's claim relates to written correspondence, it is dismissed.

**Issue (5): Remedies****The parties' arguments**

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151. *The Claimant* seeks a declaration of violation of Article 8, a quashing order for any decision preventing contact, and mandatory orders that written correspondence be delivered without delay and that the Defendants shall facilitate inter-prison visits and inter-prison telephone contact on a regular basis. Further the Claimant seeks just satisfaction pursuant to section 8 of the 1998 Act. In accordance with the principles in *Faulkner*, supra, there should be an award of damages for the Claimant's anxiety, frustration and distress. There is evidence of this in the witness statements of the Claimant and the Interested Party.
152. *The Defendants* contend, first, there should be no mandatory order requiring phone calls or inter-prison visits to take place. At most there should be declaratory relief, leaving the matter for the Defendants to reassess in the light of updated facts. Secondly as regards just satisfaction, the Defendants had little to say. A monetary award is only made if necessary and in the present case public vindication of rights by way of a declaration as to the future is sufficient.

**Discussion and analysis**

153. First, in the light of my conclusions on issues (1) and (2), in due course I will make declarations that the decisions restricting all telephone contact and inter-prison visits were contrary to Article 8 ECHR and in relation to inter-prison visits, in breach of policy, and thus unlawful. I will hear the parties on the precise terms of those declarations.
154. Secondly, I am not prepared to make mandatory orders requiring the Defendants to allow or facilitate telephone contact and inter-prison visits. It is for the Defendants to consider how matters can be taken forward, and under what conditions such contact and visits are appropriate to take place. The Defendants will understand from the declaratory relief and the terms of this judgment, that telephone contact and inter-prison visits are to be allowed, under appropriate conditions.
155. Thirdly, as to just satisfaction, I conclude that, in principle, there is to be an award of damages on this basis. Having read the Claimant's detailed account in her witness statement, I am quite satisfied that she has suffered substantial anxiety, frustration and distress over the period of a number of years, since she was moved to HMP Stafford. As was pointed out at the time, the attendance of the Claimant and the Interested Party at the hearing of this claim, each by video link from her prison, was the first time that this married couple had seen or heard each other in almost four years. I understand that the parties will endeavour to agree the amount of that award guided by awards made in Strasbourg and other cases. If not, then the matter can be referred back to court.

**Conclusions**

156. In the light of my conclusions in paragraphs 133, 141 and 150 above, the Claimant's claim in relation to the restrictions on telephone contact and prison visits with the Interested Party succeeds; her claim in relation to written correspondence is dismissed.
157. Finally I am most grateful to counsel and solicitors, and to court and prison staff, for the helpful manner in which this case has been conducted, not least in the circumstances of the Covid-19 pandemic.