



Neutral Citation Number: [2024] EWHC 2322 (Admin)

Case No: CO/185/2023; AC-2023-LON-000411

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 September 2024

Before :

**THE HON. MRS JUSTICE ELLENBOGEN DBE**

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Between :

**The King (on the application of Fuad Awale)**

**Claimant**

- and -

**Secretary of State for Justice**

**Defendant**

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**Dan Squires KC and Aidan Wills (instructed by Birnberg Peirce Ltd) for the Claimant**  
**Sarah Hannett KC and Myles Grandison (instructed by Government Legal Department)**  
**for the Defendant**

Hearing dates: 12 and 13 July 2023  
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**APPROVED JUDGMENT**

This judgment will be handed down remotely at 10.00am on 9 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

**Mrs Justice Ellenbogen DBE :**

1. The Claimant describes himself as a British, Black African of Somali origin and a practising Muslim. Following his convictions in January 2013, for the murder of two teenagers, both of whom shot through the head, he has been serving a life sentence, with a minimum term of 38 years. The sentencing judge formed the view that both murders had characteristics of an execution. In August 2013, in consequence of his involvement in a serious incident in the course of which he and two others took a prison officer hostage and made threats to kill him (for which he later received a consecutive six-year custodial sentence), the Claimant was referred to a close supervision centre ('CSC') within the long term and high security estate ('the LTHSE'), for assessment. On 16 September 2014, he was made subject to a direction by the Defendant under rule 46 of the Prison Rules 1999 (SI 1999/728) — 'Rule 46'. He has been assessed to hold extremist beliefs. Throughout his time as a CSC prisoner, he has been detained in CSC accommodation, or in 'designated cells' ('DCs') within the segregation units of other Category A prisons, where he has remained subject to Rule 46 and CSC policies. Having been admitted to Broadmoor Hospital in September 2013, since October 2013 he has been detained, variously, at HMPs Belmarsh; Long Lartin; Whitemoor; Frankland; Manchester; and Woodhill, where he is currently held. This claim raises a challenge to the circumstances of his detention. The challenge is not to his detention in the CSC per se, rather to the asserted fact that, since 13 April 2022 and as at the date of the hearing, for all but a six-week period, he had been confined to his cell for up to 23 hours a day, which is said not to have been a necessary consequence of detention on that unit; to have met the definition of prolonged solitary confinement; and to have been unlawful in all the circumstances.
2. I have considered witness statements from the Claimant and from his solicitor, Ms Sally Middleton of Birnberg Peirce Ltd. On behalf of the Defendant, I have received witness statements from Mr Steven Betts, since October 2020 the Operational Lead of the CSC Estate, whose role includes management of the CSC population. I have had regard to extensive bundles of documentation and authorities, detailed written submissions and additional authorities, provided by both parties prior and subsequent to the hearing, and the oral submissions made during that hearing. I have reviewed all such material with care.

**The CSC system**

3. Section 47(1) of the Prison Act 1952 empowers the Secretary of State to make rules for the regulation and management of prisons (amongst other institutions) and for the classification, treatment, employment, discipline and control of those required to be detained there. The Prison Rules are made pursuant to section 47.
4. Rule 46 provides:

**'Close supervision centres**

**46.—(1)** Where it appears desirable, for the maintenance of good order or discipline or to ensure the safety of officers, prisoners or any other person, that a prisoner should not associate with other prisoners,

either generally or for particular purposes, the Secretary of State may direct the prisoner's removal from association accordingly and his placement in a close supervision centre of a prison.

(2) A direction given under paragraph (1) shall be for a period not exceeding one month, but may be renewed from time to time for a like period and shall continue to apply notwithstanding any transfer of a prisoner from one prison to another.

(3) The Secretary of State may direct that such a prisoner as aforesaid shall resume association with other prisoners, either within a close supervision centre or elsewhere.

(4) In exercising any discretion under this rule, the Secretary of State shall take account of any relevant medical considerations which are known to him.

(5) A close supervision centre is any cell or other part of a prison designated by the Secretary of State for holding prisoners who are subject to a direction given under paragraph (1).'

5. The aim of the CSC system is to remove the most significantly disruptive, challenging and dangerous prisoners from the standard prison environment, in order that they may be managed within smaller, highly supervised units to enable an assessment of the risk which they pose to others, followed by work which has as its aim the reduction of that risk, and the facilitation of a return to the general prison population, or a more appropriate location, once it has sufficiently reduced. Referral under Rule 46 will ordinarily be seen as a last resort, with the expectation that all other options concerning the prisoner's management and control have been exhausted, or considered to be inappropriate in the circumstances. A referral comprises four stages, including an assessment period which will ordinarily take four months, during which time a number of reports will be commissioned in order to identify and assess the risks posed. If accepted into the CSC system, the prisoner will undergo further assessments, as required; interventions; and one-to-one work, with the ultimate aims of reducing those risks and enabling him to progress out of the CSC, following assessment that detention in the highly supervised and controlled environment which the CSC provides is no longer necessary. A prisoner will progress through, and be de-selected from, the CSC system where the risk which he presents to others in custody is assessed to have reduced to a point at which he can be managed, safely, within a mainstream prison, or more suitable environment outside the CSC estate.
6. Across the prison estate in England and Wales, there are 68 places for Rule 46 prisoners, comprising 56 places in CSC units, located in HMPs Wakefield; Full Sutton; Woodhill; Whitemoor; and Manchester, and 12 DCs, within the segregation units of HMPs Wakefield; Whitemoor; Full Sutton; Frankland; Long Lartin; and Belmarsh. DCs are available to ensure that there are adequate Rule 46 cells across the LTHSE, a directorate within His Majesty's Prison and Probation Service. They are utilised when it becomes necessary to remove prisoners from the main CSC units.

7. The CSC operates under the authority of the Secretary of State, whose responsibility is delegated to the Executive Director of the LTHSE. There are two relevant policy documents: the Close Supervision Centre Referral Manual, broadly concerned with the procedures applicable to the selection and de-selection of CSC prisoners; and the Close Supervision Centre Long Term and High Security Estate: Operating Manual ('the OpM'), which describes the structure and governance of the CSC and is concerned with its management and operation. The key decision-making entity is the Close Supervision Centre Management Committee ('the CSCMC'), which, as the OpM indicates, '[f]or the purpose of applying Rule 46... act[s] in the place of and with the delegated authority of the Secretary of State.' It is a multi-disciplinary panel, comprising 20 to 25 individuals.
8. A second central entity, the Central Management Group ('the CMG'), makes recommendations to the CSCMC regarding selection and de-selection of prisoners for the CSC, and the management and movement of CSC prisoners. On that body, the CSC's national operational lead and national clinical lead (amongst others) sit. The CMG meets monthly, usually two weeks in advance of the CSCMC. It considers all relevant information provided within referrals or assessments and drafts recommendation reports for the CSCMC. Prisoners may make representations for consideration by the CMG. Informed by the CMG's recommendations, and reports from the CSC units (see below), the CSCMC makes its decisions. Prior to a transfer, a pre-admission case conference is required, which provides the opportunity for the local receiving multi-disciplinary team ('the MDT') to identify key concerns or issues; plan the regime and unlock levels; allocate key workers; and prepare for the management of the prisoner. A pre-transfer visit from staff, at least by video-link, should also be arranged, to allow the prisoner and staff to meet and to address any concerns.
9. Each CSC unit has its own designated operational manager, who is a prison governor. That manager, or a custody manager, will chair weekly meetings — known as Dynamic Risk Assessment Meetings ('DRAMs'), which are also attended by a unit psychologist, and by mental health and other officers. Their purpose is to ensure the effective management of the CSC unit, and the prisoners within it, which will include consideration of visits, activities, internal movement and association, and ensuring that key changes in a prisoner's risk and/or behaviour are discussed collectively; necessary decisions are made; and the prisoner is informed of those decisions. Decisions may also be taken regarding the unit as a whole, for example regarding association groups and regimes. The minutes of the DRAM contain a risk assessment for each prisoner, which is updated, as necessary, for each weekly meeting. If the level of risk changes between meetings, the CSCMC will expect changes to be made at the relevant time and to be informed of them, with a formal report being provided in advance of its next monthly meeting, enabling it to consider, and, if necessary, approve those changes. Following each DRAM, feedback will be provided to the prisoner, on which he may make observations for consideration at the following DRAM.
10. Weekly reports are prepared by each prisoner's personal officer in the CSC, providing a record of the prisoner's attitude, behaviour and progress. The MDT will produce monthly reports for the CSCMC, enabling it to review and make decisions regarding the location, placement and de-selection of each prisoner, for the purposes

of Rule 46. Those reports will highlight areas of risk; progress; concerns regarding continued placement; and any other relevant factor upon which a decision could be based. They are circulated to the CSCMC in advance of its monthly meeting (convened under Rule 46(2)) and disclosed to the prisoner affected, with a view to affording him an opportunity to make representations on their content to the CSCMC. Following the CSCMC meeting, the report is updated to include extracts of the minutes, reflective of feedback from the CSCMC, which is provided to the prisoner.

11. In addition to the monthly CSCMC review, a Care and Management Plan ('CMP'), will be devised for each prisoner, to identify the work required to reduce and manage the risk of harm to others which led to his referral to the CSC. The CMP is drawn up by the MDT in the particular CSC unit, in collaboration with the prisoner, if he is willing to engage with the process, and is reviewed quarterly, in conjunction with the prisoner and his legal representative. Whether or not the prisoner wishes to be involved in target setting, he must be given the opportunity, quarterly, formally to comment on the completed CMP document, and his comments will be added to the CMP. The CMG receives feedback regarding a prisoner's engagement in the CMP process, and any changes to his risk profile, which informs its advice to the CSCMC.

### **The Rule 45 regime**

12. Outside the CSC system, removal of prisoners from association is subject to rule 45 of the Prison Rules ('Rule 45'), of which it is necessary to provide a summary, given the nature of the challenges raised in these proceedings. Rule 45 was amended in September 2015, following the decision of the Supreme Court, in July of that year, in *Bourgass and Hussain v SoSJ* [2016] AC 384, a case which will be considered later in this judgment, which had been critical of Rule 45 in its then form and of the procedure adopted in the segregation review system.

13. As amended, Rule 45 provides:

#### **'Removal from association**

**45.—(1)** Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association for up to 72 hours.

(2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.

(2A) Such authority may be renewed for subsequent periods of up to 14 days.

(2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the prisoner was removed under paragraph (1).

(2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State.

(3) The governor may arrange at his discretion for a prisoner removed under this rule to resume association with other prisoners at any time.

(3A) In giving authority under paragraphs (2) and (2A) and in exercising the discretion under paragraph (3), the governor must fully consider any recommendation that the prisoner resumes association on medical grounds made by a registered medical practitioner or registered nurse working within the prison.

(4) This rule shall not apply to a prisoner the subject of a direction given under rule 46(1).’

14. Rule 45 is supported by the *‘Reviewing and Authorising Continuing Segregation and Temporary Confinement in Special Accommodation: Amendment to Policy set out in PSO<sup>1</sup> 1700’* (‘the Amended Policy’), as updated from time to time. PSO 1700 is said to provide comprehensive guidance on all aspects of segregation, and is not limited to removal from association under Rule 45. The authorisation, review and re-authorisation required after the first 72 hours, by Rules 45(2) and (2A), is carried out by a multi-disciplinary Segregation Review Board (‘the SRB’). That body operates within the prison, but is required to act impartially and independently. It must satisfy itself that any decisions made regarding segregation are objective and evidence-based, and that they have not been influenced by bias (per the Amended Policy, at paragraphs 2.3 and 2.5).

15. Paragraph 2.20 of the Amended Policy provides:

‘Where the SRB decides in principle to continue segregation, the reasons must be explained to the prisoner at the Review Board. The prisoner must be given the opportunity to make meaningful representations before a final decision is made. Where a final decision is made to continue segregation, the chairperson must ensure that the prisoner is informed of the substance of the reasons on which the decision to continue segregation was based and ensure that the prisoner is informed, both orally and in writing, of meaningful reasons for the decision. This will not normally require the disclosure of the primary evidence on which the decision to continue segregation was based, but the reasons must:

- provide a clear justification for the prisoner’s continuing segregation;

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<sup>1</sup> Prison Service Order

- clearly reference the specific circumstances of the case;
- avoid the use of generic phrases and jargon; and
- be understandable to the prisoner taking into account any learning disability or speech, language or communication impairment.’

16. Paragraph 2.21 of the Amended Policy states that the SRB’s reasons must be recorded in a specified form and should reflect the discussions held. Paragraph 2.22 provides for the withholding of information relevant to the decision to continue segregation in specified circumstances: in the interests of national security; for the prevention of crime or disorder, including information relevant to prison security; for the protection of a third party who may be put at risk if the information is disclosed; if, on medical or psychiatric grounds, it is felt necessary to withhold information where the mental and or physical health of the prisoner could be impaired; or where the source of the information is a victim, and disclosure without his or her consent would breach any duty of confidence owed to that victim, or would generally prejudice the future supply of such information. In such circumstances, a summary, or edited form, of information protective of the source must be provided, both orally and in writing, and the completed form must record a brief description of the information being withheld, so far as compatible with maintaining security/protecting other persons. Any so-called ‘gisted’ information must be consistent with the information available to the SRB and must be sufficient for the prisoner to make meaningful representations against segregation (paragraph 2.23).

17. The functions for which Rules 45(2B) and (2C) provide are performed by the Deputy Director of Custody, or (for a first review) by a senior operational manager of at least Band 8, to whom s/he delegates the role, who is based outside (and is not seconded from) the prison in which the prisoner is segregated (paragraph 3.9). The purpose of the first review is *‘to consider whether segregation is appropriate and whether there are sufficient reasons for continuing segregation beyond the 42 day period’* (paragraph 3.5). The first reviewer may give leave for the SRB to continue to renew authorisation of segregation for a period of up to 42 days. If s/he gives leave for the SRB to continue to renew authority for segregation, the SRB must meet within 14-day intervals to authorise any further periods of segregation. It must do so within 14 days of the previous SRB review, and not 14 days from the date of the first review (paragraph 3.7). No provision is made for delegation of subsequent reviews (paragraph 3.11), which have the same purpose as the first review (paragraph 3.12). The prisoner must be allowed to make representations at each review stage, whether orally or in writing (paragraphs 3.6 and 3.13).

18. The Amended Policy is supported by a document setting out frequently asked questions and the answers to them. Under the heading ‘Prisoner Representations’, questions 23 and 24 and the answers provided to them are set out:

**‘Q23. When does the prisoner submit his/her representations?’**

The prisoner will have been advised of the date of the next SRB and invited to attend. At this point he/she should also be invited to submit any written representations on new form... The prisoner should be offered help with this if needed. Written representations can be provided to the SRB at the start of the review. If the prisoner is present he/she may also provide further oral representations during the review.

The prisoner should be advised of any forthcoming Band 8, Band 9 Senior Manager or... Reviews and invited to submit representations (as previously).

**Q24. What happens if there is sensitive information or intelligence about the prisoner which is relevant to his/her segregation? Does this need to be disclosed to the prisoner?**

No. There is no requirement to disclose the primary source document to the prisoner. Paragraph 2.22 in the policy document sets out the circumstances in which information may be withheld from the prisoner. Where any sensitive information is relied on by the SRB in reaching its decision, the prisoner must be provided with a gisted version of that information, sufficient to understand what the reason for segregation is so that he can make representations against it if necessary. The Band 8, Band 9 Senior Manager or... must be advised of any withheld information when considering his or her review.'

**The facts**

19. Much of the factual background to these proceedings is not in dispute. In the summary which follows, the focus is on the period with which the grounds of review are concerned, though it is necessary to provide some background. All prisoners other than the Claimant are referred to by letters, rather than their names. Save where the contrary is indicated, the facts stated are not disputed. In the event, not all disputes of fact have required resolution.
20. Between May and August 2019, the Claimant was held at the CSC unit in HMP Whitemoor. He was able to mix with five other prisoners, spend approximately seven hours each day out of his cell; and attend Friday prayers. In July 2019, following a fight between others in his then 'association group', he was told that he was to form a new association group with prisoner GV. The Claimant's evidence is that he did not wish to do so, as GV had a record of attacking Muslim prisoners at HMP Full Sutton and was known to have been a member of an anti-Muslim group, '*Death Before Dishonour*' ('DBD', which had as its goals eradicating Muslims from the prison system), from other members of which, it is said, the Claimant had previously received racial and religious abuse. Following GV's threats to kill him, the Claimant made a formal complaint about the requirement that he associate with him. He considers that nothing was done about that complaint. His evidence is that, on or around 3 July 2019, GV approached him in the exercise yard and, again, threatened to kill him were they to be placed together in the exercise yard on a



future occasion. The following day, the two men were placed in the exercise yard together and it is the Claimant's evidence that, mindful of the threat issued by GV the previous day, the Claimant made a pre-emptive strike, in self-defence. It is further said that the reasons for that strike were not investigated or considered.

21. The Claimant was moved to a DC and segregated, first at HMP Frankland, and then, in October 2019, at HMP Manchester. He was informed that the latter move was intended to ensure that he would have association, but it then transpired that his two would-be associates (who, so he later learned from overhearing another prisoner's conversation, were members of DBD) posed a threat to him, meaning that he could not do so. He remained at HMP Manchester throughout 2020, whilst having 'a good amount of time' out of his cell and, initially, engaging with staff. That engagement deteriorated, on the Claimant's evidence by reason of his depressed state and an absence of trust, arising from his lack of association with other prisoners.
22. On 17 January 2021, the Claimant was moved to a DC at HMP Belmarsh, having punched a prison officer in the face. The Claimant contends that he had used force in self-defence. He was charged, but the prosecution was then dropped, such that he was not called upon to advance his defence. Following concerns that he had been inciting prisoners to harm staff, on 26 March 2021 he was moved to a DC at HMP Long Lartin where he began to settle down and a more suitable long-term placement for him was sought. On 21 September 2021, his removal to a unit which could facilitate small association groups was approved and, on 9 November 2021, he was transferred to HMP Woodhill, Unit 6B, considered by the authorities to be the only suitable unit, where he remained at the date of the hearing. It is the Defendant's case that he could not have been transferred to HMP Full Sutton, where he had taken a prison guard hostage, or to HMP Manchester, following his assault on a CSC prison officer, and that a transfer to HMP Wakefield or to HMP Woodhill, Unit A would have been a regressive move, as each is a 'single unlock' only site, housing those assessed as being unsuitable to associate with other prisoners in any context. At the time, it had been the Claimant's expressed desire to transfer to HMP Whitemoor.
23. Initially, at HMP Woodhill, the Claimant was subject to a four-officer unlock, with body worn camera operational. That is to say that four officers were required to be present when his cell door was unlocked. Those officers would stand in formation; two of them having responsibility for opening the door and two standing further back, in readiness for any required response. The number of officers required to unlock the Claimant's cell fluctuated over the following months until, in September 2022, he was given, and thereafter retained, enhanced status, accorded to prisoners who demonstrate '*the required types of behaviour to a consistently high standard, including good attendance and attitude at activities and education/work and interventions.*' The requirement for a body worn camera was removed on 30 November 2022, since which time the Claimant has been on the lowest level of unlock available at the CSC — 'routine mixed unlock', meaning that he may be unlocked with other prisoners with whom he may safely associate (if any).

*Association with LF: 15 December 2021 to 12 April 2022*

24. With effect from 15 December 2021, the Claimant was placed in an association group with LF, permitting association outside their cells, which were unlocked at the same time. They developed a good relationship, though it was known that LF was shortly to be transferred, which took place on 13 April 2022. Shortly before that date, DA was identified as a potential transfer to HMP Woodhill, with consideration being given the following month to how initial contact with the Claimant could be effected. The Defendant's position is that, between April and June 2022, there was no other individual in the wing with whom the Claimant could associate, following risk assessments and in light of settled association groups. Of the two association groups then on the wing, two of the three prisoners in one group were considered to pose a threat to the Claimant's safety and the detrimental effect of dividing that group was considered to render that option non-viable. The Claimant was assessed to pose a threat to one of the two prisoners comprising the other group. Transferring the Claimant to another unit was considered to remain inappropriate, as was the transfer of another prisoner to HMP Woodhill from elsewhere in the CSC estate, there having been, in the decision-makers' view, only 13 potential associations amongst the 20 prisoners across that estate who had then been approved for mixed unlock.

*DA's transfer to HMP Woodhill: 23 June 2022*

25. DA's transfer to HMP Woodhill was confirmed on 21 June 2022. The following day, an officer informed the Claimant that DA was to be transferred into the unit on 23 June, as a potential association group for him, but that, pending an assessment of risk, they would not, immediately, be unlocked at the same time. The Claimant's evidence is that he had been concerned, understanding that DA had subjected other prisoners to racist and religiously motivated abuse and that he had recently almost killed another prisoner. The Claimant says that he had been fearful of being attacked and had raised his concerns with a prison psychologist, also making a formal complaint on 25 June 2022, which he considers not to have been investigated properly. The governor's written response to that complaint, dated 30 June 2022, sought to reassure the Claimant that association with DA would be safe and that HMP Woodhill would '*very carefully look at trialling this, so you are not in an isolated situation...*'

26. On 29 June 2022, the Claimant stated that DA was a vulnerable prisoner with whom he did not wish to associate, for religious reasons. On 7 July 2022, the Claimant stated that he was not associating with DA owing to his (DA's) behaviour, his NOMIS<sup>2</sup> records summarising his stated view that, '*...it is the CSC staff that are stopping him from being in a group with [DA] due to [DA's] behaviour and he feels like he is being discriminated against because he is losing out on time*'. The CSCMC remained of the view that it was safe for the Claimant and DA to associate. On 27 July 2022, albeit unknown to the Claimant until six weeks later, the Defendant decided that it would be unsafe for the Claimant and DA to associate, owing to the threat posed by the Claimant to DA.

*The Claimant's proposals regarding association groups*

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<sup>2</sup> Prison National Offender Management Information System, the operational database used for the management of offenders

27. The Claimant proposed other prisoners with whom he might associate:

- a. In early August 2022, he proposed AY (albeit, he says, in error, intending to refer to another prisoner, AK). The governor considered that AY would be an appropriate association. Realising his mistake a few days later, the Claimant explained it to his psychologist, together with his concern that AY was taking strong anti-psychotic medication and that he (the Claimant) had had previous negative experiences of association with someone who had been taking the same medication, who had never left his cell. The Claimant expressed his concern that association with AY would not be meaningful and would exacerbate his (the Claimant's) isolation. He also stated his worry that AY's paranoia and mental health could pose a risk to him (the Claimant). He remained unwilling to associate with AY, and requested a transfer if a solution could not be found. In the event, AY was not transferred to HMP Woodhill; his transfer was cancelled on 6 October 2022 owing to an '*elevation of [AY's] risk.*'
- b. On 15 August 2022, the Claimant asked to associate with MA, who had been convicted of the murder of Fusilier Lee Rigby. That association was not permitted, owing to the risk of harm which it might pose to others. The Claimant was first informed that it would be unlikely to happen, later being told that it would not be possible, owing to counter-terrorism concerns.

28. At the end of September 2022, the Claimant spoke to the CMG about his lack of association and asked whether he could be considered for a transfer. He was informed that he could not be transferred to another unit, owing to his history of violence at the relevant prisons.

*LF returns to HMP Woodhill: 4 November 2022*

29. On 4 November 2022, LF was transferred back to HMP Woodhill, following a deterioration in his conduct and DA's removal to HMP Full Sutton. That move had been recommended by the CMG in part to allow association with the Claimant. Their association was approved at the DRAM of 23 November 2022. Nevertheless, between the date of his transfer and 27 January 2023, LF refused to associate with the Claimant, notwithstanding (in the Claimant's words) '*extensive efforts*' by CSC staff to facilitate their association. He then changed his mind and the two prisoners associated successfully between 29 January and 16 March 2023, on which date the arrangement ended, when LF assaulted the Claimant and the two were assessed as being unsuitable to associate with one another. On 17 March 2023, LF informed his psychologist that he had refrained from associating with the Claimant prior to January 2023 at the Claimant's request and in return for favours, in order not to undermine the Claimant's application for judicial review; a disclosure which the Defendant considered to be credible, though it is denied by the Claimant and acknowledged that the Court need only resolve that issue of fact (should that be possible on the available evidence) in connection with the question of relief.

*17 March 2023 onwards*

30. Since 17 March 2023, the Claimant has not associated with any other prisoner. The Defendant's position is that there is no suitable placement in which association can be facilitated, or prisoner with whom he can associate safely. The consequence is said by the Claimant to have been that he is locked in his cell for between 22 and 23 hours a day; eating all meals alone; exercising alone, in a caged area; and spending any time outside his cell alone, with significant adverse impact on his wellbeing. One of the targets in his CMP is to interact with his peers in an appropriate manner and one of the reasons given for his inability to progress out of the CSC is that he is not meeting his targets. He has seen an imam on approximately eight occasions since 2021 and a psychologist every one to two weeks.
31. With the exception of the six-week period between 29 January and 16 March 2023, during which he associated with LF, the Claimant has not in fact associated with other prisoners, though it is the Defendant's case that he has had contact at their locked cell doors, or in exercise yards through mesh fencing, and that he has also had the opportunity for regular contact with staff, including a psychologist, and, should he so choose, the mental health team. For at least one hour a day, he has been allowed out of his cell, during which time he has been able to shower and exercise. His cell contains a telephone and a television and he is able to request up to three visits per month, under risk-based conditions.
32. The Claimant's case is that the process by which decisions regarding association have been taken is opaque, lacking clarity as to the identity of those who have decided, respectively, to place and retain him in segregation, and as to who, if anyone, has reviewed such decisions. It is said that there is no documented process by which prisoners are informed of the reasons for their segregation, given opportunities to make representations regarding its continuation, or informed about those to whom any such representations should be made. The Claimant says that, to the extent that he has an understanding of any such matter, it has derived from the Defendant's disclosure and witness statements in these proceedings. That material is also said to indicate premises for decision-making which have been erroneous and/or lacked merit, of which the Claimant had not been made aware, and, hence, which he had been unable to counter, at the time. It is said that, in practice, each body which is involved with his detention in the CSC considers responsibility for decision-making to lie with another.

### **The evidence of Steven Betts**

33. It is neither necessary nor proportionate to set out in detail the content of Mr Betts' witness statements. The reasons which he gives for the decisions taken in relation to the Claimant's periods of non-association since April 2022 may be summarised as follows:
- a. The Claimant's return to HMP Full Sutton was not an option, given the offence which had led to his referral into the CSC estate. HMP Manchester was discounted as the Claimant had assaulted staff there whilst in a small association group. Similarly, HMP Whitemoor was discounted, because the Claimant had assaulted a prisoner who had been located there and owing to the presence of prisoners who would pose a risk to the Claimant.

- b. A copy of the DRAM minutes for 6 April 2022 assessed the risk posed by the Claimant to arise from his index offence of murder and his subsequent threats to kill; his past use of weapons; his taking of a prison officer hostage at HMP Full Sutton; his pattern of violent behaviour in circumstances in which he felt aggrieved, representing a risk of violence towards other prisoners; the fact that his index offence appeared to have been motivated by a desire for revenge and the risk that the same motivation for violence would be replicated in the prison environment; his limited engagement with prison staff and the process of his reviews; his possible discriminatory attitudes towards those whom he considered to be associated with the military; and his possible extremist views.
- c. Prior to LF's transfer to HMP Full Sutton, there had been three association groups within Unit 6B at HMP Woodhill. Group A had comprised two prisoners; Group B three prisoners; and Group C LF and the Claimant. All prisoners had been settled in those groups for some time. Following LF's departure, it had not been considered appropriate for the Claimant to join groups A or B, based upon the risks which he presented to them and they to him. One of the members of Group B was assessed to pose a threat of violence to Muslim prisoners and another had held prisoners hostage because he had believed them to be terrorists. The other prisoner in the group was a known drug user and, it was said, the Claimant had indicated that he would not associate with drug users. In any event, there had been a reluctance to split up the relevant group, as two of its members had enjoyed a very supportive relationship the removal of which was considered to be detrimental to their progression. It was not safe for the Claimant to join Group A because it contained a very high profile and renowned vulnerable prisoner and, it is said, the Claimant had previously made it known that he would not associate with vulnerable prisoners, such that he would pose a risk to that prisoner, were they to associate. On Mr Betts' evidence, none of those risk assessments had been recorded, but had resulted from discussions between the prison and the CMG.
- d. Transfer to another CSC unit was considered not to be possible on the basis that the Claimant was of interest to counter-terrorism teams, having been assessed to hold extremist beliefs. Mr Betts' evidence is that, in the course of the Claimant's involvement in the staff hostage incident in 2013, he had requested the release of convicted and suspected terrorists and made a number of threats. It is said that he had also attempted to incite a prisoner who had been convicted of a terrorist offence at HMP Belmarsh to harm staff, and the assessment had been that, were he to associate with other known terrorists, he might act on their behalf, posing a risk of harm to staff. Operational factors such as capacity and availability of cells across the CSC estate are said also to have been taken into account.
- e. HMP Woodhill, Unit A and HMP Wakefield were discounted as being single unlock sites only, to which a transfer would have constituted a regressive step, there being no scope for association. The Claimant's return to HMP Full Sutton was said not to have been an option, given the offence which had caused him to be referred into the CSC estate. HMP Manchester was discounted owing to the Claimant's assault on staff whilst in a small association group there. HMP Whitemoor was discounted for similar reasons, owing to the Claimant's assault on a prisoner whilst there, and the presence of

prisoners who would pose a risk to him. That prison is said to have limited resources to manage multiple unlocks, having only one exercise yard, such that it would be very difficult to manage the risks presented by locating the Claimant there.

- f. There are said to be five other prisoners within the prison estate with whom the Claimant is not permitted to associate, three of whom in the CSC estate. Two such prisoners have made threats to harm the Claimant; two, acting with the Claimant, have previously incited others to harm staff; and one cannot associate with him because of the risk of harm which that association might pose to others. It is said that, accordingly, of the 21 prisoners designated as mixed unlock across the CSC estate, seven were immediately ruled out as possible associates, though it will be appreciated that no explanation has been provided for two of that latter number.
- g. On 25 May 2022, the DRAM minutes for the Claimant recorded that another prisoner, DA, was to be transferred to the Claimant's wing, following conversations between the CMG and the prison of which there is no written record. DA was said to have been identified in order that his own association could be facilitated, and he and the Claimant were considered safe to associate with one another, lacking any prior history. Although DA was a vulnerable prisoner, he was not high profile and the view taken was that the Claimant would present less of a risk to him. The intention had been to introduce DA into the Claimant's group and to facilitate time together in the exercise yard. The DRAM minutes for 1 June 2022 made the further observation that direct contact between the two could be considered, subject to MDT approval that it would be safe to allow association. On 21 June 2022, the minutes of the CSCMC meeting recorded that DA was due to move to Unit B at HMP Woodhill. The following day, the Claimant's association was considered at the DRAM and the observation made that DA was due to arrive on the wing the following day and would share regime time with the Claimant. Separate records for that date indicated that a supervising officer had spoken to the Claimant about DA's arrival and the proposal that he integrate into a group with the Claimant, subject to an initial period of shared domestic time during which a risk assessment would take place. The Claimant was said to have expressed unhappiness at the prospective disruption of his domestic time, which he did not wish to share, and to have stated that he was being caused more stress and was unhappy with the proposed situation.
- h. An entry in the Claimant's NOMIS records for 24 June 2022 records a conversation between the Claimant and a psychologist in which the possible association group with DA had been discussed. It was recorded that the Claimant had made it clear that he had heard that DA held racist beliefs towards Muslims and people from Asia and, therefore, would not be willing to associate with him. It was also recorded that the Claimant had stated that he did not understand why he was being asked to consider associating with a vulnerable prisoner, clarifying that an earlier comment which he had made concerning his willingness to associate with anyone had been intended to mean anyone from the main location and that he did not think that a vulnerable prisoner would be considered. He was said to have been clear that he would

not be willing to associate with DA, and to have indicated his wish to speak to the unit governor regarding association groups, so that DA's arrival would not have an impact upon him. He was recorded to have reiterated his refusal, for religious reasons, to associate with DA, by reason of his status as a vulnerable prisoner, on 29 June 2022. A conflicting message was said to have been given on 7 July 2022, whereby he had indicated that he considered the CSC staff to be responsible for preventing him from being in an association group with DA, albeit that his refusal to do so was again documented in the DRAM minutes for 6 and 13 July 2022. The minutes of the DRAM on 27 July 2022 recorded the Claimant's implied threat (as interpreted by prison staff) to assault DA, were the two to associate. It was then deemed unsafe for them to do so and constraints on accommodation required that DA be transferred out of HMP Woodhill before any other prisoner who might be able to associate with the Claimant could be transferred in. The CSCMC minutes of 19 July 2022 document the Claimant's declining to associate with DA, or with anyone else, and that that would prohibit him from demonstrating appropriate risk reduction. The hope was that the Claimant would reconsider his then current stance.

- i. The DRAM minutes of 3 August 2022 record that enquiries were made with the Claimant as to whether he would be willing to associate with another prisoner, AY, were he to be transferred to the wing. That had stemmed from a CMG site visit during which the Claimant had suggested that he would associate with AY. The CMG minutes of 5 July 2022 record the proposal that AY be transferred to HMP Woodhill to allow an association group with the Claimant. The governor had confirmed that such an association would be appropriate. On Mr Betts' evidence, the Claimant had responded by stating that he was unwilling to associate with a prisoner who was on medication; that he was worried about the risk which AY's paranoia and mental health could pose to him (the Claimant); and that AY did not come out of his cell regularly. The psychology team noted that the Claimant needed to acknowledge that the prison was trying to meet his needs. The same was noted in the DRAM minutes for 10 August 2022.
- j. At around the same time, the MDT suggested that the Claimant could associate with one of the prisoners in Group B, following observations of positive interactions between them. However, the suggestion was not considered to be viable, because the prisoner concerned was a known drug user, who had mental health issues, thereby falling within the category of prisoners with whom the Claimant had previously indicated that he would refuse to associate.
- k. In the DRAM minutes for 17 August 2022, it was noted that the Claimant had asked to associate with prisoner MA. He was first informed that that was unlikely to happen and, in the course of a CMG site visit, on 9 November 2022, Mr Betts informed him that it would not be possible, owing to counter-terrorism concerns. MA had been one of those with whom he was not permitted to associate by reason of the risk that their association posed to others.

- l. The minutes of the 7 September 2022 DRAM recorded the Claimant's ongoing unwillingness to associate with AY and request that he be transferred to a different CSC, if a solution could not be found. Mr Betts stated that they were reluctant to agree to that. By that time, two individuals had been identified by the CMG as potential associates for the Claimant, with each of whom he had refused to associate, instead proposing his own list of prisoners, most of whom considered to hold extremist Islamist views, or assessed to pose a risk to staff and security, were they to associate with the Claimant. In any event, it is said, the Claimant could not transfer to any of the other CSC units, given his history of violence there.
- m. DRAM minutes for October 2022, and NOMIS records over the same period, recorded that the Claimant had been asking questions about his association group and whether he was being considered for a transfer. At around the same time, LF's behaviour at HMP Full Sutton had deteriorated and the CMG, in conjunction with the local teams, made the decision to move him back to HMP Woodhill to enable re-engagement with his MDT, maintenance of his progression, and association with the Claimant. LF returned to HMP Woodhill on 4 November 2022. DRAM minutes for 10 November recorded the Claimant's apparent willingness to form part of an association group with LF and NOMIS records indicated that the two were getting on well. Association was approved on 23 November 2022, though it was noted that LF did not trust himself around other prisoners and that it was likely that he would prefer to be on his own rather than in the approved association with the Claimant. The DRAM minutes for 21 December 2022 recorded that LF maintained that he was not ready to associate, but that there was no intelligence of a threat to the Claimant. The MDT's decision was that the Claimant was not to be unlocked with LF until it had received assurance from both prisoners that they were ready. LF continued to refuse to associate with the Claimant.
- n. The minutes of the DRAM of 28 December 2022 record the MDT's concern that, at that time, LF could pose a danger to the Claimant, were they to associate. The decision was taken to unlock them separately. In his comments during the December monthly review, the Claimant stated that LF was refusing to associate with him, but that he remained willing to associate with LF. DRAM minutes of 4; 11; and 18 January 2023 each record the Claimant's previously stated willingness to engage with anyone, but that, following the transfers of DA and AY, he had found reasons to refuse to associate and that he remained unable to associate with LF, owing to the latter's refusal to do so.
- o. On 27 January 2023, LF informed staff that he was ready and willing to associate with the Claimant, an association approved by the governor on 29 January 2023, but later terminated following LF's assault on the Claimant, on 16 March 2023, whereafter it was no longer deemed safe for them to do so. It is said that the Claimant had consistently informed prison staff that he did not know why LF had attacked him on 17 March 2023. A psychologist on the unit had informed Mr Betts of a conversation which she had had with LF during a scheduled visit, which had taken place following the assault. The record of that latter conversation records LF's assertion that the Claimant had asked him not to associate as their association would be detrimental to his ongoing legal



proceedings and that he had not told staff the truth when asserting that he was not in the right place to associate. After LF had been told that there was a possibility that he could be moved to a DC in order to free up space for someone who was ready to associate, LF had spoken to the Claimant and said that he would be coming out of his cell, which would not ruin the Claimant's case. In response, it was said by LF that the Claimant had sought to persuade him otherwise and had shown him his paperwork, said to have explored the 'politics' between people in the CSC. LF had stated that, when they had not been associating with one another, the 'vibes' between them had been good and that the Claimant would come to his door, where they would have good conversations. However, once association had commenced, so LF had informed the psychologist, the vibe had been dead. He said that he had known the Claimant for a decade and had felt used by him, stating that, over the previous fortnight, they had not been greeting one another, and that he (LF) had decided that he would not put up with that, which had led to the assault. LF had requested that he not be put on another association group with the Claimant, as he considered that that would increase his paranoia.

- p. Having discussed the matter with the MDT team, Mr Betts had formed the view that LF's statement was credible. He noted his concerns that the Claimant was seeking to manipulate his associations, in an attempt directly to affect these proceedings, setting out a list of occasions between 5 November and 23 December 2022, on which the Claimant had sought to confer, or had conferred, some benefit on LF, for example asking that his lunch be given to him, or gifting his Xbox or time allowed out of his cell to LF.
- q. Mr Betts' evidence is that, following LF's assault on the Claimant, work had been ongoing to identify prisoners with whom the Claimant could associate and that that is a priority for the CMG, as mentioned in the minutes of the meeting of 4 April 2023 and communicated to the Claimant in his DRAM feedback letter of 12 April 2023. It is said that a prisoner at HMP Full Sutton had been identified as someone with whom the Claimant could associate, but had been considered no longer to be appropriate following that prisoner's assault on another prisoner. Another prisoner at HMP Whitemoor had been identified whose transfer to Woodhill attempts were being made to facilitate.
- r. Mr. Betts observes that, since April 2022, the Claimant's cell has included a television, and a telephone which he is permitted to use at any time other than between midnight and 06:00; he has access to newspapers, should he wish to buy them, and to books from the wing and the library; he has access to an outdoor exercise yard and is visited by an imam at least once a fortnight; and most weeks, he has an hour-long session with the psychology team. It is said that, until 14 September 2022, the Claimant was able to have closed visits, whereafter he was given the opportunity to have open visits with those with whom he had established a good rapport. According to his NOMIS records, only one visit, from the Dutch consulate, on 30 May 2022, took place during that time. Nevertheless, it is said, he is able to request up to three visits per month, under risk-based conditions; he is able to leave his cell for an hour a day, during which time he may exercise and shower; notwithstanding his lack of association, he has had opportunities to engage and interact with other

prisoners and staff on the CSC, and, thus, has not been held in total isolation; he has daily face-to-face interaction and engagement with staff, to an extent of his choosing, and, it is said, the available records indicate a reluctance, on occasions, to engage with officers on the wing, and, on others, his enjoyment of lengthy conversations with them. A non-exhaustive record is said to illustrate the nature of the Claimant's interactions with prisoners, staff and other professionals.

### **The Claimant's evidence**

34. In his second witness statement, the Claimant replied to some of the matters about which Mr Betts had given evidence. He said that he had been shocked and upset at the allegation that he had manipulated his association by seeking to bribe LF into not associating with him, and that he had not been shown any of the remarks which LF is alleged to have made at any earlier stage. He stated that LF's allegations were untrue and that the point of these proceedings is to attempt to achieve association with one or more other prisoners, which is very important to him and necessary in order to progress out of the CSC. Asking others not to associate with him would have been an act of self-harm. The Claimant said that he had been encouraged by prison staff to talk to LF through his door, with a view to encouraging him to associate, but that LF had stated that he was not in the right state of mind to associate and that he wished to find out why he had been moved and to be transferred out of HMP Woodhill. The Claimant stated that he had never asked LF not to associate with him because of his legal proceedings and, indeed, had not mentioned them to LF until around 18 February 2023, when they had become relevant following an incident the previous day in which LF had been aggressive to an officer, leading to his level being increased to a three-man unlock. When LF had later asked him why he had not backed him up when he had confronted the officer, the Claimant had told him that he wished to use the proper channels to raise problems which he was facing, rather than cause trouble with officers, and had mentioned these proceedings to indicate that he was trying to use lawful means to resolve his situation, recommending that LF adopt the same course. The only other occasion on which he had discussed possible legal proceedings regarding his lack of association had been in April 2022, at a time when LF had been about to transfer to HMP Full Sutton and the Claimant had mentioned that he was considering bringing a challenge, as he knew that he would be isolated, having no-one with whom to associate. On around 22 February 2023, LF had asked how the Claimant's legal proceedings were going and the Claimant had mentioned the suggestion that he associate with AY, which had not worked out. LF said that he thought that it was possible that he had been moved from HMP Full Sutton in order to resolve the problem of the Claimant's lack of association.

35. It is the Claimant's evidence that he and LF had started sharing food in January 2022, as the Claimant did not like cold lunches, in exchange for which LF would give him all or part of his hot meals on certain days of the week. That had been quite normal and prison staff had been aware of it at the time. When LF had been transferred out of HMP Woodhill, in April 2022, the Claimant had not eaten his cold lunches, a fact which had been noted in his CSC monthly review for July of that year. They had shared food in November 2022, on LF's return to HMP Woodhill.

36. When it had become clear that LF no longer had his PlayStation, the Claimant had offered him an extra Xbox 360, which he had not been using, as he had known that LF had been 'in a bad way' after the transfer. LF had offered to pay for it, but the Claimant had declined, as he had had no use for it. He had put in an application to give LF the Xbox, a controller and a game on 16 November 2022, mentioning that it was a gift as he (the Claimant) already had an Xbox and did not need two of them. At around the same time, he had been asked whether he would be willing to go back into an association group with LF and had said that he would be happy to do. He had also told an officer, on 16 November 2022, that he had no issue associating with LF but that LF had made clear that he did not wish to associate with him. On 23 November 2022, he had complained at his prolonged confinement and explained that he could not understand why LF did not wish to associate with him, stating that that had not been explained to him and requesting an explanation. He was told that association would be revisited when LF was ready. The Claimant contends it to be obvious from his complaint that, rather than trying to persuade LF not to associate with him, he had been desperate for him to do so and had wished to find out why LF was refusing to associate. He said that it would be 'completely bizarre' for him to have asked the prison to investigate why it was that LF was not associating with him, had he known that it was because he had bribed LF not to do so. When the transfer of the Claimant's Xbox had been approved on 29 November 2022, the Claimant had not mentioned his ongoing proceedings to LF. At no stage had officers raised any concerns that he had been bribing LF and everything had been done through the proper channels. Gifts in exchange for favours were prohibited in prison and, says the Claimant, he assumes that the governor must have been satisfied that the gift for which he had sought permission had not been a bribe. In any event, LF had not been the only prisoner to whom the Claimant had gifted items; he had given an Xbox controller to RH, on Unit 6A, following the approval of his application to do so.
37. It is the Claimant's evidence that, following LF's aggression towards an officer on 17 February 2023, he (LF) had grown increasingly paranoid, believing that officers were talking about him, between themselves and to the Claimant, nevertheless their greeting of one other had continued in the period running up to LF's assault on the Claimant. On 1 March 2023, LF had appeared to be in a strange mood, often asking the Claimant what was in his head and what was in his mind. He had also gone to stand close to the officers at one end of the landing, rather than walk up and down the landing with the Claimant, as he usually did. His mood had improved the following day and he had apologised to the Claimant for his behaviour on the previous day, saying that he had been feeling paranoid. Records for that week indicated that the two had appeared to get on well, as had the DRAM feedback dated 8 March 2023. On 11 March 2023, LF had used the gym, so there had been no association. He had made a serious threat to an officer, overheard by the Claimant. On 15 March 2023, LF had told the Claimant that he was feeling paranoid that staff had been talking about him. The Claimant's evidence is that he had heard from three officers that earlier issues with paranoia had led to LF assaulting a member of his association group, RR, in 2021, other members of which group had then asked to leave it for fear that he would do the same to them.

38. The Claimant says that he has been asked on multiple occasions why he thought that LF had attacked him, to which he had replied that he thought it was because LF was paranoid; conversations which had been recorded in his NOMIS records. Contrary to Mr Betts' evidence, the Claimant had not told prison staff that he was unaware of the reasons for that attack. His stated opinions had been recorded in his CSC weekly report for 12 to 18 March 2023. He had made a similar statement to his psychologist on 17 March, as recorded in the minutes for that meeting, having given a more detailed account in a complaint which he had entered on 16 March 2023. He had had a further conversation with an imam, on 7 June, who had said that he thought LF to be very paranoid. The Claimant says that, on approximately 25 March 2023, he had had a conversation with an officer in the exercise yard, who had told him that LF routinely asked officers whether they had been talking about him, especially when he had seen them speaking to other prisoners. The first occasion on which the Claimant had heard of the allegations which LF had made to his psychologist on 17 March 2023, had been on reading Mr Betts' first witness statement. The Claimant says that LF had made it clear to him, from the time of his return to HMP Woodhill, that he wished to be transferred to another unit, and thinks that he might have come to blame him (the Claimant) for his transfer from HMP Full Sutton following the Claimant's refusal to associate with DA and AY. He speculates that that might have contributed to LF's assault on him, though he cannot be sure to what extent. That is consistent with his solicitor's witness statement, concerning conversations which she has had with another prisoner regarding that prisoner's conversations with LF.
39. The Claimant also says that he does not recognise the account which Mr Betts gives of events concerning DA. He sets out the nature of those concerns and the information which he gave to prison officers at the time. He reiterates his understanding that his concerns were not investigated and that refusing to associate with DA had been his only option. He states that he had not been informed that anything which he had said had been taken as an implied threat towards DA until his CMP quarterly review on 9 September 2022, in the course of which he had explained that he had not threatened to use violence against DA. He observes that associating with vulnerable prisoners can have serious consequences as other prisoners can come to form negative views, concluding that the associate is himself a sex offender, with rumours being spread accordingly. The Claimant says that he was especially vigilant about avoiding that sort of risk, where possible, given the long sentence which he has to serve during which he could be attacked. His evidence is that he had not stated that he did not wish to associate with DA for religious reasons and had not been aware that that view had been held about him prior to reading Mr. Betts' witness statement. Similarly, he says that he has never said that he would not be willing to associate with prisoners who are taking medication and that he had not been aware that the prison service had been of that view prior to reading Mr Betts' witness statement. He had said that he had had a negative experience of forming part of an association group with another prisoner who had been taking strong anti-psychotic medication and that he would be concerned about associating with prisoners who had severe mental health issues and who took such medication; he had not wanted to be 'stuck' in a two-man association group with an individual who never came out of his cell and slept all the time, as, in his experience, those taking anti-psychotic medication often did, as that would have done nothing to help his feelings of isolation. The Claimant states that

he had never said that he would not associate with known drug users, or with prisoners having mental health issues, nor had he been aware of that belief before reading Mr Betts' witness statement. The Claimant says that he had formed association groups with drug users at two other prisons, in 2014 and 2019, and, in 2018, with prisoners who had had a history of drug use. That had caused no issue for him at that time and he had enjoyed good relationships with the relevant individuals.

40. Having seen the reasons given by Mr Betts for the decisions taken regarding his lack of association, the Claimant says that, had he been so informed at the time, he could have corrected misunderstandings and explained the true position. When he had arrived at Unit 6B, HMP Woodhill in November 2021 he had been told that he could not associate with other prisoners on the unit but had not been told why that was. Knowing those who were detained in the unit, he had assumed that it had probably been because they were racist and/or Islamophobic, therefore posing a risk to him, though it now appeared that that had not been the main, or only, reason. The Claimant's evidence is that he had also been given inconsistent explanations for the refusal of his requests to be transferred to HMP Whitemoor. On 25 May 2023, he had been told by a governor that that would not be possible because transfers were very difficult and there might not be room for him. It had also been said that it was the CMG which made decisions regarding transfers. Later that day, the CMG had told him that progressive moves needed to be determined by the MDT. During that same meeting Mr. Betts had told him that it had been the MDT which was responsible for transfers. The Claimant had told him that the MDT had repeatedly said that it did not make decisions concerning transfer. He says that he had not been given reasons why he could not move, simply that the decision had been made by someone else. Mr. Betts had told him that the CMG could make only operational moves and had cited the example of moving LF away following his assault on the Claimant. The Claimant says that he had also been told that he could not be transferred to HMP Whitemoor because he had assaulted a prisoner in the CSC unit there. That had been a reference to GV, whom, on his account, the Claimant had assaulted in self-defence in July 2019. That had been given as the reason why a transfer could not take place in October 2021, but a different reason had been given in June 2023, in which it had been stated only that he had outstanding CMP targets to meet. No-one had properly explained to him why he could not transfer to HMP Whitemoor, or who it was that had been responsible for making that decision. His understanding, gained from a prison officer at HMP Woodhill who had formally worked in the CSC at HMP Whitemoor and was familiar with its layout, was that there were at least two association groups in the CSC, meaning that he could associate with a different group from that of which GV was a member. It had never been explained to him why that would not be possible, nor did he know whether it had ever been considered as an option. In any event, as far as he was aware, no one had ever investigated properly his contention that he had acted in self-defence and no one had told him whether that had been considered, or, if so, with what conclusion. The Claimant states that, prior to reading Mr Betts's witness statement, he had not been informed that a transfer to HMP Full Sutton would not be an option. The reason given for that had been an incident which had taken place over 10 years previously and it was not clear from Mr Betts's statement whether the staff concerned were still based at HMP Full Sutton, and, if so, deployed to the CSC unit at that prison. He had not been told whether, if not and in the absence of any contact

with them, there was some rule or policy which meant that a prisoner who had assaulted a member of staff could not return to the prison at which that had occurred. The same position applied to the reasons, given for the first time by Mr Betts, why a transfer to HMP Manchester would not be an option. Notwithstanding his understanding that there were limited opportunities for association with prisoners outside the CSC system, he had never been told whether that had been considered in his case and, if not, why not. It would seem surprising if there were not a single person in the prison estate with whom it would be possible for him to associate, even on a limited basis.

41. The Claimant denies having incited violence against staff at HMP Belmarsh in early 2021. He says that he was not the subject of any adjudication in that connection, nor had he been asked about it. Prior to reading Mr Betts' statement, he had not heard of the allegation. He notes that it had not featured on his monthly CSCMC reports. Having been transferred from HMP Belmarsh to Long Lartin, he had raised complaints seeking an explanation for his transfer. At no point had he been told that there had been concerns to the effect that he had been inciting violence. Nor had he been in discussion with terrorist offenders whilst there; he had been held in a DC, under a regime which had not permitted association. The Claimant says that, at his trial and conviction for having made threats to kill, it had been accepted that calls for the release of certain terrorism-related offenders had not emanated from him. His co-defendant had taken full responsibility for those during the trial. The Claimant observes that none of his CMP targets, and no part of his risk reduction work, has related to extremism and it has not been suggested that there is any security intelligence report relating to him in that connection. None of the imams had indicated that he is seen as holding extremist views, or raised any concerns with him.
42. The Claimant also makes clear that he has never seen any of the documents which Mr Betts has exhibited to his first witness statement, prior to their disclosure in these proceedings. In particular, he says, he had not been provided with minutes of the CSCMC's meetings concerning his placement, or with those of CMG meetings. He had not been provided with any of the DRAM minutes, or any of the operating and clinical leads' site visit notes. The Claimant emphasises that a prisoner having enhanced status *'exceed[s] Standard level by abiding by the behaviour principles and demonstrating the required types of behaviour to a consistently high standard including good attendance and attitude at activities and education/work and interventions.'* Since 20 May 2023, his risk level has been downgraded; he is assessed to be high risk to prison staff; and medium risk to known adults and prisoners. In so far as Mr Betts' assessment of his risk is informed by his assertion that the Claimant has received 42 adjudications, the log on which he relies is misleading, containing multiple entries relating to the same incidents. The Claimant says that, in fact, he has received only three adjudications; one of them, in 2011, for having an unauthorised article in his possession (a radio which had been lent to him by another prisoner), whilst a remand prisoner; the second, in 2014, for destroying or damaging an item which had not been his own (having marked an electric shaver which had been lent to him by the prison service with his own name, for which he had not been punished at the time and which he had believed to have been dismissed until reading Mr Betts' statement); and the third, in 2019, for disobeying a lawful order, having asked for an explanation for a requirement that he go into a

body scanner. Finally, the Claimant states that Mr Betts' account of the regime to which he (the Claimant) has been subject is inaccurate in certain respects and less generous than Mr Betts' evidence would suggest.

43. Following service of the Claimant's second witness statement, no further statement was served by Mr Betts to contradict the evidence given by the Claimant.

### **The grounds of challenge**

44. Of the eight grounds of challenge to the Claimant's ongoing segregation originally advanced, only four are pursued, respectively numbered one, two, three and five:
- a. **Ground One** asserts that Rule 46(2) requires that the Defendant review and renew any direction that prisoners in the CSC be removed from association at least every month, if such continued removal is to be lawful. The Defendant has delegated the powers conferred by Rule 46(2) to the CSCMC. Throughout the relevant period, the CSCMC did not review, or authorise, the Claimant's continued removal from association, or purport to do so. Thus, the Claimant's continued removal from association is unlawful.
  - b. **Ground Two** asserts that, as a matter of common law, decisions to place and maintain a prisoner in segregation must be made fairly, having regard to the serious consequences which can ensue. That entails provision of meaningful opportunities to make representations to the decision-maker, challenging decisions to place a prisoner in, and maintain, segregation: *Bourgass* [98] to [102]. The Claimant asserts that he does not know the identity of the relevant decision-maker, or when and how representations are to be made. In any event, he has not been provided with sufficient reasons to enable him to make meaningful representations. Thus, it is said, the process adopted is, and has been, unfair.
  - c. By **Ground Three**, the Claimant asserts that holding prisoners in segregation engages their rights under Article 8 of the European Convention on Human Rights ('the ECHR'), read with section 6(1) of the Human Rights Act 1998 — 'the HRA'. Were he to succeed on Grounds One or Two of his challenge, his segregation would not be in accordance with domestic law, or, therefore, '*in accordance with the law*' for the purposes of Article 8. There is an issue between the parties as to whether this ground of challenge, as pleaded, encompasses the further contention that, in order to comply with Article 8(2), the regime governing segregation must contain sufficient safeguards against arbitrary, disproportionate and discriminatory use, including by making provision for the giving of reasons; the involvement of the prisoner affected in the decision-making process; and the review of continued segregation. The current legal regime is said not to satisfy those requirements. (The Claimant no longer pursues a contention that the conditions of his detention are disproportionate.)
  - d. **Ground Five** asserts that the public sector equality duty ('PSED') for which section 149 of the Equality Act 2010 ('the EqA') provides requires the Defendant to have '*due regard*' to whether the presence of an allegedly

significant body of racist and Islamophobic prisoners in the CSC, who are committed to attacking Muslim prisoners, places the latter at a disadvantage and, if so, to consider the need to take steps to '*remove or minimise*' that disadvantage. It is said that the Defendant has produced no evidence to the effect that she has done so.

### **The parties' submissions**

#### *For the Claimant*

##### *Ground One*

45. It is the Claimant's case that Rule 46 requires the Defendant to review and re-authorise removal from association at least monthly and that the CSCMC has not done so, rendering his continued removal from association unlawful. That submission, it is acknowledged, depends upon the proper construction of Rule 46. Two questions arise: first, whether the rule requires the Defendant to review, and, if necessary, renew, a prisoner's removal from association, or only his placement in a CSC. The second is whether prisoners who are, in practice, held in solitary confinement should be deemed to have been removed from association within the meaning of Rule 46 if, as a matter of principle, they have been deemed suitable to associate with others but there is no-one with whom it is considered that safe association can in fact take place.
46. As to the first point of construction, it is submitted that Rule 46(1) has two elements, the first providing for removal from association and the second for confinement within a CSC. On an ordinary reading of the language, it is said, the maximum period of each element cannot exceed one month and the direction will lapse if not renewed. The language of Rule 46(2) is inconsistent with an alternative construction to the effect that it is applicable only to placement in a CSC, leaving removal from association to be capable of continuing indefinitely without review. Furthermore, such a construction would be inconsistent with the provisions of Rule 45, whereby an initial direction for removal from association requires periodic review and renewal. A less rigorous requirement under Rule 46 would be extraordinary and inexplicable, as well as running contrary to Article 8 ECHR. The premise of the Prison Rules is that association is permitted, subject to Rules 45 and 46.
47. As to the second point of construction, it is submitted that a theoretical ability to associate cannot itself remove the need for review and renewal of the initial direction and would lead to a breach of a prisoner's Article 8 ECHR rights. It is said to be a question of fact whether a prisoner is removed from association, which is determined by the existence of a state of affairs, as opposed to theoretical possibility. Mr Squires KC submits that, if a prisoner's door is unlocked at the same time as the doors of other prisoners are unlocked, but he refuses to come out of his cell, he is able to associate and the need for a review is not triggered. If that state of affairs continues, he might be removed from association for that reason. If the door is not unlocked, because the prisoner has said that, were it to be unlocked, he would not come out of his cell, he is removed from association. Since March 2023, however, no question of refusal has obtained; the only period during which the Claimant refused to associate (with DA) was in June/July 2022.
48. It is not disputed that, as a question of fact, the CSCMC has not been reviewing or reauthorising the Claimant's removal from association, whether at monthly



intervals or at all. If Rule 46 is considered to create practical difficulty in its operation, the Defendant must seek its amendment, as occurred in relation to Rule 45, following *Bourgass*. It is not open to her simply to decline to follow its provisions.

*Ground Two*

49. The Claimant contends that decision-makers owe a common law duty to act fairly, to include giving the affected individual the opportunity to make representations (see *R (Doody) v SSHD* [1994] AC 531, 550; and *Bank Mellat v HMT* [2014] AC 700 [29]; [178]-[179], applicable to decisions to authorise continued removal from association: *Bourgass* [98]). In order that a right to make representations be meaningful, those affected must be provided with sufficient reasons: *Doody*, page 550, without which ‘a right to make representations is largely valueless’: *Bourgass* [100]. Sufficient reasons ought to be given both for the initial segregation and for the need for its continuation: *Bourgass* [102], resulting in the provision made by paragraph 2.20 of the Amended Policy (set out above). It is said that the reasoning in *Bourgass* applies equally to Rule 46 and is unaffected by the fact that association might take place at some future date by reason of an ‘in principle’ decision permitting it to do so.
50. In this case, it is submitted, the Claimant needs to know the following matters if he is to make meaningful representations: (1) the identity of the decision maker; (2) when and by what means he can make representations to that individual; (3) sufficient reasons for the decisions taken, including why it is that he is deemed unable to associate with anyone on his unit, why he cannot be transferred to another CSC unit in which association could take place, and why he cannot associate, for limited purposes, with prisoners from outside the CSC system. It is said that none of these requirements has been satisfied, whether by the relevant decision-maker (the CSCMC), or otherwise. That is said to be evidenced by the Claimant’s lack of awareness, prior to his receipt of the Defendant’s evidence in these proceedings, of most of the reasons for which it is now said that he is unable to associate with other prisoners. Indeed, his initial formulation of his grounds of challenge had been based upon a misapprehension of the primary reason for his lack of association. It is submitted that, if the decision-maker holds a genuine, but mistaken, belief, and his or her reasons have not been passed on to the Claimant, Ground Two should succeed — the relaying of reasons enables a prisoner to point out the relevant error. If necessary, for reasons of security, those reasons can be given in gist, or suitably redacted: *Bourgass* [103] to [105]. In short, it is submitted, the process has been unfair, rendering his segregation unlawful.
51. It is further submitted that, where there is a dispute on the evidence, it is to be resolved in accordance with the principles distilled in *R (F) v Surrey County Council* [2023] 4 WLR 45 [46] to [50]. Should the grounds of challenge require the factual dispute to be resolved, it should be resolved on the papers, with the party who seeks to prove a fact to bear the burden of doing so. When undertaking that exercise, the Court is not required to accept any evidence from a witness who has not been cross-examined; it can reject evidence which ‘cannot be correct’, or, for example, which is inconsistent with other evidence. If a conflict cannot be resolved, the Court should proceed as if the relevant fact has not been proven. Mr. Squires submits that the only dispute which might need to be resolved, is whether reasons

were given to the Claimant at various stages. Even then, the reasons said to have been given are submitted to have been inadequate. Were that submission to be accepted, the factual dispute need not be resolved.

*Ground Three*

52. It is submitted that, for a power the exercise of which interferes with Article 8(1) rights to be ‘*in accordance with the law*’, for the purposes of Article 8(2), it must be accompanied by sufficient safeguards against the risks that it will: (1) be used in an arbitrary or discriminatory manner: *R (Roberts) v Commissioner of Police of the Metropolis* [2016] 1 WLR 2010, SC [3]; and (2) give rise to a disproportionate interference with Convention rights: *Beghal v DPP* [2016] AC 88 [32]. In connection with solitary confinement, the ECtHR has held that ‘*domestic law must afford a measure of legal protection against arbitrary interference*’: *Maslák v Slovakia* (2022) 75 EHRR 13 [142], to include the subject’s participation in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests: *Maslák* [149], [159], [161]. ECtHR caselaw relating to solitary confinement and Article 3 ECHR, said to apply a fortiori to Article 8 ECHR, has stressed the need for detail, based upon an individualised assessment of necessity.
53. It is submitted that, were the Claimant to succeed on Ground One or Two, his removal from association would not comply with domestic law, or, hence, with Article 8 ECHR. In any event, and irrespective of whether Ground One succeeds, it is said, the legal framework adopted does not satisfy the principles summarised above.

*Ground Five*

54. The PSED is one of process, not outcome. Provided that the Court is satisfied that there has been a rigorous consideration of the duty, it is for the decision-maker to decide the weight to be accorded to the various factors informing the decision: *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037, CA [175(6)]. The duty is both continuing and proactive: *Bridges* [175(4)]; [177]. An important evidential element in demonstrating its discharge is the recording of the steps taken by the decision-maker in seeking to meet the statutory requirements: *R (Bracking) v SSP* [2014] Eq LR 60 [26(2)]. It is for the Claimant to establish that there is reason to believe that there may be a disadvantage: *R (BAPIO) v RCGP* [2014] Eq LR 409 [29].
55. By reference to the above legal principles, the Claimant submits that there is clear evidence of racism and Islamophobia in the CSC system, across the country, including racially and religiously motivated attacks on and abuse of Muslim and non-White prisoners. The Claimant’s evidence of his own experience in that connection is not disputed. He has raised complaints about racist and, specifically, Islamophobic prisoners, including in relation to the Defendant’s proposal that he associate with GV and DA. Further, KT, described by the Claimant as a ‘mixed race Muslim’, had brought a successful claim in the County Court against the Ministry of Justice for failing to have protected him from racially and religiously motivated attacks and abuse in the CSC, and properly to have investigated such matters, contrary to Articles 3, 8 and 14 ECHR. It is said that the CSC is small, catering for up to 68 Rule 46 prisoners, and that there is an obvious risk that, if a sizeable

number of racist prisoners, committed to attacking others, is present within that system, that will create disadvantages for those of a particular race or religion, which the PSED requires the Defendant to consider and to have due regard to the need to remove or minimise. Mr Squires submits that the Defendant accepts that the PSED applies to the management of prisoners in the CSC system, yet has advanced no evidence to demonstrate that she has considered how such a body of prisoners might affect non-White and Muslim prisoners. That is said to be particularly noteworthy following the County Court judgment in favour of KT. It is said that none of the measures and no part of the material upon which the Defendant relies is adequate to its purpose, or satisfies the positive duty incumbent upon her. Reliance upon generalities regarding the workings of a process, or commitment to equality and diversity, will not suffice: *R (Runnymede Trust) v PM* [2022] EWHC 298 (Admin). In Mr Squires' submission, this being a case in which the Defendant has simply not asked herself whether Muslim and non-White prisoners suffer 'disadvantages' within the CSC owing to the presence of a large body of racist and Islamophobic prisoners, and considered the need for any such disadvantages to be 'remove[d] or minimise[d]', it is one in which she has failed to discharge her mandatory obligations. Thus, it is said, the test is not one of rationality (as would be the case in circumstances in which it is said that some, inadequate inquiries have been made), but, in any event, in all the circumstances, were that to be the test, any conclusion to the effect that there is no reason to believe that the presence of the relevant group of prisoners in the CSC may disadvantage Muslim and non-White prisoners would be irrational.

*For the Respondent*

56. Ms Hannett KC submits that there are six matters of important context which ought to inform consideration of all grounds of challenge:

- a. The CSC is a uniquely challenging environment within the prison estate, housing the most disruptive; challenging; and dangerous of the prison population, who cannot be managed within the normal population, as a measure of last resort.
- b. It is a feature of the CSC system that all of its prisoners are likely to pose a risk of harm to other prisoners and/or prison officers. The order and consequences of that risk are of the highest gravity.
- c. Apart from the risk posed by prisoners to one another, a number of factors are extremely constraining when seeking to make arrangements for association:
  - i. the size of the CSC (there being 68 places, and a current population of 58 prisoners);
  - ii. the limited number of CSC units: HMP Woodhill has two units; four other prisons (HMPs Wakefield; Full Sutton; Whitemoor and Manchester) have a single unit; three others have DCs within a segregation unit for those subject to a single unlock regime, which would be of no value to the Claimant; HMPs Wakefield and Woodhill Unit A are also single unlock only;

- iii. the fact that only 21 prisoners are designated as mixed unlock, amongst whom it is common for there to be no association, for safety-related reasons (such as the risk of violence or to national security) peculiar to the individuals or their interaction. The remainder are subject to single unlock. Thus, finding suitable associates is ‘extraordinarily difficult’; and
  - iv. in the Claimant’s case, there are six prisoners across the CSC estate with whom he cannot associate, leaving 15 with whom he may do so in principle.
- d. Placement on the CSC, and decisions concerning association and its removal engage questions of judgement, informed by a number of factors, the overriding one of which being the risk of violence, and, as between (for example) the Claimant and MA, inciting others to commit criminal acts.
  - e. That requires expert judgement to be exercised by the Defendant, via the CSCMC and CMG, but also by the prison itself, in particular given that, within the context of the CSC, every entity is multi-disciplinary and receives input from psychologists, amongst others.
  - f. Whilst the Claimant adopts the term ‘solitary confinement’, that term should be approached with some caution, for the reasons given by Lord Reed PSC in *R (AB) v SoSJ* [2022] AC 487, SC [32]; it is a term lacking definition within English and European law and lacking any universally agreed definition within international law. *AB* post-dates *Bourgass* and the Court’s focus has to be rather more precise. Acknowledging that detention in the CSC will have an adverse impact on health, use of the term solitary confinement obscures that which the Court must consider. In practice, the Claimant has been allowed to exercise daily out of his cell and is encouraged to interact with prison officers; psychologists; imams; representatives of the Independent Monitoring Board; and the mental health team. He is also able to request visits with friends and family and has access to a telephone in his cell. The term ‘solitary confinement’ is not apt to describe those circumstances.

57. Ms Hannett further submits that four legal principles ought also to inform the appropriate response to all grounds of challenge:

- a. There is no private or public law right or entitlement to association; whether or not a prisoner should have the opportunity to associate with another requires *‘the exercise of judgement, having regard to information and advice from a variety of sources, including the governor, healthcare professionals and the prisoner himself’*: *Bourgass* [122] to [125];
- b. It is an inevitable consequence of a custodial order that a prisoner *‘cannot move freely and choose his associates as [others] are entitled to do’*: *R (Daly) v SSHD* [2001] 2 AC 532 [5], a point which applies with greater force to those detained in the CSC;

- c. A prisoner's removal from association is a means by which the prison can manage risk. It is not intended to be punitive. When taking such decisions, the CSCMC is assessing risk, not determining criminal charges: *Bourgass* [92]; and
- d. The Defendant and her department are recognised as '*experts in management of prisoners in the prison estate, including assessing prisoner risk when it is relevant to the wide range of decisions which such management may involve*': *R (Gilbert) v SoSJ* [2015] EWCA Civ 802 [71]. Accordingly, when reviewing such decisions, the courts, ordinarily, will be '*... slow to interfere with decisions which relate to the management of prisons*': *R (Potter) v SSHD* [2001] EWHC 1041 (Admin) [38].

### *Ground One*

58. Ms Hannett acknowledges that the Defendant's position on Ground One stands or falls according to whether a Rule 46(3) direction has been given in relation to the Claimant, and, if so, has had the effect for which she contends. She submits that a direction under Rule 46(1) has two aspects; first the removal of the prisoner from association, and, secondly, the placement of that prisoner in a CSC: *R (Syed) v SoSJ* [2017] 4 WLR 101 [45]. Upholding that interpretation of Rule 46(1), the Court of Appeal ([2019] EWCA Civ 367) held that 'removal from association' bears the meaning '*removal from all contact with other prisoners*' [32] (emphasis original). A direction under Rule 46(3), that a prisoner may associate with others in the CSC (mixed unlock), is said to have the consequence that that prisoner will only be subject to one limb of the direction under Rule 46(1); detention within the CSC. Pursuant to Rule 46(2), the CSCMC, acting with delegated authority, must review whether the Rule 46(1) direction ought to be renewed every month. The extent of that duty will depend upon whether a Rule 46(3) direction is in place, which need take no particular form, may be implicit and need not be capable of immediate implementation, if a period of risk monitoring in relation to a specific association is required. Indeed, if the prison is informed that a particular prisoner does not wish to associate with another, the door will not be unlocked because the refusal itself indicates a risk born of some difficulty between the two. In such circumstances, the non-association results from the prisoner's election, not from the prison's removal of association. Where no Rule 46(3) direction has been given, it is accepted that the CSCMC must review both the prisoner's removal from association and his placement on the CSC. Ms Hannett submits that a Rule 46(3) direction was given on 21 September 2021, in which circumstances the duty of review thereafter, imposed by Rule 46(2), related only to the prisoner's placement in the CSC. The CSCMC had reviewed the Claimant's placement each month, concluding that he could not be managed outside Rule 46 conditions. The lawfulness of those decisions had not been the subject of challenge and it had been under no additional obligation to review the Claimant's removal from association, because he had not been removed from association within the meaning of Rule 46(1), as interpreted by the Court of Appeal in *Syed* — throughout the period to which his challenge relates, the Claimant had been designated a 'mixed unlock' prisoner, permissive of his association with other prisoners, subject to individual risk assessment, such that the direction under Rule 46(1) had been qualified, pursuant to Rule 46(3).

59. Ms Hannett further submits that the CSCMC's obligation under the Prison Rules informs the correct reading of the OpM. The CSCMC is obliged to review and determine *'the appropriateness of the location of CSC prisoners'*, which includes consideration of whether to renew the Rule 46(1) direction for placement in the CSC and whether such prisoners legitimately are placed within the CSC estate. In an appropriate case, association might be a matter which is considered as part of that assessment, but that is not synonymous with a public law duty to review association, she says. In the absence of such a duty, Ground One must fail. Nevertheless, submits Ms Hannett, as a question of fact, a prisoner's association is subject to review and oversight, via the MDTs, at the DRAMs held within each CSC unit. It is said that those DRAMs are better placed than is the CSCMC to review a prisoner's association, because they interact with and observe prisoners and have a better understanding of their day-to-day behaviour and relationships with one another. Per *Bourgass* [122], the identification of those within the CSC who may safely associate with one another *'will depend on an assessment by the prison authorities of a variety of factors, such as the number and characteristics of the prisoners held in the prison, the number of staff on duty, security concerns, disturbances in the prison, and other contingencies...'* It is said that such complex, and often fast-changing, assessments can only be made safely by the MDT, in the local CSC unit, rather than by the CMG on a monthly basis. Whilst centralised bodies might be involved in the process, particularly when it requires the transfer of prisoners between units, there is submitted to be a clear rationale, consistent with the Prison Rules, for the structure of the OpM, which places association within the remit of the DRAMs. In this case, submits Ms Hannett, the CSCMC had identified prisoners with whom the Claimant could associate, and had sought to facilitate their association, notwithstanding the Claimant's refusal to do so; a matter beyond the CSCMC's control (see above).
60. The Claimant's submission that, on an ordinary reading of the language of Rule 46(2), both elements of the direction under Rule 46(1) cannot exceed one month and will lapse if not renewed is said to ignore the effect of a Rule 46(3) direction and its qualification, or variation, of a Rule 46(1) direction. Further, it is said, Rule 46(2) makes no reference to the review of a direction under Rule 46(3), in referring only to a direction given under Rule 46(1). Ms Hannett submits that to be unsurprising, there being no obvious need for the CSCMC to review a direction to the effect that association can resume. Similarly, the Claimant's submission to the effect that the Defendant's interpretation is inconsistent with the reviews required under Rule 45 is said to ignore the effect of a direction under Rule 46(3) – if there is no Rule 46(3) direction in place, such that both parts of a Rule 46(1) direction remain extant, the CSCMC must review removal from association each month, but, where a Rule 46(3) direction is in place, the position is not analogous to that under Rule 45, because there has been no removal from association. The procedural protections conferred, respectively, by Rules 45 and 46 differ because the former rule applies anywhere in the prison estate other than the CSC, in which prisoners have already been selected and met the threshold test imposed by Rule 46(1). In those circumstances, the CSCMC has already determined that association is to be constrained and is in a position to scrutinise the process. That is not true of Rule 45 prisoners.

61. As to the Claimant's contention that he has, in fact, been removed from association because he is not presently associating with other prisoners, Ms Hannett submits that the Court of Appeal in *Syed* ([37] and [40]) had accepted that Rule 46 (and Rule 45) were authorisation provisions, permitting (1) removal from association to be authorised, where that appeared desirable for the maintenance of good order or discipline, or to ensure the safety of others, and (2) resumption of association pursuant to Rule 46(3). Where the Defendant has directed that a prisoner shall resume association, she has determined that it is no longer desirable that he be removed from association, for the purposes of the Prison Rules.
62. Ms Hannett submits that, contrary to the Claimant's position, that does not lead to absurd consequences. Pursuant to the OpM, the CSCMC must consider how to give Rule 46(3) meaningful effect – it must review the '*appropriateness of the location of CSC prisoners*', which will include many factors, such as their relationship with the MDT; the progress being made with risk reduction work; and the suitability of the regime (necessarily including the association which is in fact possible). The DRAMs, too, review the level of association weekly, subject to the oversight of the CSCMC, which, together with the CMG, considers possible transfers in and out of the relevant unit. In any event, the fact that little to no association is taking place in practice for a prisoner who is the subject of a Rule 46(3) does not give rise to an obligation under Rule 46(2) that the CSCMC undertake a monthly review of that prisoner's association. It is submitted that the demarcation in roles between decision-makers is clear: the CSCMC decides whether a direction under Rule 46(3) ought to be made and, with the assistance of the CMG, will identify prisoners across the CSC estate who are risk assessed as suitable to associate with the Claimant. The CSCMC authorises the movement of prisoners within the CSC estate. The local MDT, via the DRAMs, facilitates association within the unit, which may involve the identification of those who are suitable for association. Reasons are provided to the prisoner following DRAM meetings. A decision regarding association requires both central and local input, the central bodies having knowledge and oversight of prisoners across the CSC estate and the local body being in the best position to understand the particular risks posed by individual prisoners in the unit. The process differs from that under Rule 45 but is not inferior. There will come a point where segregation is disproportionate or runs contrary to Article 3 ECHR. That is not the Claimant's case. Were the end of the road to be reached for a prisoner, because the Rule 46(3) direction was incapable of being implemented, he would have to revert to Rule 46(1).

### *Ground Two*

63. Ms Hannett accepts that, as a matter of common law, the Claimant is entitled to the provision of reasons for the requirement that he remain subject to Rule 46. She submits that there has been no breach of that obligation, as reasons are ordinarily provided following the CSCMC's monthly meetings. He is not entitled, it is said, to the monthly provision of reasons for his inability to associate with various prisoners and *Bourgass* is not authority to the contrary. In that case, the relevant prisoner had been subject to a direction by the Secretary of State removing him from all association, in which circumstances the Supreme Court had held that, in order to make effective representations, he had to be informed of the substance of the basis upon which authority under Rule 45(2) had been sought [100]. In that situation, it is said, the position was binary. By contrast, it is submitted, in this case, at all material

times, the Claimant has been the subject of a direction under Rule 46(3), having the effect of qualifying the direction made under Rule 46(1) and permitting him to associate with those with whom he is assessed as being safe to do so. It is said that the Claimant's position is dependent upon the existence of a separate public law duty to review, and give reasons for, decisions made about his association and the identification of those with whom he may safely associate, themselves entailing a series of value judgements, the provision of detailed explanations for which would impose an undue administrative burden. It might also be inappropriate to provide reasons relating to the circumstances of particular individuals. Where there is an extant direction under Rule 46(3), no such duty arises. In any event, it is said, there is good reason for the absence of a duty to explain to those located in the CSC why it is that they are not permitted to associate with particular prisoners; decisions regarding association are nuanced and sensitive, and it will often be inappropriate to disclose information to a prisoner about his own association risk or that of his prospective associate. Decisions regarding association may also reflect the individual preferences of a prisoner, the disclosure of which may give rise to heightened levels of risk and engage confidentiality concerns. For that reason, the Defendant requires flexibility in the level of detail to be provided and there is no need for reasons to be given regarding suitability, it being implicit in the approval of association that the latter may be safely achieved. Even if the provision of some reasons is required, in the context of the CSC that duty will almost always be satisfied by a relatively high-level gist and there will be no need to disclose the underlying evidence or factual basis for the judgements which have been formed.

64. Notwithstanding the absence of a public law duty, Ms Hannett submits that, at all times, the Claimant has been informed, properly and adequately, of the reasons for the changes in association at HMP Woodhill, Unit 6B. He had been aware of LF's departure from the wing. On 11 May 2022, he had been informed by the CSC psychology team that suitable options for an association group might not exist, on the bases of the risks posed to him, and his multiple non-associations. At the quarterly CMP meeting on 10 June 2022, it had been explained to the Claimant's legal representative that the prospect of other prisoners being moved to the wing was the subject of discussion in DRAM meetings; the duty of care to safeguard him was a factor in the absence of association; and that the fact that his previous violence had been peer-related meant that associates of his had to be assessed for suitability. The Claimant had been informed of DA's transfer and of the prospect of associating with him. It had been explained to him that that association would be safe. AY's proposed move had been discussed directly with him. The Claimant had decided not to associate with either prisoner. He had repeatedly sought a transfer to HMP Whitemoor and it had been explained to him that such a move would not be possible because that CSC housed an inmate whom he had previously attacked, resulting in a risk of harm to the Claimant and others on that unit. The Claimant's request that he associate with MA had been met with a response that that would not be an option, owing to counter-terrorism concerns. Ms Hannett submits that the Claimant's position as to the level of information and detail which the reasons to be given ought to contain is unrealistic and ignores the context of the CSC, carrying with it the risk that provision of specific information, including that regarding another prisoner's risk assessment, or the staffing levels at another prison, may itself give rise to a risk. The Claimant's real concern, she submits, is that he



disagrees with the decisions taken, rather than that he does not understand the bases for them.

65. Ms Hannett accepts that, as a matter of common law and pursuant to the OpM, the Claimant is entitled to make representations as to whether he should remain subject to a Rule 46 direction, and in connection with his CMP. She submits that there has been no contravention of that entitlement and observes that the Claimant has made representations which the CSCMC has considered. For the reasons summarised at paragraph 63, above, it is said that there is no right to make representations as to association, save as afforded by the OpM. In any event, the Claimant has been given, and has taken, the opportunity to make representations about his association in general and his preferred associates, both to the CSCMC and, via staff, to the MDT for consideration at DRAMs. Ms Hannett submits that the Defendant has considered, and, frequently, has acted upon those representations, in connection with prisoners DA, AY and LF. The Claimant's transfer to HMP Whitemoor had been considered inappropriate. Here again, it is submitted, his real complaint is that he has not been permitted to choose his own associates and/or the location of the CSC in which he is to be detained. Such matters are not for him to determine, nor are they the subject of the challenge mounted in these proceedings. Once a prisoner has been placed in the CSC, for the reasons to which Rule 46(1) refers, the security risks of allowing association with a non-CSC prisoner would be too great. Such an association might happen on occasion, but only where a prisoner is subject to de-selection and being eased back into normal association. Ms Hannett acknowledges that no such explanation has been given to the Claimant prior to these proceedings, but observes that no representations by him could have been made to any effect because he has yet to reach the stage at which de-selection and phased return would be a viable prospect.

### *Ground Three*

66. Ms Hannett acknowledges that the Claimant's placement in the CSC engages his rights under Article 8 ECHR. She further accepts that, between November 2021 and March 2022; May to June 2022; and August 2022 and January 2023, the decision to maintain him in the CSC was not in accordance with the law, as the CSCMC had included an acting prison governor, contrary to the guidance given by the Supreme Court in *Bourgass*. To that, limited, extent, the Defendant concedes ground three. The balance of that ground is premised upon the merit in grounds one and/or two, which, in her submission, lack merit (see above) and ought to be dismissed.
67. In so far as the Claimant seeks to challenge the system, as opposed to the application of the rules in the Claimant's case, Ms Hannett contends that such a challenge is not open to him on his pleaded case, which is said not to extend to the adequacy of the rules and guidance per se. In any event, the requirement that the scope of any discretion be set out with clarity is said to be satisfied by that part of the OpM which identifies the criteria to be applied when considering association. The OpM further explains the external scrutiny of the DRAM afforded by the CMG and CSCMC. There is also the availability of proceedings for judicial review. It is acknowledged that the OpM does not require DRAMs to provide reasons for their decisions, other than those made under Rule 46(1), and that that would constitute a

deficiency, were the Court to determine that reasons ought to be provided. The same would be true in connection with any requirement that representations be permitted, other than in connection with Rule 46(1).

### *Ground Five*

68. The legal principles applicable to ground five are acknowledged to be as summarised by the Claimant. In discharge of her duty under section 149 of the EqA, the Defendant had conducted an equality impact assessment ('EIA'), in January 2021, updated in February 2023, which had applied to the referral and management of prisoners placed in the CSC. Whilst neither had addressed the specific issue raised by the Claimant, both EIAs had assessed the relevant data in an initial screening to determine whether the use of the CSC system gave rise to any equality issues. Both had considered the safeguards in place to protect against differential treatment, noting the risk that assessments are subjective, but reasonably attaching weight to the fact that they are conducted by professionals of various disciplines, said to reduce the potential for variances or differential treatment for any particular group of prisoners. Ongoing measures were in place to monitor and review equality issues. Ms Hannett submits that the question is whether the Defendant has acted irrationally in not having gathered the information/made the further enquiries which the Claimant contends to have been required; whether there has been some threshold evidence available which renders her decision not to have done so irrational? The answer is said to be no. First, it is submitted that the fact that assessments are risk-based and made by multi-disciplinary bodies reduces the risk of discrimination, in minimising the risk of group-think. Secondly, the question is said to be whether there is evidence of a cohort of prisoners having a risk regarding association and/or progression. Accepting that there is a cohort of racist prisoners on the unit, Ms Hannett submits that there is no evidence that that fact has an impact on either matter.
69. Ms Hannett further submits that the Claimant's argument is premised upon the flawed assumption that Muslim or Black prisoners are at a heightened risk of isolation and thereby suffer discrimination. As above, and as identified in the EIAs, the risk of discriminatory assessments is said to be met by the multi-disciplinary approach of all decision-making bodies, the decisions of which are informed by the views of others. Secondly, the premise that those who are Black or of Muslim faith are more likely to have issues in associating with others in the CSC and, thereby, to end up, effectively, in isolation is unsubstantiated. Its evidential foundation, she submits, comprises simply the Claimant's own experience and that of a particular non-White Muslim prisoner. A striking feature of Ground Five is said to be that those grounds (Six and Seven) by which the Claimant had originally asserted direct and/or indirect discrimination by reference to his race and/or religion or belief have been abandoned and, it is said, the evidence demonstrates that the Claimant's lack of association over the relevant period has resulted, in large part, from his own conduct. KT's experience, albeit highly regrettable, is said not to go to the issue raised by Ground Five, namely whether the presence of racist and/or Islamophobic prisoners in the CSC impedes the ability of Muslim and/or non-White prisoners to associate or progress. Any non-association by KT had resulted from a risk assessment and there had been no evidence before the Court as to his progression. Thirdly, decisions regarding association in the CSC were focused upon a holistic

assessment of risk, albeit one which had regard to the prisoner's current regime status; the most appropriate CSC in which he should be detained; and access to relevant professional staff. They were taken against a background of the limited number of CSC places and the even more limited number of CSC prisoners who were able to associate at all. In that context, it is submitted, the regard which is 'due' under section 149 of the EqA to individual association decisions must be at the very lowest end of the scale: see, by analogy, *R (London Borough of Lewisham) v Assessment and Qualifications Alliance* [2013] EWHC 211 (Admin) [145], citing *R (Greenwich Community Law Centre) v Greenwich London Borough Council* [2012] EWCA Civ 496 [30]. In order accurately to assess the equality impact of a prisoner's ability to associate in the CSC, the Defendant would have to obtain the full reasons why each prisoner could, or could not, associate with others, a level of granular detail which was not required where the EIA had identified that protection against discrimination based on race or religion was conferred by the fact that assessments were made on the basis of the threat posed by an individual prisoner and carried out by a wide range of professionals. Thus, even if the information identified by the Claimant had been obtained, the conclusion reached would have been the same. Fourthly, that was not to put the cart before the horse; the Defendant's obligation was to take such steps as were reasonable to inform herself in order to fulfil the duty imposed by section 149 of the EqA. Her approach, in context, had been rational, being the basis of the Court's review. Fifthly and in the alternative, if the Court were to conclude that there had been a breach of the PSED, it ought to go on to find that, per section 31(2A) of the Senior Courts Act 1981, the outcome for the Claimant would not have been substantially different if the conduct of which complaint is made had not occurred. Whilst the burden was on the Defendant to establish that proposition, plainly it was discharged in light of the Claimant's acceptance that decisions regarding his own association were untainted by discrimination.

### *Relief*

70. Ms Hannett submits that the Claimant has suffered no loss or damage as a consequence of any breach of the HRA and/or the EqA. He would not be entitled to damages under section 8(3) of the HRA, unless the Court were satisfied that an award was necessary to afford just satisfaction to him. In cases involving violations of Article 8 ECHR as a result of segregation, the ECtHR had frequently concluded that a finding of violation constituted sufficient satisfaction, a principle which ought to be applied in this case. No relief had been sought in relation to Grounds One and Two, save insofar as each informed Ground Three, and, in so far as relief was sought in relation to that ground, a short judgment containing declaratory relief to the effect that, during the relevant periods, the decision to maintain the Claimant in the CSC had not been in accordance with the law for the purposes of Article 8 ECHR would suffice; there was no basis for any award of damages: see *Syed*, at first instance [77] and *R (Dennehy) v SoSJ* [2016] EWHC 1219 (Admin) [175]. If the Court were to consider that the reasons with which the Claimant had been provided at the time of the relevant decision had been inadequate, but that such inadequacy had been made good by the provision of greater detail in these proceedings, that, too, would go to the issue of relief.

## **Discussion and conclusions**

### *Ground One*

71. It is first necessary to consider the proper construction of Rule 46. The Court's function in so doing is to determine the meaning of the words which Parliament used: *Williams v Central Bank of Nigeria* [2014] AC 1189, SC [72]. The existence of any anomalies, particularly where they exist on either interpretation urged, cannot limit the meaning to be attached to clear language: *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR (HL) 231, 235C, 235E. It is only when the wording used is 'capable of meaning X or Y [but] X produces injustice, absurdity, anomaly or contraction' that meaning Y may be preferred: *Stock*, 236F. It is for the Government to remedy any construction which it considers to be unwelcome, through amendment, rather than for the Court to distort the statutory language under the guise of a purported process of interpretation: *R(AA) v SSHD* [2017] 1 WLR 2894, CA [47]. '[A]n unlooked-for and unsupportable injustice or anomaly can be readily rectified by legislation: this is far preferable to judicial contortion of the law to meet apparently hard cases ...': *Stock*, 237D. Thus, unless the language used admits of more than one meaning, the (potential) practical consequences of its true meaning cannot inform its construction. That is not to say that the context of the statute (or, here, subordinate legislation) as a whole and the purpose of the relevant provision are irrelevant considerations as aids to construction: *R v Luckhurst* [2022] 1 WLR 3818 [23], nor is it to suggest that, where the ordinary meaning of the words used leads to an extraordinary result, the wording should not be re-examined: *Re British Concrete Pipe Association's Agreement* [1983] 1 All ER 203 at 205, but neither proposition enables an interpretation distortive of its true meaning.
72. The power conferred by Rule 46(1) arises in the circumstances there specified, where it appears desirable...that a prisoner should not associate with other prisoners, either generally or for particular purposes, whereupon the Defendant may direct the prisoner's removal from association accordingly and his placement in a CSC (emphasis added). As that wording makes clear, there are two distinct aspects of a Rule 46(1) direction. So it is that Rule 46(3) provides that the Secretary of State may direct that such a prisoner may resume association with other prisoners, either within a CSC (as defined in Rule 46(5)) or elsewhere. As was held in *Syed*, at first instance [45], when such further direction is given, it 'qualifies or removes the effect of one part of the rule 46(1) direction but it does not remove the direction itself, which remains in place'.
73. Rule 46(2) applies to 'a direction given under paragraph (1)' and does not distinguish between the two aspects of the latter. It provides that such a direction shall be for a period not exceeding one month, but may be renewed from time to time, for a like period. Ms Hannett is right to accept that Rule 46(2) requires a monthly review of whether each part of the Rule 46(1) direction ought to be renewed, for as long as it is extant. The real questions arising for the purposes of Ground One are whether a direction under Rule 46(3): (a) has been given in this case; and, if so, (b) itself removes the need for review of the Claimant's removal from association, if he is not in fact associating with other prisoners. In relation to question (b), a subsidiary question emerges from the Defendant's submissions, namely whether the answer to that question differs according to whether any lack of association is, in whole or in part, the product of the prisoner's own decision not to associate.

*Question (a): Was a Rule 46(3) direction given in this case?*

74. I am satisfied that no Rule 46(3) direction was given in this case. As Mr Squires submitted in reply, the first suggestion that such a direction had been given, by the CSCMC in its meeting of 21 September 2021, came in the course of Ms Hannett's oral submissions. The Defendant's Amended Summary Grounds of Defence ([37]) refer to the Claimant having been '*designated as "mixed unlock" pursuant to Rule 46(3)*', but do not identify a date from which that is said to have applied, or on which (and by which entity) the direction itself is said to have been given. Mr Betts' witness statements are silent on the point. The Defendant's skeleton argument asserted that a Rule 46(3) direction had been in place throughout the period to which these proceedings relate, but did not identify when and how it had been given. The height of Ms Hannett's oral submissions was that such a direction had been implicit in the minutes of the CSCMC meeting which she identified. As that submission recognises, the minutes of that meeting do not record the giving of such a direction. More particularly, the later review, which took place on 8 November 2021, recorded the Claimant's status at that time to have been 'single unlock', meaning that he had to be unlocked on his own. On the Defendant's case, had he been the subject of a Rule 46(3) direction on 21 September 2021 (which it is not suggested had been revoked at any time thereafter), he would have been designated 'mixed unlock' in November of that year, even if the local unit had yet to identify or facilitate a suitable association group for him. Further, accepting that a direction under Rule 46(3) need not take a particular form, I am satisfied that it must be both express and clear in its terms. Anything short of those basic requirements leaves the need, imposed by Rule 46(2), for renewal from time to time of a Rule 46(1) direction which has directed a prisoner's removal from association, and the date by which each renewal must take place, unclear. It gives rise to uncertainty on the part of the Defendant; the CSCMC, and the affected prisoner.

75. As the Defendant accepts, there having been no direction under Rule 46(3), as I find, and no monthly review, or renewal, by the CSCMC of the Rule 46(1) direction relating to the Claimant's removal from association, in accordance with Rule 46(2), that is dispositive of ground one in favour of the Claimant. Nevertheless, for the sake of completeness, and because it has been fully argued, I address, below, question (b) and the subsidiary question to which it has given rise.

*Question (b): Does the giving of a direction under Rule 46(3), without more, itself remove the need for a review under Rule 46(2)?*

76. This question arises on the (erroneous) hypothesis that, during the period commencing in April 2022, the Claimant was subject to a direction under Rule 46(3), notwithstanding which, with the exception of a six-week period in early 2023, no suitable association could be found, whether at HMP Woodhill or elsewhere.

77. It is right to acknowledge that the wording of Rule 46 refers to the giving of a relevant direction by the Secretary of State, rather than to the state of affairs which results therefrom, but it is clear, from *Syed*, that the focus is to be on the latter. In

that case, in the Court of Appeal, at [32], [33] and [39], Haddon-Cave LJ held (with emphasis original):

‘[32] First, the plain ordinary meaning of the phrase “removal from association” in Rule 45(1) means removal from all contact with other prisoners. The literal meaning of “removal” is to “take away” (c.f. The Oxford English Dictionary). It does not mean “reduction” or “limitation” (as Lewis J noted at paragraph [41]). It is instructive that Rule 45(1) allows “removal from association” where it appears desirable that a prisoner should not associate with other prisoners “either generally or for particular purposes...”, i.e. at all.

[33]...the phrase “removal from association” is a synonym for segregation i.e. the removal from *all* association with other prisoners. Lord Reed said in *R (Bourgass)*...at [1]: “*These appeals are concerned with the procedure following when a prisoner is kept in solitary confinement, otherwise described as “segregation” or “removal from association”.* Similarly, in *R (Dennehy)*...at [3], *Singh J (as he then was)* said: “[T]he Claimant has been in what is commonly called “segregation” (strictly “removal from association”).” It is no coincidence that the same phrase “removal from association” is used in both Rules 45 and 46.

...

[39] It is relevant also to note that both Rule 45 and 46 have in-built checks and balances. There are rolling time limits for the periods for which a prisoner’s “*removal from association*” may be authorised and the requirement for regular reviews...Under Rule 46, a prisoner’s “*removal from association*” may be renewed monthly...’

78. As those dicta indicate, the focus is on the state of affairs under which the prisoner is actually detained. As Lewis J, as he then was, put it, in *Syed* at first instance (at [44] and [46]):

‘44. ...references to ‘association’ and to ‘associate with other prisoners’ are references to a state of affairs, that is the ability of a prisoner to interact, outside of a cell, with other prisoners.

...

46. ...[Rule 46(3) provides for the Secretary of State to direct that the prisoner “shall resume association”. The rule contemplates association as being a state of affairs, that is a situation where a prisoner can, outside of his cell, associate or interact with other prisoners. Removal from association means bringing that state of affairs to an end. It does not mean removing a prisoner from a particular wing or changing the number of hours or the number or identity of prisoners, or the location in which association may take place.’

79. That is hardly surprising, given that a direction that a prisoner ‘shall’ resume association which is not implemented is of no utility or protective effect. If the Defendant’s construction of Rule 46 were right, in such circumstances the Defendant would come under no obligation to review and renew a prisoner’s removal from association from time to time, placing him in a position inferior to that which he would have occupied had he remained subject to a direction under Rule 46(1) and to that which a prisoner removed from association under Rule 45 would occupy. I reject Ms Hannett’s submission to the effect that removal of association under Rule 45 is not analogous, because it applies outside the innately constraining environment of the CSC; if anything, that serves to underline the importance of ongoing review for a CSC prisoner. Thus, even on the hypothesis that the wording of Rule 46 admits of the alternative meaning which Ms Hannett urges — that the giving of a Rule 46(3) direction itself removes the obligation imposed by Rule 46(2) — I consider that such a construction produces an injustice and is anomalous, such that the construction which I hold to be correct ought to be preferred.
80. Acknowledging that, at first blush, a reading of Rule 46 which requires a monthly review of a prisoner’s removal from association in circumstances in which, as a matter of principle, such removal is no longer considered desirable by the Secretary of State may be thought counter-intuitive, I consider that to be the proper construction of the Rule: a direction under Rule 46(3) is one to the effect that a prisoner ‘*shall resume association*’. I reject Mr Squires’ primary submission that such wording itself indicates the need for a Rule 46(3) direction to be implemented with immediate effect, which would be inconsistent, at least, with a prisoner’s ability to resume association ‘elsewhere’ (than in the CSC) — it is inevitable that specific association groups will need to be considered, entailing all necessary prior risk assessments and arrangements. Nevertheless, acknowledging that it may not always be possible to give immediate effect to any such direction does not lead to the conclusion that the giving of the direction itself suffices to remove the need for review under Rule 46(2). Once it is acknowledged that the focus of Rule 46 is on the underlying state of affairs to which it relates and not on mere decisions of principle, I am satisfied that, for as long as any Rule 46(3) direction has not been implemented, the relevant prisoner is in fact removed from association under the original Rule 46(1) direction; there being no other basis for his segregation. Accordingly, Rule 46(2) requires that there be monthly reviews and, if appropriate, renewal of that direction by the CSCMC (as the body to which the Defendant’s obligations have been delegated), informed by the CMG and by the MDT’s discussions at the DRAMs, if that state of affairs is to be permitted to continue. If the CSCMC is satisfied that removal from association remains desirable until such time as a suitable association group can be identified and the Rule 46(3) direction implemented, either within the CSC or elsewhere, it will renew the Rule 46(1) direction. Doubtless, its decision will be informed by any refusal by the prisoner concerned to associate with a prisoner who might otherwise be considered suitable; the reasons given therefor; and their perceived merit. Similarly, any challenge by the prisoner to his continued de facto removal from association will be susceptible of scrutiny by the CSCMC and, if advanced by way of an application for judicial review, by the Court. An unreasonable refusal to associate may well be considered to justify ongoing removal from association in circumstances in which the available pool of suitable associates is limited. That will be a fact-sensitive decision.

81. Mr Squires' position that, irrespective of any direction given under Rule 46(3), a prisoner is not removed from association if his door is unlocked but he refuses to leave his cell, but *is* removed from association where, having been informed that the prisoner will refuse to associate, the prison service does not unlock his cell door, might, on superficial analysis, appear unattractive; the outcome in each event is the same, and, it might be thought, unlocking the door in such circumstances is, at best, pointless, such that a failure to do so does not render the Defendant, or the particular unit, the operative cause of the lack of association. On closer analysis, however, I am satisfied that it is correct. The practical effect of the fact that a prisoner is unable to leave his cell for the purposes of association, irrespective of its originating cause, is that the state of affairs to which *Syed* refers obtains. Indeed, on the Defendant's own position, the question is simply one of degree: implicit in Ms Hannett's submission that, were 'the end of the road' to be reached for a prisoner, because a Rule 46(3) direction was incapable of being implemented, he would have to revert to Rule 46(1), is her recognition that it is the underlying state of affairs which determines the Defendant's Rule 46 obligations and not its originating cause. If a prisoner is, in fact, segregated from other prisoners, in the sense discussed in *Syed*, he is removed from association.
82. That construction of Rule 46 does not give rise to absurd consequences, or an extraordinary result, nor does it lead to injustice, even in circumstances in which removal from association results, in whole or in part, from a prisoner's own unreasonable refusal to associate; it acts as a check and balance on his continued de facto removal from association, with all that that entails, for as long as that state of affairs endures. Where a Rule 46(3) direction has been given, but has not been given effect, it enables ongoing independent scrutiny by the CSCMC (rather than the local MDT) of the length of time taken to implement it and any barriers to implementation. The CSCMC's approach will be informed by the local MDT's expertise and local knowledge, but will not be dictated by them.
83. In this case, for the significant majority of the period to which these proceedings relate, the Claimant has not associated with any other prisoner outside a cell. Irrespective of whether the reasons for that state of affairs are sound, and/or it is, in whole or in part, a situation of his own making, the effect is that he has been removed from association, as described in *Syed*, by Lewis J [46], and by Haddon-Cave LJ [32] and [33]. Ms Hannett's submission that it is not the Defendant who has removed him from association; rather that no suitable association group has been available, or that the Claimant has elected not to associate with one or more suitable individuals, ignores the basic fact that (excepting a six-week period), the result has been that the Claimant's door has not been unlocked at the same time as that of another prisoner. Indeed, Ms Hannett identified an unwillingness on the part of prisoners who have been assessed as suitable associates to associate with one another as itself presenting a risk. Efforts made within the unit to enable the resumption of association have not achieved their aim.
84. It is no answer to say, as Ms Hannett does, that the removal of association is not intended to be punitive; its adverse effect on the prisoner concerned is, nevertheless and as she acknowledges, significant. None of the principles, and no part of the context, which she submits ought to inform the Court's approach to consideration



of removal from association and prison management obviates the Defendant's need to comply with Rule 46. Whether or not, in practice, it is the MDT, through the DRAMs, which is best placed to review the suitability of prospective association groups, the responsibility under Rule 46(2) lies with the Defendant, acting by the CSCMC. Furthermore, given Ms Hannett's acknowledgement that, absent a direction under Rule 46(3), it would be for the CSCMC to review continued removal from association, it is unclear why it should be in any inferior position to do so once such a direction has been given.

85. Applying that analysis to the facts of this case, there is no dispute that, between LF's transfer out of HMP Woodhill, on 13 April 2022, and 23 June 2022 ('period one'), the Defendant considered there to be no prisoner in the unit with whom the Claimant could safely associate. Between 23 June and 27 July 2022 ('period two'), on the Defendant's case, the only reason for any lack of association was the Claimant's own refusal to associate with DA. In early August 2022, believing that the Claimant would be willing to associate with AY, the governor approved that association. It is the Defendant's case that it was the Claimant's unwillingness to associate with him which precluded that possibility until 6 October 2022 ('period three'), when AY's transfer to HMP Woodhill was cancelled. Association with MA, proposed by the Claimant, was not permitted, owing to counter-terrorism concerns. At around the same time, the Claimant's transfer to a different unit was said to have been precluded by his prior history of violence. Association with LF, following his return to HMP Woodhill, was approved on 23 November 2022, but LF's refusal to associate with the Claimant meant that that could not commence until 29 January 2023 ('period four'). It endured until 16 March 2023 ('period five'), terminating by reason of LF's assault on the Claimant. From that date until the date of the hearing ('period six'), the Defendant has been of the view that there is no suitable placement in which safe association can be facilitated, or prisoner with whom he may associate safely.
86. It is only during periods two and three, as identified above, that it is said that, in effect, the Claimant removed himself from association. The Claimant does not dispute that it was he who had refused to associate with prisoners DA and AY, whilst contending that there had been sound reasons, in each case, for his refusal. In the event, and for the reasons set out above, it matters not, if, as a question of fact, the result has been that he has been removed from association in the sense discussed in *Syed*, which I now consider.
87. Albeit that, on the evidence of Mr Betts, some, limited interaction with certain prisoners is recorded as having taken place between 29 June 2022 and 28 January 2023 (prior to the resumption of the Claimant's six-week period of association with LF), in my judgement, it did not suffice to indicate that the Claimant was not removed from association during that seven-month period. In two instances (28 August and 5 October 2022), the circumstances and duration of the communication recorded are not specified. In one instance (10 August 2022), it is said that the Claimant had been able to speak to a fellow prisoner whilst in the exercise yard. No further details are given. In the remaining 28 instances (albeit that they are said not to be exhaustive), at least one of the two prisoners was unable to interact with the other outside a cell (see *Syed*, per Lewis J, at [44]). No details of the duration of those interactions are recorded, save that a conversation which took place on 4

August 2022 is said to have lasted ‘a long time’, and one on 19 January 2023 to have taken place over 45 minutes. Acknowledging that, in *Syed* [46], Lewis J referred to a prisoner’s ability to interact with other prisoners outside his (own) cell, I do not consider that sporadic and minimal interaction with another prisoner who is himself unable to leave his cell means that the first prisoner has not been removed from association. *Syed* itself was concerned with a reduction in the number of hours over which, and individuals with whom, association was permitted (see the judgment of the Court of Appeal at [13] and [29]). So it was that the Court of Appeal stressed (at [32]) that ‘removal’ did not mean ‘reduction’ or ‘limitation’. At [40], Haddon-Cave LJ cited the submission made on behalf of the Secretary of State (with which he stated that he agreed [41]), including an example of some, albeit limited, association, being ‘*limited association in small groups of 2 or 3 outside the cells in the CSC or Segregation Unit (or even sharing cells).*’ Consistent with Lewis J’s characterisation, at [44] of the first instance decision, that characterises association by reference to the absence of a physical barrier between prisoners, rather than according to whether the cell door which separates them is that of a particular prisoner. In any event, the Claimant’s last recorded interaction with another prisoner — through a cell door — produced in these proceedings, was with LF on 28 January 2023, the day before their association commenced. Interactions with prison staff and others, both prior and subsequent to 17 March 2023, self-evidently did not constitute association with other prisoners.

88. For the sake of completeness, I do not consider that *R(AB)*, in which the appellant detainee had been subject to a single unlock regime, assists the Defendant. Irrespective of whether the term ‘solitary confinement’ is apt to describe the circumstances in which the Claimant in this case has been detained, the question, addressed above, is whether he has been ‘removed from association’ and, if so, with what consequence in law. The questions for the Supreme Court in *AB* were whether solitary confinement (as defined by counsel for the appellant detainee in that case) of persons under the age of 18 was inherently inhuman and degrading, contrary to Article 3 ECHR, and, if not, whether there was a single and universal test of the compatibility of solitary confinement with Article 3, namely that there existed ‘exceptional circumstances’ in which such treatment was ‘strictly necessary’. The Court answered both questions in the negative, holding that whether or not the circumstances of detention contravene Article 3 ECHR depends closely on the facts of the particular case [50] and that the Court had repeatedly said that removal from association did not itself amount to inhuman treatment [51]. It declined to lay down a definition of solitary confinement and to hold that treatment satisfying that definition automatically violated Article 3 ECHR, at least if it exceeded a specified duration. The issues in this case do not engage Article 3 and nothing said in *AB* revisited the meaning of ‘removal from association’ discussed in *Syed*.

89. I conclude that, other than between 29 January and 16 March 2023, during the period to which these proceedings relate the Claimant has been removed from association within the meaning of Rule 46, during which period, it is common ground, there was no review or renewal by the CSCMC of the direction given by the Defendant under Rule 46(1) relating to his removal from association, rendering his removal unlawful for that reason. Ground One succeeds.

*Ground Two*

90. I turn to consider the Claimant's contention that he is entitled to be, but has not been, provided with reasons for his removal from association such as to enable the making of representations in that connection. I have rejected the Defendant's contention that a Rule 46(3) direction had been given and held that, in any event, there would have been an ongoing duty on the Defendant under Rule 46(2), pending the implementation of any such direction.

91. In *Bourgass*, as Lord Reed JSC recorded [94], neither party had sought to support the decision of the Court of Appeal (which had considered itself bound by earlier authority) that the common law afforded an adult prisoner no right to be provided with adequate disclosure or reasons to enable him to challenge his continued segregation. At [96] to [103], he held:

96. In *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 the House of Lords ..., in the speech of Lord Mustill, set out the approach to be followed when considering questions of procedural fairness generally, and more particularly the procedural rights of prisoners in relation to decisions which may affect them adversely. The House also rejected the argument that the existence of express statutory rights to a fair hearing in relation to some kinds of decisions affecting prisoners entailed the absence of any such right in relation to all other such decisions.

97. More recently, in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 this court considered the rationale of procedural fairness at common law, and emphasised both the instrumental value of enabling persons to participate in decision-making when they may be able to contribute relevant information or to test other information before the decision-maker, and the ethical value of allowing persons to participate in decision-making which concerns them and is liable to have a significant effect on their rights or interests, where they may have something to say which is relevant to the decision to be taken. The court also referred to research indicating the significance of unfair procedures in prisons, in particular, in affecting prisoners' attitudes and their prospects of rehabilitation.

98. Whatever the position may have been in the past, the approach described in *Doody* and *Osborn* requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State under rule 45(2). That follows from the seriousness of the consequences for the prisoner of a decision authorising his segregation for a further 14 days; the fact that authority is sought on the basis of information concerning him, and in particular concerning his conduct or the conduct of others towards him; the fact that he may be able to answer allegations made, or to provide relevant information; and, in those circumstances, from the common law's insistence that administrative power should be exercised in a manner which is fair.

99. A contrary conclusion cannot be drawn from the absence from rule 45 of procedural provisions similar to those contained in the

rules governing adjudication proceedings. It would be extraordinary if, where there was sufficient evidence to warrant disciplinary proceedings, the prisoner were entitled to a fair process at the end of which he might be segregated as a punishment for up to 21 days, yet where there was insufficient evidence, he could be segregated for a much longer period, without procedural protection. The Court of Appeal's decision to the contrary in *Hague* cannot be sustained.

100. A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought. That will not normally require the disclosure of the primary evidence on which the governor's concerns are based: as I have explained, the Secretary of State is not determining what may or may not have happened, but is taking an operational decision concerning the management of risk. It is however important to understand that what is required is genuine and meaningful disclosure of the reasons why authorisation is sought. The reasons for continued segregation which were provided by the prison staff involved in the present cases gave, at best, only the most general idea of the nature of their concerns, and of why those concerns were held. More could and should have been said - and was said, in the witness statements filed in these proceedings - without endangering the legitimate interests which the prison authorities were concerned to protect. The imposition of prolonged periods of solitary confinement on the basis of what are, in substance, secret and unchallengeable allegations is, or should be, unacceptable.

101. More specifically, in Bourgass's case, although some of the reasons given to him explained that his segregation was based on the assault on Sahebzadeh, the prison failed to provide any information as to why he was considered to have been involved in an assault which took place in his absence, despite being repeatedly asked to do so. The statement that he was to remain in segregation "pending an investigation into a serious assault" became particularly egregious when repeated after all investigations had ceased. Stating that segregation was "pending CSC referral", or that "we are trying to transfer you", provided no explanation related to rule 45. Stating that "you are an unacceptable risk to other prisoners", that "you are known as a threat to other prisoners", that "your behaviour is deemed to be unsuitable for normal location", or that "you would be a disruptive influence on normal location", told him nothing about the basis on which he was considered to present such a risk or threat or disruptive influence, or about the behaviour which was deemed unsuitable.

102. Similar criticisms apply in Hussain's case. He had been provided with information as to the basis on which he was believed to have assaulted another prisoner. It was not explained why, several months later, his suspected responsibility for that assault was still

considered to require his segregation, not as a punishment, but for the maintenance of good order and discipline. It was only in the present proceedings that further allegations against him were disclosed, namely that he was suspected of having attempted to convert other segregated prisoners to Islam. Once that was disclosed, he was able to provide a response.

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

92. All of the above principles apply, with equal force, to decisions taken under Rule 46, in which ‘removal from association’ bears the same meaning as it does in Rule 45 (see *Syed* in the Court of Appeal, [33] and [36]). None of them is distinguishable according to whether a ‘binary’ decision to segregate is being taken, as distinct from a decision relating to specific association groups, nor is it undermined by any decision that, in principle, association may resume, if an appropriate association group can be found. Indeed, in such circumstances, the need to give genuine and meaningful disclosure of the reasons for continued removal from association, and the right of a prisoner to make related representations, are the more acute. I reject Ms Hannett’s submission that there is good reason for the absence of a duty to explain to those detained in the CSC why they are not permitted to associate with particular prisoners; whilst it might (though will not necessarily) be the case that the circumstances contemplated in [103] of *Bourgass* would more frequently apply, there is no principled basis for any blanket rule to that effect, particularly in circumstances in which, as a matter of principle, it is considered that association is desirable and may be achieved safely. It is, therefore, necessary to consider whether effect was given to both rights in this case.

93. As Ms Hannett submits, LF’s transfer out of HMP Woodhill in April 2022 was known to the Claimant and, rightly, it is not submitted on his behalf that he ought to have been accorded the opportunity to make representations as to the merit in that operational decision. Thereafter, Ms Hannett relies on the DRAM minutes for 11 May 2022, which record the following account from the psychologist: ‘*The next key point was lack of association opportunities. I highlighted that this was outside Woodhill’s direct control, and that suitable locations for association group might not currently exist for [the Claimant] based on risks to him, or possible non-associations. His legal rep has said they will take this forward – possibly with CMG.*’ It is not suggested that, prior to these proceedings, the Claimant was provided with those minutes, but they are advanced as an accurate record of the conversation which they record. The matters highlighted by the psychologist amounted to no more than general speculation and did not meaningfully identify

which locations for association would be considered suitable, or which risks, or possible non-associations were considered to apply, rendering meaningful representations by the Claimant (or on his behalf) impossible. Further, as Mr Betts has stated, following LF's transfer to HMP Full Sutton, none of the risk assessments regarding the Claimant's ability to join one of the three association groups at Unit B, HMP Woodhill was recorded. Similarly, the fact that, at a CMP meeting on 10 June 2022, the Claimant's legal representative had been informed that the prospect of other prisoners moving to the unit had been discussed in the DRAM, and of the need to safeguard the Claimant, itself encompassing the need for prospective associates to be risk assessed for suitability having regard to the previous peer-related nature of earlier violence by the Claimant, provided no reasons for any decisions taken in relation to the suitability of particular associates in response to which meaningful representations could be made.

94. Albeit only 24 hours in advance of DA's transfer to HMP Woodhill, the Claimant had been made aware of that transfer and of the prospect of association. He was able to, and did, make representations in that connection. Similarly, he made representations in relation to AY. In both instances, the Defendant had intended that association take place, and was not, therefore, providing reasons for its removal, though meaningful disclosure of the reasons why the Claimant could not transfer to an alternative unit was not provided, a situation which endured pending and subsequent to LF's return to HMP Woodhill.
95. Upon LF's return, the Claimant was made aware that he (LF) did not wish to associate with him. For the purposes of Ground Two, the reasons for LF's position are immaterial. The Claimant's evidence, uncontradicted on this point, is that, when, in November 2021 and January 2022, he had sought permission to associate with others in addition to LF, his requests had been met with responses to the effect that association was subject to risk assessment and that other prisoners could not associate with him on grounds of race or religion. No further detail was provided, nor was the decision-maker identified. He was told simply that association would not be permitted owing to 'individual risk factors and association preferences'. No such factor or preference was identified, even in gist, then or subsequently.
96. Albeit in gist only, a comprehensible and, I am satisfied, adequate reason in all the circumstances (counter-terrorism concerns) was given for refusal of the Claimant's suggested association with prisoner MA, on which the Claimant was in a position to make representations. None of the other reasons advanced by Mr Betts in these proceedings for the Claimant's inability to associate with either association group in HMP Woodhill was provided at an earlier stage. A suggestion that the Claimant had previously made clear his unwillingness to associate with known drug users is disputed by the Claimant, and he was in no position to make representations to that effect at the time, as he had been ignorant of the decision-maker's belief. The generic suggestion that the Claimant had been regarded, by an unspecified decision-making body, as posing a risk to an 'elderly', 'very high profile and renowned vulnerable prisoner' in one of the established association groups at HMP Woodhill had not been explained to him, nor is the nature of the perceived risk identified, even at this stage. It does not explain why the Claimant could not associate with the other prisoner in the particular association group.

97. Prior to receipt of Mr Betts' evidence, the Claimant had been given no explanation of why it was that he could not transfer to HMPs Manchester or Full Sutton, nor was it clear whether that position had been considered since November 2021. The minutes of the CSCMC meeting in September 2021, to which Mr Betts refers in evidence and with which the Claimant was not provided at the time, do not refer to a transfer to either prison, or to HMP Whitemoor. If there is a policy that a person can never be transferred to a prison in which he has had a history of violence, however long ago, that has not been disclosed, to the Claimant or the Court, precluding the Claimant's ability to make representations as to its lawfulness. On instructions at the hearing, Ms Hannett submitted that there is no such 'blanket policy' and that the decision had been based upon an 'individualised risk assessment', of which no details were provided. It follows that, both at the time and as now informed, the Claimant is in no position to make representations regarding that assessment either. It is not known whether the members of staff in question continue to be employed in the relevant units, or in the wider prison. The earlier incident in HMP Full Sutton occurred in 2013, and in the main prison rather than in the CSC unit.
98. In lawyers' correspondence in October 2021, the Claimant had been informed that he could not be transferred to HMP Whitemoor owing to his assault on another prisoner in the CSC, presumed to be GV. There being two association groups in HMP Whitemoor, no reason was given as to why the Claimant could not associate with the group of which GV was not a member. If that had been because the prisoners in that group were thought to pose a risk to him, the nature of that risk, and the basis of its assessment, was not explained, even in outline, nor was it explained why the Claimant's own need for association was apparently considered subordinate to GV's needs. That position continues. Ms Hannett's submission that there had been no need to provide the Claimant with reasons why he could not transfer to a prison other than HMP Whitemoor because, in their letter dated 7 October 2021, his solicitors had stated that he would only transfer to that particular prison, rested on a flawed premise. In fact, the Claimant's solicitors had stated that, *'So far as we are aware, the only establishment that offers the opportunity for [the Claimant] to meet his objectives is HMP Whitemoor.'* At no point thereafter had it been suggested that HMP Whitemoor would be the only prison to which the Claimant would be willing to transfer. Mr Betts' evidence is that HMP Whitemoor had been discounted *'...as there was a prisoner located there who the Claimant had assaulted, and prisoners who would pose a risk to the Claimant.'* Once again, no explanation of the risk considered to be posed to the Claimant, or of the options (if any) which had been considered, is provided. That does not afford a basis for the making of meaningful representations in response.
99. Prior to these proceedings, no reason (or response) had been provided as to why the Claimant's suggestion that a degree of association outside the CSC be permitted had been rejected, or whether it had been considered, though the risk as now identified is readily comprehensible, particularly in light of the absence of any challenge to the identified need for the Claimant's detention in the CSC. In my judgement, that reason would have sufficed to enable the making of representations, had it been communicated to the Claimant in ordinary course.
100. Ms Hannett further relies upon information provided to the Claimant by the CSCMC, on 9 May 2023, that *'You have been assessed as able to associate with*

*risk assessed prisoners whilst held in PR 46 conditions, however, due to your reluctance to mix with others and circumstances you are not associating at this time, this has been reviewed and will ensure that a suitable association group is created*. That was generic in nature and did not provide genuine and meaningful disclosure of the CSCMC's reasons in sufficient detail to enable the Claimant to respond, nor was the 'reluctance' to which reference was made identified, such that it could not be discerned whether it included perceptions of reluctance which the Claimant would have contended to have been based upon a flawed understanding or assumption, such as an unwillingness to associate with known drug users. It did not explain why the Claimant's prior reluctance (reasonable or otherwise) to associate with DA or AY precluded association with another or others long after those associations had been proposed. The reasons now given by Mr Betts as to why the Claimant cannot associate with prisoners in the unit at HMP Woodhill do not extend to two of the five potential associates.

101. Thus, with the limited exceptions identified above, throughout the period to which these proceedings relate, and even at this stage, the Claimant has not been provided with adequate reasons enabling him to make representations regarding his continued removal from association, including as to why he could not be transferred to a CSC unit outside HMP Woodhill. The Supreme Court's characterisation of the reasons provided in *Bourgass*, at [100] to [102], set out above, is equally apt to describe those given in this case, even acknowledging that, in the circumstances summarised at [103] of that case, only a gist need be provided. I accept Mr Squires' submission that the administrative burden which it is said by the Defendant that provision of adequate information would create is outweighed by the importance of procedural fairness, as explained in *Bourgass*, at [98] to [100]. In light of the conclusions which I have reached, having regard to such reasons as have been given to the Claimant throughout the relevant period, it is unnecessary, for current purposes, for me to resolve the disputes of fact which have arisen — had appropriate reasons been given to the Claimant at the time, any potential misunderstanding or unwarranted assumption could have been raised and investigated.

102. Ground Two succeeds.

### *Ground Three*

103. Subject to exceptions which are not here engaged, section 6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, defined, by section 1(1), to include Article 8 ECHR. That Article provides:

**'Article 8**  
**Right to respect for private and family life**

**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.’

104. As a matter of principle, Article 8(1) is engaged by a prisoner’s removal from association because it constitutes an interference with the right to respect for private life as interpreted by the ECtHR and by domestic courts. It therefore needs to be justified in accordance with Article 8(2): see *Syed*, in the Court of Appeal, at [57]ff. I did not understand Ms Hannett to contend to the contrary.
105. The Defendant acknowledges that placement in the CSC engages the Claimant’s rights under Article 8(1) ECHR and that, over the periods identified above (the last of which ending in January 2023), the decision to detain him in the CSC was not ‘in accordance with the law’, by reason of the constitution of the CSCMC. To that extent, she ‘concedes’ Ground Three. That, however, is not the issue raised by Ground Three, which challenges the lawfulness of the Claimant’s removal from association, not his detention in the CSC per se, from April 2022 onwards.
106. The Defendant also acknowledges that, were the Court to conclude that reasons ought to be provided by the MDT, via the DRAMs, for decisions taken regarding association, the current practice would constitute ‘a deficiency’. I have concluded, under Ground Two, that adequate reasons for the Claimant’s continuing removal from association ought to have been provided by the CSCMC (incorporating any reasons given by the bodies by which its decisions were informed which it adopted).
107. In light of my conclusions as to Grounds One and Two, and in the respects identified in that connection, the Claimant’s removal from association from April 2022 onwards was not in accordance with domestic law. As Ms Hannett accepts, it follows from those findings that Ground Three succeeds on those bases, but it is further contended by the Claimant that the legal framework relating to removal from association itself runs contrary to Article 8 ECHR in failing to afford sufficient protection against the risk of arbitrary or discriminatory use of the relevant powers and/or of disproportionate interference with the rights which it confers. The first question is whether Ms Hannett is right in her contention that no such argument is open to the Claimant, because it does not arise on his pleaded case.
108. In his claim form [49], within a section headed ‘Legal principles’, the Claimant pleaded that Article 8 ECHR encompassed procedural protections necessary to safeguard against arbitrary interference with the substantive rights conferred, going on to assert the protections which those would include in the context of, in his language, ‘solitary confinement’. That paragraph formed part of a sub-section summarising the legal principles said to apply to an interference with Article 8 rights. Within a later section, headed ‘Application’, the following was pleaded, at [57], sub-headed ‘The interference is not in accordance with the law’:

‘The interference with C’s Article 8 rights is not in accordance with the law because his solitary confinement is not accompanied by the necessary procedural protections. Most importantly, D is not reviewing on a regular basis (or at all) C’s solitary confinement. That is a necessary requirement for the interference with C’s rights arising from his solitary confinement to be in accordance with the law. In addition, D has failed and continues to fail to provide C with the reasons necessary to enable him meaningfully to participate in the process. Finally, the interference with C’s Article 8 rights arising from his being in solitary confinement is not in accordance with the law for the reasons set out under Grounds 1 and 2 above.’

109. As Ms Hannett submits, it is that paragraph which identifies the basis of the challenge advanced. Acknowledging that there is a focus on the Defendant’s treatment of the Claimant himself, against the background of the legal principles previously outlined reference is made to the absence of necessary procedural protections. Acknowledging that a systemic challenge could have been more clearly pleaded, I am satisfied that the paragraph raises such a challenge and that its nature was clear, at the latest, from the time at which the Claimant’s skeleton argument was served in advance of the hearing. The issues were fully ventilated at the hearing and Ms Hannett was given the opportunity to supplement her oral submissions in that connection in writing thereafter, meaning that the Defendant was accorded suitable opportunity to respond. In the event, she stated that she had no further submissions to make on the point. I, therefore, turn to consider the merit in the substantive challenge. Whilst Mr Squires adopted the term ‘solitary confinement’ throughout his submissions, as was held in *R(AB)*, that term has no universally accepted definition (see above) and I have considered his submissions by reference to the removal from association with which they, and the relevant legal framework, are concerned.
110. The principles to be applied were summarised in *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037, CA [55], citing with approval [56] those which had been identified by the Divisional Court:

‘The general principles applicable to the ‘in accordance with the law’ standard are well-established: see generally per Lord Sumption in *Catt* [2015] AC 1065, paras 11-14; and in *R(P) v Secretary of State for Justice* [2019] 2 WLR 509, paras 16-31. In summary, the following points apply.

(1) The measure in question (a) must have ‘some basis in domestic law’ and (b) must be ‘compatible with the rule of law’, which means that it should comply with the twin requirements of ‘accessibility’ and ‘foreseeability’ (*Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Silver v United Kingdom* (1983) 5 EHRR 347; and *Malone v United Kingdom* (1984) 7 EHRR 14).

(2) The legal basis must be ‘accessible’ to the person concerned, meaning that it must be published and comprehensible, and it must be possible to discover what its provisions are. The measure must also be

‘foreseeable’ meaning that it must be possible for a person to foresee its consequences for them and it should not ‘confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself’: Lord Sumption JSC in *P*, para 17.

(3) Related to (2), the law must ‘afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise’: *S v United Kingdom* 48 EHRR 50, paras 95 and 99.

(4) Where the impugned measure is a discretionary power, (a) what is not required is ‘an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right’ and (b) what is required is that ‘safeguards should be present in order to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights’: per Lord Hughes JSC in *Beghal v Director of Public Prosecutions* [2016] AC 88, paras 31 and 32. Any exercise of power that is unrestrained by law is not ‘in accordance with the law’.

(5) The rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them: per Lord Sumption JSC in *Catt* at para 11.

(6) The requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue: per Lord Sumption JSC in *Catt* at para 11.’

111. In *R (Roberts) v Commissioner of Police of the Metropolis* [2016] 1 WLR 2010 [3], SC, it was held that:

‘... the Convention concept of legality entails more than mere compliance with the domestic law. It requires that the law be compatible with the rule of law. This means that it must be sufficiently accessible and foreseeable for the individual to regulate his conduct accordingly. More importantly in this case, there must be sufficient safeguards against the risk that it will be used in an arbitrary or discriminatory manner. As Lord Kerr put it in *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49..., at para 93, “The opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality” in this sense.’

112. The Claimant’s central contention is that removal from association constitutes a serious interference with a prisoner’s Article 8 rights, and, where prolonged, increasingly so, and that there is no provision for the giving of reasons to, or involvement of, the prisoner affected within the decision-making process. As

Ground One has succeeded, his further contention that there is no requirement for any review of a prisoner's removal from association, following any direction given under Rule 46(3), does not arise for consideration.

113. In *Maslák*, the ECtHR was concerned with nine applications arising from the high security unit ('HSU') detention regime in which the applicant had been placed, in three different prisons in Slovakia, on preventive security-related grounds. Decisions regarding the placement of a prisoner on such a regime are entrusted to the governor of the relevant prison and are to be reviewed by the governor and the public prosecution service ('PPS') at least once every three months, on the basis of a proposal made by the prison's educational officer, or Service for Prevention and Security, following its discussion by a placement committee. So far as material to this case, the applicant complained that his placement in the HSU (and the extension of the time which he had spent there) had been unlawful and arbitrary, contrary to Article 8 ECHR (amongst other articles). The regime to which he was subject, taken at its lowest, had been no more restrictive than that of which the Claimant complains in these proceedings and, at times, significantly less so. At [140] to [142], the ECtHR observed:

'140. The applicant's complaints are aimed specifically at his detention in the HSU and the regime imposed on him there, which is in general stricter than ordinary detention in service of a prison sentence ... There may thus be no doubt that the applicant being required to serve part of his sentence under the HSU regime constituted an interference with his right to respect for his private and family life.

141. The subjecting of a detainee to a special high-security regime is not, by itself, in breach of Article 8 of the Convention; however, for it to be compatible with the requirements of that provision it must be applied "in accordance with the law", pursue one or more of the legitimate aims listed in paragraph 2 and, in addition, be justified as being "necessary in a democratic society" (see *Piechowicz*, cited above, § 212 with further references).

142. As to the requirement for the interference to be "in accordance with the law", according to the Court's settled case-law this does not merely require that it should have a basis in domestic law but also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision as to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law must be sufficiently clear in its terms as to give individuals an adequate indication as to the circumstances in which and the conditions under which public authorities are entitled to resort to the impugned measures. In addition, domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic

principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference (see *Al-Nashif v. Bulgaria*, no. 50963/99, §119, 20 June 2002, and also, mutatis mutandis, *Zoltán Varga v. Slovakia*, nos. 58361/12 and 2 others, § 151, 20 July 2021).’

114. The Court went on to examine the substantive and procedural legal bases for the imposition of the HSU regime on the applicant, at [159] stating:

‘159. The Court reiterates that although Article 8 contains no explicit procedural requirements, the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests, as safeguarded by that Article (see mutatis mutandis, *Lazoriva v. Ukraine*, no. 6878/14, § 63, 17 April 2018).’

It concluded [175] that there had been a violation of the applicant’s Article 8 rights. Amongst its reasons for so doing was the fact that, to a significant degree, the applicant had been excluded from the decision-making process and that, in view of the way in which the PPS and Constitutional Court had made use of their jurisdiction in the matter, any safeguards which they provided had been limited.

115. Rule 46 authorises a direction to be given that a prisoner be removed from association; the renewal of that direction from time to time; and a direction that the prisoner shall resume association. All such discretionary powers are those of the Defendant, acting by the CSCMC. Nothing in Rule 46, or in the enabling legislation, sets out the process by which they, or any related powers, are to be exercised. To the extent identified, that is to be found in the policy relating to the operation of the CSC system; the OpM<sup>3</sup>.

#### *The OpM*

116. The reporting structures to which the OpM refers (at page 38) provide for:
- a. weekly reports, as an ongoing record of the prisoner’s attitude, behaviour and progress, which are used to inform a monthly report, and should be provided at the prisoner’s request, redacted if necessary;
  - b. a monthly report, to be completed for each prisoner, for submission to the monthly CSCMC meeting. The purpose of that report is said to be to provide information to the CSCMC to enable the committee to review and make decisions regarding location, placement and selection of each prisoner, in line with Rule 46: ‘...*the report essentially explains to the CSCMC why continued placement within the CSC is necessary, or otherwise, by highlighting areas of risk, progress, concerns regarding continued placement, and any relevant*

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<sup>3</sup> Pre-referral processes, with which this case is not concerned, are to be found in the CSC Referral Manual.

*factor on which a decision can be based. Monthly reports should be disclosed to the prisoner prior to the CSCMC to enable him to make comments on the report. Abusive or inappropriate remarks will not be accepted. Following CSCMC the report should be updated with relevant extracts from the meeting minutes to reflect any feedback from the CSCMC, and an updated copy provided to the prisoner within seven working days.’;*

- c. an annual review, the purpose of which is to review key aspects of the prisoner’s management such as any ongoing referrals, re-categorisation reviews, parole hearings, outstanding charges, outstanding treatment, any changes in circumstances, and to consider the long-term plans for the prisoner. It is said to be essentially a checklist for CSC teams as opposed to a report, and, as such, is not required to be disclosed to the prisoner, though it may be disclosed if requested. An annual review is to be completed by the holding establishment and forwarded for discussion at the next scheduled CSCMC following its completion.

117. It is clear, from page 39 of the OpM, that association is to be considered at the weekly DRAMs:

‘The purpose of the meeting is to ensure that key changes in a prisoner’s risk and/or behaviour are discussed collectively, decisions made and the prisoner informed of those decisions. This process may also make decisions around the unit as a whole at that time, such as association groups and regimes. This process supports improved communication and consistency in approach and serves to support the whole team.

...

#### Association

Prison rule 46 permits the removal from association where required, thus association may be denied on the basis of risk as per selection into the CSC. However, all prisoners will be individually assessed for both suitability for activities, and for the risk they pose to themselves and others to consider the suitability for supervised and risk assessed association. Prisoners will be risk assessed as one of two levels:

##### 1. Routine – mixed unlock

‘Routine’ identifies that he may be unlocked with other prisoners. Further detail will be provided in the individual risk assessment carried out on arrival into the CSC and routinely after that according to individual circumstances at DRAM.

##### 2. Restricted – singular unlock

A ‘restricted’ regime may be imposed where the risk to others is considered too high to enable him to participate in mixed association

or mixed activities. The consideration of risk may not be accompanied by the deterioration in behaviour and consequently the IEP<sup>4</sup> level may not always change in relation to the regime risk management level.’

118. That constitutes the full extent of the material touching on association (for a prisoner who has been accepted into the CSC, following referral) within the OpM. It is to be contrasted with those aspects of the Amended Policy which are summarised at paragraphs 14 to 18, above, in relation to a prisoner who is segregated and denied normal association within the mainstream prison population, under Rule 45 (and Rule 48, relating to temporary confinement in special accommodation).
119. In so far as the OpM relates to association and its removal, it is sparse; confers the responsibility for decision-making on the MDT in the DRAMs (save in circumstances in which a transfer to a different CSC unit is in contemplation); and does not require reasons to be given for the MDT’s decisions, or that the prisoner be permitted to make representations in connection therewith. The policy makes provision for weekly reports which inform the monthly reports submitted to the CSCMC, but the latter are said to concern ‘*why continued placement within the CSC is necessary, or otherwise.*’ Nothing in that part of the policy cures the deficiencies in the part expressly relating to association. If it is in fact the case that the CMG and/or CSCMC are intended to play a greater, or scrutinising role, that is not set out in the policy itself.
120. As explained in the OpM, following selection into the CSC post-assessment, the CMP is formulated and reviewed quarterly, in collaboration with the prisoner. That involves all appropriate members of the MDT. The CMG is provided with ‘*feedback about the prisoner’s engagement in that process and changes in their risk profile and advises the CSCMC with regard to the best locations to manage risk and facilitate progression*’ (OpM, page 28). It is said that, when considering whether a prisoner is suitable to transfer to another CSC unit, for progressive or other reasons, the local MDT will review existing information in order to consider the individual circumstances and CMP information indicating risk reduction or a need to progress. That should be raised with the CMG, initially, and then discussed at the CSCMC. Establishments should ensure that representatives attending the CSCMC are able to advise the committee on any operational issues regarding or affecting the movement of prisoners subject to Rule 46, and have the authority to agree any moves. CSC locations should advise CMG in advance of their meeting of any requested moves, including the basis of the request and any key information to enable the CMG to plan moves, where possible, across the estate. When the ‘proposed moves’ list is circulated to establishments prior to the CSCMC meeting, any factors affecting the moves indicated should be considered locally with relevant staff and the SMT and fed back prior to the CSCMC meeting to enable consideration of alternative options and relevant contact with establishments. Pre-transfer arrangements must then be made, once the CSCMC has agreed a move for a prisoner (OpM, page 35).
121. Apparent from the above, and consistent with the system as explained by Mr Betts in his first witness statement, is that the degree of involvement which the CMG

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<sup>4</sup> [Incentives and Earned Privileges Scheme]

and CSCMC each has in determining association is limited to consideration of movements between CSC units. Mr Betts puts the matter in this way:

‘41. It follows that decisions about a prisoner’s association are complex, and require a careful and detailed consideration of the risk, both physical and emotional harm, that the prisoner may pose to other prisoners, and the risk that other prisoners may pose to them. These risks necessarily change, or develop, on a frequent basis and the management teams have to be able to respond and make changes to associations accordingly. This is the primary reason why the responsibility for determining association is with the DRAM and the MDT. That is also why they are undertaken at an expert multi-disciplinary meeting.’

122. Thus, the process as set out in the OpM does not itself provide for external scrutiny of decisions regarding continued removal from association within the CSC unit in which a prisoner has already been placed. External scrutiny would be available in the form of judicial review, but that does not afford a practical mechanism or, hence, safeguard, through which routinely to oversee or challenge individual decisions on an ongoing basis.
123. In my judgement, Ms Hannett’s submissions as to clarity are aimed at the wrong target. The issue is not whether removal from association is identified to result from an assessment of the risk posed by and/or to a particular CSC prisoner, but as to the need for clear procedural safeguards in the form of requirements that the relevant decision-making body, or bodies, provide meaningful reasons and allow representations by the prisoner concerned regarding the assessment of that risk and/or its consequences for association. No provision is made for that in the relevant sections of the OpM. At the very least, the manner of the exercise of the discretion to remove prisoners from association has not been set out with sufficient clarity (cf *Maslák* [142]).
124. Consideration of the OpM as a whole does not remedy those defects. The monthly report is said to relate to ‘placement on the CSC’; a distinct issue, as reflected in the two aspects of Rule 46(1). The annual review is not routinely disclosed to the prisoner and does not, on its face, extend to a consideration of removal from association. Neither the provision of reasons nor the permitting of representations is required. Ms Hannett did not submit to the contrary, or place reliance upon the annual review. She rightly acknowledged that there is no specified requirement for the DRAM to give reasons, or to allow representations, in relation to a prisoner’s removal from association.
125. Having regard to all of the above, in my judgement the legal framework within which decisions regarding a CSC prisoner’s removal from association are made does not afford the requisite measure of legal protection against arbitrary interference with the rights guaranteed by Article 8 of the ECHR, from which it follows that, for that reason, too, interference with the Claimant’s Article 8 rights is not in accordance with the law, as required by Article 8(2). In short, the legal framework, comprising the legislation and the OpM, lacks clarity as to the manner of the exercise of the discretion to remove a prisoner from association and does



not require that the prisoner be involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests, as safeguarded by Article 8 ECHR. It is not for the Court to re-draft the policy, but one need only look to the Amended Policy, for an indication of the material which is lacking in the OpM.

*Ground Five*

126. So far as material, section 149 of the EqA provides:

**‘149 Public sector equality duty**

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- i. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- ii. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- iii. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) ...;
- (c) ....’

The relevant protected characteristics are identified at subsection 149(7) and include race, and religion or belief.

127. The parties are agreed that the PSED applies to the management of CSC prisoners and as to the legal principles engaged by this ground of challenge (which I have summarised when recording their submissions). In *Bridges*, the Court held (at [174] to [176] and [180] to [182]):

174. ...those principles were set out by McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60, at [26]. It is unnecessary to set out that passage in full here. It is well known and has frequently been cited with approval since, including in *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811, at [73] (Lord Neuberger PSC).
175. In that summary McCombe LJ referred to earlier important decisions, including those of the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, in which the judgment was given by Aikens LJ; and *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin); [2012] HRLR 13, in which the judgment was given by Elias LJ. For present purposes we would emphasise the following principles, which were set out in McCombe LJ's summary in *Bracking* and are supported by the earlier authorities:
- (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
  - (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
  - (3) The duty is non-delegable.
  - (4) The duty is a continuing one.
  - (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
  - (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.
176. We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to

reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect.

...

180. The importance of the PSED was emphasised in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [274], where Arden LJ (as she then was) said:

“It is the clear purpose of section 71 [the predecessor to section 149] to require public bodies ... to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. ...”

181. We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.

182. We also acknowledge that, as the Divisional Court found, there was no evidence before it that there is any reason to think that the particular AFR technology used in this case did have any bias on racial or gender grounds. That, however, it seems to us, was to put the cart before the horse. The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account.

#### *The EIAs*

128. It is the Claimant’s position that, in exercising her function of operating the CSC system, and in making decisions concerning his association within that system, the Defendant is in breach of her continuing PSED. The Defendant acknowledges that the PSED applies to the giving of directions under Rule 46 and the management of prisoners within the CSC. She relies on the EIAs, considered below, as discharging that duty.

#### *2021*

129. In the EIA dated January 2021, statistics as to the CSC population from April 2017 to that date were set out. It was noted that they provided indicators to inform

management, but were limited in their interpretation owing to the small numbers involved. It was said that the number of prisoners held within the CSC system, both at selection and for assessment as a whole, were small (52 nationally, as at the end of December 2020) and that, consequently, the percentage analysis of the ethnic mix varied from month-to-month, with small changes in the population having a larger impact on the CSC statistics. It was noted that those figures did not reflect a disproportionate number of prisoners from a BME background within the CSC system. As at the end of December 2020, of the total number of prisoners, 40 (77%) were White; six (11.5%) were Black; four (7.7%) were described as ‘mixed’; and two (3.8%) as Asian, meaning that 23% of prisoners in the CSC system were from a BME background. It was also recorded that the CSC population accounted for 0.07% of the total adult male prison population as of 30 September 2020, of which 72.3% were White and the balance BME. The 2021 EIA also recorded that, of those held within the CSC as at the end of December 2020, 32.3% were Muslim; 36.5% were Christian; and the balance were of other faiths, or (19%) had not stated or had no religion or belief. It was noted that, in relation to the national figures, published in December 2020, which represented the LTHSE for September 2020, there was a high over-representation of Muslim prisoners, by 131.9%, which had increased since the previous EIA, dated 2019. The statistics for Muslim prisoners were further broken down into different ethnic groups. Of the 17 Muslim prisoners held in the CSC in January 2021, seven were described as White British; one as White Irish; one as Mixed White/Asian; two as Mixed White/Black African; and the balance as Asian or Black, of varying ethnicity. Seven of the 17 Muslim prisoners had converted to Islam whilst in prison. The EIA noted that *‘the identified small differences in religious beliefs when compared to the LTHSE show a decrease in potential concerns around equality. Given the small numbers in the CSC, this difference does not raise concerns in regards to religious beliefs of CSC prisoners. However [it] is an important area to continue to actively monitor and explore...’* Also recorded in the EIA was the fact that, in 2020, questionnaires had been issued to all CSC residents by members of the clinical team and, once completed, returned anonymously in sealed envelopes. It was noted that only seven responses had been received, representing 14.9% of the population, which had not highlighted any issues regarding the OpM. In response to the question *‘Could the policy have a differential impact on staff, prisoners, visitors or other stakeholders on the basis of any of the equalities issues?’* the following answer was provided: *‘This analysis has highlighted a very small over-representation of CSC prisoners who are of Muslim religion, and a very small under-representation of CSC prisoners of the Christian faith. Given the small numbers in the CSC, this has not been identified to be a current concern. However, it is important that this continues to be monitored and explored appropriately, as currently occurs through data monitoring on a monthly basis and by the CSCMC quarterly. Furthermore, the cases referred to the CSC are all based on incidents and levels of violence – essentially the risk that men pose to other people in custody – and religious denomination is not considered when assessing risk of violence to others.’*

130. The 2021 EIA next addressed whether there were safeguards to prevent inconsistent outcomes and/or differential treatment of different groups of people. It was said that the CSC referral manual and OpM provided clear guidelines on the criteria and processes required when referring a prisoner to the CSC system

and the processes required to manage prisoners following selection into the CSC after assessment. It was noted that assessment of risk could be subjective, based upon the interpretation of the facts available to the author, however, reports and assessments were completed by qualified professionals (psychology and mental health) which should offer a professional assessment of the facts and related risks. Other reports provided for the referral and assessment process were provided by prison officers or managers, probation staff, and any other relevant person involved in the case, such as healthcare, education, chaplaincy, or an instructor, with all such reports taken into account, such that decisions on referral and acceptance were based entirely on the risk presented by the individual whilst in custody. It was said that all referrals for assessment and de-selection were considered by the CMG and that decisions regarding selection/de-selection were made at a multi-disciplinary case conference attended by all report authors, and shared by the CSC operational manager. The recommendation from the case conference was presented to the monthly CSCMC meeting for a decision which had to be agreed, or amended, by the director of the LTHSE, or a delegated authority. Thus, it was said, a prescriptive process was in place comprehensively to consider individual cases and circumstances, against clear guidelines, reducing the potential for variances or differential treatment for any particular group of prisoners. In the summary at the end of the EIA (so far as material for current purposes), it was said that race was of no relevance to equalities issues, and that the ethnicity figures for the population held within the CSC system did not indicate an over-representation of BME prisoners. Similarly, it was said that there was no relevance of equalities issues to religion or belief; at that time there was no noticeable over-representation of prisoners of a particular faith; a matter which would continue to be monitored and explored.

2023

131. When the EIA was revised in January 2023, it was noted that the number of prisoners held within the CSC system nationally was 58, representing a 9.4% overall increase in population since April 2017. As in 2021, it was said that the figures did not reflect a disproportionate number of prisoners from an ethnic minority background located within the CSC system, of whom 45 (77.5%) were White; seven (12.06%) were Black; five (8.6%) were described as Mixed; and one (1.7%) was described as Asian. It was said that those figures showed little deviation year on year. When compared with the position as it had stood at the time of the January 2021 EIA, the percentage of prisoners from an ethnic minority background was one percent higher. It was further recorded that the figures demonstrated that the CSC prisoner population differed slightly from the national statistics with regard to race, with 76% being White and 24% of ethnic minority background. The EIA recorded that *'due to the sample group size, this is not a concern'*. Of the prisoners held within the CSC as at February 2022, 21 (36%) were said to be Christian; 15 (25.8%) were said to be Muslim; four (7%) were said to be Jewish; three (5.1%) were said to be 'Other'; and 15 (25.8%) were said to have no, or not to have stated any, religion or belief. In relation to the national figures published in December 2021, representing the LTHSE for January 2022, there was noted to be a high over-representation of Muslim prisoners, by 131.9%, which had increased since an EIA dated 2019. Once again, it was noted that the number of prisoners held within the CSC system was small in statistical terms (0.07% of the national population), such that small changes in

population could lead to large changes in the percentage figures being reported. Upon a comparison of the religion of CSC prisoners with that of LTHSE prisoners in January 2023, 25% of CSC prisoners were said to be Muslim, compared with 24% in the LTHSE population. Of the 15 Muslim prisoners in the CSC system in January 2023, seven were White; one was Mixed White/Asian; one was Mixed White/Black African and the remaining prisoners were Black or Asian, of varying ethnicity. Seven individuals were recorded to have converted to Islam whilst in prison. The 2023 EIA noted that *'The identified small differences in religious beliefs when compared to the LTHSE show a decrease in potential concerns around equality. Given the small numbers in the CSC, this difference does not raise concerns in regards to religious beliefs of CSC prisoners. However, it is an important area to continue to actively monitor and explore, further exploration has noted that the number of CSC prisoners who have converted to Islam in prison has remained at a similar level to the last report.'* The same notes were made in relation to stakeholder feedback; impact; local discretion; and summary of relevance to equalities issues in relation to race and religion or belief, as had been made in the 2021 EIA.

132. Neither EIA considered the specific issue raised by the Claimant in these proceedings, being whether the known presence of a significant body of racist prisoners in the CSC disproportionately impeded the ability of non-White or Muslim prisoners to associate, or, by extension, progress. Ms Hannett does not suggest that any other enquiry was made, or data gathered, to ascertain whether that was the case. Instead, she relies upon the risk-based and individualised nature of the assessments undertaken in relation to each prisoner and prospective association group in the CSC. That is no answer to the point; the question is whether it is less likely that a suitable association group will be found for a non-White or Muslim prisoner. No statistical, or other, data has been provided by the Defendant to indicate whether or not that is the case, nor has any reason been advanced as to why no such analysis has been undertaken.
133. Mr Betts gave evidence to the effect that, of the 58 prisoners currently housed in the CSC estate, 37 are designated as single unlock. He has identified the ethnicity and (where stated) religion of those prisoners, 28 of whom are White and 12 of whom are Muslim. Thus, only 21 prisoners within the CSC are, in principle, available to form association groups, but that says nothing of: (1) the reasons for the designation of the balance as single unlock; or (2) why it is that those who are, in principle, able to associate, are considered unsuitable to form association groups with particular prisoners. In neither case is it clear which, if any, prisoner is unable/restricted in his ability to associate by reason of the risk posed by his racist and, in particular, Islamophobic views. Mr Betts does not identify the conclusions which are said to be drawable, or to have been drawn, from the figures which he has provided.
134. Mr Betts also gave evidence of measures pursued by the CSC system *'to address equality concerns across the CSC estate'*, namely:
  - a. the central Specialist Pathways, Diversity and Inclusion team, which undertakes an annual diversity and inclusion meeting, the purpose of which being to discuss diversity and inclusion and how it may be promoted, as

well as addressing any associated concerns. That team also discusses the equalities data which is compiled for the CSC quarterly;

- b. the equalities team and local process in place in each prison, to manage Discrimination Information Report Forms, which provide a mechanism by which prisoners in the estate can raise concerns in respect of perceived discrimination;
- c. the prison officer in each unit whose role it is to act as diversity and inclusivity representative, and whose purpose is to assist in the promotion of inclusion; and
- d. ‘culture webs’, which had been commissioned to support each site in looking at its individual culture and to identify themes (positive and negative) across the site, which had explored diversity and inclusion issues.

The above represents the full extent of the detail provided and does not address the matter on which Ground Five is founded. Even if it safely may be inferred that no such initiative has indicated an issue of the relevant nature, it is not suggested that there has been any proactive enquiry undertaken by the Defendant, or any indication that she has turned her mind to that issue. General regard to issues of equality is not synonymous with having specific regard, by way of conscious approach, to the statutory criteria: per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) [84], approved in the Court of Appeal in *R (Bailey) v Brent LBC* [2012] Eq LR 168, at [74] to [75], cited with approval in *Bracking* [26(6)].

135. The Defendant’s knowledge of the cohort of racist prisoners in the CSC was supplemented by that of the matters with which KT’s County Court claim was concerned. As is apparent from the second witness statement of the Claimant’s solicitor ([11] and [12]) who, at one time, had represented KT, in that claim KT had contended that the defendant had breached his rights under Articles 3, 8 and 14 of the ECHR, in failing to have protected him from racially and religiously motivated attacks and harassment by other prisoners, and properly to have investigated such matters. The defendant’s defence to that claim was struck out in January 2022, and judgment entered in KT’s favour, owing, it is said, to the defendant’s serious breaches of its disclosure obligations. A subsequent application for relief from sanction was dismissed. Remedy was the subject of agreement and took the form of a declaration that the defendant had breached KT’s rights under each Article by failing to have protected him from racist and religiously motivated abuse and assaults from other prisoners in the CSC and by failing properly to have investigated the same. It is said that the judge ordered the defendant to pay ‘substantial damages’, although no sum is specified. From that summary, it is clear that there was no adjudication on the substantive merit in KT’s claim. No detail is provided of the underlying facts beyond: (a) that appearing in footnote 5 within the Statement of Facts and Grounds: ‘...*That claim, and the evidence filed in it, addressed the existence of prisoners (including members of the DBD gang) within the CSC who have subjected Muslim prisoners and prisoners from minority ethnic groups to serious verbal and physical abuse. C gave evidence in these proceedings.*’; and (b) a short witness statement from

the Claimant, dated 1 August 2021, served in those proceedings, and relating to a period ending on that date and commencing in March 2017. Whilst not probative of the asserted inequality the subject of Ground Five, the information made available in those proceedings and the claims brought afforded further indication of the need to make enquiries as to the matters underpinning Ground Five. I am satisfied that all such matters, together with the concerns raised by the Claimant concerning association with GV and DA, and the risk assessments undertaken both in relation to the prisoners comprising Group B at Unit 6B, HMP Woodhill and to those whom the Claimant had himself proposed as associates (see, respectively, paragraphs 33(c) and 33(l), above), gave the Defendant grounds to believe that the manner in which association was being removed/permitted was not fulfilling the statutory goals for which section 149 of the EqA provides, obliging her to have due regard to exercising those functions in a manner which did so (see *BAPIO* [29]). She did not conscientiously apply her mind to that need.

136. In any event, were Ms Hannett's submission that there is no, or limited, evidence that the cohort of racist prisoners in the CSC has an impact on association or progression to be correct, it would be, in the language of *Bridges*, to 'put the cart before the horse. The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account.' I reject Ms Hannett's submission that there is no requirement to analyse the reasons for non-association, or restricted association, across the CSC, nor would that analysis be particularly onerous, given the size of that group of prisoners and the information routinely collated and known to each committee. I also reject her submission that the Claimant's abandonment of those grounds of challenge by which he had alleged direct, alternatively indirect, discrimination is fatal, or damaging, to Ground Five, though it may be of relevance to relief; the PSED is not dependent upon the ability of a particular prisoner to establish that he personally has been the subject of discrimination of the type to which enquiries ought to have been directed.
137. Ms Hannett does not challenge the duty of enquiry inherent in the PSED, that is the need to garner sufficient information to be able to determine whether discrimination may occur, in order lawfully to exercise that duty. I reject her submission, advanced by reference to *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] EWHC 638 (Admin) and *R (Khalsa Academies Trust Ltd) v Secretary of State for Education* [2022] ELR 55, each decided at first instance, that Ground Five can only succeed in the event that the Defendant is shown to have behaved irrationally. That principle applies where the public authority has made some enquiry and the question is whether it has sufficed, that is whether the authority has adopted a rational approach to the collection of data. Here, as in *Bridges*, no enquiry has been made, and no data collected, in relation to the matter in issue. In short, the Defendant has not taken all reasonable steps to make the enquiries required by the PSED. But, in any event, I am satisfied that the Defendant's knowledge of the existence of a significant cohort of racist prisoners, coupled with that gained from KT's claim; from the Claimant's own expressed concerns in relation to GV and DA; and gained from the risk assessments undertaken both in relation to the prisoners comprising Group B at Unit 6B, HMP Woodhill and to those whom the Claimant had himself proposed as associates (see, respectively, paragraphs 33(c)



and 33(1), above), rendered her decision not to make such enquiries, including as at the date of the hearing before this Court, irrational. Nor, on the available evidence, may it be said with any force that the carrying out of the relevant enquiries would have been futile — whilst the resultant data is unlikely to affect the composition of those detained within the CSC, it might affect that of particular association groups, or give rise to further consideration of the possibility of limited association with prisoners who are not detained in a CSC unit, subject always to risk assessment, and/or to further initiatives aimed at addressing racist beliefs and behaviour. In any event, the point here is not that the outcome will necessarily be different, rather that it cannot be said that equality implications could have no bearing on decisions as to association and ability to progress (cf *R (London Borough of Lewisham) v Assessment and Qualifications Alliance* [145] to [148]). Indeed, and by extension, were the position otherwise, there would have been no purpose to the collection of such data as was collected and considered, for the EIAs of 2021 and 2023.

138. No part of the above analysis loses sight of the fact, emphasised in each EIA and by Ms Hannett, that the size of the cohort of CSC prisoners leads to limitations on the inferences which may be drawn from data collected. Further, it must be recognised that the nature of the risks posed by those detained in the CSC is such that there may be multiple reasons why association and progression will not be possible for any given prisoner, which may have nothing to do with the racist views of other prisoners and may be born, in whole or in part, of the risks which he poses to others. It does not follow from any breach of the PSED that the outcome for a particular prisoner would have been any different had the Defendant's duty been discharged. I bear in mind that the requirements imposed by the PSED are context-dependent and do not require the impossible; rather the taking of reasonable steps to make enquiries about that which may not yet be known to a public authority regarding the potential impact of a decision or policy on individuals having the relevant protected characteristics — here, race and religion or belief — and a rigorous consideration of the PSED. The Defendant's and her department's expertise in the management of prisoners and the assessment of prisoner risk are to be informed by that approach.
139. In all the circumstances, I am satisfied that, in failing to have made enquiries as to the impact of the significant body of racist, including Islamophobic, prisoners in the CSC, the Defendant has not had due regard to the needs for which sub-section 149(1), involving the needs for which sub-section 149(3)(a), of the EqA provides. Ground Five succeeds.

### *Relief*

140. All four grounds of challenge having succeeded, I turn to consider the appropriate relief.
141. Section 31(2A) of the Senior Courts Act 1981 provides that the High Court must refuse to grant relief on an application for judicial review, and may not make an award under subsection (4) on such an application, if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

142. So far as material, section 8 of the HRA provides:

**‘8 Judicial remedies**

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) ...

(6) In this section—

...;

“damages” means damages for an unlawful act of a public authority;  
and

“unlawful” means unlawful under section 6(1).’

143. In *Shahid v Scottish Ministers* [2016] AC 429, SC, giving the judgment of the Court, Lord Reed JSC held (at [87] to [90]):

*'Just satisfaction*

87. Where the court finds that an act of a public authority is unlawful under section 6(1) of the Human Rights Act, as in the present case, section 8(1) of the Act enables the court to grant such relief or remedy, or make such order, as it considers just and appropriate. Under section 8(3) of the Act, no award of damages is to be made unless, taking account of all the circumstances of the case, including any other relief or remedy granted, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. Section 8(4) requires the court, in determining whether to award damages, or the amount of an award, to take into account the principles applied by the European Court under article 41 of the Convention. The approach which should be adopted was explained by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, and by this court in *R (Faulkner) v Secretary of State for Justice*; *R (Sturnham) v Parole Board of England and Wales (Nos 1 and 2)* [2013] UKSC 23 and 47; [2013] 2 AC 254.
88. The European Court has considered the application of article 41 in a number of cases concerned with violations of article 8 where prisoners were subject to segregation. In some cases, modest awards have been made in respect of non-pecuniary damage arising not from the segregation itself, but from other restrictions imposed. For example, in *Gülmez v Turkey* (Application No 16330/02) given 20 May 2008, an award was made in respect of a restriction on the prisoner's right to receive family visits. In other cases, the court declined to make an award in respect of non-pecuniary damage, holding that the finding of a violation of the Convention in itself constituted sufficient just satisfaction: see, for example, *Messina v Italy (No 2)* (Application No 25498/94) given 28 September 2000. On general principles, however, there is no doubt that an award may be made in respect of the costs and expenses necessarily incurred in order to establish the violation, or for its prevention or redress.
89. In the present case, it is not suggested that the appellant was prejudiced by the breaches of the time limit under rule 94(5), which invalidated the authorisation of 14 months of his segregation. His segregation would without doubt have continued during those periods even if the procedures had been carried out timeously. Nor has it been established that the deference of local management to the ECMDP was prejudicial to the appellant. Whether the failure to develop a management plan for his integration into the mainstream, or to consider possible transfers, resulted in the prolongation of his segregation is possible but uncertain. Three matters are however clear. One is that it is not suggested that he suffered any severe or permanent injury to his

health as a consequence of the prolongation of his segregation. Another is that the degree of interference with his private life which resulted from his removal from association with other prisoners was relatively limited, given the attitude of the other prisoners towards him. The third is that he was not isolated from all contact with other prisoners, and remained entitled to receive visits and to make telephone calls.

90. In these circumstances, just satisfaction can be afforded by making a declaratory order, establishing that the appellant's Convention rights were violated, and by making an appropriate award of costs.'

144. The Claimant has succeeded in his contention that his removal from association over a protracted period was not reviewed by the CSCMC, as it ought to have been (Grounds One and Three); that, even at this stage, he has not been given adequate reasons, on which representations could be made (Grounds Two and Three); and that the legal framework itself is not in accordance with the law, in failing to contain sufficient safeguards against arbitrary use (Ground Three). He has given evidence of the nature and effect on his wellbeing of his removal from association and of his self-referral to the mental health team, following which, he states, he was assessed by a nurse to meet the criteria for severe depression. He has referred to four Muslim CSC prisoners in HMP Whitemoor with whom he believes that he could associate and access corporate worship (the minimum number for which being three). He further notes that, in the past, he has been in an association group with four non-Muslim prisoners, without issue. It may be that at least some of those associations would be precluded by the risks which the Claimant himself poses, whether individually, or in any particular association group, but, in all such circumstances, it cannot be said, in relation to any of the relevant grounds of challenge, that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

145. Furthermore, I do not consider that it may be said that the finding of a violation of Article 8 in itself constitutes just satisfaction. The degree of interference with the Claimant's private life which has resulted from his removal from association has been of some significance and duration and appears to have had consequences for his mental health (albeit that suitably cogent medical evidence will need to be provided on any assessment of damages). His contact with other prisoners short of association has been limited and his contact with staff and other professionals of limited compensation for that fact. On the material with which I have been provided, it cannot be said that his refusal to associate with DA (between 23 June and 27 July 2022) or AY (between early August and 6 October 2022) was obviously unreasonable and, applying the principles distilled in *R (F) v Surrey County Council*, I am satisfied that the Claimant's response to the suggestion that he had bribed LF not to associate with him between 23 November 2022 and 29 January 2023 is persuasive, for the reasons which he has given (summarised above), themselves consistent with the documents to which he refers.

146. All of that said, it is to be borne in mind that the matters for which any award of damages would compensate the Claimant do not extend to his detention in the restrictive regime of the CSC per se, and that there are independent factors, both personal to him and to other prisoners, which would affect their ability to form association groups, such that any award is likely to be relatively modest.
147. Rightly, Mr Squires does not submit that anything other than the declaratory relief which Ms Hannett asserts to be required is warranted in relation to those periods during which the Claimant's detention in the CSC was not in accordance with the law by reason of the constitution of the CSCMC.
148. In all the circumstances, I am satisfied that it is appropriate to grant declaratory relief as follows:
- a. Between November 2021 and March 2022; May and June 2022; and August 2022 and January 2023, the Defendant's decisions to maintain the Claimant's placement in the CSC violated his rights under Article 8 ECHR, as not having been in accordance with the law, and, accordingly, having been unlawful under section 6(1) of the HRA, as the CSCMC had included an acting prison governor, contrary to the guidance given by the Supreme Court in *Bourgass and Hussain v SoSJ* [2016] AC 384.
  - b. Between 13 April 2022 and the date of the hearing before this Court, with the exception of the period beginning on 29 January and ending on 16 March 2023, the circumstances of the Claimant's removal from association violated his rights under Article 8 ECHR, as not having been in accordance with the law, and, accordingly, were unlawful under section 6(1) of the HRA.
  - c. In failing to consider and make reasonable enquiry as to whether the acknowledged presence of a significant body of racist and Islamophobic prisoners across the CSC places Muslim and/or non-White prisoners at a particular disadvantage in connection with their ability to associate, and, through association, to progress, the Defendant is in breach of her continuing PSED, contrary to section 149 of the EqA.
149. Further:
- a. In default of agreement between the parties, there shall be an assessment of non-pecuniary damages payable to the Claimant by reason of the Defendant's violation of his Article 8 ECHR rights the subject of the declaration at sub-paragraph 148(b) above; and
  - b. The Claimant shall be entitled to an appropriate award of the costs actually, necessarily and reasonably incurred in establishing the violation of his Article 8 ECHR rights the subject of the declaration at sub-paragraph 148(b) above, to be assessed if not agreed.