



Neutral Citation Number: [2019] EWHC 3553 (QB)

Case No: QB/2019/002608

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2019

Before :

LADY JUSTICE SIMLER
and
MR JUSTICE CAVANAGH

Between :

SECRETARY OF STATE FOR JUSTICE
- and -
PRISON OFFICERS ASSOCIATION

Applicant

Respondent

Sir James Eadie QC, Daniel Stilitz QC, and Katherine Hardcastle (instructed by the
Government Legal Department) for the **Applicant**
Hugh Southey QC and Stuart Brittenden (instructed by **Thompsons**) for the **Respondent**

Hearing date: 19 November 2019

Approved Judgment

Lady Justice Simler and Mr Justice Cavanagh:

1. This is the judgment of the court.

Introduction

2. The Secretary of State for Justice seeks an order of appropriate penalty against the Prison Officers' Association ("the POA") under CPR 81, for alleged civil contempt by reason of disobedience of a court order. No order of committal is sought against any named individual. The application notice for contempt was issued on 19 July 2019 (though it was not sealed until 7 October 2019) and was served directly on the POA's solicitors, with supporting material, on 3 September 2019. The order alleged to have been breached on two occasions is a permanent injunction ordered by Jay J on 19 July 2017 ("the Injunction"), after a contested trial, prohibiting the POA from inducing, authorising or supporting any form of industrial action by a prison officer. We set out the relevant terms of the Injunction later in this judgment.
3. The Secretary of State contends, and the POA does not dispute, that, on 14 September 2018, the POA induced national strike action by prison officers; and on 21 February 2019, the POA supported industrial action by prison officers at HMP Liverpool. It is also the case that the POA accepts that the two incidents referred to amount to breaches of express terms on the face of the Injunction. Nor does the POA contend that it was unaware of the terms of the Injunction imposed on it.
4. As Mr Stephen Gillan, the General Secretary of the POA explains in his evidence and we accept, the POA plays an important and significant role in facilitating and maintaining good industrial relations. It represents just over 30,000 dedicated, hardworking prison officer members across 122 prisons in England and Wales. It is well documented that, while the prison population has been growing and continues to grow, the number of prison officers is falling. Mr Gillan refers to the annual report for 2019 of HM Chief Inspectorate of Prisons for England and Wales (referred to as "HMCIP"). The opening paragraph of the report's introduction reads:

“... far too many of our jails have been plagued by drugs, violence, appalling living conditions and a lack of access to meaningful rehabilitative activity... Overall, levels of self-harm were disturbingly high and self-inflicted deaths tragically increased... ..

However we were also struck, as in previous years, by the extraordinary dedication of those who work in our prisons. Their work is difficult, often dangerous, largely unseen by the public and, as a result, little understood. Many worked through a period in which reduced resources, both in terms of staff and investment, made it extremely difficult to run some of our jails. Many are new to their jobs and deserve as much support as possible as they gain experience and grow into their roles in an environment where, in too many establishments, drug-fuelled violence remains a daily reality.”

That backdrop provides important context for the contempt application, the POA's response to it, and its cross-application by notice dated 10 October 2019, to set aside or vary the Injunction.

5. In summary, the POA submits that the court should dismiss the contempt application and/or for the same reasons, should set aside or vary the Injunction for the future, on the basis either that the Injunction should not have been granted at all, or that the terms of the Injunction are too wide. The POA submits that a case decided by the European Court of Human Rights since Jay J's judgment, **Ognevenko v Russia** (Application No 44873/09) (2019) 69 EHRR 9, decided on 20 November 2018, makes clear that the Injunction gave rise to a violation of the POA's rights under Articles 11, 3 and/or 14 of the European Convention on Human Rights ("the Convention"). This means, contends the POA, it would be unlawful and in breach of Article 11 of the Convention for this court to take any steps to enforce the Injunction, and the Secretary of State too is in breach of his Convention obligations by applying to enforce it by this application.
6. The POA submits that a complete ban on industrial action is a disproportionate interference with Article 11 rights of freedom of association in the absence of compensating measures to offset the ban. Further, the ban on inducement and support of industrial action contravenes Article 3 because it will give rise to a significant risk of degrading treatment in violation of Article 3 as POA members may not be aware of their legal rights and obligations unless advised by the POA. They may, therefore, be unaware that their continued attendance at work would breach their rights as protected by Article 3, or that they may be caused to detain prisoners in conditions that violate Article 3.
7. Yet further, the POA submits that the ban on the inducement and support of industrial action violates Article 14 (the prohibition of discrimination), to the extent that it limits the application of s.44(1)(d) of the Employment Rights Act 1996 ("the ERA"). Section 44(1)(d) provides that an employee has the right not to be subjected to a detriment for leaving the workplace because s/he reasonably believed themselves to be in serious and imminent danger. The POA submits that all other workers have the benefit of the protection of this provision, but that the effect of the Injunction was to erode the protection for prison officers afforded by it.
8. It is no answer to this, submits the POA, for the Secretary of State to say that the Injunction is consistent with the statutory prohibition on the inducement of strike action laid down by s.127 Criminal Justice and Public Order Act 1994 ("the 1994 Act"), because s.127 must be "read down" in order to render it consistent with the Convention. If it is read down in this manner, the actions of the POA in September 2018 and February 2019 were not in breach of s.127 of the 1994 Act.
9. The POA makes a further submission not based on the Convention. It submits the Injunction goes too far under domestic law because it prohibits the POA from "supporting" any form of industrial action by any prison officer. The POA contends that this means that the POA is prevented from providing support, advice or guidance to any officer who is contemplating withholding his services, and that this is not something that is rendered unlawful by s.127 of the 1994 Act.
10. In the alternative, even if the POA is in contempt, it submits that the court should not impose any penalty. Reliance is placed on the same arguments by way of mitigation

and in support of the contention that the court should not impose any sanction on the POA for the breaches of the Injunction. The POA submits no harm was caused on either occasion, and even if the court concludes a penalty should be imposed, the court should take account of the above in mitigation when deciding upon sanction.

11. As will be apparent from this summary of the issues, the applications raise wide-ranging issues of law. However, even if the POA is right in its submission that the Injunction breaches Convention rights, or was wrongly made for other reasons, the question arises as to what consequences should follow. The POA did not advance any argument based on the Convention in the hearing before Jay J. There was no successful appeal on this or any other basis. The POA did not make an application to set aside or vary the Injunction until after contempt proceedings were commenced. It admits that it has twice breached the terms of the Injunction. In those circumstances, is it a defence to a contempt application for a respondent to argue that recent developments in case-law show that the injunction should not have been granted in the first place, given the injunction was still in force when the breaches took place? Again, in what circumstances, if any, should an injunction be varied or set aside on the basis of arguments which were advanced, or could have been but were not advanced, to the court before the injunction was originally granted? We will return to these questions later in the judgment.
12. The Secretary of State is represented by Sir James Eadie QC, leading Mr Daniel Stiliz QC and Ms Katherine Hardcastle. The POA is represented by Mr Hugh Southey QC and Mr Stuart Brittenden. Mr Stiliz QC and Mr Brittenden appeared in the injunction hearing before Jay J. We are grateful to all counsel for their helpful written and oral submissions.

The structure of this judgment

13. In the remainder of this judgment, we will deal with the issues in the following order:
 - 1) The terms of the Injunction (granted by Jay J on 19 July 2017);
 - 2) The relevant statutory provisions;
 - 3) The relevant facts;
 - 4) Was the POA in breach of the express terms of the Injunction?
 - 5) Article 11 of the Convention: does Article 11 as interpreted in **Ognevenko**, mean that the POA has a right, under the Convention, to induce, authorise or support industrial action, in a way that is prohibited by the Injunction?
 - 6) Article 3: does Article 3 mean that the POA has a right, under the Convention, to support industrial action in a way that is prohibited by the Injunction?
 - 7) Article 14 and s.44 of the ERA: does the Injunction mean that there is unlawful discrimination against prison officers contrary to the Convention because they are not free to absent themselves from the workplace because of serious and imminent danger?
 - 8) The domestic law challenge to the breadth of the Injunction;

- 9) In light of the above, is the POA in contempt and, if so, should the court impose no penalty? If the court decides to impose a penalty, what should it be?
- 10) Again in light of the above, should the Injunction be varied or set aside; and
- 11) Conclusion.

(1) The terms of the Injunction (granted by Jay J on 19 July 2017)

14. The Injunction was granted after a trial, at which both sides were represented by leading and junior counsel. The Injunction carried a penal notice in the following terms:

“IF YOU THE POA DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND ANY OF YOUR OFFICERS MAY BE SENT TO PRISON OR FIND ALL YOUR ASSETS MAY BE SEIZED.”

So far as material, it provides:

“(a) That the POA whether by any agent or committee, official, or officer, including, for the avoidance of doubt, any committee, official, officer or meeting of any local branch or otherwise be restrained from:

- i) Inducing, authorising or supporting any form of industrial action by any Prison Officer in the form of:
 - (1) The withholding of any services as a prison officer (including any services that a prison officer was prior to the inducement carrying out in that capacity, whether such services were being performed pursuant to a contractual obligation or otherwise);
 - (2) Any action that would be likely to put at risk the safety of any person (whether a prisoner, a person working at or visiting a prison, a person working with prisoners or a member of the public);
- ii) Inducing, persuading or procuring any of its members to commit a breach of discipline.”

The judge made declarations in similar terms.

15. The Injunction addressed its effect on the POA as a corporate entity and the potential liability of its officers. Further it made clear in a paragraph headed “Parties other than the Claimant and the Defendant”, that:

“It is contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person so doing may be sent to prison, fined, or have his assets seized.”

16. There is no dispute that Mr Gillan notified the membership of the effect of the judgment handed down by Jay J and the Injunction, by sending out a circular dated 31 July 2017, circular 98/2017, enclosing a copy of the Injunction itself. The circular drew attention to the penal notice and emphasised the terms of the Injunction. Recipients were invited to bring the circular to the attention of the membership and to contact their NEC representatives for advice if there was anything that was not understood.
17. No argument was advanced before Jay J to the effect that s.127 of the 1994 Act is, in whole or in part, in violation of Articles 11, 3 and/or 14 of the Convention. Nor was there any challenge to the enforceability of s.127 on any other basis. Rather, the main issue of law contested before Jay J was whether the words “the withholding of services as a prison officer” in s.127 applied not only to services which a prison officer was contractually obliged to perform but also to services which were “voluntary” but being carried out by the prison officer. In that regard, Jay J held s.127 is widely drawn, stating at [127]:

“The bullet-pointed services [namely the “voluntary” services the POA contended were not covered] are important, essential services which ... would if withdrawn cause significant risk to prisoners in particular those who are violent or vulnerable. This has two aspects. First, I do not accept that the concerted withdrawal at short notice could readily be ameliorated by the blanket issuing of instructions [by governors to undertake essential services], I accept Mr Stilitz’s submission that, as a matter of common sense, there would be chaos in the first instance; and that on any view of the evidence it would take time for governors to mobilise and identify specific requirements in relation to each and all of the bullet-pointed tasks. These matters have to be addressed on a case by case basis and it is obvious to me that there would be logistical and practical difficulties..... On any view, there would be scope for debate as to whether governors’ instruction were lawful and reasonable; and that scope would be fully deployed. Secondly, I also accept Mr Cople’s evidence that the perpetuation of minimum staff levels on an unremitting basis for anything beyond the short to medium term would lead to an impoverished regime and an unacceptable level of risk amongst a volatile and frustrated prison population, held in their cells for longer than normal”.
18. Mr Southey QC raises an issue as to the meaning of the word “supporting” as used in clause (a)(i) of the Injunction. He submits that the addition of this word has the effect of rendering it unlawful for the POA to provide support, advice and guidance to any prison officer contemplating withholding his or her services. That goes further than “inducing” and means that it would be unlawful for the POA to acknowledge or express understanding of an officer’s concerns when they propose to or actually withdraw their services, and that it would also capture a situation where a POA representative intercedes on a member’s behalf to justify the member’s actions to management or in providing support to seek a resolution. The POA submits that for this reason alone the permanent injunction is unquestionably too broad in its scope.

19. Sir James Eadie QC on the other hand, submits that the use of the word “supporting” does not have the broad meaning contended for by the POA. In particular, it does not prevent the POA from expressing sympathy or support to a prison officer merely because they are taking industrial action.
20. We agree with the Secretary of State’s interpretation: in context, the word “supporting” is clearly intended to connote the provision of support for industrial action, and not support in a general sense, for POA members. It is intended to make clear that the Injunction would apply to cases in which a group of members commenced industrial action and then looked to the POA for its support in relation to the industrial action. There is nothing to prevent the POA from providing guidance to a member who is contemplating withholding his or her services, provided that nothing that the POA or its representatives does amounts, expressly or impliedly, to inducing, authorising or providing encouragement or assistance for industrial action. Similarly, if a member takes industrial action without the inducement or support of the POA, there is nothing to prevent the POA from acting as a conduit between the member and the employer, provided again that this is not an indirect way of providing encouragement, support or assistance for the industrial action itself.
21. We add that if the POA was concerned that the use of the word “supporting” goes too far, we are surprised that no submissions to that effect appear to have been made before Jay J. Paragraph 153 of his judgment shows that the judge invited the parties to agree the terms of the order, on the basis that he would be invited to resolve any disagreements about the wording. There is no indication that the POA objected to the use of the word “supporting” at that stage.

(2) The relevant statutory provisions

Section 127 of the 1994 Act

22. Section 127 provides relevantly as follows:

“127 Inducements to withhold services or to indiscipline

(1) A person contravenes this subsection if he induces a prison officer—

- (a) to take (or continue to take), any industrial action;
- (b) to commit a breach of discipline.

(1A) In subsection (1) ‘industrial action’ means—

- (a) the withholding of services as a prison officer; or
- (b) any action that would be likely to put at risk the safety of any person (whether a prisoner, a person working at or visiting a prison, a person working with prisoners or a member of the public).

(2) The obligation not to contravene subsection (1) above shall be a duty owed to the Secretary of State.

(3) Without prejudice to the right of the Secretary of State ... by virtue of the preceding provisions of this section, to bring civil proceedings in respect of any apprehended contravention of subsection (1) above, any breach of the duty mentioned in subsection (2) above which causes the Secretary of State ... to sustain loss or damage shall be actionable, at his suit or instance, against the person in breach.

(4) In this section ‘prison officer’ means any individual who—

(a) holds any post, otherwise than as a chaplain or assistant chaplain or as a medical officer, to which he has been appointed ...

(aa) holds any post, other than as a chaplain or assistant chaplain, to which he has been appointed for the purposes of section 7 of the Prison Act 1952 (appointment of prison staff)

...

(c) is a custody officer within the meaning of Part I of this Act or a prisoner custody officer, within the meaning of Part IV of the Criminal Justice Act 1991 or Chapter II or III of this Part.

(5) The reference in subsection (1) above to a breach of discipline by a prison officer is a reference to a failure by a prison officer to perform any duty imposed on him by the prison rules or any code of discipline having effect under those rules or any other contravention by a prison officer of those rules or any such code.

(6) In subsection (5) above ‘the prison rules’ means any rules for the time being in force under section 47 of the Prison Act 1952.

...

(8) Nothing in the relevant employment legislation [including the Trade Union and Labour Relations (Consolidation) Act 1992 and the Employment Rights Act 1996] shall affect the rights of the Secretary of State ... by virtue of this section.

(9) In this section ‘the relevant employment legislation’ has the same meaning as in section 126 above”.

Section 44(1)(d) Employment Rights Act 1996 (“the ERA”)

23. Section 44(1)(d) ERA provides:

“(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work...”

Human Rights Act 1998 (“the HRA”)

24. Sections 2, 3, 4, and 6 of the Human Rights Act 1998 provide, so far as relevant:

“2. — **Interpretation of Convention rights.**

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights...

3.— **Interpretation of legislation.**

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- (2) This section—
 - (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation....

4.— Declaration of incompatibility.

- (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
- (4) If the court is satisfied—
 - (a) that the provision is incompatible with a Convention right, and
 - (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.
- (5) In this section “court” means ...
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal;
- (6) A declaration under this section (“a declaration of incompatibility”)—
 - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.”

6 – Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if –
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted any differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes –
 - (a) a court or tribunal”.

The POA has not applied for a declaration of incompatibility in relation to s.127 of the 1994 Act.

The relevant Convention rights

25. Article 3 provides as follows:

“Prohibition of torture

No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

26. Article 11 provides:

“Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State.”

27. Article 14 provides:

“Prohibition of discrimination

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

(3) The relevant facts

28. On behalf of the Secretary of State for Justice, we have been provided with two affidavits and exhibits from Mr Philip Copple, the Director General for Prisons; an affidavit and exhibit each from Mr Francis Stuart, the Head of Employee Relations for HM Prison and Probation Service; and Governor Pia Sinha, Governor of HMP Liverpool. For the POA we have three affidavits together with exhibits from Mr Stephen Paul Gillan, the General Secretary of the POA and an affidavit (with exhibits) from Frances O’Grady, the General Secretary of the Trades Union Congress.

29. Mr Copple explains the effect of industrial action by prison officers, especially where it is unplanned or called on short notice: it poses serious risks to the health and safety of prisoners and remaining staff, and to the integrity of prison buildings and property. It disrupts the work of the criminal courts and the lives of visiting families and friends of prisoners. It exacerbates existing pressures on limited resources. Past incidents of

industrial action have led to costly damage; numerous escapes; and increased incidents of self-harm and suicide amongst inmates. We note that Mr Gillan does not dispute this evidence, and describes at length how potentially dangerous prison environments can be.

30. Unsurprisingly in these circumstances, Her Majesty's Prison and Probation Service (referred to as "HMPPS") takes the threat of industrial action seriously, putting in place contingency measures so far as possible in respect of such action. For example, the steps that were taken to mitigate the threat of industrial action at HMP Liverpool on the evening of 20 February 2019 are described by Governor Sinha and Mr Stuart, and included putting in place "national industrial action contingency plans" despite the fact that the threatened action appeared to be local and relatively small. We accept the need for HMPPS to plan on the basis that any incident of industrial action, however small or short lived, may not be capable of resolution and poses a risk of death or serious injury, damage and disruption, and a risk also of spreading to other prisons.
31. It is no doubt for these reasons that Parliament has recognised the exceptional nature and context of the prison environment and enacted s.127(1) of the 1994 Act, prohibiting inducement to industrial action by prison officers.
32. Notwithstanding that prohibition, the evidence demonstrates three occasions on which the Secretary of State has been granted injunctions on the basis of s. 127, requiring members of the POA to return to work and prohibiting the POA from encouraging and assisting industrial action in future. (Other incidents are also described by Mr Cople in his evidence, but the extent of the POA's role and involvement in these is unclear, and we have not placed any reliance on them). The incidents leading to the grant of injunctions are in summary as follows.
33. On 28 October 2016, the POA threatened a national strike by circular 97/2016, in breach of s.127. The Secretary of State sought an injunction; the circular was subsequently withdrawn; and the injunction was not then pursued. Within a few weeks, on 14 November 2016, the POA again threatened a national strike following agreement by its National Executive Committee ("the NEC") to "call national protest action" in breach of s.127. An injunction was granted by Kerr J (following an inter partes hearing, with clause 1 in identical terms to the Injunction) on 15 November 2016, prohibiting the POA from "inducing, authorising or supporting any form of industrial action".
34. On 22 February 2017, the POA threatened national industrial action in breach of s.127 and the Kerr J injunction. The threat was subsequently withdrawn.
35. On 27 February 2017, the POA threatened national industrial action by calling on members to withdraw from so-called "voluntary tasks" (circular 21/2017) alleged to have been in breach of the Kerr J injunction. The Secretary of State obtained a further injunction, ordered by Leggatt J on 28 February 2017, in materially the same terms as the Kerr J injunction on the basis of that alleged breach.
36. The Secretary of State subsequently issued proceedings against the POA, seeking damages, declarations that the conduct was unlawful and a final injunction restraining the POA in the same terms as those ordered by Leggatt J. The POA resisted the claim (as already indicated) on the basis that the injunctions obtained by the Secretary of State did not restrain all industrial action and that a call to withdraw from "voluntary tasks"

was not unlawful. The trial was heard by Jay J who found that the POA's conduct amounted to a breach of s.127, including withdrawal from "voluntary tasks", and issued the final Injunction to which we have already referred.

14 September 2018

37. There is no dispute that the first breach of the Injunction occurred on 14 September 2018 as follows. A POA press release posted on its website on 14 September 2018 stated:

"The POA General Secretary Steve Gillan today called for all POA members in England and Wales prisons to take protest action outside their workplace from 07:00 until instructed otherwise."

Following discussions with the then Minister of State, the POA instructed its members to return to work at approximately 3.30pm that afternoon, again by way of a press release. The action was therefore relatively short-lived. The POA relies on the fact it produced agreement addressing its concerns about violence, and caused no actual harm. Mr Gillan gives evidence about the steps taken by the POA to ensure that minimum cover is provided where action of this kind is taken. We accept this evidence but bear in mind that however short lived, the action might not have been capable of resolution and inevitably posed a real risk of death or serious injury to prisoners, prison officers and members of the public, together with potential damage and disruption.

38. We do not accept Mr Gillan's assertion in his first affidavit that the POA is not in a position to control its members and cannot prevent them from walking out. The press releases issued by the POA sought in terms to elicit just such behaviour from its members; and achieved compliance when the members were instructed to return to work.
39. Mr Gillan seeks to explain and/or justify the inducement to a national strike on 14 September 2018. He states that the trigger for the call for national protest on 14 September 2018 was the production of an "Urgent Notification" letter issued by HMCIP to the Secretary of State dated 12 September 2018, published on 13 September 2018 under the Protocol between HMCIP and the Secretary of State (dated 20 November 2017). This followed an inspection which identified significant concerns about the treatment and conditions of prisoners, including rising levels of violence (including assaults on staff) and a "dangerous lack of control in many parts of the prison", leading HMCIP to fear that "there could all too easily be a complete breakdown in order and discipline".
40. Mr Gillan explains that the Urgent Notification letter "presented an opportunity to keep up the pressure on the Secretary of State for Justice to try and improve conditions at the prison and highlight the ongoing problems in the system" but the POA "got brushed off". He viewed the letter as "an opportunity to try a different approach to trying to get these issues addressed. It was certainly not intended as a deliberate or direct snub to the court's authority, but was instead the action of a union that was out of options in the face of the most appalling dangers being faced daily by its members." He acknowledges that the circular put out by the POA was in breach of the Injunction and says he is "sorry for that".

41. We note that, as set out in the Urgent Notification letter, under the relevant protocol the Secretary of State had 28 days to respond to HMCIP publicly, addressing the issues raised by the letter. It seems to us, in agreement with the Secretary of State, that to call for industrial action on 14 September 2018 (the day following its publication), the POA pre-empted that response, and sought to take advantage of the publicly expressed concerns of HMCIP, thereby undermining the rationale of the protocol and Urgent Notification process.
42. The call for nationwide industrial action was a clear inducement to members of the POA to strike in breach of paragraph (a)(i)(1) of the Injunction as is realistically conceded by the POA. It is plain that the POA knew of the facts which constituted the breach of the Injunction in relation to this incident.

21 February 2019

43. The facts relating to events at HMP Liverpool on 21 February 2019 are less stark. The evidence of Mr Copple, Governor Sinha and Mr Stuart describes learning on the evening of 20 February 2019, that local POA branch members at HMP Liverpool were planning a walk out the following morning. In response, contingency plans at local and national level were enacted.
44. Mr Gillan comments on that evidence (at paragraph 168 of his first affidavit) in relation to the evening of 20 February 2019 as follows:

“Mark Fairhurst, the National Chair contacted our branch secretary Custodial Manager Robert Williams that evening [20 February 2019] to ask for a branch meeting the following morning to talk about PSO 1600 there and to update the membership on a few national issues such as the pension age, the Berryman case etc. The branch made all the arrangement and Mr Williams contacted Governor Sinha by Facebook Messenger to ask for facility time for a meeting intended to start at 7am before the shift began at 7.15am. I understand this was granted late in the evening.”
45. At around 7am on 21 February 2019, prison officers at HMP Liverpool held a meeting outside the grounds of the prison, at which they were addressed by Mr Mick Pimblett (a member of the POA’s National Executive Committee (“the NEC”), with authority to bind the POA). At around 8.45am that morning, Mr Pimblett and others met Governor Sinha, to inform her that staff at the prison would not be attending work. Mr Pimblett made a number of requests of the Governor on behalf of local branch membership.
46. Around 8.50am, Mr Stuart telephoned Mr Gillan to make clear his view that the action was prima facie in breach of s.127 and the Injunction; and to invite the POA to repudiate it. Mr Gillan responded with requests for certain action by the Governor, in line with the requests made by Mr Pimblett, but did not repudiate the action.
47. Later that day, a press release (which included the contact names and telephone numbers of Mr Gillan and Mr Fairhurst) was placed on the POA’s website in the following terms:

“WALK OUT AT HMP LIVERPOOL

Today Prison Officers have refused to enter HMP Liverpool following the ‘unjust sacking’ of a longstanding Prison Officer of 26 years, despite being cleared of any wrongdoing by the Police after a full investigation.

Staff at Liverpool fear for their personal safety and local management refuse to provide them with any assurances.

Leaders of the POA said:

Prison Officers face ever-increasing levels of violence, due to unprecedented levels of drugs and debt within the prison population and Liverpool is a high-risk prison.

Prison Officers are taught to use Control and Restraint (C&R) to manage the prison population. As part of the training they are taught to use a pre-emptive strike if they feel their personal safety, that of a colleague, or a prisoner is at risk.

The Officer used this approved method and was unjustly sacked.

Prison Officers now fear they will lose their jobs if they use force and will often allow prisoners to assault them rather than risk their employment.”

48. There was other media coverage, including an interview by The Independent newspaper with Mr Fairhurst, in which he explained the position at HMP Liverpool and the request for the Secretary of State to “sit down with them at a national level and review the use of force policy and training”. Mr Pimblett spoke to the BBC.
49. Mr Gillan explains that for the POA to repudiate the action would have been “politically untenable” and seen as “washing our hands of the members and telling them that we were not prepared to help them try and get a safer workplace. Our credibility would have been gone in an instant and our ability to help either then or in the future would have been badly compromised.” He says that the POA acted only in the role of intermediary or broker between prison officers and management, and did not induce the action. Further, to repudiate the walk-out would have shattered credibility amongst the membership and the POA’s ability to undertake that role in the future. He accepts however, that the POA’s actions could be seen as “supporting that walkout”.
50. Whether or not the POA induced the action on this occasion (which is denied), it is not disputed that it supported it, and there can be no doubt given the history and the evidence, that it knew of the facts which constituted breach of the Injunction on this occasion.
51. We accept Mr Gillan’s formal denial, on behalf of the POA, of inducement, as an honest expression of his opinion. However, we have concluded that the irresistible inference from all the material available, is that we can be sure there was inducement by the POA on this occasion as well. Mr Fairhurst (the National Chair) called the meeting of the branch members at 7am on the morning of 21 February 2019. Mr Pimblett (an

authorised NEC member) addressed the meeting, following which staff refused to attend for work. Both men were present at HMP Liverpool on 20 and 21 February, and involved in planning and in the events that occurred. They know what was said to members, and discussed and/or agreed as between the local branch and the POA at national level. Yet neither has provided a witness statement responding to the express allegation of inducement made in these contempt proceedings, still less have they set out what was said in the any of the meetings/discussions that took place. It is particularly surprising that if Mr Pimblett was simply acting as go-between (as the POA asserts) that we have no witness statement from him saying that. It seems to us that we are entitled to draw adverse inferences from their silence.

52. Mr Gillan was not present, but there is clear evidence of coordination in his actions, and those of Mr Fairhurst and Mr Pimblett. He and Mr Fairhurst used the occasion of the local strike by members to request that certain issues arising at a national level (so beyond the local demands of branch members) be given consideration, and only agreed to direct Mr Pimblett that the members should return to work once assurances had been received on these national issues. Despite the obvious co-ordination between Mr Pimblett and Mr Gillan in terms of the requests they made of the Governor and Mr Stuart, Mr Gillan gives no evidence at all about discussions he must have had with Mr Fairhurst and/or Mr Pimblett, and given that he was not present, cannot give any evidence about the planning the night before, or what was said to members on 21 February.
53. We have no doubt that Mr Pimblett was taking instructions from Mr Gillan and/or Mr Fairhurst and it is not in dispute that on the basis of their instructions, he instructed the membership at HMP Liverpool to return to work later in the day, as they duly did. The evidence as a whole makes us sure, not only that the NEC provided practical support and direction to the strike action, together with publicly supportive statements on its own website and in comments to the national media, but also that Mr Pimblett did more than act as a go-between, and that he went as far as to induce members on behalf of the POA to continue their strike action during the course of the day on 21 February at HMP Liverpool.

(4) Was the POA in breach of the Injunction

54. The procedural requirements and safeguards applicable to proceedings for contempt and breaches of injunctions are not in dispute. An applicant bears the burden of proof to the criminal standard. Further, because of the quasi-criminal nature of contempt proceedings, careful compliance with procedural rules contained in CPR 81 (and the accompanying Practice Direction) is required to ensure that the proceedings are fair. There is no suggestion that these requirements have not been satisfied here.
55. The three elements that must be established to prove contempt in injunction cases (see **Masri v Consolidated Contractors International Company SAL** [2011] EWHC 1024 (Comm) at [150], approved in **Devere v Hither Green Developments Ltd** [2015] EWCA Civ 1365 at [47]) are that:
 - i) The respondent to the application knew of the terms of the order.
 - ii) The respondent acted (or failed to act) in a manner which involved a breach of the order.

- iii) The respondent knew of the facts which made his conduct a breach. There is no separate requirement to show that the respondent acted in the belief that what he did was in breach of the order.

56. In light of the evidence and the findings we have made, there is no doubt that the POA knew of the terms of the Injunction, and we are sure that:

- i) The POA induced national strike action on 14 September 2018, knowing of the facts that made this a breach of the Injunction; and
- ii) The POA both supported and induced continued strike action at HMP Liverpool on 21 February 2019, again, knowing of the facts that made this a breach of the Injunction.

(5) Do any of the arguments seeking to challenge the Injunction on its merits and advanced by reference to Articles 11 and/or 3 and/or 14 of the Convention afford the POA a defence to this claim?

57. Mr Southey made clear in the course of argument that only the POA's arguments based on Convention rights and the HRA 1998 are relied on as affording the POA a defence to the allegations of contempt. The remaining arguments are advanced by way of mitigation of penalty only.

58. We have summarised the human rights arguments shortly in the introductory section above, and return to these arguments in more detail below. However, the first question that must be addressed is whether they are arguments that the court should even entertain, and if so on what basis.

59. At the outset it seemed to us that the argument advanced by the POA might be analogous to the argument advanced in **Boddington v British Railways Board** [1999] 2 AC 143. There, in response to a criminal prosecution based on breach of a byelaw, the defendant was permitted to argue by way of defence that the byelaw was ultra vires the primary legislation and therefore to be treated as if it had never been in force so that a prosecution based on it could not be entertained.

60. However, we have concluded, in agreement with Sir James Eadie, that there is no real analogy with that case, and the position here is materially different. First, in this case there is an order of the High Court – the Injunction - made on a final and permanent basis following a full trial. The order has not been appealed, varied or discharged, and continues in force unless and until discharged.

61. Those avenues (applications to vary or discharge) are (and have been) available to the POA throughout and afford procedural protection in the event, say, that a new argument or different understanding of the law arises. Meanwhile, the obligation to comply applies irrespective of any views the POA might have as to the appropriateness or otherwise of the order. As Romer LJ said in **Hadkinson v Hadkinson** [1952] P 285 at p 288 in a passage endorsed by the Privy Council in **Isaacs v Robertson** [1985] AC 97 at pp 101F-102C:

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of

competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. “A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.” (Per Lord Cottenham LC in *Chuck v Cremer* (1846) Cooper temp Cottenham 205, 338). Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court... is in contempt and may be punished by committal or attachment or otherwise.”

Thus it was not open to the POA to have assumed new arguments about the legality/appropriateness of the Injunction are correct and to have disobeyed it on that basis, running the arguments it would have advanced as a defence to this application.

62. Secondly, the scheme of the HRA has the effect that the consequences of a successful human rights argument are different from an argument that a byelaw relied on as the basis for a criminal prosecution is ultra vires and therefore of no effect.
63. Although not presented in this way, the logic of the argument advanced by the POA (that the absence of compensatory measures for the total strike ban in s.127 of the 1994 Act means it is incompatible with the POA’s Article 11 rights) is that it is not simply a plea to vary the Injunction granted by Jay J. It amounts to an argument that it is unlawful for any injunction to be made where it enforces s.127 (in the absence of compensating measures) and is an argument that s.127 is itself incompatible with the Convention rights in issue. That conclusion is reinforced by the POA’s reliance on s.3 HRA as discussed below.
64. If correct about its human rights arguments, the POA contends that s.127 and/or the Injunction can be read compatibly with its Convention rights, in accordance with the strong interpretive obligation in s.3 HRA. It submits that it is possible to read words into s.127 to ensure that the ban on strike action applies “save where the European Convention on Human Rights entitled the person to act as they did”. Since reliance on s.3 HRA depends first on a finding of incompatibility, the first question that must be answered is whether the ban on strike action for essential services contained in s.127 of the 1994 Act can be read down or interpreted as a conditional or qualified ban. In other words, can s.127 be read and understood as banning strike action except where there are no compensatory measures in place?
65. We have concluded that it is simply not possible to read the legislation in this way. The interpretative obligation imposed by s.3 HRA undoubtedly allows words to be read into s.127 (see **R v A** [2002] 1 AC 45 at [44]). However, the interpretation adopted must

not be inconsistent with a fundamental feature of the provision in question (see **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 at [33]). Section 127 imposes an outright and complete ban on taking strike action where essential services are involved. This is for good reason as we have already described, and is a fundamental feature of the provision. The ban is not qualified in any way, as it could have been. Nor is the ban made conditional on other measures being put in place, again as it could have been. In those circumstances, it seems to us that it is inconsistent with the fundamental feature of an outright ban, to read in words that make it conditional on some extraneous measure being in place. To do so does not go with the grain of the legislation.

66. For these reasons it is not possible to read the legislation as the POA invites us to do.
67. If s.3 HRA cannot be used in this way, the assumed incompatibility of s.127 is only capable of remedy pursuant to s. 4 HRA. However, as s.6(2) HRA makes clear, even where a declaration of incompatibility is made, the provision remains in force and has full effect. That in turn means that any incompatibility affords the POA no defence to this application. Nor, contrary to the submissions made by Mr Southey, will the court itself be acting incompatibly by enforcing the Injunction that merely seeks to enforce primary legislation contained in s.127, which remains extant and binding: see s.6(2)(b) HRA.
68. In light of that reasoning, we have concluded that the Convention rights arguments do not afford the POA any defence to this contempt application. The POA was and remains bound by the terms of the Injunction, and subject to any other arguments addressed below, has breached those terms.

(6) Article 11 of the Convention: does Article 11 mean that the POA has a right to induce, authorise or support industrial action, in a way that is prohibited by the Injunction?

69. We accept as Mr Southey submits, that although UK domestic common law recognises no right to strike, the European Court of Human Rights (“the ECHR”) has in a number of cases since 2007 confirmed that the right to strike is an element of the right to freedom of association conferred by Article 11(1); and there are other international instruments that recognise this right, including the Council of Europe’s Social Charter and International Labour Organisation (“ILO”) Conventions.
70. The right in Article 11(1) is qualified and can be justifiably restricted in accordance with Article 11(2). For example, in **NURMT v United Kingdom** (2015) 60 EHRR 10 a ban on secondary industrial action was held to involve no breach of Article 11. Similarly, in **Association of Academics v Iceland** (2018) 67 EHRR SE4, the ECHR found that legislation prohibiting strike action did not violate Article 11. Furthermore, Article 11(2) provides that Article 11(1),

“Shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State”.
71. We also accept Mr Southey’s contention that the prohibition on inducing a prison officer to participate in industrial action of any kind in s.127 of the 1994 Act, engages Article 11 (see for example, **Veniamin Tymoshenko v Ukraine**, app 48408/12 at [77] and **Hrvatski Liječnici Sinkikat** app 36701/09 at [49]).

72. The POA does not question that its members operate in an “essential service” and acknowledges there may be certain legitimate restrictions on its ability to organise industrial action in consequence. It contends however that the outright ban on strike action in s.127 violates rights protected by Article 11, relying on the judgment of the ECHR in **Ognevenko**, delivered on 20 November 2018, well after the Injunction was granted, as indicating that even in a case where workers are engaged in essential services justifying some restriction or prohibition on strike action, adequate protections should be put in place to compensate for the limitation placed on their freedom to take strike action. The POA contends that this judgment provides a basis for varying or discharging the Injunction.
73. **Ognevenko** concerned the dismissal of a railway worker ostensibly for having participated in strike action in breach of legislation banning such action in a sector regarded as an essential service. In its judgment the Strasbourg Court referred to the relevant ILO and other materials, setting out a number of relevant ILO principles in particular as follows:
- “595. Where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.
596. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and public services should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which awards, once made, fully and promptly implemented.”
74. The ECHR also referred to the relevant case law of the European Committee of Social Rights as set out in its Digest of case law which reads as follows:
- “1. Restrictions related to essential services/sectors
- Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. “energy” or “health” – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of the minimum service requirement in these sectors might be considered in conformity with article 6(4)...”
75. Mr Southey particularly emphasises paragraphs 73-78 where, he submits, the ECHR proceeded on the hypothesis that the rail worker was actually engaged in an essential service and, having regard to questions of proportionality, the Strasbourg Court reasoned:

“77. ... there is no information as to whether the Government have ever considered any alternatives to the ban on the right of certain categories of railway workers to strike. For instance, the ILO advises the States to require minimum services to be provided during a strike by its participants instead of banning strikes...”

78. The Court has not been informed of any safeguards designed by the Government to compensate railway workers for their inability to participate in strike action. For example, the ILO requires conciliation and arbitration proceedings by way of such safeguards...”

76. Mr Southey argues that the current ban on strike action violates the POA’s Article 11 rights because there are no “appropriate guarantees” in the form of essential compensatory safeguards in place that correlate with the degree of restriction on the POA’s ability to organise industrial action and provide recourse to adequate, impartial, and speedy conciliation and arbitration proceedings in which the parties concerned can participate at every stage and where awards, once made, are fully and promptly implemented.
77. In terms of safeguards said by the Secretary of State to be in place and to afford dispute resolution and other mechanisms relating to health and safety, operational and security issues and pay, these are described by Mr Copple in his second affidavit. First, the Whitley structure operates both nationally and at local level, providing regular meetings at which the POA can raise and escalate matters impacting on its members. The meetings are formally recorded and national meetings are published as Notices to Staff. Secondly, there are monthly POA and senior management team meetings at each prison. Thirdly, there is a national collective agreement (Bulletin 8) which covers day-to-day shift working arrangements and practice in line with the Working Time Directive. Fourth, a local disputes resolution agreement introduced in 2008 (PSO 8525) provides a procedure to support managers and POA representatives at local establishments in reaching agreement on local management issues impacting on POA members. The procedure allows for escalation of issues to national level and where resolution cannot be found, allows for alternative methods of resolution to be considered. Fifth, in 2011, the POA and HMPPS agreed a National Disputes Resolution Procedural Agreement (“the NDRPA”). This allows independent conciliation and arbitration on terms and conditions for certain prison officers (in grades where there are recognition rights) where agreement cannot be reached on change proposals impacting on such terms and conditions. The judgment of Kerr J in **POA v SSJ** (December 2018) emphasised the importance of this structure in enabling consultation and negotiation and it has since been invoked to reach agreement on the introduction of new, professionally qualified, prison officer roles in the Youth Custody Service.
78. Sixth, so far as health and safety in prison environments is concerned, a national agreement was reached with the POA in 2015 for a continuing programme of joint health and safety prison assurance visits which continues to operate. POA officials and HMPPS health and safety leads visit prisons jointly to assess health and safety practice and make recommendations to Governors in the form of a joint report. This programme of work has been recognised by the Health and Safety Executive as good practice. Seventh, the POA and HMPPS have also developed a “Regime Management Planning”

process which provides a basis for Governors to discuss (with a view to reaching agreement) the details of local operational staffing arrangements and contingencies and to set out different safe levels of prisoner regime delivery in line with the available staffing. The Regime Management Planning process includes local risk assessments and safe systems of work which are discussed, agreed and reviewed with the local POA. The arrangements are set out, following agreement with the POA, in a Prison Service Instruction (or PSI) 7/2017. Another PSI 6/2015 entitled HMPPS National Policy, Organisation and Summary Arrangements for the Management of Health and Safety, sets out the requirement for HMPPS trade unions to be consulted on matters of health and safety as part of the legislative statement of arrangements under the provisions of the Health and Safety at Work Act 1974.

79. Finally, and in relation to pay, the Prison Service Pay Review Body is a compensatory mechanism first recommended by the ILO and introduced as a measure to compensate for the loss of the right to take industrial action under s.27 of the 1994 Act. Its terms of reference demonstrate its independence. It invites representations from the POA on behalf of its membership on an annual basis. Its operation has been the subject of consideration by the ILO following a complaint by the POA in August 2004. The Committee requested that the Government continued to ensure that the Pay Review Body awards are binding on the parties and may be departed from only in “exceptional circumstances”. There has been no complaint by the POA to the ILO since 2004.
80. The affidavits of Mr Gillan and Ms O’Grady criticise aspects of the framework of safeguards relied on by the Secretary of State. Mr Southey contends, in summary, that the POA has legitimate and significant concerns for its member’s safety and working conditions but has no means of recourse to any independent arbitration proceedings with binding awards. He submits that it is not sufficient to note the existence of suggested safeguards. Rather, the terms of each scheme must be considered to determine whether it compensates for what is lost when a strike ban is in place. For example, he points to the fact, among others, that the Prison Service Pay Review Body lacks independence because a majority of the members who appoint it are government officials and its recommendations are not binding and can simply be ignored. Furthermore, the “exceptional circumstances” in which a recommendation can be departed from are not defined, and recommendations have in fact been departed from on three occasions. The Whitley structure on pay and conditions is not binding. The NDRPA is a non-legally binding collective agreement, and is limited in scope: it does not cover pay and would not, for example, cover a local dispute about safety or operational issues, and is not a mechanism which compels the employer to engage in binding arbitration. Prison Service Order 8525 provides a procedure to address local disputes, but does not provide for binding arbitration.
81. Nor, in the alternative is there a minimum service agreement that would ensure agreement in advance with the employer for the maintenance of a minimum level of cover (etc) for the full duration of any dispute. (As described by Ms O’Grady, this is common and used successfully in the NHS). Mr Southey submits there is good reason to believe this is a practicable solution: HMPPS policy permits reduced levels of service; and Mr Gillan gives examples of certain prisons running on reduced staffing levels for long periods.
82. Mr Southey also points to the different position in Scotland, where s.127 of the 1994 Act does not apply, but there has been a voluntary “no strike” agreement in place since

(at least) 2016. Although at one point he suggested that the *quid pro quo* for this agreement was a binding arbitration clause together with a minimum service agreement, in fact neither is currently in place. The court was also referred to a review of industrial relations conducted by Ed Sweeney of ACAS, commissioned in 2007 jointly by the POA and HMPPS, and published in 2008. (Following the review, the suspension was lifted and s.127A was enacted, allowing s.127 to be suspended in England and Wales). The review envisaged a legally binding dispute resolution agreement with the ability to refer to legally binding arbitration, but that recommendation was not adopted. In 2019, the POA approached HMPPS about agreeing a national dispute resolution procedure with binding arbitration. By letter dated 16 July 2019 that proposal was rejected on behalf of HMPPS as so far removed from any arrangement that could be agreed that it did not provide a sound basis for talks. Fresh talks focusing on developing a new local disputes resolution procedure were instead proposed.

83. Mr Southey submits there is no sufficient justification for the failure to agree to binding arbitration, which would provide an incentive to negotiate and agree; or alternatively, the introduction of a minimum service level agreement and right to take some form of industrial action. Without either avenue, he submits that the union has no leverage in seeking to resolve industrial disputes. He relies on his Articles 3 and 14 submissions to support the arguments above about proportionality because, he submits, they demonstrate how the POA is prevented from effective representation in relation to fundamental rights.
84. We do not accept these arguments, clearly as they were advanced.
85. Leaving aside the fact that in our judgment **Ognevenko v Russia** involves no new principle of law concerning the prohibition on industrial action, but rather the application of well-established principles to the facts of a particular case, this is not a case where there are no compensating measures at all enabling the POA to represent and protect its members on health and safety, operational, pay and other issues arising between HMPPS and the POA. Rather, it is the sufficiency of those measures that is in issue. This court is simply not equipped to decide whether one sort of compensating measure is better than another or to assess its adequacy in the absence of some hard edged or bright line requirement that the Secretary of State is required to have complied with but has not. That explains why such significant reliance is placed by Mr Southey on behalf of the POA, on binding arbitration as a necessary, hard edged, safeguard.
86. We accept that legally binding arbitration does not form part of the framework of safeguards in place, and further, that there is force in some of the criticisms made by the POA of the individual dispute resolution mechanisms available. However, there is nothing in the terms of Article 11 or indeed the case law of the ECHR (as Mr Southey concedes) that requires the provision of legally binding arbitration as a necessary precondition for removing the right to strike in essential services. No such hard edged or bright line requirement can be discerned.
87. We have set out above the ILO principles concerning the right to strike (as recorded in **Ognevenko v Russia**). They make clear that the absence of compensatory measures does not render a strike ban unjustified, but justification is harder to establish in such a case. The ILO principles refer to the need for “adequate, impartial and speedy conciliation” enabling parties to take part at every stage, and where awards once made

are fully and properly implemented. The ILO does not identify binding arbitration as a minimum mandatory requirement.

88. Nor did the ILO Committee, in its report (No 336, March 2005) which dealt with the POA complaint challenging the adequacy of the compensating measures adopted by the Secretary of State for Justice (to which we refer above), reach that conclusion. The report concludes,

“767. Considering that the prison service constitutes an essential service in the strict sense of the term and that prison officers... exercise authority in the name of the State, the Committee is of the view that it is in conformity with freedom of association principles to restrict or prohibit the right to take industrial action in the prison service.”

89. The Committee made recommendations that the Government initiate consultations with the POA and HMPPS with a view to *improving* the current mechanism for determining prison officers’ pay and requested that the Government “...*continue to ensure* that the awards of the prison service pay review body are binding on the parties and may be departed from only in exceptional circumstances” (emphasis added). That its recommendations are cast in these terms, and not in terms of any finding of breach, reflects a recognition that this is an essential service where the prohibition on strike action is justified. The thrust of the recommendations recognises the range of compensatory mechanisms that might be provided, and that these may well be adequate even when not legally binding.
90. The same is true of the judgment of the ECHR in **Ognevenko v Russia** which affords no real analogy with this case. The core reasoning of the judgment is at paragraph 72 where the ECHR noted an international consensus that in the case of workers in the State administration who provide essential services to the population, restrictions may be imposed on their right to strike. The ECHR however rejected the contention that railway transport was an essential service. But even assuming it was, and that stoppage on railway transport could lead to negative economic consequences, this would not amount to solid evidence justifying the necessity for a complete ban: see paragraph 73. In fact, no alleged damage caused by the strike was substantiated: see paragraph 74. Nor did the Russian Government provide any information to justify the policy choice made by the legislature in favour of the ban or demonstrating that alternatives to the ban were considered: see paragraphs 76 and 77. Finally, as to safeguards designed to compensate railway workers for their inability to participate in strike action, the ECHR’s conclusion at paragraph 78 recognises that a range of safeguards might be available and adequate –

“For example, the ILO requires conciliation and arbitration proceedings by way of such safeguards”

– but it had not been informed of *any* safeguards designed by the Russian Government to compensate railway workers. There is nothing in the ECHR’s judgment to suggest that binding arbitration is a necessary measure.

91. It seems to us that in the absence of a hard edged or bright line requirement, and absent some flagrant breach, there is a margin of appreciation afforded to member states in

regulating the exercise of trade union freedom. The breadth of the margin is context specific and inevitably depends on factors including the extent to which the services are essential, the nature and extent of the restriction on trade union rights and the competing rights and interests of others in society who are liable to suffer as a result of the unrestricted exercise of such rights. When assessing the nature and extent of the restriction contained in s.127 and the Injunction, any measures in place to offset the existence of any such restriction by enabling the trade union to protect its members' interests, must also be considered.

92. The context here is a truly essential service: the exceptional nature of the prison environment means that the risks and potential consequences of the withholding of services by prison officers are grave. Withdrawal of their services (particularly at short notice, making it difficult if not impossible to put contingencies in place) gives rise to dangers to the life and safety of other officers, ordinary citizens, and to the lives and safety of prisoners for whom the state has special responsibilities. The legislative choice made by Parliament in enacting s.127 of the 1994 Act is obviously legitimate and justifiable.
93. Differing reasonable judgments might be made about the nature and extent of any compensating safeguards to be put in place; and it is clear to us that there is a range of different measures that might together work effectively to enable a trade union to protect its members' interests in a service that is not permitted to take strike action for good reason, even where such measures do not involve binding arbitration or a minimum service level agreement. Provided the framework of measures has force and efficacy (and is obviously not a sham) that is likely to be sufficient even if a union would have liked more. There is solid evidence of a range of different protective measures available in this case, as described above. The measures are undoubtedly not a sham, and have force and efficacy. We are satisfied they provide an adequate guarantee offsetting the strike ban with a range of different mechanisms through which the POA can legitimately support and protect members' interests, notwithstanding that it would have liked more.
94. We are also doubtful as to how binding arbitration could work in practice outside a pay context. For example, it is difficult to envisage realistic, practicable arrangements for delegating nuanced operational decisions about workplace safety (that can arise on an urgent basis) to an independent third party in arbitration proceedings. What is the prison officer to do in the meantime, and how is safety of the prison environment to be preserved while parties go to binding arbitration on the issue? Moreover, we have doubts about a minimum service level agreement in this context. Leaving aside the short notice issue, on the POA's evidence about staffing of prisons and the real and immediate risk of serious violence posed by the environment, it seems to us that such an agreement could not practicably provide for a lesser service level than the current service level provision which is effectively a minimum service level. To operate at even lower levels is likely to lead to prisoners being on permanent lock down or to other failures properly to protect their human rights.
95. For all these reasons, we reject the POA's argument that the terms of s.127 and/or the Injunction operate as a disproportionate interference with its Article 11 rights. The provisions seen in the light of the framework of compensating measures in place, are a proportionate means of achieving the legitimate aims to which we have referred.

96. In any event, even had we accepted the POA's argument on this issue, as already stated above, the most that we could have done, by way of remedy, would have been to make a declaration of incompatibility. We could not have disapplied s.127, nor declared that the POA was not bound to comply with it.

(7) Article 3: does Article 3 mean that the POA has a right, under the Convention, to support industrial action (e.g. by giving advice to members) in a way that is prohibited by the Injunction?

97. Mr Southey relies on the Secretary of State's positive obligation imposed by Article 3 to protect prison officers from being subjected to "degrading treatment". He relies on **Z v United Kingdom**, app 29392/95, where the European Commission on Human Rights stated:

"...the Commission considers that [state authorities] may be regarded as subject to the positive obligation to take those steps that could be reasonably expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have had knowledge." [94]

98. It is undoubtedly the case that ill-treatment protected by Article 3 can include serious assaults; and that a real risk is one that is more than remote and fanciful (**Rabone and another v Pennine Care NHS Trust** [2012] 2 AC 72 at [38]) and an immediate one is one that is present and continuing (**Rabone** at [39]). We accept that where there is a real and immediate risk of death or serious violence in prisons, there is a duty to take reasonable steps to protect both prison officers and prisoners.

99. Mr Southey submits that the high levels of violence in prison; the fact that many prisoners are dangerous; and the fact that HMPPS recognises the need to control prisoners to prevent violence all indicate that there is a real and immediate risk of serious violence. This is borne out by the description of the working conditions that prison officers are expected to endure across the prison estate, as described not only by Mr Gillan, but by the HM Chief Inspectorate of Prisons as follows:

"... We saw once more in 2018-19 – the fourth year on which I have reported – that far too many of our jails have been plagued by drugs, violence, appalling living conditions and a lack of access to meaningful rehabilitative activity... However, we were also struck, as in previous years, by the extraordinary dedication of those who work in our prisons. Their work is difficult, often dangerous, largely unseen by the public and, as a result, little understood..."

100. Mr Southey contends that in these circumstances, and since s.127 of the 1994 Act and/or the Injunction permit of no exception or derogation under any circumstances, the POA's Article 3 rights are breached because the POA is unable to advise its members to stop work immediately or refuse to return to work because of a serious and imminent danger posed by the environment or the requirement to detain prisoners in conditions that violate Article 3. Mr Southey contends that unless the obligations imposed by s.127 and/or the Injunction are interpreted in light of Article 3, this is a violation of Article 3 because unless advised by the POA, it will give rise to a significant

risk of a violation of Article 3 if POA members are unaware of their legal rights and obligations.

101. We do not accept this argument for the following reasons.
102. First, it seems to us that any Article 3 risk does not flow from the ability or inability of the POA to give advice, but from the prison environment itself. Nor do we accept that the prohibition on industrial action exposes prison officers to an enhanced risk of breach of Article 3 rights. To the contrary, it seems to us that the prohibition reduces that risk by ensuring that prisons remain staffed by prison officers.
103. Secondly, there may be circumstances where a prison officer faced with serious and imminent danger can legitimately withdraw to a place of safety. The ability of prison officers to do so does not depend on the POA being able to induce industrial action. Nor does the prohibition prevent the POA from advising its members generally about such dangerous conditions or situations. But what the POA cannot do (whether directly or indirectly) is induce, advise or encourage a prison officer or group of prison officers to walk out and withhold their services for any reason.
104. Thirdly, we are satisfied by the evidence that there is a wide range of measures in place to protect prison officers and reduce the risks to which they are subject as a result of their environment. Industrial action is not such a measure and would raise rather than reduce the risks. Examples of measures in place include extensive training and support on how to respond safely to threats of and actual violence by prisoners, given to new prison officers and on an annual refresher training basis. Annual training in control and restraint techniques is mandatory for all prison officers. Prison Service Order 1600 provides guidance on the use of force and instructs officers faced with a conflict situation to avoid danger, defuse the situation, or control the situation. All officers are required to be familiar with this guidance. The guidance makes clear that it is for the individual officer to determine whether and when force has become necessary to control an escalating situation. Prison Service Order 30/2015 deals with safety where formal restraint is not possible and covers the use of self-defence.
105. There are extensive local contingency plans, reviewed annually, covering every possible type of incident, ranging from a single incident of violence to a hostage situation to widespread concerted indiscipline involving a number of prisoners. The contingency planning extends to local emergency services and ensuring that prison officers are familiar with access and exit points and other local provision available to support their deployment. PSI 09/2014 deals with incident management and sets out the objective of contingency planning, namely to ensure incidents are resolved with the minimum risk of harm to staff, prisoners and to the public.
106. In addition to training, personal protective equipment is provided and all prison areas have access to alarm buttons to obtain backup. Local and national command suites are set up to provide local support and direction to those on the scene of a larger incident, with a view to planning and organising any necessary intervention. The evidence indicates that incidents of disorder in prisons occur relatively frequently but most are low-level and capable of being resolved locally. They are mostly the result of protest action or impulsive acts by small numbers of prisoners.

107. For these reasons, we reject the POA's argument that the terms of s.127 and/or the Injunction interfere with its Article 3 rights. The fact that there are no exceptions or derogation from the terms of the section or the Injunction does not begin to amount to an Article 3 breach. In any event, as before, even had we accepted the POA's argument on this issue, the most that we could have done by way of remedy, would have been to make a declaration of incompatibility. We could not have disapplied s.127, nor declared that the POA was not bound to comply with it.

(8) Section 44 ERA 1996 and Article 14: does the Injunction mean that there is unlawful discrimination against prison officers contrary to the Convention because they are not free to absent themselves from the workplace because of serious and imminent danger?

108. The POA makes two final submissions based on s.44(1)(d) ERA 1996. This section (which is set out above) provides that an employee has the right not to be subjected to a detriment by his or her employer on the ground that, in circumstances of danger which the employee reasonably believed to be serious and imminent, and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work.
109. The first submission is that s.44(1)(d) narrows the scope of the prohibition on inducing prison officers to take any industrial action, imposed by s.127 of the 1994 Act. The POA submits that it cannot be a breach of s.127 for the POA to advise or encourage a prison officer to stop work immediately, because the officer is in danger, and to refuse to return to work whilst conditions of serious and imminent danger persist. We will call this submission the "domestic law argument".
110. The second submission, the "Article 14 argument" is in the alternative to the first submission. If, contrary to the first submission, s.127 prohibits the POA from advising or encouraging its members to withhold their services because of serious and imminent danger, then, the POA submits, that is a violation of Article 14 of the Convention. This is because domestic legislation unjustifiably discriminates against prison officers in this regard, as compared with other workers.
111. We deal with the domestic law argument first. The POA points out that s.44(1)(d) applies to prison officers in the same way that it applies to other employees. The POA submits that it follows that any action that is authorised by s.44(1)(d) is lawful action authorised by primary legislation and so cannot amount to industrial action. This means that it falls outside the scope of s.44(1)(d): it is lawful action that is authorised by primary legislation. The POA submits that this means that it is lawful, under domestic law, for the POA to advise members of their rights under s.44(1)(d), and to counsel and support those members who exercise their rights under s.44(1)(d), even if this amounts to inducing the members to withhold their services.
112. We do not accept this submission.
113. Section 127 of the 1994 Act and s.44(1)(d) ERA 1996, respectively, deal with different matters. Section 127 imposes a prohibition against inducing a prison officer to take industrial action. Section 44(1)(d) on the other hand, has nothing to do with inducements to take industrial action. It does not confer any protection on trade unions. Rather, s.44(1)(d) grants protection to employees against suffering detriments for

leaving the place of work, and/or refusing to return to work, in the face of a reasonable belief on the part of the employee that s/he is in serious and imminent danger which s/he cannot reasonably have been expected to avert. Section 44(1)(d) does not provide any protection for a trade union which induces a prison officer to withhold his or her services on this ground, by advising or encouraging them to do so.

114. It follows that there is no overlap, let alone any conflict, between s.127 and s.44(1)(d): they simply deal with different things. It follows in turn that there is no basis for interpreting s.127 in such a way that the section does not apply to cases in which the ground for the inducement to withhold services is that there are reasonable grounds to believe that prison officers are in serious and imminent danger.
115. In our judgment, the POA is wrong to submit that any action authorised by s.44(1)(d) cannot amount to industrial action because it is lawful action authorised by primary legislation. The words “industrial action” are defined, for the purposes of the ban on inducements in s.127, to include “the withholding of services as a prison officer” (s.127(1A)(a)). This wording is broad enough to cover the withholding of services on the ground of a reasonable fear of serious and imminent danger. In such circumstances, the prison officer is protected from being subjected to a detriment as a result (s.44(1)(d)), but any person who directly or indirectly induced the prison officer to withhold his or her services would nonetheless be in breach of s.127.
116. Even if there were an overlap between s.127 and s.44(1)(d), the prohibition on inducing prison officers to take industrial action would take precedence. This is because of s.127(8) which provides that nothing in the relevant employment legislation, which includes the ERA 1996, shall affect the rights of the Secretary of State to take legal action, under s.127, to prevent a trade union or other person from inducing prison officers to withhold their services.
117. This does not mean that the POA is prohibited from providing any assistance to its prison officer members who are, or who may be, faced with circumstances that mean that the officers reasonably believe they are in serious and imminent danger, which they cannot reasonably be expected to avert. As Sir James Eadie accepted in oral argument, there is nothing wrong with the POA expressing understanding and support for a prison officer’s concerns about dangerous situations, and the POA is entitled to advise its members generally on the terms and effect of s.44. However, the POA may not, directly or indirectly, induce, advise or encourage a prison officer or group of prison officers to walk off the job, and so to withhold their services, for any reason.
118. The POA’s alternative Article 14 argument contends that, if, contrary to its primary case, the effect of s.127 is that the POA cannot advise or encourage prison officers to stop working because of a reasonable fear of serious and imminent danger, then s.127 is incompatible with Article 14 of the Convention. Article 14 provides that the enjoyment of Convention rights and freedoms shall be secured without discrimination on any protected ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth “or other status”.
119. The POA submits that the status of being a prison officer is an “other status” for these purposes. Prison officers are treated less favourably than other workers in an analogous situation in relation to their Convention rights, because other workers can have the

benefit of advice, support and guidance from their trade union about whether to walk out because of a reasonable fear of serious and imminent danger, whereas s.127, prevents the POA from providing this assistance to prison officers.

120. The questions that a court must ask itself when faced with an Article 14 challenge are now very well established. They are often referred to as “the **Michalak** questions” and are set out by Lord Steyn in the judgment of the House of Lords in **R(S) v Chief Constable of South Yorkshire Police** [2004] UKHL 39; [2004] 1 WLR, at paragraphs 42-43, as follows:

“42. Based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), para 52 and [2003] EWCA Civ 797, [2003] 3 All ER 577, five questions can be posed as a framework for considering the question of discrimination:

- (1) Do the facts fall within the ambit of one or more of the Convention rights?
- (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
- (3) If so, was the difference in treatment on one or more of the proscribed grounds under Article 14?
- (4) Were those others in an analogous situation?
- (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?

43. ... But a caveat must be mentioned. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 3 WLR 113 Baroness Hale of Richmond explained (para 134, p 157):

“the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided”

121. It is clear, in our view, that the first two **Michalak** questions can be answered in the affirmative. The facts in issue fall within the ambit of Article 11. It is not necessary, for these purposes, that the facts give rise to a breach of Article 11. It is enough that the restriction on freedom of association arising from s.127 comes within the general scope of Article 11, even though, as we have found, that freedom is a qualified freedom and the restriction arising from s.127 is compatible with Article 11.

122. As for the second question, there is a difference in treatment between prison officers and many other categories of workers. There is a blanket ban on the POA inducing prison officers to take industrial action (i.e. by walking off the job) even if the reason is a reasonable fear on the part of the officers of serious and imminent danger. There is no such blanket ban for most other workers, though it is worth making the point that nor is there complete freedom to induce other workers to walk out on the ground of a reasonable fear of serious and imminent danger. Section 44(1)(d) ERA 1996, does not absolve trade unions of the need to comply with the balloting and notification requirements, set out in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 if they are to advise their members to withhold their services because of a reasonable fear of serious and imminent danger. Nonetheless, we are satisfied that the position as regards prison officers is different.
123. This is a case in which it is convenient and appropriate to take questions (3) to (5) together. In our view, when that is done, it is clear that there has been no breach of Article 14. The central reason is that prison officers and most other workers are not in an analogous position. As stated above, prison officers are engaged in a special type of work, which provides an essential service. The risks and potential consequences of the withholding of services by prison officers are grave. Withdrawal of services gives rise to dangers to the safety of their colleagues, to the safety of prisoners and to public safety, in a way that does not apply, at least to the same extent, to other workers. This is the reason that s.127 applies to them but does not apply to the generality of workers.
124. This sets prison officers apart from other workers who come within s.44(1)(a). They are more akin to police officers and members of the armed forces. Both of these groups are subject to similar, if not greater, restrictions on freedom of association as prison officers, in that they are prohibited by law from taking industrial action. A police officer who withholds his or her services commits a disciplinary offence against Regulation 20 of the Police Regulations 2003, and s.91 of the Police Act 1996 makes it a criminal offence to induce a police officer to withhold his or her services. A member of the armed forces who withholds his or her services will commit an offence under the Queen's Regulations, and encouraging disaffection in the armed forces is a criminal offence, contrary to the Enticement to Disaffection Act 1934, s.1.
125. Accordingly, in our judgment, the challenge under Article 14 fails because, regardless of any other considerations, prison officers are not in an analogous position to their comparators (other workers whose trade union may advise them to withhold their services because of a reasonable fear of serious and imminent danger). Even if this were not the case, we take the view that the difference in treatment would be objectively justified, for the reasons given above in relation to the Article 11 challenge. In the circumstances, it is not necessary for us to deal with question (3).
126. For these reasons we reject the POA's submission that the POA's inability to induce its members to withhold their labour on the ground that the members have a serious fear of serious and imminent danger means that UK law is inconsistent with the protections conferred by Article 14 of the Convention. As before, even if this had been our view, the POA would still have faced the difficulty that the most that we could have done, by way of remedy, would have been to make a declaration of incompatibility.

(9) The domestic law challenge to the breadth of the Injunction;

127. We have addressed the argument under this heading at paragraph 20 above. We have rejected it and do not consider there is any basis for challenging the Injunction as being wider than the terms of s.127 of the 1994 Act itself.
128. The words of the Injunction are clear. It prevents the POA “inducing, authorising or supporting any form of industrial action” (emphasis added). It does not prevent the POA from providing general support to an officer who is taking industrial action, or expressing sympathy for his plight, for the reasons discussed above. What the POA cannot do is support the industrial action itself, whether by supporting a member’s actions in withholding or continuing to withhold their services, or in any other way. There is an important distinction between the two.

(10) In light of the above, is the POA in contempt and, if so, should the court impose any penalty? If the court decides to impose a penalty, what should it be?

129. The POA accepts that if the human rights and other arguments advanced by it about the scope of the Injunction are rejected, there have been two breaches of the Injunction.
130. Mr Southey submits that the court has a wide discretion whether to impose a sanction and, if so, to determine what is appropriate in the circumstances. He invites consideration of a number of factors said substantially to mitigate the breaches, and contends that a finding of contempt does not require the imposition of any sanction over and above the “public humiliation” perceived as attaching to the delivery of a judgment in public identifying the contemnor’s reprehensible behaviour: see **R (Bemboa) v Southwark LBC** [2002] EWHC 153 (Admin) (where Munby J took the view that the public interest would be better served by the public being told how badly Southwark had behaved rather than by the imposition of a penalty). He submits this is a case for a last warning, without further sanction.
131. The mitigating factors relied on by Mr Southey include the following:
- i) The POA relies on the prevalence of violence and its objectively verified concerns about the working conditions endured by its members.
 - ii) The two incidents of breach occurred in circumstances where there were no adequate compensatory measures, placing the POA in an invidious position, not of its own making.
 - iii) Further in relation to the 14 September 2018 incident, it was a direct consequence of successive failures to engage in discussions about putting binding arbitration mechanisms in place or how to address the unsafe working conditions for prison staff. The POA genuinely sought to resolve the issues. It did not act with malicious intent or without cause and there is no evidence of any harm being caused.
 - iv) As to the second incident in February 2019, it was not instituted or initiated by the POA but occurred in circumstances in which the POA was not able to control grassroots members. Once the dispute arose, the POA did take proactive steps to resolve it by intervening as a broker. In any event, the trigger was

unacceptable levels of violence. The POA did not make outlandish or excessive demands on behalf of members and was merely seeking to protect members' rights under Article 3 by ensuring that they were legally able to protect themselves from potential breaches of Article 3.

- v) The POA has a critical role in promoting good industrial relations. To be effective it must retain the confidence of its members. It cannot therefore simply repudiate industrial action in circumstances such as those involved in February 2019. This would place a wedge between it and its members and it would lose credibility and its members would be out of control.
132. At the heart of the mitigation arguments advanced by Mr Southey, is the contention that the POA was out of options and was driven, in effect, to breach the Injunction.
133. We do not accept this argument. Parliament has legislated to prohibit inducement to strike action in the prison sector. The POA is not entitled to disobey the law because it cannot secure a particular outcome it desires. Nor does this provide any excuse for non-compliance with a court order, particularly one made after a full trial in circumstances where the POA was and remained well aware of the terms of the Injunction and its penal consequences. Furthermore, it seems to us that this line of mitigation suggests that a deliberate decision to disobey the Injunction was taken by the POA in order to further what the POA perceived its members' interests to be and irrespective of the law and the court order. In other words, we have concluded that far from providing any mitigation for the POA's actions, this argument serves to exacerbate its position.
134. In any event, we do not accept that the POA was out of options and had no other avenue available to represent and support its members. The mechanisms available for resolving operational and other workplace issues and addressing health and safety concerns are described above. There are many different ways in which prison officers' interests can be protected and advanced by the POA. Further, we cannot accept as legitimate the suggestion that the POA would lose credibility if it repudiated unlawful strike action taken by its members. The POA is required to act lawfully. If it has created a problem with its credibility by acting unlawfully, the answer is to rectify that problem by complying with the law and making clear to its members its obligation to comply with the law.
135. We accept the serious challenges and dangers faced by prison officers in the prison environment and the public interest in having well run prisons. We have no doubt that the POA has an important role to play in promoting good industrial relations. However, in our judgment, far from affording any mitigation here, the difficult conditions in the prison estate are in fact the very reason why unlawful industrial action in this context must be marked with a proper sanction and why future compliance with the terms of the Injunction (and s.127) is essential.
136. We turn to consider sanction in those circumstances.
137. There were two deliberate breaches of an extant court order. These were not the first time the POA is alleged to have been in breach of the provisions of s.127 of the 1994 Act. There were at least three previous occasions (starting on 14 November 2016) when the Secretary of State has obtained injunctions restraining unlawful inducement action by the POA, as we have described above. There is an established history of threats or

calls to strike, followed by interim injunctions being granted. Finally, the Injunction was ordered on a permanent basis following a contested trial, at which none of the arguments now advanced were even raised. No step was taken by the POA until after the committal application was made to seek to vary or discharge the order.

138. The two breaches with which we are concerned were serious. We have set out the facts in relation to each above and these are not repeated here. In short, in the first there was inducement by the POA of a national strike in full knowledge of the Injunction. Far from being in a position where the POA had no options on this particular occasion, the urgent notification letter (relied on as the trigger for the court to strike action) represented a meaningful step in escalating concerns about conditions at HMP Bedford with a period of 28 days for responding. The POA actions pre-empted any response and undermined the rationale of this process. It was, in Mr Gillan's words, "an opportunity to keep up the pressure on the Secretary of State for Justice to try and improve conditions at the prison..." rather than any sort of legitimate action to protect members from serious and imminent danger.
139. In the February 2019 incident, there was both support and inducement to strike action at HMP Liverpool as we have found. The POA took the opportunity to raise issues of national concern beyond the local demands made by branch members, refusing to repudiate the strike as it should have done. It only agreed to direct Mr Pimblett that members should return to work once assurances on these national issues had been received. The POA showed itself well able to control its members through Mr Pimblett who acted on the directions of Mr Gillan and Mr Fairhurst in instructing members to return to work, which they did.
140. We accept that there is no evidence of actual harm caused as a result of either incident, and that both were relatively short-lived. However, the potential risks and consequences were grave.
141. In light of the deliberate decision to take strike action in full knowledge of the Injunction and on the purported basis that it was out of options and forced to do so, it is difficult to give much credence to apologies or expressions of remorse offered by the POA for its unlawful conduct. It appears to us to have behaved as if it is above the law, and literally to have shown contempt for solemn court orders with penal notices.
142. Sir James Eadie made clear at the outset that the Secretary of State does not seek the imposition of a penalty against any individual. Had he done so these deliberate contempts are likely to have warranted a custodial penalty. A fine is sought as an alternative, but it must reflect the same level of seriousness.
143. Having regard to all the matters set out above, particularly the established history of threats and interim injunctions having to be sought, we are satisfied that this is not a case for a last warning as Mr Southey submits. The POA has had many warnings, not least the Injunction itself, made following a contested trial. It has shown itself quite unwilling to respond to serial court orders. Nor in light of its deliberate defiance, do we regard the public humiliation attached to this judgment as sufficient penalty by itself. In our judgment, the culpability of the POA for these breaches and their potential harm is high and warrants the imposition of an appropriate fine.

144. Mr Gillan urges us to have regard to the impact any fine might have on the POA's ability to represent its members effectively. He also raises the possibility that a particularly large penalty might lead to the need to levy a surcharge on members on low average annual salaries. Those members would be under no obligation to meet that call but if they did not do so, he suggests the POA's financial viability would come into question.
145. That evidence is to be considered in the light of the documentary evidence Mr Gillan provides as to the POA's financial position, in the form of its latest return filed in accordance with obligations under s.32 Trade Union and Labour Relations (Consolidation) Act 1992 with the certification officer. The form shows that its general fund at the end of the year ending 31 December 2018 stood at £3,181,181. The balance sheet for the same year end shows total net assets of in excess of £4 million. This material suggests the POA has assets that can be used to meet any fine we impose without recourse to a surcharge on ordinary prison officer members who, though they may have responded to the POA's inducements, did not themselves act in breach of the Injunction.
146. In light of the foregoing considerations and having regard to the need to mark the POA's conduct in the two serious, deliberate breaches by appropriate and proportionate punishment, the penalty we impose is a fine of £95,000 for the first breach; and £115,000 for the second breach.

(11) Should the Injunction be varied or set aside?

147. In light of our conclusions that the terms of the Injunction (and s.127 of the 1994 Act) do not disproportionately interfere with Article 11 rights and do not contravene Articles 3 and/or 14 of the Convention or domestic law, no basis for discharging or varying the Injunction for the future has been established by the POA. It is therefore unnecessary to consider in what circumstances, if any, an injunction should be varied or set aside on the basis of arguments which were in fact advanced, or could have been but were not advanced, to the court before the injunction was originally granted.
148. We repeat our conclusion that the undoubtedly difficult conditions in the prison estate afford strong reason why unlawful industrial action in this context cannot be tolerated and why future compliance by the POA with the terms of the Injunction (and s.127) is essential.

(12) Conclusion

149. For the reasons we have given, we find the breaches of the Injunction alleged in the application notice are proved beyond reasonable doubt. The POA, having notice of the Injunction:
- i) Induced national strike action on 14 September 2018; and
 - ii) Supported and induced strike action at HMP Liverpool on 21 February 2019.
150. The Injunction was lawfully made; its terms are in accordance with s.127 of the 1994 Act; and the POA is bound by its terms. The breaches were serious.

151. We grant the order for appropriate penalty made by the Secretary of State for Justice against the POA and impose a total fine of £210,000.
152. We invite the parties to agree the terms of a consequential order in light of this judgment. Finally, we record our thanks to the parties and their respective legal teams for the assistance they have provided and the focus and clarity of their submissions.