Neutral Citation Number: [2023] EWCA Civ 842

Case No: CA-2022-001247

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
HUGH MERCER QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2022] EWHC 1376 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE THIRLWALL
and
LORD JUSTICE PETER JACKSON

- -

Between :

SECRETARY OF STATE FOR JUSTICE	**Appellant**
- and -	
PETER KANE	**Respondent**
- and -	
THE INDEPENDENT ADJUDICATOR	**Interested Party**

- -
- -

Myles Grandison (instructed by **GLD**) for the **Appellant**
Michael Bimmler (instructed by **Coninghams**) for the **Respondent**

Hearing date : 4 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This is an appeal by the Secretary of State for Justice in a claim for judicial review by a prisoner, Peter Kane, who challenged the decision of an Independent Adjudicator ("IA"), District Judge (Magistrates' Court) Deborah Wright, following a hearing on 31 July 2020. The IA accepted pleas to two charges of breaches of Prison Rules by Mr Kane ("the Respondent") and found that two further breaches were proven and imposed sanctions of a cumulative total of 18 additional days to be served in prison. Mr Kane was then a category A prisoner at HMP Whitemoor, serving a sentence of 14 years imprisonment for supplying heroin.

2. The events which led to the hearing occurred on 7 June 2020 at about 11am. Governor Wood spoke to the Respondent regarding a letter that he proposed to send. She explained that she was not prepared to permit him to send the letter because it contained material which she considered to be abusive. The Respondent became upset at this decision and verbally abused the Governor using florid and wholly unacceptable language. He exited the room where this conversation took place and threw himself over a railing onto netting which was in place to prevent prisoners harming themselves. He also picked up a wooden item described as an "applications box" and threw it at a window causing it to smash. He then threw a piece of wood in the direction of Governor Wood's head. She ducked and the piece of wood did not hit her. Unsurprisingly, the Respondent was the subject of prison discipline charges for these events.

3. The Respondent appeared before Governor Mallon on 8 June 2020 charged with 4 matters namely:

    a. Assaulting Governor Wood;

    b. Endangering health and personal safety of others;

    c. Damaging prison property; and

    d. Threatening, abusive or insulting words or behaviour.

4. Governor Mallon referred these matters to the police because of his concern about the seriousness of the matters. However, it appears that a prompt decision was made by the police not to investigate, thereby leaving the matters to be dealt with under the prison discipline system.

The referral

5. The matter having been returned to the prison within two days, it came before a different prison governor, Mr Butler, on 10 June 2020. Governor Butler then decided to refer the four charges to an IA, giving the following reason for the referral to the Independent Adjudicator:

    "due to the nature and the police returning the charge I will send to the IA"

    As all four charges arose out of the same incident, they were all referred together.

6. Following the referral, the charges were listed before Deputy District Judge Day sitting as an Independent Adjudicator on 26 June 2020. IA Day decided to adjourn the matter

to the next sitting on 17 July 2020, so that legal advice and representation for the Respondent could be obtained and the reporting officer and CCTV evidence made available. IA Day filled in four separate proformas (one for each of the four charges) with details of the outcome of the hearing. The proforma included 'Question F', which read "Is IA satisfied that the Governor gave proper consideration to whether the charge is so serious that added days should be awarded if the prisoner is guilty (i.e. the offence poses a very serious risk to order and control of the establishment, or the safety of those within it)?". It is also indicated on the proforma, next to Question F, that a negative answer to that question must lead to a decision to dismiss the charges. IA Day on each proforma ticked 'Yes' in response.

7. The adjourned hearing on 17 July 2020 took place before IA Wright. She decided to further adjourn the hearing to 31 July 2020, due to the absence of the Reporting Officer and of the Respondent's solicitor. She answered "Yes" to Question F on all four proforma hearing records.

8. On 31 July 2020, the substantive adjudication hearing took place, again in front of IA Wright. She noted in her narrative record of the hearing that a preliminary objection had been raised by the Respondent's solicitor Mr Coningham at the start of the hearing. The objection was that there was a lack of evidence for any finding that the referring governor had properly considered whether the charges met the applicable seriousness threshold before referring them, and that the IA accordingly lacked jurisdiction. The IA was invited to dismiss the charges. This issue equated to the question posed as Question F on the proforma hearing records. IA Wright made a preliminary ruling on this objection which she recorded as follows:

> "One preliminary point. Procedure followed when matter referred to me. Does the charge meet the seriousness criteria. Noted in the record due to the nature of the police returning it to the IA. Required by the PSI. Says I do not have jurisdiction.
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> I am satisfied that the matter is serious enough for referral. First there are certain types of matter which are considered serious enough for referral in the light of Covid 19 hearings and the new regulations. Second although the governor does not explicitly say so, he felt that the matter was serious enough for referral to the police. I have jurisdiction because the Governor was perfectly entitled to refer to me and in any event I am not bound by the PSI."

9. Following this preliminary ruling, the Respondent pleaded guilty to the charges of criminal damage and using threatening, abusive or insulting words or behaviour. He pleaded not guilty to the charges of assault and endangering the health or personal safety of others. IA Wright heard evidence on the two contested charges and found them proved. At the conclusion of the 31 July 2020 hearing, she sentenced the Respondent to punishments of 18 additional days of detention each on the assault and endangering health and safety charges, as well as 12 additional days of detention each on the damage and using abusive words charges, all sentences to run concurrently with each other.

10. The Respondent applied, pursuant to Rule 55B of the Prison Rules, for a review of the sentence imposed by the Senior District Judge (Chief Magistrate) on 13 August 2020. DJ Goozée, acting as nominated district judge on behalf of the Senior District Judge, upheld the sentence on 17 August 2020.

The claim for judicial review

11. Mr Kane issued a claim for judicial review on four grounds. Ground 1, the only relevant one for present purposes, was that:

> "The Independent Adjudicator erred in declining to dismiss the charges on a preliminary point raised on behalf of the Claimant, namely that she could not be satisfied that the adjudicating governor had given proper consideration to the seriousness of the offences before referring them to her. In arriving at her decision not to dismiss the charges, the Independent Adjudicator took into account and relied on irrelevant considerations which she recorded as the reasons for her decision and/or acted irrationally in finding that such proper consideration had been given, when there was no evidence for such a finding."

12. The application for permission was first considered on the papers by John Howell QC, sitting as a Deputy Judge of the High Court. In a decision of 9 February 2021 he refused permission to apply for judicial review. His reasoning on Ground 1 was:

> "Ground 1. The Governor decided to refer the matter to an Independent Adjudicator ("the IA") on June 10 2020 "due to its nature", given that the police had returned "the charge". The nature of the charges were unarguably serious (the offences alleged posed a very serious risk to order and control of the establishment, or the safety of those within it) and were such that, if proved, added days were likely to be awarded. The complaint in relation to the Governor's decision (which is the relevant decision for the purpose of Rule 53A) is thus that he did not state that in his view it was so serious that additional days should be awarded due to the nature of the charge if found guilty. In context that was unarguably what the Governor intended to indicate by stating that the reference was made due to the nature of the charge. Whether or not the IA's reasons are flawed, any such error was immaterial in those circumstances."

13. The application was renewed to an oral hearing which came before David Lock QC (also sitting as a Deputy Judge of the High Court) on 18 March 2021. In a decision handed down on 23 March 2021 he too refused permission for judicial review. He said, at [13]:

> "The central flaw in ground 1 is that there is no requirement under the Prison Rules 1999 for an Independent Adjudicator to investigate the factual basis upon which a decision was made by a Prison Governor that either the "so serious" test was met on the facts of an individual case or that it was necessary or expedient

> for some other reason for the charge to be inquired into by the adjudicator. If the Independent Adjudicator was under no legal duty to inquire into the reasons that the charges were transferred to her, in my judgment she cannot be said to have acted unlawfully in failing to do so. An Independent Adjudicator cannot have her decision undermined by failing to take a step that she had no duty to take.
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> ...
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> 16. In this case, as Mr John Howell QC observed when refusing permission, the facts speak for themselves. This was plainly a case where the "so serious" test was met. I agree. Indeed, the Claimant pleaded guilty to 2 out of the 4 charges and was sanctioned with additional days imprisonment by the Independent Adjudicator for those charges. No challenge has been made or could be made against that sanction decision. It thus demonstrates that, even on the matters which the Claimant admits, it was entirely proper for a Prison Governor to have made the decision to refer this case to an Independent Adjudicator. That shows that there was never any merit to the claim that the charges had been improperly referred to the Independent Adjudicator."

14. By a decision on the papers made on 8 September 2021 Popplewell LJ granted permission to apply for judicial review and returned the substantive application to the Administrative Court for hearing, writing that the ground advanced was arguable and raised an important point of practice.

The Prison Rules and Prison Service Instructions

15. The statutory basis for the prison discipline system is found in section 47(1) of the Prison Act 1952, as amended, which provides that:

> "The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions, secure training centres or secure colleges, and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

16. Rule 53A of the Prison Rules 1999 provides for determination of the mode of inquiry, i.e. whether the charge is to be inquired into by a prison governor or by an Independent Adjudicator, by the following process:

> "(1) Before inquiring into a charge the governor shall determine
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> > (i) whether the charge is so serious that additional days should be awarded for the offence if the prisoner is found guilty, or

> (ii) whether it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator.
>
> (2) Where the governor determines:
>
> (a) that it is so serious or that it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator, he shall:
>
> (i) refer the charge to the adjudicator forthwith for him to inquire into it;
>
> (ii) refer any other charge arising out of the same incident to the adjudicator forthwith for him to inquire into it; and
>
> (iii) inform the prisoner who has been charged that he has done so;
>
> (b) that it is not so serious or that it is not necessary or expedient for some other reason for the charge to be inquired into by the adjudicator, he shall proceed to inquire into the charge. […]"

17. The Secretary of State has power to issue Prison Service Instructions (PSIs). These are binding on governors and prison staff, though not on IAs. At the time of these events the PSI dealing with prisoner discipline procedures was PSI 05/2018. Referrals to an IA were dealt with in Annex A, at [2.28]-[2.34]:

> "2.28 The most serious disciplinary offences will normally be referred to the police, as in paragraph 2.23 in this Annex, and prosecuted in the courts rather than adjudicated. But if the case is not referred, or no prosecution follows and the adjudication resumes, the adjudicator should then consider whether to refer the case to an IA. *If the prisoner is eligible for additional days (see paragraphs 2.72 – 2.77 in this Annex), and the adjudicator considers that the offence is serious enough to merit this punishment if the prisoner is found guilty, the case should be referred* (see paragraph 2.32 in this Annex). If the prisoner is not eligible for additional days the case should not normally be referred, since the IA can only give the same punishments as the governor.
>
> 2.29…
>
> 2.30 If one of a group of related offences by the same prisoner is referred to an IA, the other charges will also be referred.
>
> 2.31 *The adjudicator should state their reasons for referral to the IA* on Form IA1 under 'additional comments', *as quoting 'seriousness of the offence' alone may not be sufficient in all cases.* Care should be taken not to compromise their

> independence; staff must not discuss individual cases with the IA.
>
> *2.32 The test for seriousness (see paragraph 2.28 in this Annex) is whether the offence poses a very serious risk to order and control of the establishment, or the safety of those within it.* Governors/Directors should also bear in mind that IAs are an expensive resource, as is the legal aid that prisoners may claim for representation at IA hearings. Each case will be assessed on its merits, but the following offers some guidance:
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> • Serious assaults should always be referred, e.g. those where the injuries include broken bones, broken skin, or serious bruising, and
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> - those where the assault was pre-planned rather than spontaneous,
> - those where the alleged offender has a previous history of violence during the current period in custody,
> - the victim's role within the establishment (e.g. staff), their vulnerability, and the location of the incident, will also be factors,
>
> 2.33 Once a charge has been referred to an IA it cannot be referred back to a governor – the IA will deal with it from then on. *However, if the IA considers the referral to have been unlawful, they may decide not to proceed and therefore the adjudication will be dismissed. An unlawful referral would be one in which the PSI or Prison or YOI Rules have not been correctly followed i.e. the case should not have been referred in the first place if the guidelines in the PSI were followed correctly, for example, if a Governor referred a case that was simply a charge of disobeying an Officer, with no other aggravating features."* [emphasis added]

18. At that time an IA had no power to remit a case to the governor, nor to refer a case to the police. Amendments have been made with effect from 4 April 2023 to the Rules and the PSI to give IAs both these powers, and to amend the PSI in certain other respects. They do not apply to the present case.

The judgment under appeal

19. Following the order of Popplewell LJ the substantive application for judicial review came before Hugh Mercer QC ("the judge"), sitting as a Deputy Judge of the High Court, on 11 May 2022. In his judgment ([2022] EWHC 1376 (Admin) he said:

> "12. The Claimant's first ground focuses on the reasons given by the adjudicator for considering there to have been a sufficient 'determination' by the prison governor for there to have been a

lawful referral. This is the logical starting point, as it is the governor's determination which refers the charge to the adjudicator under rule 53A. The adjudicator is given a specific task of inquiry by Rule 53A but that task has to be lawfully conferred on the adjudicator without which he has no power to act. The adjudicator appears in my judgment to be in the same or at least in an analogous position to that of any statutory tribunal – that it only has those powers conferred by the relevant statutory framework. Both counsel before me agreed that an adjudicator has the power to inquire into the legality of the reference to the adjudicator as this goes to the adjudicator's jurisdiction. In support of that position, I was referred in particular to the words of paragraph 2.33 of Annex A of the PSI:

> "Once a charge has been referred to an IA it cannot be referred back to a governor - the IA will deal with it from then on. However, if the IA considers the referral to have been unlawful, they may decide not to proceed and therefore the adjudication will be dismissed. An unlawful referral would be one in which the PSI or Prison or YOI rules have not been correctly followed i.e. the case should not have been referred in the first place if the guidelines in the PSI were followed correctly, for example, if a Governor referred a case that was simply a charge of disobeying an Officer, with no other aggravating features."

13. The essential framework and therefore the jurisdiction of the adjudicator is provided by rule 53A. While there is no duty to inquire into the factual basis of the governor's finding, it must in my judgment be apparent to the adjudicator that the governor has applied his or her mind to the 'so serious' threshold. In this context, an adjudicator reviewing whether Rule 53A had been complied with would be entitled to expect to see brief reasoning, capable of being interpreted as addressing the threshold, stated on the face of the decision. This is apparent from the mandatory nature of rule 53A, the use of the word 'determined' and the two separate evaluations which need to be carried out in the application of Rule 53A(1), (i) and (ii), namely on the grounds that the charge is 'so serious' or 'necessary or expedient for some other reason'.

14. Moreover, that is supported by paragraphs 2.28 to 2.33 of Annex A to the PSI where significant guidance is provided on what conduct may cross the 'so serious' threshold. Accordingly, what is expected from the governor is to evaluate the seriousness of the conduct. In particular, the PSI indicates that the conduct should be considered by the governor to pose "a very serious risk to the order and control of the establishment": para. 2.32.

15. Before considering in more detail the reasoning of DJ Wright, I note that DJ Wright stated: "I am satisfied that the

> matter is serious enough for referral". The problem is that the rule 53A confers the task of assessing the seriousness of the charge on the prison governor. A similar comment can also be made in respect of IA Day's consideration and also that of District Judge Goozée on behalf of the Chief Magistrate relied on by the Interested Party. In my judgment, the view which matters in relation to the seriousness of the charge is that of the governor making the referral.
>
> 16. It also follows that the Court has no power to substitute its own view of the seriousness of the charge. Mr Grandison urged upon me six reasons as to why this charge was serious. But those reasons do not assist me on the legality of DJ Wright's finding on jurisdiction. Nor does Mr Grandison's overarching submission assist me: "If this conduct does not cross the threshold of seriousness, what does?""

20. After considering a witness statement filed by DJ Wright and other matters the judge continued:

> "26. DJ Wright's second consideration is as follows: "Second although the governor does not explicitly say so, he felt that the matter was serious enough for referral to the police.
>
> 27. The difficulty which arises from this second consideration is that it refers not to the determination which referred the charges to the adjudicator but rather the initial determination which referred the charges to the police. The Claimant submitted that this reasoning is confused but the second governor who referred the charges to the independent adjudicator did expressly refer to the fact of the police returning the charge and therefore to the fact that the charges had been referred to the police by the first governor so that I do not find the reasoning to be confused.
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> 28. Mr Bimmler took me to the Crime in Prison Referral Agreement made between Her Majesty's Prison and Probation Service (HMPPS), National Police Chiefs Council (NPCC) and the Crown Prosecution Service which states at Annex A under the heading 'Mandatory Crime Referral Criteria":
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> "The crimes below must be reported to the police for investigation. … • Assaults against a member of staff, except where there is no little or no injury (see Annex B)" Annex B of the same document under the heading "Staff Assaults" states: "1. Other than those less serious assaults where there is little or no injury, which are more appropriately dealt with by adjudication, all assaults on staff will be referred to the police for investigation and consideration for prosecution."
>
> 29. It follows therefore that an assault on a member of staff would normally be referred to the police unless it were a case of

> little or no injury such as the present one. The fact that this assault was without injury but was nevertheless referred to the police tends to suggest that it was regarded as being at the higher end of assaults without injury. Also, Annex B suggests that adjudication is for less serious charges than those referred to the police. However, there is no suggestion that the threshold for referral to the police is the same as that for referral to an adjudicator. Mr Grandison submits that, by referring the matter to the police, it is implicit that the governor concluded that a maximum sentence of 42 additional days of additional possible imprisonment was an inadequate punishment. It does not seem to me that this necessarily follows because a referral to the police for assaults on staff is to be made, save for a few exceptional cases.
>
> The reference by DJ Wright to the matter being "serious enough" may be capable of being interpreted as a reference to the 'nature' of the offence on which the second governor relied in making his referral to an adjudicator. But there is no suggestion by the Interested Party that all assaults on staff are without more to be referred to an adjudicator. Assaults are many and various as are the circumstances in which they occur. For example in this case, matters such as the conditions of detention applicable in this prison in June 2020 taking account of Covid-19; the applicable visits regime in January 2020 and the nature of the Claimant's relationship with the addressee of the letter could potentially form part of the relevant circumstances.
>
> 31. In conclusion, the reasons given by DJ Wright for considering the governor to have properly considered the threshold for referral fail to reveal any consideration of the 'so serious' threshold by the second governor. Accordingly, in my judgment, DJ Wright lacked the power to proceed with the adjudication and should have dismissed it."

21. The judge accordingly quashed the decision of IA Wright. Mr Grandison, who appeared then for the Secretary of State as he has before us, realistically accepted that because of the effluxion of time the matter should not be remitted to the governor.

22. The Secretary of State applied for permission to appeal to this court ("PTA") on two grounds. The first argued that the judge was wrong to have concluded that the IA did not have the jurisdiction or power to proceed with an adjudication and that she should therefore have dismissed it. The second ground was that, in the alternative, the judge failed to address section 31(2A) of the Senior Courts Act.

23. The Secretary of State applied to this court for permission to appeal. By order made on 20 October 2022 Singh LJ granted it on both grounds. He considered that the appeal had a real prospect of success and also that the case raised issues of general importance as to the jurisdiction of IAs in the context of prison discipline, which provided another compelling reason why this court should have the opportunity to give an authoritative judgment.

24. I will consider Ground 1 first, since Ground 2 only becomes relevant if the Secretary of State fails on Ground 1.

The submissions in this court on ground 1

Appellant (Secretary of State)

25. Mr Grandison argued that the judge was wrong to have concluded that IA Wright did not have jurisdiction to proceed with an adjudication and should therefore have dismissed the charges. He relied on four factors.

26. Firstly he submitted that the judge was wrong to criticise the lack of detailed reasons provided by Governor Butler when making the referral to the IA, and that, in the words of John Howell QC when refusing permission, the seriousness test "was unarguably what the Governor intended to indicate by stating that the reference was made due to the nature of the charge". Mr Grandison referred us to observations of the Court of Appeal (Criminal Division) in *R. v. Veysey* [2019] 4 WLR 137 at [35], albeit in relation to referrals by governors to the police

> "35 .. In our judgment, there is no possible basis for challenging the decision of the governor to refer these offences for prosecution rather than dealing with them under the Prison Rules. Whatever deficiencies there might have been in the contemporaneous paperwork, Veysey has shown no basis for challenging the later evidence of the governor as to the reasons why internal disciplinary sanctions would not meet the seriousness of the case. Those reasons are in reality obvious, and no lengthy or detailed consideration was needed to reach the conclusion that the incidents should be referred to the CPS…."

27. Mr Grandison submits that in the present case the facts of the allegations spoke for themselves; their seriousness would have been "beyond obvious" to a governor of a prison in the high security estate, who would have possessed expertise in assessing the sort of conduct that would pose a risk to good order and discipline. Ordinarily, the court would be slow to interfere with such an assessment where there is material to support such a decision.

28. Mr Grandison cited Sullivan J in *R. (on the application of Bannatyne) v. The Secretary of State for the Home Department* [2004] EWHC 1921 (Admin), at [20] "It is trite law that the adequacy of a judge's reasons should not be considered in the abstract but in the light of the particular issues on which he or she is called to adjudicate." Here, the reasons were provided by a prison governor (as opposed to a lawyer or judge) who was not asked to justify his decision at the time. In a system that prioritises a speedy and summary procedure, the reasons provided need not have been detailed in a case such as the present.

29. Mr Grandison's second "factor" was a submission that an IA's power to dismiss a referral (other than on finding the charge or charges not proved) is not provided for by either the Act or Rules, and is limited to referrals that are "unlawful" (see paragraph 2.33 of the PSI). It is not an opportunity to argue the finer points of what would amount

to mitigation of the sentence. Given that the alternative to proceeding with a referral was (under the 2018 PSI) to dismiss it, the threshold was necessarily a high one.

30. Thirdly, the judge appears, at [30], to have erred in viewing the Respondent's conduct through the prism of the criminal law, as opposed to prison discipline, when assessing seriousness. While it is true that assaults are "many and various", the fact is that the Respondent was accused of having assaulted a governor in the high security estate with a piece of wood. Such an assault on a very senior member of staff clearly posed "a very serious risk to order and control of the establishment," irrespective of the lack of physical injury occasioned.

31. Fourthly, the judge failed to appreciate the relevance of the fact that the matter had been referred to the police. Paragraph 2.23 of Annex A to the 2018 PSI notes that, save for requests by the victim, this should occur where "the relevant internal disciplinary processes are insufficient to deal with the offence and where circumstances indicate that referral to the police is appropriate…", which Mr Grandison submits is where the referring governor considers that the maximum penalty of 42 additional days that could be imposed by an IA would be insufficient. Consequently, the fact that Governor Butler and IA Wright both mention the referral to the police was relevant to the consideration of "seriousness".

32. Mr Grandison, quite rightly, did not seek to rely on the witness statement of the IA, and we were not referred to it in argument.

Respondent (Mr Kane)

33. For the Respondent Mr Bimmler argued that the judge was right to find at paragraphs 15-16 of his judgment that the duty to assess the seriousness of a charge, and whether it meets the threshold for referral to an IA or should be adjudicated internally by a governor, is unequivocally given by Rule 53A to the prison governor. It is immaterial whether the IA considers a case to meet the referral threshold, and it is equally not for the Senior District Judge's nominee, the Administrative Court or indeed the Appellant to substitute their own views.

34. Accordingly, he submits, it is correct and logical that the Question F of the proforma asks "Is the IA satisfied *that the Governor gave proper consideration* to whether the charge is so serious that added days should be awarded if the prisoner is guilty (i.e. the offence poses a very serious risk to order and control of the establishment, or the safety of those within it)" (emphasis added) rather than, for instance, "Is the IA satisfied that the charge is so serious that added days should be awarded…".

35. The IA was required to assure herself that her jurisdiction has been properly established, that is, whether a charge has been properly (or validly) referred. This is so because the IA's only jurisdiction is statutory, and IAs only have jurisdiction on a charge when there has been a valid, lawful referral to them.

36. In order for a governor's referral to be valid, it must comply both with the legal framework and with the relevant published policy in the PSI (which binds governors). Governors do not have a discretion to refer cases to IAs as they deem fit. Rather, Rule 53A of the Prison Rules foresees a two-step process: by rule 53A(1) the governor must first make a determination whether either of the criteria in rule 53A(1)(i) or (ii) applies.

If the governor has made such a determination, then by Rule 53A(2)(a) the governor *shall* refer the case to the IA (and conversely, where the governor has determined that neither of the criteria are met, the governor shall proceed to inquire into the charge: rule 53A(2)(b)).

37. The IA has the power to review whether the referring governor had acted in accordance with Rule 53A and the requirements of the PSI binding the governor, that is to say whether the governor had applied his or her mind to the applicable test and given consideration to the seriousness of the individual allegation(s). This definition of whether a referral is lawful is also found in paragraph 2.33 of Annex A to the PSI. Indeed, Mr Bimmler argued that where the point is expressly taken on behalf of a prisoner, the IA has not only a power but a duty to review the lawfulness of the referral.

38. The judge focussed correctly on the adequacy of the IA's decision and rationale, rather than on the referring governor's decision as such. The judge was entitled to find that the evidence before the IA was not capable of supporting her decision that the referring governor had properly followed the Prison Rules, and had evaluated the seriousness of the charges in light of the definition and guidance given in the PSI.

39. Mr Bimmler takes issue with the submission that the judge erred in viewing the Respondent's conduct through the prism of criminal as opposed to prison discipline. He submits that no "prism of the criminal law" was employed by the judge, who made neither reference to any criminal case law nor Sentencing Guidelines or similar. Rather, the judge (properly) reflected factors which would affect the seriousness of a disciplinary charge in a custodial setting and could be taken into account by referring governors.

40. Mr Bimmler submitted that the judge was right to hold the threshold for a referral to the police is lower than the threshold for a referral to the IA and that a prior decision to refer to the police thus cannot be evidence that proper consideration had been given to the Rule 53A threshold. As set out above, there is no statutory or common law seriousness (or similar) threshold for a referral to the police; governors have the power to refer instances of suspected crime to the police.

41. However, in practical recognition of the fact that many incidents regularly dealt with by the prison adjudication system could if proven also amount to a crime, Her Majesty's Prison and Probation Service (HMPPS), the National Police Chiefs Council (NPCC) and the Crown Prosecution Service on 7 May 2019 entered into a (non-binding) "Crime in Prison Referral Agreement" about the referral of crime in prison, which includes referral criteria and guidance. The judge was entitled to interpret this agreement, at paragraph 29 of the judgment, as indicating that "a referral to the police for assaults on staff is to be made, save for a few exceptional cases". Insofar as there is a difference between the wording in paragraph 2.23 and the Crime in Prison Referral Agreement, it is the latter which set out the referral threshold which fell to be applied when the Respondent's case was referred to the police by Governor Mallon. The judge was right in holding that the fact that the first governor had assessed the charge to merit referral to the police, which the second governor relied upon, could not demonstrate that the second governor had properly applied Rule 53A as interpreted by the PSI.

42. Accordingly, Mr Bimmler submitted, none of the four factors elaborated by the Appellant identify an error in the judge's findings and analysis at first instance. He

argued that the "reason" (other than the previous reference to the police) given by the referring governor, did not amount to a properly reasoned decision. He referred to *R v Birmingham City Council ex p B* [1999] ELR 305.

Discussion

43. Since the system of IAs was established following the decision of the European Court of Human Rights in *Ezeh and Connors v UK* (2003) 39 EHRR 1, there have been three ways in which an offence against prison discipline can be dealt with. The first is by a governor who, if the charge is found proved, may impose some penalties but may not award additional days in custody. The second is by referral to an IA, in practice a District Judge or Deputy District Judge (Magistrates Courts), who may award up to 42 additional days if the charge is found proved. The third is a reference to the police, who may in turn involve the Crown Prosecution Service, leading potentially to a prosecution in the criminal courts. A governor's decision as to which of these three courses to follow seems to me analogous to a decision by a magistrates' court whether or not to send a case triable either way to the Crown Court.

44. If Prison Rule 53A stood alone, the Claimant's case would be hopeless. The Rule requires the governor to refer a case to an IA if either of two tests is satisfied. The first (which I will call a "so serious" case) is where the governor determines that the charge is so serious that additional days would be awarded if the case was proved. The second is that it is necessary or expedient "for some other reason" for the charge to be enquired into by an IA. We are not concerned with the second type of case, and if referring a charge to an IA for "some other reason" the governor should no doubt be required to set out what that reason is. But Rule 53A gives no indication of a requirement for a governor to give *reasons* in every case for determining that the charge is so serious that additional days might be awarded.

45. Moreover, I am not persuaded that justice and fairness require such reasons to be given in a "so serious" case. The governor's view of the seriousness of the charge cannot be binding on the IA. If the IA finds the case not proven that is the end of the matter. If the IA finds the charge proven but considers that the imposition of additional days in custody would be inappropriate then they can impose no such penalty. This would not mean, on an ordinary reading of the rule, that the referral had been unlawful, any more than a committal for trial or sentence by a magistrates court is made retrospectively unlawful if the Crown Court considers that the justices could perfectly well have dealt with the matter within their own powers.

46. However, the terms of PSI 5/2018 made the position less simple. Paragraph 2.28 repeated the statutory test in Rule 53A, but paragraph 2.32 proceeded to gloss it by saying that the test for seriousness is whether the offence poses a very serious risk to order and control in the establishment or to the safety of those within it. The same paragraph says that each case will be assessed on its merits, but listed some categories of serious assaults which should always be referred. Paragraph 2.33 states that if the IA considers the referral to have been unlawful they may decide not to proceed and therefore the adjudication will be dismissed. It goes on to give an example of an unlawful referral as being one where the PSI has not been correctly followed, and the case should not have been referred in the first place, such as where a governor referred a charge of disobeying an officer with no other aggravating features.

47. It is significant that paragraph 2.33 of PSI 5/2018 conferred a power on IAs *not to proceed* if they consider that the case should not have been referred in the first place. At that stage, presumably, the evidence has not been heard. This may explain why paragraph 2.31 advised that the adjudicating governor should state the reasons for referral to the IA on the appropriate form, as "quoting 'serious of the offence' alone may not be sufficient in all cases".

48. Sometimes it may not be apparent from the charge and the brief summary given on the charge sheet why the offence is said to pose a very serious risk to order in the prison or to the safety of those within it, or to justify the award of additional days. In such a case, if the referring governor does not give reasons for the view that the case was so serious as to justify referral, there is a risk that the IA will decide not to proceed with a case which would otherwise have justified a full hearing before the IA. But that creates no unfairness to the prisoner: on the contrary. Moreover, in some cases, it may be obvious from the nature of the charge or the particulars given on the charge sheet that the "so serious" test is satisfied. This is such a case, as demonstrated by the penalty imposed by IA Wright and upheld by DJMC Goezee.

49. Despite the wording of Question F on Form IA1, I do not accept that (at least in a "so serious" case) the IA is under a duty in law to enquire into the thought processes or reasoning of the referring governor. The IA is under a duty to form an independent view on whether to proceed; and then, of course, if the case does proceed, to form their own view on guilt or innocence and on penalty.

50. I do not consider that any assistance can be derived from the decision in *R v Birmingham City Council ex p B*. That was a school admissions appeal in which Scott Baker J held that a standard form letter which was "nothing more than an incantation" of the two stage procedure for deciding such appeals" and told the reader "absolutely nothing about the particular facts and circumstances of this applicant's appeal" was deficient. It is too far removed from the context of the present case to be relevant. In public law, as Lord Steyn famously said, context is everything.

51. Prison discipline is meant to provide a simple, speedy and proportionate system of justice. The prisoner is at no risk of additional time in custody if the matter is dealt with internally and at risk of a maximum of 42 days if the case is referred to an IA. If the adequacy of reasons given by the referring governor can be the subject of judicial review, that raises the prospect of applications for permission on paper, renewal to an oral hearing and an application for permission to appeal to this court becoming routine. Speed and simplicity would be impossible to achieve and the cost to public funds would be considerable.

52. Despite the skill and eloquence with which Mr Bimmler put his case, I consider that the two experienced public lawyers (Mr Howell QC and Mr Lock QC) who refused permission in 2021 were entirely correct. The referring governor's mention of the nature of the charge was a sufficient basis for referral to the IA. The facts of the charge spoke for themselves.

Conclusion

53. I would allow the Secretary of State's appeal on Ground 1 and set aside the order of the judge. The decision of IA Wright was correct, although Mr Kane can no longer be

required to serve the 18 additional days since the custodial period of the sentence which he was serving at the time of the incident has now expired. Ground 2 (the alternative argument based on s 31(2A) of the Senior Courts Act 1981) has become academic and no more need be said about it.

Lady Justice Thirlwall:

54. I agree.

Lord Justice Peter Jackson:

55. I also agree.