Neutral Citation Number: [2019] EWHC 2884 (Admin)

Case No: CO/2203/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 30th October 2019

Before:

Lady Justice Thirlwall DBE
Mrs Justice Elisabeth Laing DBE
and
Mr Justice Dove

- -

Between:

The Queen (on the application of ANTHONY O'BRIEN)	**Claimant**
- and -	
INDEPENDENT ADJUDICATOR	**Defendant**
- and -	
(1) GOVERNOR OF HER MAJESTY'S PRISON THE MOUNT	
(2) SECRETARY OF STATE FOR JUSTICE	
(3) HERTFORDSHIRE CONSTABULARY	**Interested Parties**

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Mr Paul Greatorex (instructed by **Edwards Duthie Shamash**) for the **Claimant**
Mr Will Hays (instructed by **the Government Legal Department**) for the **1st and 2nd Interested Parties**

Hearing dates: Wednesday 6th February 2019

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Approved Judgment

Lady Justice Thirlwall:

This is the judgment of the court to which we have all contributed.

Introduction

1. The Claimant is a serving prisoner at HMP The Mount. This is his application for judicial review of a decision by an independent adjudicator, the Defendant, to refer disciplinary charges to the police, instead of deciding them for herself.

2. There are two 'adjudicators' in the relevant legislative scheme, an adjudicator, usually a prison governor, who first makes an inquiry into a disciplinary charge, and an independent adjudicator, to whom the adjudicator must refer certain cases for him or her to inquire into them. For clarity, we will in this judgment refer to the Defendant, and others who carry out the same role, as 'the IA', and to the adjudicator as 'the adjudicator'.

3. Permission to apply for judicial review was granted on the papers, on two grounds, by Andrew Baker J. He refused permission to apply for judicial review on three further grounds. When those grounds were renewed, Lang J ordered that, at the substantive hearing, there should also be a 'rolled-up hearing' of the application for permission to apply for judicial review on those renewed grounds, to be followed by a substantive hearing of those grounds if permission were granted.

4. The Claimant was represented by Mr Greatorex. The Defendant has not appeared on this application or been represented. The application has, in practice, been defended by the first two interested parties. They were represented by Mr Hays. We are grateful to both counsel for their written and oral submissions.

The issues

5. The main issue is whether, under the relevant legislative scheme, the IA had power, a charge having been referred to her by the adjudicator to her for her to inquire into, not to inquire into it, but, instead, to refer it to the police for them to investigate, with the result either, that she would not inquire into it all (if a prosecution followed) or that she would only inquire into it much later (if at all) if, in the event, there was no prosecution. There are two further issues. The first is whether, if the IA did have power to refer the charge to the police, her decision to do so was unlawful because it was taken pursuant to a policy which is not published and was in any event unlawful. The second is whether, in referring the charge to the police, she breached, and is liable for a breach of, the Data Protection Act 1998 ('the DPA'). Those two further issues are the grounds for which, in effect, Andrew Baker J refused permission, and which were renewed at the hearing before us. The parties agreed that the fourth issue stood or fell with the first issue.

The facts

6. There are two relevant records of the adjudication hearings. It has not been straightforward, as will become apparent, for us to piece together the history of this matter. What follows is the best which can be achieved from such records as have been provided in the papers. The first form is stamped '6 December 2017'. It records

a charge contrary to Prison Rule 51, and that the charge was laid within 48 hours of the discovery of the alleged offence. Section 2 is headed 'Referral to the Police (Governor...Only). The form records that the charge was not referred to the police. The first hearing was held by AT Burnitt (a Governor) on 7 December 2017. The Claimant attended and he pleaded not guilty. The Governor recorded, in section 6, that he had read the Claimant's submission and that he was referring the case 'to the IA, the presence of the R/O and for the analysis of the phone'.

7. The second hearing was held by the Defendant on 2 January 2018. The adjudication was opened and adjourned to 22 January so that the Claimant could be represented by a solicitor. A third hearing was held by the Defendant on 22 January. The Claimant pleaded not guilty. The issue was knowledge. The note then summarises the evidence. The note refers to the fact that the phone had been sent for analysis. The hearing was adjourned until 21 February 2018 for the 'SIR', that is, the Security Information Report (see, for example, paragraph 7 of the attendance note of Ms Koska, the Claimant's representative, to which we refer below).

8. The note records, under the date '21 February 2018' that the Claimant faced a second allegation. 'I have explained that it is my intention to refer both matters to the police'. The note records Ms Koska's concern about double jeopardy. It continues, 'In view of the fact that I have not made a finding in relation to this matter, there can be no double jeopardy and the circumstances have changed because of more recent charge makes matter that much more serious'.

9. The second form is stamped '31 January 2018'. The Claimant was alleged to be in possession of a mobile phone discovered in his cell. This became the second charge. The form records that the time limits have been complied with and that the Governor did not refer the charge to the police. The first hearing was held on 1 February 2018 by 'Evans. A', Governor. It records that the Claimant refused to attend the hearing. The Governor's decision was 'Due to charge this has been referred to the IA on 21 February 2018'. We think this means 'due to the serious nature of the charge', that is, because the charge was a charge of possessing a mobile phone.

10. The second matter was heard with the first at the hearing of 21 February 2018. The note of the hearing says 'Open adjudication. As this is a second matter committed within a short space of time and the other matter is not concluded, I am going to refer <u>both</u> to the police' (underlining in the note). The note then says that the Claimant had refused to attend the adjudication and returned to the wing. He had a representative on another matter, Ms Koska, who was not instructed on this matter. 'She is worried about me opening in absence on this. I explain that he knew he had 2 adjudications. He has clearly now declined to attend either adjudication. I will open in absence and refer to the police'.

11. The Defendant added a note, which is hard to decipher fully. The gist of this is that after the end of the adjudication, she had spoken to someone who told her that when she had initially called the case, the Claimant, who was still in the segregation unit, had been asked if he was going to attend the adjudication and had said 'No'.

12. We have read a witness statement from Ms Koska, which exhibits her attendance note of 21 February 2018. She represented the Claimant at the hearings before the

Defendant on 22 January and on 21 February 2018. She prepared the attendance note when events were fresh in her mind.

13. That note records her recollection, which is that she was called in by the Defendant who told her that she was referring the matter to the police. The Claimant was facing a second adjudication for possessing a mobile phone, and on that basis, the Defendant was now referring both charges to the police. If not for the second adjudication, the Defendant said that she would have heard the first charge, but that it was her 'policy' to refer to the police in these circumstances. The Defendant then said that there had been a number of successful convictions for possession of mobile phones in prison and that sentences of 12, 14 and 34 months had been upheld by the courts.

14. That note then records that Ms Koska raised concerns about double jeopardy and questioned the referral to the police, as the adjudication had already been opened by the Defendant. The Claimant, Ms Koska said, had a credible defence, that he had not known 'the phone was in the cushions in the chair'. Ms Koska asked if there was any further evidence in the Security Information Report which had been requested. The note reports that the Defendant replied that there was no double jeopardy as the Defendant had not yet passed sentence. There had been a change of circumstances, which permitted the Defendant to refer the case to the police. The Defendant said that she was not bound by paragraph 2.25 of PSI 47/2011 (which we summarise below). The note reports a statement by the Defendant that she had not looked at the additional evidence, that she had made the decision to refer when she arrived and had seen that the Claimant had a second adjudication for possession of a mobile phone. The Defendant is said to have told Ms Koska that she would refer both matters to the police for investigation 'in accordance with her policy'.

15. Ms Koska then had a conference with the Claimant. He told her that he did not want to appear in front of the Defendant to hear her decision. Ms Koska was not representing the Claimant on the second matter. She raised with the Defendant her concerns about her intention to refer the charges to the police. The Defendant opened the second charge in the Defendant's absence and said she would refer it to the police.

16. Whilst the Defendant said she would refer the two cases to the police it was not she who made the referral. It was made on behalf of the prison by a prison officer and received by the Prison Liaison officer (PLO) (a police officer with Hertfordshire police who is assigned to the prison). We assume that the referral was not specifically approved by nor discussed with a governor before it was made.

17. The Claimant sent a pre-action protocol letter on 27 March 2018. That letter summarised the facts. The 'policy' of the Defendant was said to be unlawful on four grounds.

    i) The IA had no power to refer the matter to the police.

    ii) The decision offends against the principle of double jeopardy.

    iii) The decision was taken pursuant to an unpublished and unlawful policy and not based on the facts of the case.

    iv) There had been a breach of the Data Protection Act 1998.

18. The Government Legal Department ('GLD') replied on 24 April 2018. The author of the letter said that he represented the governor and the Secretary of State for Justice. He said that 'The Learned Judge is not represented and she has indicated that she wishes to remain neutral in the matter. She has, however, provided a statement in which she addresses the points you have made in your letter'.

19. In the statement the Defendant says that she is an IA. She used to go the prison once a fortnight, most fortnights. The number of referrals has increased, so that another adjudicator has been attending in order to ensure that adjudications can take place once a week. A significant number of referrals are about mobile phones. She noticed a great increase in referrals at the end of last year. Many concerned 'repeat offenders'.

20. She had asked why these cases were referred to her and not to the police. At the same time, significant sentences of imprisonment had been upheld by the Court of Appeal in such cases. There had also been more prosecutions at her court for possession of mobile phones. She spoke to Governor Evans, who told her that referrals were being returned by the police. She drew the attention of the PLO to the long sentences of imprisonment which had been upheld by the Court of Appeal recently. She told the PLO that it was her intention to refer cases of possession to the police where there was a previous history of possession. 'This did not amount to an instruction to prosecute, nor did it constitute a hard and fast rule'. She had been persuaded in some cases not to refer cases to the police. 'In other words, I use my discretion in every case. This does not amount to policy. It certainly does not extend beyond this prison'.

21. The Defendant then referred to PSI 10/2012, which we summarise below. At paragraph 9, she asserted that IAs 'can and always have had the right to refer to the police. It isn't specifically mentioned in the Prison Rules or PSI 47/2011. It is widely used. To suggest that a judge could not refer a criminal offence to the police would offend against public policy'.

22. In paragraph 10 she describes what happened. She exercised her discretion not to refer on 2 January because she felt that all prisoners should be warned that on the next occasion they were caught she would refer them. [We note, however, that no such warning is recorded in the Defendant's record of the proceedings on 2 January 2018.] Moreover, the Defendant records that as at 2 January 2018, the Claimant had already had an adjudication for possessing a mobile phone in March 2017, for which he had been awarded 18 additional days. The note then says that the Defendant decided to refer both matters on 21 February 2018, when the Claimant appeared in front of her having been charged with possession of another mobile phone. She then quoted from the record of the proceedings.

23. At paragraph 11, she said, 'I do not recall saying that it was my policy to refer second offences to the police. However, I concede that I may have done. If so, the term was used lightly and intended to convey the message that it is my practice to do so. I most certainly did not say anything to give the impression that there was a wider policy'. Paragraphs 13-15 consist of legal argument. We say no more about them.

24. The GLD's letter accepts that IAs have no statutory power to refer charges to the police. It asserts that governors have no such power either. PSI 47/2011 assumes such a power, but does not confer it. The letter argues that both governors and IAs, 'as with any person' may make a report to the police, and that the power to refer may be

inferred from the nature of the office held. It was contrary to public policy and 'implausible' to suggest that IAs have no such power. The letter asserts that the Governor now thinks that the referral to the police was correct. There is no direct evidence to support this but the approach of the prison to the referral and the fact that the Governor did not express any concern about the referral then, or earlier, support that assertion.

25. It appears from a response by the Treasury Solicitor dated 12 December 2018 to a request for further information filed on behalf of the first Interested Party, and from the Claimant's skeleton argument, that on 7 August 2018, the Governor decided not to proceed with the first charge. The Claimant was not told about this until 'some time later'. Further similar charges were laid on 8 August and 12 October 2018. The governor referred them to the police. On 13 December 2018, without prior warning, the Claimant had a police interview about the second charge, and the third and fourth charges. He was still awaiting the outcome at the date of the hearing.

The legislative scheme

(1) The Prison Acts

(a) The Prison Act 1865

26. The Prison Act 1865 ('the 1865 Act') made detailed provision for the running of prisons. It provided, in short, for prisons to be under local control and to be paid for from local rates. Section 4 defined the 'Gaoler' as 'the Governor, Keeper, or other Chief Officer of the prison'. The Justices in Session assembled were obliged by section 10 to appoint, among other officers, a Gaoler. Schedule 1 contained regulations for the government of all prisons. Section 21 gave the Justices a supplementary rule-making power. By section 58, every prisoner was deemed to be in the legal custody of the Gaoler. Paragraphs 68-80 of Schedule 1 made further provision about the Gaoler. He was obliged to live in the prison (paragraph 68). By paragraph 69, 'The Gaoler shall strictly conform to the Law relating to Prisons and to the Prison Regulations, and shall be responsible for the due Observance of them by others. He shall observe the Conduct of the Prison Officers, and enforce on each of them the due Execution of his Duties, and shall not permit any subordinate Officer to be employed in any private Capacity, either for any other Officer of the Prison, or for any Prisoner.' Paragraph 69 gave him power to suspend subordinates for misconduct. He was responsible for keeping the various records listed in paragraph 77. Paragraph 80 provided for the delegation of the Gaoler's powers to a Deputy Gaoler. Paragraph 63 gave prison officers acting as a such the powers of a constable. Paragraph 93 obliged prison officers to obey the Gaoler.

(b) The Prison Act 1877

27. The Prison Act 1877 ('the 1877 Act') reorganised the prison system in England and Wales. In short, it ceased to be a system of local prisons. It was, from then on, funded by money provided by Parliament (section 4). The prisons, and, among other responsibilities, the responsibility for appointing all officers, were transferred to the Secretary of State (section 5). Section 35 provided that the officers who were attached to prisons on commencement were to continue in office on the same terms as if the 1877 Act had not been passed. They could be distributed among prisons by the

Secretary of State, and were to 'perform such duties as they may be required to perform by the …Secretary of State, so that such duties are the same or analogous to those they performed previously to the commencement of this Act, and, subject as aforesaid, they shall perform the same duties as nearly as may be as the are performing at the time of the commencement of this Act'. Section 51 gave the Secretary of State power to make rules in pursuance of the 1877 Act. Expressions defined in the 1865 Act had the same meaning in the 1877 Act (section 61).

(c) The Prison Act 1898

28. Section 2(1) of the Prison Act 1898 ('the 1898 Act') gave the Secretary of State power to make rules for the government of prisons. By section 2(2) they were to be laid before Parliament in draft. Section 10 re-enacted paragraph 63 of Schedule 1 to the 1865 Act.

(d) The Prison Act 1952

29. The short title of the Prison Act 1952 ('the Act') shows that it is a consolidation Act made under the Consolidation of Enactments (Procedure) Act 1949. Section 1 vests all powers and jurisdiction in relation to prisons in the Secretary of State, subject to the provisions of the Act. Section 3 gives the Secretary of State power to appoint and employ such officers and servants as he may determine (subject to the sanction of the Minister for the Civil Service as to number). Section 4(1) gives the general superintendence of prisons to the Secretary of State. By section 7(1), every prison is to have a governor, a chaplain, and such other officers as are necessary. If in the Secretary of State's opinion it is large enough, a prison may have a deputy governor (section 7(3)). Section 8 re-enacts section 10 of the 1898 Act.

30. Section 8A gives the governor power to authorise people to search for unauthorised property. By section 13(1), every prisoner is deemed to be in the legal custody of the governor. Section 16A gives the governor power to authorise drug tests in a prison, and section 16B, tests for alcohol. Sections 40A-40C provide for the classification of articles in prisons into three Lists (A, B and C). A person who brings such an article into a prison is guilty of an offence. A mobile phone is a List A article (section 40A(3)(b)). A governor can authorise such articles to be brought into a prison or given to a prisoner (sections 40B(5), 40C(7)). Other articles are subject to a similar regime and subject to authorisation by a governor (sections 40CA, 40CB, 40D and 40E). Section 42A gives the governor power to dispose of unauthorised property.

31. Section 47(1) gives the Secretary of State power to make rules for the regulation and management of prisons. Rules must give a person charged with any offence under the rules a proper opportunity of presenting his case (section 47(2)). The Secretary of State can make rules about the employment of prisoners, their payment, and reduction in their wages by the governor for certain purposes (section 47A).

(2) The Prison Rules 1999 SI No 728 ('the Rules')

32. The Rules revoke the previous rules listed in Schedule 1 to the Rules.

33. 'Governor' includes an officer for the time being in charge of a prison (rule 2(1)).

34. Part II of the Rules is headed 'Prisoners'. It makes detailed provision for the care and custody of prisoners, for the day-to-day running of prisons, and for prison discipline. By rule 11, a prisoner may make a complaint about his imprisonment to the governor. The governor must work in partnership with local health care providers so as to ensure that prisoners have access to the same services as the general public (rule 20). Rules 21 and 22 impose various duties of governors in connection with ill prisoners. Part II of the Rules also gives the governor a range of other powers in connection with the welfare and discipline of prisoners (see, for example, rules 35D(1), 39(2), 41(1), 44, 45, 48, 49, and 50A(1)).

35. Part III is entitled 'Officers of Prisons'. Officers must obey the Rules and 'assist and support the governor in their maintenance and obey his lawful instructions'. A governor can direct a prison officer to be searched (rule 64). Part VI includes rule 81, which gives a governor, with leave of the Secretary of State, power to delegate any of his powers and duties under the Rules to another officer of the prison.

36. Rules 51-61A, which are in Part II, are entitled 'Offences against Discipline'. The scheme of this group of rules is that the offences are listed in rule 51. They include having an unauthorised article (rule 51(12)). A mobile phone is such an article, unless the Secretary of State or the governor has authorised its possession (see section 40A(3)(b) of the Act). Where a prisoner is to be charged with an offence, rule 53(1) requires the charge to be laid as soon as possible, and, save in exceptional circumstances, within 48 hours of the discovery of the offence. Rule 53(2) requires every charge to 'be inquired into by the governor, or as the case may be, the adjudicator' (that is, the IA). Rule 53(3) requires every charge to be first inquired into, not later, save in exceptional circumstances and in accordance with rule 55A(5), where it is inquired into by the governor, the next day, and where it is referred to an adjudicator (an IA) under rules 53A(2) or 60(3)(b), 28 days after it is referred.

37. 'Adjudicator' (that, is, 'IA') is defined in rule 2(1) as 'a District Judge (Magistrates Courts) or Deputy District Judge (Magistrates Courts) approved by the Lord Chancellor for the purpose of inquiring into a charge which has been referred to him'.

38. Before the governor inquires into a charge, rule 53A(1) requires him to decide whether the charge is so serious that additional days should be awarded for it if the prisoner is found guilty, or whether it is necessary or expedient for some other reason for it to be inquired into by the adjudicator (the IA). Where the governor so decides, he must refer the charge (and any charge associated with it) 'forthwith' to the adjudicator (the IA) for him to inquire into it. Otherwise, he must 'proceed to inquire into it' (rule 53A(2)). If at any stage before the governor has decided on the appropriate punishment for the offence, he decides that the offence is so serious that additional days should be awarded for it, or that it is necessary or expedient for some other reason for the adjudicator (the IA) to inquire into it, he must refer it to the adjudicator (the IA), who must first inquire into the charge (other than in exceptional circumstances) 28 days after the charge is referred to him (rule 53A(3)).

39. Rule 54(1) gives a prisoner who is charged the right to be told what the charge is as soon as possible, and in any case, before it is inquired into by the governor or by the adjudicator (the IA), as the case may be. Rule 54(2) provides that 'At an inquiry into a charge against a prisoner he shall be given a full opportunity of hearing what is alleged against him and of presenting his own case'. 'At an inquiry into a charge

which has been referred to an adjudicator [an IA], the prisoner…shall be given the right to be legally represented' (rule 54(3)).

40. Rule 55(1) lists the punishments which a governor can impose. Rule 55A(1) lists the punishments an adjudicator (an IA) can impose. They include the punishments listed in rule 55(1) and, in the case of a fixed term prisoner, an award of additional days not exceeding 42 days. A prisoner can apply for a review of some of the measures imposed by an adjudicator (an IA) (rule 55B). The review must start within 14 days of receipt of the request and must be conducted on the papers alone (rule 55B(3)). Punishments may be suspended in accordance with rule 60. Rule 61 enables the Secretary of State to quash any finding of guilt made or punishment imposed by an adjudicator (but not an IA) and remit or mitigate any punishment. Subject to any directions of the Secretary of State, a governor may also, on the grounds of good behaviour, remit or mitigate any punishment imposed by an adjudicator (an IA) (rule 61(2)).

(3) The relevant Prison Service Instructions

41. We were referred to two Prison Service Instructions ('PSIs').

(a) Prisoner Discipline Procedures PSI 47/2011

42. Prisoner Discipline Procedures PSI 47/2011 was published by HM Prison and Probation Service (which, we take it, is or was an emanation of the Secretary of State, an intuition which is supported by the contact email address). It is expressly directed 'For action by' Governors and Directors of Contracted Prisons and Youth Offender Institutions ('YOIs'), and 'For information' to 'All staff who have contact with prisoners'. It replaces PSO 2000 Prison Discipline Manual Adjudications (with transitional provisions). This PSI is 77 pages long. It makes very detailed provision, supplementing the relevant Rules, about the preliminaries to, and the conduct, and aftermath, of adjudications, including, for example, how charges are to be worded, the lay-out of the hearing room, hearsay evidence, what happens when there is evidence of further offences and the circumstances in which a prisoner might be entitled to be represented at a hearing before the prison adjudicator (as opposed to the IA).

43. According to paragraph 1.4, the 'Desired Outcomes' are that adjudications should be conducted 'lawfully, fairly and justly and contribute to the maintenance of order, control, discipline and a safe environment by investigating offences and punishing those responsible'. The key service outcome (paragraph 2.1, in bold) is that 'The use of authority in the establishment is proportionate, lawful and fair. A safe, ordered and decent prison is maintained. Prisoners understand the consequences of their behaviour and consider and address the negative aspects of their behaviour as a result'. Paragraph 2.1 underlines the importance of swift action.

44. Every establishment is to have an Adjudication Liaison Officer who has been suitably trained to advise staff on whether a charge is an appropriate response to an incident and if so, what charge to lay (paragraph 2.3).

45. One of the many topics covered is 'Referral to the police'. Paragraph 2.17 says that guidance on reporting crime in prison to the police will be published later. In the meantime, advice should be sought from the National Offender Management Service

('NOMS') security group (now HMPPS). Where a serious criminal offence seems to have been committed, the police must be contacted immediately. All serious assaults on staff or prisoners must be referred to the police immediately. In other cases, the decision to refer will be made during the adjudication. After opening the procedure the adjudicator should consider whether the charge is serious enough to be referred to the police for investigation and for possible prosecution in the courts. That decision is for the adjudicator (paragraph 2.18). The relevant paragraphs recognise that the principle of double jeopardy may be engaged.

46. Paragraph 2.20 says that the most serious cases will normally be referred to the police and prosecuted rather than adjudicated. If the case is not referred to the police, or is referred but not prosecuted, the adjudicator must then consider whether to refer the case to the IA. Paragraph 2.23 says that the test for 'seriousness (paragraph 2.20)' is whether 'the offence poses a very serious risk to order and control of the establishment, or the safety of those within in it'. It is clear from the text that this is the test which is to be applied to a decision to refer to an IA, not to a decision to refer to the police. Governors are reminded that IAs are expensive, as is the legal aid to which prisoners are entitled. Paragraph 2.13 then lists the types of factors which would indicate that an offence is so serious that it should be referred to an IA. Whether a charge of possession of unauthorised articles should be referred would depend on 'the nature and quantity of the items…mobile phones will usually be referred'.

47. Paragraph 2.24 states that once a charge has been referred to an IA it cannot be referred back to a governor – 'the IA will deal with it, unless the IA considers the referral to have been unlawful (i.e. not referred in accordance with [the Rules]), when the IA may decide not to proceed'. Paragraph 2.25 says that IAs are bound by the Rules but 'are independent of NOMS and need not comply with this PSI – although we hope they will be guided by it'.

(b) Conveyance and Possession of Prohibited Items and Other Related Offences PSI 10/2012

48. The addressees of Conveyance and Possession of Prohibited Items and Other Related Offences PSI 10/2012 are the same as the addressees of PSI 47/2011. The measures are designed to 'ensure tighter control' of items in prisons. They also 'provide the option to pursue criminal charges against anyone in breach of the relevant sections of the Prison Act' (section 1). Much of the PSI explains amendments to the Act made by legislation in 2007 and in 2010, and their practical implications for the management of prisons. Chapter 5 deals with authorisations.

49. Chapter 6 is headed 'Communications and Liaison'. Paragraph 6.1 refers to arrangements between the Crown Prosecution Service ('the CPS') and the Association of Chief Police Officers ('ACPO') for the charging and prosecution of prisoners. We think it likely that those arrangements are in the document which we describe in the next section of this judgment. The Police Intelligence Officer for each establishment should be the first point of contact for pursuing criminal charges against a person who has breached the Act. The reader is referred to Chapter 7 for 'comprehensive guidance' on referring [relevant offences] to the police'. Chapter 7 does give that detailed guidance; in paragraphs 7.1 and 7.2 which deal with the main factors, and necessary intent, and then in paragraphs 7.13-7.15, which deal with criteria for

judging the 'Seriousness' of alleged offences. There is further guidance for each offence in each of paragraphs 7.16-7.20. Paragraphs 7.21-22 describe liaison with local 'CJS Partners'. Prisons are encouraged to 'engage in local tri-partite discussions with CJS partners' to explain the implications for prisons of such offences and 'highlight any perceived need for prosecution'.

(4) Other relevant instruments

50. A protocol agreed between NOMS, ACPO and the CPS assumes that crimes will be referred to the police by 'Prison Managers' (Annex B). The protocol provides for the compulsory referral of serious crimes, the referral of other, less serious crimes when certain conditions are met, and the referral of even less serious offences (such as mobile-phone crime) when there are aggravating features, or the crime has wider consequences for the prison community, and in other, stated, circumstances.

Submissions

51. The shape of both sides' submissions was foreshadowed in the pre-action protocol letters.

52. The Claimant submitted that the IA has no power to refer a charge to the police. Mr Greatorex characterised the defence of the Interested Parties as having three themes.

    i) The Claimant just wanted to avoid police involvement.

    ii) 'What is the world coming to if a judge cannot tell the police about a criminal offence?'

    iii) The charge has now been referred to the police and nothing can change that.

53. He made two broad submissions about the position of the Interested Parties. They simply failed to engage with two basic issues of public law:

    i) the scope of the IA's statutory powers, and

    ii) the allocation of the responsibility for any decision to refer a disciplinary charge to the police.

54. Their defence hinged, rather, on supposed practical objections to the Claimant's argument. Practical considerations were simply irrelevant to a question of jurisdiction. But in case practical arguments were relevant, he submitted that there were three practical reasons why that defence was wrong.

    i) Its consequence was delay in the disciplinary process. *R (Haase) v District Judge Nuttal* [2007] EWHC 3079 (Admin) (paragraph 44) shows that disciplinary charge should be dealt with quickly. During that delay, as Mr Hays accepted, a relevant consideration for the prison authorities in any decision to withhold privileges was any pending charge or charges. The delay here was six months or so in relation to the first charge. Over a year after it had been made, the second charge was still pending.

ii) It would lead to uncertainty and inconsistency, as each IA could develop her own approach, which might be in conflict with the approach of prisons (based on the relevant PSIs) and of other IAs.

iii) It permitted disagreement between individual governors and IAs.

55. On the principal issue, he submitted that the IA was a creation of statute with a very narrow remit. The sole raison d'être of the IA was the decision of the European Court of Human Rights in *Ezeh v Connors v the United Kingdom* (39665/98) (2004) 39 EHRR 1. The IA has no functions other than those conferred by statute, and those incidental powers which are 'necessary' to enable a statutory power to be exercised: see paragraph 23 of *R (Ward) v Commissioner of Police for the Metropolis* [2005] UKHL 32; [2006] 1 AC 23, per Baroness Hale (with whom three other members of the Court agreed). A power to refer to the police, and not to carry out (or to postpone for an unknown period) carrying out her statutory function role was not an incidental power which was necessary to enable her to exercise her statutory function.

56. It was clear from the legal materials that the decision whether to refer a charge to the police was for the governor, not for the IA. The position taken by the Secretary of State in this case was not reflected in any of those materials, and, in part, the submissions of the Interested Parties contradicted those materials. If the IA had concerns about whether a governor should have referred a case, she could, after the event, discuss those concerns with the governor; but she simply had no power to signal her disagreement with such a decision by referring the charge to the police and thus declining to do, whether indefinitely, or for an unknown period, the task she had been given by the statutory scheme, the charge having been referred to her by the governor. If the Secretary of State was concerned about the legal position, it was open to the Secretary of State to amend the Rules in order to give the IA power to refer a charge to the police instead of making a decision on it. Given their respective roles and their consequent knowledge of the affairs of a particular prison, it was obvious that the governor was in a much better position to decide whether to refer a charge to the police than was an IA.

57. The defence, further, confused the statutory office held by the IA with the person who happened to have the office conferred on her. The fact that the IA was a District Judge was nothing to the point. In just the same way, the fact that the Special Immigration Appeals Commission was chaired by a High Court Judge did not make it immune from judicial review (see *R (U) v Special Immigration Appeals Commission* [2010] EWCA (Civ) 859; [2011] QB 120).

58. Mr Greatorex accepted that his second ground might not be distinct from his first ground. He further accepted that the principle of double jeopardy did not apply. He submitted that it was nevertheless unique for a person to be subject, simultaneously, to two sets of criminal proceedings in respect of the same charge.

59. Grounds three and four only arose for decision if the IA had power to refer the charge to the police. Mr Greatorex made submissions based on *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. It was unlawful for an administrative decision maker to decide cases in accordance with an unpublished policy. It was quite clear that the IA had a policy or practice of referring

a second charge to the police. He acknowledged that there is something anomalous in the idea of a judge having a policy at all.

60. He submitted that his fifth ground stood or fell with his first ground. It was an important part of the legal analysis. The IA had processed sensitive personal data. She was not acting as a concerned citizen. She only had the information about the charge because she had been given it in her capacity as IA, for the sole purpose of holding an inquiry into the charge(s). The data protection issue, at its simplest, was whether it was necessary for the IA to give the information (that is, for the purposes of the DPA, to process the data) for the administration of justice. It was not necessary, as her statutory function was to inquire into the charge, not to refer it to the police.

61. Mr Hays referred us to the relevant Rules. He submitted that throughout the procedure the governor and the IA had power to refer a charge to the police. He submitted that the IA was 'standing in the shoes of the governor', although he accepted that the IA did not have the governor's knowledge of the prison. He also submitted that the governor retained the power to refer a charge to the police even after the governor had referred that charge to the IA, which appeared to contradict paragraph 2.24 of PSI 47/2011. It was 'implicit' in the Act that her right to make a report to the police was not removed. Alternatively, if it was needed, the legislative scheme as a whole conferred an express authority on the IA to refer a charge to the police.

62. He referred us to three cases, which, he submitted, showed that judges were guardians of the public interest in the prosecution of crime. They were *X (Children) (Disclosure of Judgment to Police)* [2105] 1 FLR 1218, *Rafidi v Commonwealth Bank of Australia Limited* [2017] NSWCA 96 (a decision of the Court of Appeal of New South Wales), and *R v Armstrong* [2012] EWCA (Crim) 83. They supported his argument, he submitted, that there must be a mechanism by which a judge should be able to refer a charge to the police. Judges have a role in connection with the proper administration of justice. He had made efforts to find examples where this had happened before. Barriers should not be erected to prevent a reference to the police. The IA 'was not deprived of the power which the governor would have to refer a charge to the police'.

63. He pointed out that IAs are not bound by the PSIs. There were various opportunities for evidence to come to light in the process of the inquiry. He accepted, in answer to a question from the Court, that rule 54 suggested that the word 'inquiry' meant 'hearing'. *Haase* showed that the IA's role is inquisitorial. He also accepted, in answer to a further question from the court, that that inquisitorial function could only be carried out during the hearing.

64. In any event, the IA, who was a District Judge (Magistrates' Court), had wide powers as a Justice of the Peace, which was an ancient office. It would be 'remarkable' if she did not have power to refer a charge to the police. A prisoner had no right to make representations before the IA decided to refer a charge to the police. Such a referral was made in the public interest and was 'unlikely to gain assistance from the representations of a prisoner on this point'. But if the Claimant had had such a right, he had been given that opportunity.

65. The IA did not operate an unlawful policy. She was not guilty of apparent pre-determination, because she had exercised her discretion. Her statement, though not a

witness statement, should be given 'the full weight' which should be given to a statement from GLD from a judicial office-holder.

Discussion

(1) Does the IA have power to refer a charge to the police?

66. The IA has no express power to refer a charge to the police. The question, therefore, is whether a power to refer a charge to the police is an incidental power which is 'necessary' to enable the IA to exercise the statutory power which has been conferred on her. The answer to that question depends on an analysis of the power in question, in its legislative context. In short, we are satisfied that a power to refer a disciplinary charge to the police, instead of inquiring into it herself, is not necessarily incidental to the functions which are conferred on the IA by the legislative scheme.

67. The first aspect of the legislative context is the Act. Section 1 shows that, subject to the express provisions of the Act, Parliament intended the Secretary of State (and not the court) to have all powers and jurisdiction in relation to prisons. Section 4 shows that Parliament intended the general superintendence of prisons to be vested in the Secretary of State. There is therefore ample statutory authority for the issue of PSIs by the Secretary of State, regulating any aspect of prisons in as much detail as the Secretary of State considers appropriate. The scope of the PSIs is only limited by any express provision to the contrary in the rules 'for the regulation and management of prisons' made under the power conferred by section 47(1). It is also clearly Parliament's intention that the Rules should provide that any person charged with a disciplinary offence should have a proper opportunity of presenting his case (section 47(1)).

68. The second aspect of the legislative context is the Rules. Six points, in particular, are significant.

i) The definition of 'adjudicator' (that is, the IA) in Rule 2(1). That tells us that, in this scheme, the IA has a limited, express, function: that of inquiring into a charge.

ii) The language of rule 54, which suggests strongly that an inquiry is an actual hearing, which it is for the IA to regulate, and which she may, if necessary, adjourn, for example in order to obtain further evidence, but which the IA must conduct and after which she must make a decision.

iii) The extremely short time limits throughout the relevant section of the Rules. Those suggest that, in order to maintain prison discipline, charges should be dealt with as soon as possible (and therefore, in-house). The imperative is a swift inquiry, followed by swift punishment if the charge is proved.

iv) The list of disciplinary offences, in rule 51, and the punishments they attract. This is a bespoke list of offences, presumably because those who are subject to it are serving prisoners, and because the aim is to preserve discipline in a prison by dealing with charges quickly. Some are criminal offences (such as assault). Others not (such as consensually drinking alcohol or possessing a mobile phone). Those that are criminal offences, whether per se, or because the conduct occurs in a prison, might be likely, if they were charged and prosecuted to conviction in a criminal court, to merit a significantly longer sentence than the maximum of 42 days which can be imposed by the IA. These factors suggest that the regime for discipline in prisons is intended to operate separately from, and not as a part of, the criminal justice system. These features also suggest that the legislative scheme favours quick adjudication and punishment over what, in the civilian world, might be regarded as condign punishment. A premise of the Rules, therefore, is that for many of those disciplinary offences the penalties available to governors and adjudicators are sufficient, despite any disparity with the sentence which might be passed by a court on conviction. That may be because in the view of the Secretary of State, who frames the Rules, the public interest is not necessarily always served by prosecuting and imposing (after inevitable delay) what would be the appropriate punishment for a non-prisoner, but by dealing with the offence quickly and in a way that has an immediate impact on the prisoner, such as loss of privileges, being confined to his cell, etc. The way in which that balance has been struck in the Rules is a matter for the Secretary of State, and not for the court (unless the Rules are ultra vires, which has not been suggested).

v) Rule 51 does not include very serious offences. A further premise of Rule 51, therefore, is that some offences are self-evidently too serious to be dealt with in the prison disciplinary system.

vi) The factual context for which the Rules have been made. The governor, not the IA, is deeply involved in all aspects of prison discipline; he is in a much better position than an IA (who will visit as required to conduct the cases referred to him) to assess which of the less serious offences against prison discipline are more appropriately (and quickly) dealt with by the police, the adjudicator and the IA. The governor has the big picture about what happens in the prison, and the IA does not.

69. The IA does not need such a power in order discharge her function, which is to investigate the charge which is referred to her by the governor in accordance with the Rules. Such a power is quite different from the IA's powers, for example, to ask for evidence to further her inquiry, and to regulate the conduct of the hearing into the charge, which are obviously necessarily incidental to her express functions.

70. A risk which is inherent in this legislative scheme is that, on inquiry into a charge, evidence may come to light which may suggest to the IA that the facts reveal conduct which is far more serious than the conduct which was known to adjudicator when he referred the case to the IA. If the conduct disclosed by her investigation shows that a different, more serious charge could (and in the view of the IA, should) be preferred, we consider that it would be open to her to inform the governor, so that the governor can then consider what to do in relation to the more serious conduct, including

referring it to the police. But that would not entitle the IA to abandon her inquiry into the existing, less serious charge.

71. If, however, what comes to light is that the facts of the existing charge seem to be more serious than they did at first, as here, because a further similar offence has come to light, that, in the first instance, is a matter for the governor. What went wrong in this case is that first, neither governor seems to have been aware of the March 2017 adjudication. Second, the governor who referred the second charge to the IA did not know about the first charge. Had the second governor known about the first charge, she would have been able to consider whether or not to refer the second charge to the police. What went wrong, therefore, is not a risk which is inherent in the legislative scheme but the result of poor coordination within the prison. But this sequence of events did not entitle the IA to abandon her inquiry which had been referred to her by the second governor in accordance with the Rules.

72. The Secretary of State submitted that the rules permitted an IA faced with this situation to refer the charge to the police. They do not. It is not for the court to re-write the Rules. If the Second Interested Party wishes to achieve that outcome, it is open to him to amend the Rules.

73. We now consider subsidiary submissions which were made to suggest that there was some power outside the Act and Rules to enable the Defendant to refer a charge to the police or, put another way, the absence of a power conferred by the rules on her as an IA did not prohibit her from reporting the crimes to the police either as a member of the public or as a District Judge and Justice of the Peace.

74. The governor of a prison has no express power, statutory or otherwise, to report to the police crime or suspected crime within the prison but such a power is necessarily to be implied to enable him to carry out his express functions, in particular to maintain prison discipline. There is nothing in the Rules, which are delegated legislation and take precedence over the PSIs, to prevent the governor reporting crime to the police; the two PSIs give guidance to governors about the circumstances in which criminal offences should be referred to the police, and assume that there is such a power. We are satisfied that the governor has power to report to the police crime or suspected crime within the prison. Mr Hays points out that the IA is sitting in the place of the governor and so, he submits, retains the Governor's powers to report a case to the police even at the stage of adjudication. We do not accept that submission. The IA is not sitting as a substitute governor; he is independent of and sits instead of the governor. He does not have the governor's powers. He has only the powers of the IA which we have already described.

75. Mr Hays submitted that the Defendant was entitled to refer the matter to the police in her capacity as a District Judge and the Defendant pointed out that it would offend public policy were a judge to be prevented from reporting crime.

76. From time to time a judge sitting in court proceedings may direct that some aspect of the case be referred to the DPP or to the police or other authorities. Evidence may emerge in the course of the evidence in a civil or criminal trial in open court of, for example, serious criminal conduct (which is not the subject of the proceedings). The reporting of crime cannot depend upon whether a police officer happens to be sitting

in the courtroom as evidence emerges. The public policy imperative that crime be investigated requires that action be taken by the judge in the interests of justice.

77. We consider that a District Judge (Magistrates' Courts) would be entitled to take the same course when sitting in the Magistrates' Court. We do not, however, consider, that the approach is the same when the judge is sitting, not as a judge but as an IA. A District Judge who sits as an IA does so because he has been approved so to do by the Lord Chancellor (see Rule 2). But, when sitting as an IA, as here, his powers are only those conferred for the discharge of the limited function of inquiring into the charge (and the incidental powers necessary to enable her to inquire into the charge). We consider that the parallel with the approach in *R (U) v Secretary of State for the Home Department* is close.

78. Nor are we persuaded that the IA, as a public-spirited citizen, or as a JP was entitled to refer the charge to police. We consider that the sensitive personal data comprised in the charge and associated information was communicated to the IA for one purpose only: to enable her to inquire into the charge. That purpose is not to process the data by referring the charge, or causing it to be referred, to the police. To this extent, in our judgment, the fourth ground supports the first ground of claim.

(2) Did the IA have an unlawful policy to refer second possession charges to the police?

79. This question only arises if the IA had power to refer the charges in this case to the police. A preliminary issue is what we make of the evidence about the hearing. In so far as there is any issue about what the IA decided, the primary source of evidence is the written record of the proceedings. In so far as there is any question about what happened in the course of the hearing, witness evidence is admissible. The only such evidence is the witness statement of Ms Koska. We note that it is not materially contradicted by the note from the Defendant.

80. We consider that this issue has, understandably, perhaps been inappositely framed, because of the word 'policy', which Ms Koska says the IA used, and which the IA concedes that she may have used, during the hearing. It would not be lawful for a judicial decision maker to have a personal policy about how to deal with certain types of case. We note, in any event, that the IA, in a previous case involving the Claimant, did not refer the charge to the police, but dealt with it herself, even though it was a second adjudication, and despite the 'policy' (see the witness statement of Nichole Warren dated 17 May 2018; she represented the Claimant at a hearing conducted by the Defendant at HMP The Mount on 18 December 2017).

81. We consider that a better way of labelling this complaint, which Mr Greatorex accepted when asked by the court, is that it is a complaint of apparent pre-determination. We also consider that, on the facts as disclosed by the record of the proceedings and by witness statement of Ms Koska, that there was apparent pre-determination. The key point is that, as Ms Koska's attendance note records, the IA told Ms Koska that she (the IA) had not looked at the additional evidence, had decided to refer the cases to the police when she arrived (and had discovered that the Claimant had a second adjudication for possession of a mobile phone listed to be heard that day) (see paragraphs 10 and 11 of the attendance note). In the previous case, by contrast, the IA, rightly in our judgment, asked for, and listened to, submissions about why she should not refer the charge to police, and (as it happens)

acceded to those submissions (see Nichole Warren's witness statement). There was, it seems to us, no arguable apparent pre-determination in that case.

(3) Was there a breach of the DPA?

82. In the light of the parties' agreement that this ground adds nothing to the first ground, we do not consider it necessary to add much to what we have said about this point in paragraph 74, above. Section 4(4) of the DPA requires the data controller (in this case, the IA) to comply with the data protection principles Part 1 of Schedule 1 of the DPA, and in Schedules 2 and 3 of the DPA. The first data protection principle is that data must be processed fairly and lawfully; in particular, sensitive personal data must not be processed unless one of the conditions in Schedule 3 is met. The only potentially relevant condition in Schedule 3 is condition 7(a), 'The processing is necessary for the administration of justice'. If the IA had no power to refer the charge to the police, the IA breached the first data protection principle.

Conclusion

83. For these reasons, the IA acted unlawfully in the Claimant's case on 21 February 2018 by directing that two charges of possession of a mobile phone be referred to the police, and not inquiring into them herself.

84. We would add only that it should not be thought that there is an absolute prohibition on an IA reporting to the police crime that has come to his or her attention via the IA process. We have in mind cases where corruption has occurred or cases of gross error when the public-policy imperative that crime should be investigated and prosecuted may require that matters discovered in the IA process be reported to the police. That is not this case. These offences could and should have been reported to the police by the governors, as the interested parties accept. We acknowledge that by her actions the Defendant corrected the effect of the errors made by the governors but the course she took was not open to her for the reasons set out in the judgment.

Remedy

85. Since we circulated the draft judgment in this case the parties have informed the court that the Claimant has now been released and the second disciplinary charge set out at paragraph 25 has been marked "not to be proceeded with". The police investigation continues.

86. We have received written submissions on the question of remedy. The only issue between the parties was whether the decision should be quashed or whether a declaration that it was unlawful was sufficient remedy. In our judgment the declaration of unlawfulness is sufficient.