Neutral Citation Number: [2020] EWHC 1367 (Admin)

Case No: CO/256/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2020

Before :

MR JUSTICE SPENCER

- -

Between :

SHAHERIZ KHAN	**Claimant**
- and -	
(1) GOVERNOR OF HMP THE MOUNT	**Defendant**
(2) SECRETARY OF STATE FOR JUSTICE	
And	
HERTFORDSHIRE COMMUNITY NHS TRUST	
	Interested Party

Amanda Weston QC (instructed by **Prisoners' Advice Service**) for the **Claimant**
Russell Fortt (instructed by **GLD**) for the **Defendants**

Determined on written submissions

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 4th June 2020 at 10.30am.

Mr Justice Spencer :

The issues

1. This judgment deals with issues arising from service by the claimant of notice of discontinuance of his claim for judicial review. That notice was served on Monday 27 April 2020, the day after I had refused (on the papers) the claimant's late application to vacate the hearing of the claim listed for a full day on Thursday 30 April 2020.

2. The first issue is costs. The normal consequence of serving notice of discontinuance of a claim for judicial review (like any other claim in civil proceedings) is liability to pay the costs of the defendant up to and including the date of discontinuance "unless the court orders otherwise": see CPR r.38.6(1). The claimant asks the court to exercise its discretion to depart from the normal rule and to make no order for costs between the parties. The application is opposed by the defendants.

3. The second issue is whether the court should entertain an application by the defendants to set aside the notice of discontinuance, pursuant to CPR r.38.4. Put shortly the defendants suggest that, although it failed, the application to vacate was a device to avoid the full hearing of the claim on 30 April which the claimant knew he was bound to lose, and the defendants were thereby deprived of a favourable decision on the merits. In the alternative, the defendants invite the court to declare that their impugned conduct was lawful and not in breach of Articles 2 and 3 ECHR. The claimant maintains that the notice of discontinuance was served in good faith, and that the relief sought by the defendants is inappropriate, unnecessary and disproportionate.

4. I am grateful to counsel for their written submissions on these issues. I indicated that it was proportionate to determine the issues on written submissions rather than incur the additional cost and inconvenience of an oral hearing. There was no dissent from that suggestion.

Factual background

5. Because the issues require detailed consideration of the history of the matter, the factual background must necessarily be rehearsed at some length.

The claimant's medical condition

6. The claimant (now aged 39) is serving a sentence of 10 years' imprisonment for supplying class A drugs. His earliest release date is October 2022. He is a category C prisoner, currently held at HMP The Mount. He was transferred there from HMP Bedford in July 2019. He has a serious health issue in that he suffers from thalassemia, a lifelong condition where the body produces insufficient haemoglobin, which is necessary for the red blood cells to carry oxygen around the body. He requires regular blood transfusions. This in turn renders him vulnerable to excessive accumulation of iron in the body which can cause catastrophic injury to vital organs and is life threatening. He is a disabled person within the meaning of s.6 Equality Act 2010.

7. Whilst in prison the claimant was receiving a blood transfusion every three weeks at Whittington Hospital, London, under the supervision of his treating consultant haematologist, Dr Farrukh Shah.

8. The claimant's condition requires treatment by medication (chelating agents) to reduce the build up of iron in the blood. There are drugs which can be prescribed. One is desferioxamine ("DFO"), which ideally is given by an infusion via a peripherally inserted central catheter ("PICC"). The tube is inserted into the arm and is held in place by a dressing which is changed every week. Another form of medication is deferasirox ("DFX"), which is taken once a day in tablet form.

9. Whilst he was at HMP Bedford his treating consultant, Dr Shah, advised in a report dated 13 July 2018 that the best option would be DFO via a PICC line, but the claimant refused to consider this because it was not suitable in closed prison conditions. The other option was the oral medication DFX, supplemented by another oral medication, deferiprone. If that led to side-effects it would be necessary to proceed with the PICC line.

10. In a further report dated 1 September 2018 Dr Shah advised that the treatment goal of intravenous DFO via a PICC line should be supported by the prison service, if possible by transfer to open conditions where there as less risk of the PICC line becoming dislodged through close contact with other prisoners. Because the claimant was against the idea of a PICC line, he continued with daily medication in tablet form.

11. Following his transfer to HMP The Mount, the issue was raised again in October 2019, by the claimant's brother making a complaint about his treatment. The brother asserted that the claimant required a PICC line and asked the prison to consider home detention curfew, re-categorisation to category D or early release, all of which the prison governor refused.

12. The claimant's solicitors wrote to the defendants in October 2019, expressing concern that because the claimant had now stopped taking his oral medication, his health was at serious risk. The prison clinical services manager, Michael Coates, assured the claimant's solicitors by letter dated 16 October 2019 that the claimant was receiving adequate treatment in conjunction with specialists as required, and that the claimant's brother had been so informed.

The pre-action protocol letter is sent

13. A pre-action protocol letter was sent on 29 November 2019 which asserted that the claimant had now been told that he must have a PICC line fitted as this was the only other treatment which could manage his condition and stop it worsening. The letter required that the defendants should consider re-categorising the claimant to category D immediately rather than wait until May/June 2020 (two years before his earliest release date) when he would otherwise become eligible to be considered for transfer to open conditions.

The judicial review claim is issued

14. Having received no satisfactory response, the claim for judicial review was issued on 24 January 2020, seeking urgent consideration. Significantly, it was pleaded at paragraph 2(6) that the claimant had been advised that in place of the tablets he was taking he needed to have a PICC line fitted as this was the only other treatment

method available to manage his condition and prevent worsening, and that "on or about 17 October 2019 specialist nurse Emma Prescott emailed the first defendant [i.e. the prison governor] to that effect", giving a reference to the medical records at page 86 in the accompanying bundle.

15. In my view that pleading was not supported by the medical evidence. The note in question (17.10.19) was made by the prison clinical services manager, Michael Coates. It records that he contacted Emma Prescott, the thalassaemia nurse specialist, who confirmed that although a PICC line would have been optimal treatment a year ago when it was previously discussed, the treatment the claimant was currently being offered was optimal. He had responded well to medication; a PICC line would not be indicated now. She would arrange for another MRI scan in the near future, and if his condition was not improving a PICC line might be recommended at that stage.

16. There was a letter from the claimant's treating consultant, Dr Farrukh Shah, to Michael Coates, dated 29 October 2019 confirming that an MRI scan was planned in the near future but that currently his "ferritin" was improving and there was no reason to change from the regime of oral medication if his "iron burden" was coming down.

17. The claim has been presented throughout on the basis that a PICC line was an essential part of the treatment the claimant required, which could not safely be administered in closed conditions at HMP The Mount. The relief sought was a mandatory order that the claimant be transferred to category D open conditions, or alternatively an order that the defendant(s) exercise discretion whether to transfer the claimant to open conditions in accordance with the terms of the court's judgment.

18. I note that in the medical records there is an entry for 23 January 2020 suggesting that the claimant was not taking his medication "as he wants a PICC line and believes this is the way you will get one".

19. An entry dated 12th February 2020 records that at his last consultation with a specialist nurse at hospital in January it had been decided he would continue with his oral medication, excade 360 mg once a day. He been tolerating this well until last Tuesday 5 February when he felt he was developing renal pain.

20. On 5 February 2020 the defendants filed an acknowledgement of service and summary grounds of defence asserting that the claim was totally without merit in that it was predicated on the assertion that the claimant currently required a PICC line and there was no evidence to show that this was the case.

Permission is granted

21. On 17 February 2020 Mr Clive Sheldon QC, sitting as a Deputy Judge of the High court, granted permission on the papers to apply for judicial review. He considered that the claimant had raised an arguable case on the facts that, given his current medical situation, "…the PICC line is necessary for him at this stage to treat his underlying condition, and that receiving the PICC line treatment in HMP [The] Mount or any other category C facility may not be appropriate medically given the circumstances prevailing at such prisons." The judge considered that the matter

needed swift consideration. He ordered expedition, with an abridged timetable for service of the defendants' detailed grounds of defence and evidence.

22. On 27 February 2020 the treating consultant, Dr Shah, wrote to the health care unit at the prison confirming that the MRI results from November 2019 showed a consistent improvement in the claimant's liver iron on the current regime. The oral medication he had been taking had kept his ferritin stable and his liver iron was improving. On the basis of the MRI scan results, the current therapeutic strategy (i.e. oral medication) appeared to be effective in controlling his liver and cardiac iron burden: "We would therefore not be recommending a change in his chelation regime to an intravenous regime", i.e. a PICC line.

23. The defendants' solicitors (GLD) emailed Dr Shah's letter to the claimant's solicitors on 28 February 2020 inviting the claimant to discontinue the claim, saying: "We are of the strong view that continuing to pursue this matter is an unnecessary use of court time and public funds".

24. Far from expressing any willingness to withdraw the claim, the claimant's solicitors replied on 4 March 2020 asserting instead that they could see no reasonable basis for the defendants' continuing to defend the claim. In view of the grant of permission they urged the defendants to "reconsider their stance" and to agree to conduct a slightly earlier re-categorisation review with the expectation that, if a category D prisoner, the claimant could be transferred to an open prison to receive adequate medical care expeditiously with a PICC line.

Detailed grounds of defence are served

25. As required by the order granting permission, the defendants filed detailed grounds of defence and a witness statement from Michael Coates, both dated 6 March 2020. Mr Coates confirmed that if a patient requires complex treatment which cannot be facilitated at the prison, arrangements will be made for the patient to be transferred to a suitable location where treatment can be facilitated. If it is deemed necessary for a patient to have a PICC line, the plan of care is assessed individually. Risk assessment is carried out and a decision made as to whether the required treatment can be facilitated at the prison. This is the same for all complex care requirements, ensuring best practice and optimum patient care. Mr Coates confirmed that the claimant's medical condition is being managed by his existing treatment and that his consultant haematologist, Dr Shah, had confirmed in the letter of 27 February 2020 that he does not recommend a change in the claimant's regime.

26. Consistent with the evidence of Michael Coates, the grounds of defence gave the following assurance (at paragraph 33):

> "In the event that the defendants receive medical advice to suggest (i) that the claimant requires a PICC line and (ii) that this requires that he be moved to another part of the prison estate, the defendants will at that point make a decision based on the evidence. To date there has been no material on which the defendants could conclude that the claimant is being disadvantaged by remaining at HMP The Mount, no material to show he requires an early consideration of re-categorisation and no material to show that any move from HMP The Mount is necessary by way of a reasonable adjustment."

27. The reality of the case is that, at the date of discontinuance, there was no further medical evidence to contradict the opinion of Dr Shah that a PICC line is not presently required.

The Covid-19 restrictions bite

28. On 17 March 2020 the claimant's solicitors repeated their request for an early categorisation review. By now the Covid-19 restrictions arising from the coronavirus pandemic were beginning to bite. In view of the claimant's medical condition he was, on the face of it, likely to qualify for special treatment as a particularly vulnerable person.

29. Having received no response, the claimant's solicitors wrote again on 23 March 2020 repeating their request for an early re-categorisation review and requesting that because the claimant was a low risk prisoner but in the vulnerable category for Covid-19 he should be released (on licence) or transferred to an open prison.

30. On 24 March 2020 the defendants' solicitors wrote apologising for the delay in responding and said they would discuss the matter with the defendants and endeavour to revert as soon as possible.

31. On 25 March 2020 the claimant's solicitors pressed for an update and asked whether the defendants were considering release. They pointed out that thalassaemia is a serious blood disorder likely to put the claimant into one of the highest risk categories for shielding from Covid-19. They asserted that his Article 2 rights were engaged.

32. On 26 March 2020 the claimant's solicitors wrote again attaching an urgent application for early release.

33. That same day, 26 March 2020, the claimant's solicitors sent a detailed letter before claim asking that the defendants consider granting the claimant early release on compassionate grounds pursuant to s. 248 Criminal Justice Act 2003. Alternatively, they required an assurance that the prison governor would follow the updated Covid-19 prison guidance to protect the claimant who was at particularly high risk. The letter referred to the existing claim for judicial review and suggested that the grounds could if necessary be amended before the hearing set for 30 April to reflect the claimant's worsening situation. The letter required confirmation that early release or temporary release would be granted, or that reasons for refusal of such relief would be provided.

34. On 31 March 2020, in the absence of a full response, the claimant's solicitors threatened an urgent application to the court.

The possibility of ROTL is raised

35. Later that day, 31 March, the defendants' solicitors replied at length explaining the process for dealing with any application for early release on compassionate grounds and pointing out that normally this would be considered only where the prisoner was terminally ill and death was likely within three months, which was not the case here. The letter suggested in the alternative that the claimant might consider applying for

compassionate release on temporary licence (ROTL). The letter confirmed that the prison was complying with current Covid-19 guidance.

36. On 1 April 2020 the claimant's solicitors replied at length taking issue with the defendants' stance in relation to release on compassionate grounds and challenging the policy. The letter suggested that the claimant would not be eligible for ROTL. A response was requested by the end of Friday 3 April failing which counsel would be instructed "for further urgent litigation".

37. After a holding reply the defendants' solicitors responded at length by letter dated 8 April 2020. Reassurance was given that appropriate steps were being taken at the prison to enable those in the "at risk" cohort to self-isolate, and that the claimant was being held under appropriate "shielding" arrangements. The letter confirmed that there was currently no evidence to justify early release on compassionate grounds. The letter acknowledged that, as the claimant's solicitors had suggested, he did not meet the criteria for ROTL.

Amendment of the claim is mooted

38. On 15 April 2020 the claimant's solicitors wrote to the defendants' solicitors requesting consent to amend the grounds of the claim for judicial review to embrace a challenge to the failure to grant the claimant temporary release under the new rule 9A of the Prison Rules 1999 arising from the Covid-19 restrictions. They said that if temporary release was not granted, or the proposed amendment was not consented to, there would be an urgent application to the court for permission to rely on the proposed amended grounds, with potential costs implications.

39. The letter of 15 April 2020 also pointed out that: (i) the claimant was not taking his oral medication; (ii) a PICC line could not be facilitated at the prison; (iii) the claimant was in the "shielding" group at most risk from the Covid-19 virus; and (iv) the claimant had not been taking his chelation medication (save for a four day trial period earlier in 2020) owing to increasingly painful and distressing side-effects. The letter took issue with the defendants' suggestion that adequate self-isolation measures were being adhered to in the prison. A draft witness statement from the claimant's solicitor Ms Laura Orger was sent with the letter, outlining the claimant's concerns.

40. It also appears that on 15 April 2020 there was a conversation between counsel for the claimant and counsel for the defendants in which the claimant's concerns were emphasised. It was explained that it had not been possible to obtain updated medical evidence in relation to the risk from the claimant ceasing to take his oral medication owing to the Covid-19 restrictions.

41. On 16 April 2020 the defendants' solicitors responded pointing out that the current judicial review consisted of a challenge to the defendants' ongoing decision not to transfer the claimant to a category D open prison, the suggestion being that the claimant required a PICC line which could not be used in closed conditions. This was the basis on which permission had been granted. The letter went on to suggest that the judicial review had now become academic; there was no longer a basis to continue with the claim because it was accepted in the claimant's solicitors' letter of 15 April that the claim had been overtaken by events and the remedy originally proposed i.e. a

review and transfer to open conditions, no longer appeared to be appropriate. The defendants' solicitors pointed out in their letter that the challenge which was now being advanced was a new and distinct issue. The judicial review concerned a challenge to a previous and separate decision unconnected to the Covid-19 emergency issues. A decision in relation to ROTL in the light of the Covid-19 restrictions was yet to be made. Any challenge to that decision should be addressed by a new claim if necessary, not by amending the current claim.

42. The claimant's solicitors replied on Friday 17 April 2020 taking issue with the suggestion that the claim was now academic and insisting that the judicial review grounds needed to be amended urgently. The letter acknowledged that in the extant judicial review the immediate need for urgent relief had been overtaken by events in that a transfer to open conditions was not currently available as a remedy " but it may return to being a suitable remedy in due course, when it is safe"; thus the extant judicial review remained in place. The letter gave notice of the claimant's intention to issue separate urgent judicial review proceedings if necessary and implored the defendants once again to agree to an amendment of the grounds. The letter requested a response by noon on Monday 20 April.

43. The defendants' solicitors were not able to respond fully by that that deadline. However, they made it clear that their position remained the same: the application to amend the current grounds was opposed because the amendment raised a new and distinct issue which should be addressed by a new claim.

The defendants' full response, 22 April

44. On Wednesday 22 April 2020 the defendants' solicitors sent a very full 14 page reply. It was acknowledged that, contrary to the parties' previous mutual understanding, the claimant was in fact eligible to be considered for ROTL. The letter dealt comprehensively with the relevant policies and duties under the Covid-19 restrictions. It was reiterated that any challenge relating to the claimant's release as a result of those restrictions would amount to a new claim which should be addressed in fresh proceedings and not by amendment to the existing claim. In any event, as those issues were still under consideration and no decision had been made, it would be premature to bring such issues before the court. The letter concluded by requesting consent for the provision of the claimant's updated medical records as there had been a discussion between counsel that the defendants' medical advice may be out of date.

The application to vacate is floated

45. In response to this letter the claimant's solicitors replied at around noon on Wednesday 22 April that they recognised that a transfer to open conditions in the current crisis was not a possible remedy. They suggested that the hearing on 30 April should be vacated "because we accept it is not appropriate to pursue this at the current time. This does not mean it could not become an appropriate remedy after the coronavirus crisis is over and restrictions lifted". The letter confirmed that the claimant would not issue separate urgent judicial review proceedings pending the defendants' expeditious consideration of the claimant's application for ROTL.

46. Under the directions in the order granting permission, the claimant was required to file his skeleton argument by 4 pm on Wednesday 22 April. That afternoon the

defendants' solicitors pointed out that, as things currently stood, the hearing on 30 April was still taking place and they would be grateful to receive the claimant's skeleton argument.

47. The claimant's solicitors replied swiftly by email that this was "a highly unreasonable request" given that they had been waiting for the last three days to receive the defendants' substantive response. They complained that the defendants had still to provide information and documentation in relation to the claimant's application for ROTL and details of the new prison Covid-19 guidance.

48. The defendants' solicitors replied swiftly, disputing that the request for the claimant's skeleton argument was unreasonable. They pointed out that there had been no suggestion previously that the claimant was considering requesting the defendants to agree to vacating the hearing listed on 30 April. It was not unreasonable therefore to expect the claimant's skeleton argument on the issues in relation to which the claimant had been granted permission.

49. The claimant's solicitors immediately responded that they had not been intending to vacate the hearing but only to amend the grounds "to reflect the current position of the worsening of the claimant's healthcare situation in light of the coronavirus crisis." They said that, in light of the defendants' 14 page letter "it appears events have overtaken the original application." They complained that the claimant had still not received application forms for ROTL.

50. The defendants' solicitors replied by email that evening, Wednesday 22 April, insisting that the directions required the claimant to file his skeleton and that any delay would impact on the defendants' ability to file their skeleton in time.

51. The claimant's solicitors replied at around 9 pm that evening expressing the view that there was "now insufficient need" to justify the hearing on 30 April. They suggested vacating the hearing by consent, with a view to the matter being relisted, if necessary, at a later date when the "restrictions on prisoner transport" had been lifted. The solicitors said they would send a draft consent order next morning to vacate the hearing.

The application to vacate is made

52. Next day, Thursday 23 April, the claimant's solicitors wrote to the court requesting that the hearing on 30 April be vacated. They explained that there was no current viable remedy and that was why they had not served the claimant's skeleton argument due on 22 April. The letter asserted that there was now "no urgent justification for the hearing to go ahead on 30 April" and they would be asking the court to vacate the hearing, to be relisted as necessary once the coronavirus restrictions were lifted.

53. The application notice filed in support of the application to vacate the hearing asserted that the remedy sought in the judicial review, namely a re-categorisation review and transfer to open conditions so that the claimant could receive adequate medical care, was not available at the current time because all inter-prison transfers were currently banned due to the coronavirus pandemic. This had only been confirmed to the claimant's solicitors the previous day. It was asserted that in the light of the court's

own coronavirus guidance the hearing should not go ahead as it was not currently urgent. The court was invited to vacate the hearing for that reason or alternatively on the grounds that it was not fair to the claimant to proceed "when the original JR has now been overtaken by events which mean the remedy sought is temporarily unavailable."

54. The application to vacate the hearing was sent to the court, and copied to the defendants' solicitors, by email at 15.59 hrs on Thursday 23 April. The covering email asserted that "an urgent hearing next week serves no logical purpose and is a waste of court time and public funds". The email apologised to the court that this urgent application had become necessary and indicated that the claimant would be seeking the costs of the application to vacate.

55. When the application and draft consent order were served, the defendants' solicitors responded, on Thursday 23 April, that the issue of whether the claimant's health condition could be safely managed at HMP The Mount remained a live issue because: (i) a decision had not been reached on the ROTL and may not be reached by the date of the hearing on 30 April; (ii) if that decision was not favourable, the alleged breaches of Article 2 and 3 ECHR and the Equality Act 2010 would need to be determined; and (iii) if the ROTL decision was favourable, any release would be temporary and the questions raised in the judicial review would still have to be determined because the defendants maintained that the claimant could be returned to closed conditions at the end of any ROTL period. The letter concluded with a reminder that the claimant's skeleton argument was overdue and requested that it now be provided.

56. On the afternoon of Friday 24 April there was a further flurry of email exchanges. At 14.45 hrs the defendants' solicitors sent a draft of the submissions they proposed to file later that afternoon, together with a copy of the decision of the Divisional Court in *R* (*Davis) v Secretary of State for Justice* [2020] EWHC 978 Admin, which had been handed down earlier that afternoon. The defendants' solicitors wrote:

> "We consider that your client's claim as currently pleaded is without merit and has no prospect of succeeding. Although our client does not agree that next Thursday's hearing [30 April] should be vacated, it is open to your client (as we highlighted last week) to discontinue his claim and, should he decide to do so, the SSJ would not oppose that. The purpose of sending our submissions in response to your application in draft [is] to give you the opportunity, in light of the judgment in *Davis*, to discontinue before the court determines your application to vacate."

The email indicated that the submissions would be filed at 3.30pm that afternoon to maximise the chances that the court could determine the application to vacate that afternoon.

57. At 15.56 hrs the claimant's solicitors replied to the defendants' solicitors' earlier email asserting that the claimant had not had a reasonable opportunity to respond to the matters set out in the detailed grounds of defence because events had been

overtaken by the Covid-19 crisis. They asserted that the defendants were proceeding on medical evidence which was well out of date, as it referred to conditions as at November 2019 not current conditions. The claimant had not been taking his chelation medication for over six months owing to painful and debilitating side effects "and has been advised that but for his being in Cat B closed conditions he would be able to have a PICC line fitted". The email continued:

> "The defendant's attempts to frustrate proceedings are motivated by the fact that we have permission; we consider such attempts to be opportunistic, unreasonable and unfair given the problems caused in the preparation of this matter and not able to find a clinician willing and able to assist during this crisis. This is an HRA case and so the court is not simply looking at the information before it at the date of the defendant's decision – the court must be satisfied that the defendants have properly informed themselves as to the current treatment needs which is at yet not properly determined. Your application for costs is wholly without merit. You are well aware that this matter could have been resolved between the parties without compelling us to resort to this action.… This is the first time you have asserted the claimant ought to withdraw the claim – it would be grossly unfair to the claimant to remove his access to an appropriate remedy solely because the remedy is temporarily unavailable to him the reasons beyond his control. We will only be seeking to relist the case if necessary."

58. Meanwhile, at 15.54 hrs the defendants' solicitors emailed to the court and to the claimant's solicitors their detailed submissions opposing the application to vacate, drafted by counsel, Mr Fortt.

59. Consistent with the defendants' earlier position in correspondence, Mr Fortt's submissions contended that there was no good reason to postpone determination of the issues in the judicial review, which were unaffected by the separate matter of the claimant's application for ROTL. Whatever the decision on that application, the issues in the judicial review still needed to be decided. Judicial time and resources, and the resources of the parties, had already been committed to resolving that issue on an expedited basis at the hearing listed for a full day on 30 April. Reference was made to the case of *Davis*, which was said to be "on all fours with the reasons for rejecting the adjournment in that case, which also involved an Article 2 and 3 challenge which was considered to be wholly distinct from questions of whether ROTL was or was not granted". The written submissions concluded with a request that the application to vacate should be refused, with costs, and that the claimant should file his skeleton argument by 9 a.m. next day, Saturday 25 April.

60. At 16.32 hrs the defendant solicitors emailed to the Administrative Court lawyer (copying in the claimant's solicitors) further brief submissions for the court's consideration in response to the suggestion that the medical evidence was out of date. They made the point that this was the first time the claimant had raised the issue of the medical evidence as a reason for vacating the hearing, and it was not referred to in the application notice. Nor had it previously been suggested that the claimant had been unable to respond to the detailed grounds of defence. The medical records up to

February 2020 clearly demonstrated the claimant does not need a PICC line. A few minutes later the defendant solicitors forwarded a copy of the letter from Dr Shah dated 27 February 2020.

61. At 17.43 hrs the claimant's solicitors responded. They insisted they were not deviating from or supplementing the basis of the application to vacate, namely that the remedy sought was temporarily unavailable. The claimant had been awaiting a further decision of the prison governor in relation to temporary release and had only received the defendants' 14 page response on 22 April, together with the new Covid-19 prison guidance. They asserted that Dr Shah's letter of 27 February 2020 referred to treatment and results four months earlier and was out of date and inconsistent with earlier evidence. It did not set out the current medical situation clearly or fully.

The application to vacate is refused

62. As the hearing on 30 April had already been listed before me, I was required to consider and determine the application to vacate. Time was of the essence. In breach of the directions, no skeleton argument for the hearing had been filed and no hearing bundle. I had been provided only with the basic documentation which was held by the court electronically. On Friday evening, 24 April, I therefore requested (through the Administrative Court lawyer) that by 11 am on Monday 27 April the parties should provide me with electronic copies of their respective bundles which already existed. The paper bundles were at the Royal Courts of Justice and inaccessible owing to the Covid-19 restrictions. Sight of the bundles was necessary so that I could understand the issues properly and decide the application to vacate fairly. All the email correspondence and other documentation I have summarised was also available to me.

63. Through the diligence of the parties' solicitors their respective electronic bundles were emailed to me early on Sunday morning, 26 April, totalling some 450 pages. It was plainly imperative that the application to vacate be determined as soon as possible so that the parties knew where they stood, and so that, if the case remained listed, the skeleton arguments and hearing bundle could be prepared and filed in good time.

64. On Sunday afternoon, 26 April, I came to a firm decision not to vacate the hearing listed on 30 April for the reasons set out in the order:

> "1. The application to vacate is made on the basis that there is now no need for urgent relief because inter-prison transfers are currently banned and it is possible that the claimant may be granted release on temporary licence (ROTL) in view of his health status under Covid-19 guidance.
> 2. Even if the claimant is granted ROTL, that will only last for the duration of the Covid-19 restrictions, following which he will be returned to prison.
> 3.If he is refused ROTL he will remain at HMP The Mount.
> 4. Either way the issues on which he seeks a determination in this judicial review will therefore remain to be decided in any event.
> 5. In those circumstances the hearing on 30 April should go ahead."

65. My order was forwarded to the parties at 15.35 hrs. I directed that the claimant should file his skeleton argument by 4 pm on Monday 27 April, and the defendants should file theirs by 4 pm on Wednesday 29 April. I directed that the parties should agree and file a core bundle of essential documents. I reserved the costs of the application and gave liberty to apply.

The claimant seeks to discontinue

66. Shortly before 4 pm that Sunday afternoon, 26 April, some 22 minutes after receiving my order, the claimant's solicitors emailed the defendants' solicitors seeking the defendants' consent to the claimant's discontinuance of the judicial review claim. As a matter of law, of course, no such consent was necessary.

67. At 10.15 hrs next morning, Monday 27 April, the defendants' solicitors replied, pointing out that that their consent was not required and expressing surprise that the claimant's solicitors were now proposing to discontinue the claim in contrast to their earlier stance. The email continued:

> "The speed of your indication that your client intends to discontinue the claim suggest[s] that you in fact always intended to discontinue if your application to adjourn was not granted. You are in fact behaving in exactly the same way as the claimant in the case of *Davis*… such that your intended discontinuance is abusive and is a blatant attempt to circumvent the court's decision on the adjournment application… In the circumstances we request that you agree by consent that the court should declare that Articles 2 and 3 and the Equality Act were not breached and did not require that your client should be transferred to open conditions. In the event that you do not agree to such a declaration, we will put before the court the same alternative options advanced in *Davis* in the event that you serve a notice of discontinuance. As you are aware our client has always been of the view that your claim has no merit whatsoever and we necessarily wish to obtain observations from the court similar to those in *Davis* to assist our client in the event that your client attempts to re-litigate the same issues in a further claim based on the same facts at some point in the future. In the event that you discontinue, your client will in any event be liable to pay our client's costs of this claim."

68. At 11.01 hrs on Monday 27 April the claimant's solicitors replied to that email at length, expressing disappointment at its tone and seeking agreement that there should be no order for costs in the event of discontinuance. The email rehearsed the history of the matter, from the claimant's perspective, at paragraphs 1-4. It included the following:

> "As JR remedies are discretionary, we have taken the pragmatic view to vacate the pending hearing, rather than waste the court's and government's time. We maintain that was the correct action at the time. We do not agree it is fair in the above circumstances that we

> should be liable for the defendants' costs given the defendant's conduct of this matter, although we recognise the difficult circumstances in which we are all having to operate. It is disappointing that you fail to recognise that we did not rush to amend grounds following our client's Covid related risk issues, nor to bring that mass to the court, but carefully delayed in order to receive your client response.…"

69. At 11.47 hrs on Monday 27 April, the defendants' solicitors replied, maintaining their stance that they would not waive their entitlement to costs on discontinuance. They also reserved their position, if notice of discontinuance was served, to set aside the discontinuance as an abuse, or in the alternative to seek observations from the court about the conduct of the claimant's case along the lines of those in *Davis*.

70. At 11.56 hrs on Monday 27 April the claimant's solicitors responded, pointing out that the claimant had stopped taking his oral medication six months earlier because he could not tolerate the acute kidney pain it caused, and he remained at serious risk of harm. They took issue with the relevance of *Davis*, insisted that they had acted in good faith on the claimant's behalf throughout, and expressed disappointment at the defendants' stance.

Notice of discontinuance is served

71. Meanwhile, at 11.43 hrs on Monday 27 April the claimant's solicitors had emailed to the court (and to the defendants) a notice of discontinuance in the prescribed form. They wrote:

> "….we respectfully ask the judge to consider deviating from the standard order for costs where cases are discontinued to make an order that each party is to bear their own costs. We have set out what we believe to be compelling reasons for this at points 1-4 below and sought to agree this with the defendant solicitors."

The reference to points 1 to 4 was a reference to the email sent earlier to the defendants' solicitors.

72. At 11.53 hrs on Monday 27 April the defendants' solicitors emailed the court (and the claimant's solicitors) requesting that the court should not make any order in relation to costs or discontinuance until the defendants had forwarded the written submissions which counsel was working on.

73. At 12.10 hrs on Monday 27 April the claimant solicitors emailed the court (and the defendants' solicitors) requesting that that the judge should make the discontinuance order and allow the parties to provide written submissions on costs at a later date.

The defendants make submissions in response to discontinuance

74. At 14.15 hrs on Monday 27 April the defendants' solicitors emailed to the court (and the claimant's solicitors) comprehensive written submissions in response to the claimant's notice of discontinuance. They asserted that the logic of the notice of

discontinuance was that either (a) the claimant now conceded the issue under Article 2 and 3 and the Equality Act 2010 or (b), notwithstanding the court's decision to refuse the adjournment, the claimant intended, if there was an adverse ROTL decision, to issue a second claim for the same relief as he had sought in the judicial review which he had discontinued. The asserted that if (a) applied, the claimant ought to be in a position to consent to a declaration that his continued detention at HMP The Mount did not violate Article 2 and 3 and the Equality Act 2010. If (b) applied, the notice of discontinuance was merely a procedural device intended to circumvent the effect of the court's decision on adjournment. It would amount to an abuse of process. In that event there would be no resolution of those issues of the lawfulness of the claimant's detention, discontinuance would not amount to *res judicata*, and any subsequent attempt by the claimant to resurrect the claim would require an application under CPR 38.7 which would inevitably give rise to a further disputed hearing as to whether permission should be granted.

75. The defendants argued in these submissions that if the claimant did not consent to the declaration sought, the notice of discontinuance should be set aside and the matter should be heard on 30 April. If that course did not commend itself to the court, an alternative avenue through which the court could address the defendants' concerns would be for the court to record in its reasons accompanying the order (including as to costs) the circumstances in which the notice of discontinuance had been served and such other observations as the court felt able to make, which was the approach of the Divisional Court in ***Davis***. Although it was implicit in these written submissions that the defendants opposed any waiver of their costs on discontinuance, they did not address the arguments in detail.

76. When the notice of discontinuance and email exchanges were drawn to my attention, I directed that the claimant should serve written submissions by 10 am on Wednesday 29 April.

The claimant makes submissions on costs

77. On 29 April, the claimant's submissions on costs were duly served. I shall return to them in detail, but in short it was contended that there was a material change of circumstances arising from the Covid-19 crisis which justified departure from the normal rule that a claimant who discontinues is liable for the costs of the defendant incurred on or before the date of discontinuance. The submissions referred to a considerable volume of correspondence.

78. The claimant's submissions did not address the issues raised in the defendants' submissions in response to the notice of discontinuance, that is to say the question of a declaration and/or the possible setting aside of the notice of discontinuance as an abuse of process. Accordingly I directed that the claimant should serve further written submissions on those issues by 10 am on 30 April, together with an electronic bundle of the correspondence referred to in his submissions on costs. I also directed that the defendants should respond by 10 am on 30 April (if so advised) to the claimant submissions on costs.

79. On 30 April the parties' respective further submissions were duly served, together with an electronic bundle of correspondence running to some 97 pages. I appreciate

the difficulties faced by the claimant's solicitors in providing that bundle, which could not be achieved by remote working. I am grateful for their cooperation.

The procedural framework

80. Strictly speaking, the claimant's application to depart from the normal rule that on discontinuance he should pay the defendants' costs should have been made in accordance with the interim applications procedure: see paragraphs 22.3.6 and 12.7 of the Administrative Court Judicial Review Guide 2019.

81. Similarly, strictly speaking the application by the defendants to set aside the notice of discontinuance should have been made by formal application notice pursuant to CPR 38.4.

82. I am content to deal with the cross-applications without any such formal applications, in the interests of proportionality. No point on the absence of formality is taken by either party. I have all the material I need to determine the issues.

The decision of the Divisional Court in *R (Davis) v SSJ*

83. It is appropriate at this stage to say a little more about the case of *Davis* in which the Divisional Court handed down judgment on the afternoon of Friday 24 April, and which the defendants assert involved precisely the same tactical decision by the claimant to discontinue judicial review proceedings once the court had refused the claimant's application to vacate the hearing of his claim.

84. I note that Mr Fortt was junior counsel for the defendants in *Davis*, and it is therefore unsurprising that he has sought to equate the situation in the present case with that in *Davis* and contend for the same relief.

85. *Davis* was, however, significantly different on its facts in that there was no pre-existing claim for judicial review before the Covid-19 restrictions came into force and impacted on serving prisoners. Davis was terminally ill and therefore extremely vulnerable. Applications for permanent release on compassionate grounds under s.248 Criminal Justice Act 2003 had been refused in 2019. He had applied for release on temporary licence (ROTL) in the context of the current public health emergency as soon as that opportunity arose following the issue of relevant guidance by the Secretary of State for Justice. Before that application had even been determined, the claimant filed a claim for judicial review on 13 April, asserting that the defendant's positive obligations under Articles 2 and 3 ECHR mandated his immediate release on compassionate grounds.

86. Given the importance and urgency of the issue, stringent case management orders had been made, designed to lead to a rolled-up hearing on Wednesday 22 April. After a great deal of work been done by the defendant for that hearing, the claimant invited the defendant's solicitors at midday on Tuesday 21 April to agree to vacate the hearing next day pending the resolution of the ROTL application. The defendant refused, contending that the point of principle raised by the claimant's primary case

remained apt to be determined, and the Divisional Court was fully geared to achieving that goal the following day.

87. At 16.04 hrs on 21 April the claimant filed an application to vacate the hearing. The Divisional Court received written submissions. At 11.03 hrs on 22 April the parties were informed that the application to vacate had been refused, with reasons to follow in due course. The Divisional Court was satisfied that the issue of principle could be determined without the outcome of the ROTL application being known.

88. Less than half an hour later, at 11.29 hrs, the claimant filed a notice of discontinuance, also indicating his intention to seek to depart from the normal rules as to costs.

89. Written submissions were filed promptly the same day by both parties. The defendant contended that the notice of discontinuance was a blatant and abusive attempt to circumvent the court's decision not to vacate the hearing. The defendant's concern was that, in the event that the ROTL was refused, the claimant would seek to revive all his arguments on the nature and scope of the positive obligation under Articles 2 and 3 ECHR because no *res judicata* would arise, the claim having been discontinued.

90. As in the present case, the defendant suggested "a trio of options": first, that the claimant should agree to a declaration that there was no obligation under Articles 2 and 3 ECHR to release him; second, that the notice of discontinuance be set aside under CPR r.38.4 and that the issue of principle be determined forthwith; third, that the court should record the circumstances in which the claim had been discontinued and make such observations as appropriate on what had happened to date.

91. In the event the Divisional Court adopted the third of these options. The court expressed the opinion that there was a very strong inference that by serving notice of discontinuance the claimant was seeking to circumvent the court's decision not to vacate the hearing. It was not practical for procedural reasons to determine the application to set aside the notice, but the court was mindful of the requirement under CPR 38.7 that a claimant who discontinues a claim needs the permission of the court to make another claim arising out of facts which are the same or substantially the same as those relating to the discontinued claim. The court therefore contented itself with making appropriate observations on the circumstances of the case, should any attempt be made to revive the claim in future.

Factual analysis

92. Before addressing the respective applications, it is necessary to set out my factual analysis. The detail of the evidence is complex. There is a danger of losing sight of the wood for the trees, and of losing sight of the reality of the issues as they stood at the date of discontinuance.

93. The nub of the claim for judicial review was that the claimant's medical condition required that there be an early re-categorisation of his status, so that if re-categorised to category D, he could be transferred to an open prison where treatment with a PICC line would be possible. The claimant's case was that the defendants were required to provide this relief without which they would be in breach of Articles 2 and 3 ECHR and their duties under the Equality Act 2010.

94. The claim for judicial review depended upon the central factual assertion that the claimant's condition could not safely and properly be managed without a PICC line, and therefore could not safely and properly be managed in closed conditions at HMP The Mount.

95. Although it is true that the treating consultant, Dr Shah, had advised in 2018 that the ultimate goal should be a PICC line, at home or in open prison conditions, there was a satisfactory alternative treatment plan in place, based on oral medication to prevent "iron overload". That was confirmed in Dr Shah's report dated 29 October 2019.

96. Although the claimant stopped taking his oral medication for a short time in October 2019, the entries in the medical records up to April 2020 confirm that the issue was carefully considered by medical staff at the prison and Whittington Hospital. An MRI scan in November 2019 was satisfactory and his renal test results were good (see entries for 15.11.19 and 28.11.19).

97. Perhaps understandably the claimant wanted to promote the goal of a PICC line, as that would enhance the prospects of re-categorisation and transfer to an open prison. I note that on 29 November 2019 he reported to the nurse at the prison that he been told by the hospital he would be having a PICC line in December. When that was checked, it turned out that there were no such plans.

98. This is consistent with the claimant's perception of how best to achieve a transfer, evidenced by the entry in the medical records for 23 January 2020, reporting the belief that the claimant was not taking his medication "as he wants a PICC line and believes this is the way he will get one".

The defendants' application to set aside the notice of discontinuance

99. Logically the first issue to consider is the defendants' application to set aside the claimant's notice of discontinuance.

100. In the defendants' written submissions (27 April) in response to the claimant's notice of discontinuance (already detailed at paragraphs 74-75 above) Mr Fortt contended that the notice should be set aside if the claimant declined to consent to a declaration to the effect that the claimant's continued detention at HMP The Mount in the present circumstances does not violate Article 2 or 3 ECHR or the claimant's rights under the Equality Act 2010.

101. In the claimant's written submissions in reply (30 April) Ms Weston QC contended that the defendants' application to set aside the notice of discontinuance was disproportionate and unmerited and has given rise to further wholly unnecessary costs and use of court resources. She disputed Mr Fortt's analysis of the evidence in relation to the claimant's state of health. She denied that the claimant's conduct in discontinuing was in any way an abuse of process, which would be the required threshold for exercising the court's discretion to set aside the notice of discontinuance. She emphasised that the key objective of the judicial review proceedings was to obtain an early re-categorisation review taking into account the claimant's condition and treatment. This had been overtaken by events in the developing Covid-19

restrictions when other potential ways of achieving the claimant's temporary release became available. All the decisions by the claimant's legal team had been taken in good faith in the context of a complex and difficult crisis which had placed enormous stress on the limited resources of the claimant's solicitors, the Prisoners' Advice Service, which is a charity. Ms Weston submitted that the present case is entirely different from that which arose in ***Davis***.

Discussion

102. The principles on which the court should approach an application under CPR r. 38.4 to set aside a notice of discontinuance were confirmed by the Court of Appeal in *Stati v Republic of Kazakhstan (No 2)* [2018] EWCA Civ 1896; [2019] 1 WLR 897, largely adopting the approach of Henderson J in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank plc* [2015] EWHC 55 (Ch). The discretion is not confined to cases of abuse of process or collateral tactical advantage.

103. Among the relevant considerations identified by the Court of Appeal when exercising the discretion are: (i) that a claimant's desire to bring proceedings to an end should be respected, not least because a claimant could not be compelled to prosecute a claim; (ii) that the court's substantive and procedural objective is to achieve a just result according to law and to limit costs to those proportionate to the case; (iii) that the court had to consider all the circumstances, not merely those concerning only one party; (iv) that conduct was relevant and might be important, particularly conduct aimed at abusing or frustrating the court's process or securing an unjust tactical advantage, but such conduct is by no means conclusive.

Conclusion

104. Applying those principles, I am satisfied that it is not appropriate in this case to exercise the court's discretion to set aside the notice of discontinuance. My reasons are as follows.

105. First and foremost, this was not, in my view, a cynical decision by the claimant to seek a procedural advantage by avoiding an adverse decision in the judicial review claim which was to be heard on 30 April, intending to resurrect the same claim in future proceedings. It was not an abuse of the court process to gain a collateral tactical advantage.

106. Rather it was a decision made in good faith recognising the reality that the claim for judicial review was bound to fail at the hearing on 30 April because the medical evidence did not support the claimant's fundamental case that there was a pressing need for treatment via a PICC line which necessitated his transfer to open prison conditions.

107. The application to vacate the hearing on 30 April had been made in good faith in the hope that, if it succeeded, the need for determination of the judicial review would be overtaken by the impact of the Covid-19 restrictions on the claimant's continued detention at HMP The Mount and the prospect of release on temporary licence.

108. Second, the defendants' concern that the claimant may seek to revive the claim which has been abandoned, having avoided an adverse decision by discontinuing, is adequately met by the procedural hurdle the claimant would face should he be minded

to pursue such a course. I adopt the same course as the "third option" in *Davis*. That is a sufficient and proportionate remedy.

109. As was pointed out by the Divisional Court in *Davis*, CPR r.38.7 would apply. It provides:

> "38.7 A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if-
>
> (a) he discontinued the claim after the defendant filed a defence; and
> (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

110. As in *Davis*, the claimant in the present case would require further public funding to bring a further claim. He would need the permission of the court because (a) the defendants had filed both summary and detailed grounds of defence, and (b) the further claim would arise out of substantially the same facts, if not the same facts, as the present claim. In the light of the evidence of Michael Coates and the assurance in the detailed grounds of defence (referred to at paragraphs 25 and 26 above) there was, in my view, no prospect of the judicial review claim succeeding at the hearing on 30 April. On the available evidence there was no prospect of establishing a breach of Article 2 or 3 ECHR or a breach of the Equality Act 2010 arising from the defendants' continuing refusal (i) to re-categorise the claimant as category D and (ii) to transfer the claimant to open prison conditions.

111. Third, but of less importance, it is to be noted that on 28 February the defendants' solicitors had positively encouraged the claimant to discontinue the claim (see para 23 above). That invitation was unconditional. Had the claimant then served notice of discontinuance there is no reason to think that the defendants would have raised any objection along the present lines. That said, the circumstances at that stage would not have been complicated by the late application to vacate the hearing on 30 April, which the defendants would say made all the difference.

The claimant's application not to order costs on discontinuance

112. In her written submissions (29 April) Ms Weston QC contends that the normal rule should not apply in this case because there has been a material change of circumstances sufficient to displace the presumption that a claimant who discontinues must pay the defendant's costs of the claim in accordance with CPR r. 38.6(1).

113. The change of circumstances she relies upon is the impact of the Covid-19 pandemic on the conduct of the claim, and the alternative opportunity for the same practical relief it provided through changes in the Prison Rules, which (it is said) made the claim itself academic. In her written submissions Ms Weston sets out the history of the correspondence between the parties, hence the detail in which I have recited that history. She submits that it was reasonable for the claimant to issue the claim because there had been no adequate response to the pre-action correspondence; the claimant's position was vindicated by the grant of permission.

114. Thereafter, Ms Weston submits, the Covid-19 pandemic and its consequences for prison management affected the conduct of the claim in a number of ways. For example, communication between the claimant's solicitors and the claimant himself became difficult. In particular it was difficult for the claimant's solicitors to obtain accurate information in relation to the claimant's current medical condition, or to have him examined again by his consultant haematologist. On this issue she refers in her later written submissions (30 April), at paragraph 5, to the continuing concern that the claimant remains on a reduced dosage of oral medication because of side-effects. She submits that the priority shifted to securing the claimant's release on compassionate grounds or on temporary licence (ROTL). The defendants' insistence that the claimant was being properly and effectively "shielded" from infection was shown to be wrong and became a key issue.

115. Ms Weston submits that the claim for judicial review had become "academic" as inter-prison transfers were no longer permitted owing to the pandemic. She submits that the unprecedented impact of the pandemic amounts to a change of circumstances which seriously hampered preparation of the claim for judicial review. She accepts that the court should have been placed on notice of this difficulty earlier, but the defendants were well aware of it and were not prejudiced.

116. Ms Weston submits that the application to vacate was made "because at that time it appeared that the grant of permission in the case was an important procedural advantage for the client, should, after the crisis, the defendants continue to ignore the request from the claimant to deviate from standard re-categorisation review practice and consider transfer for medical reasons relating to his disability. It was wholly appropriate in light of the court's conclusion on the application [to vacate], to re-evaluate the benefit to the claimant of proceeding…".

117. On behalf of the defendants, in his written submissions (30 April) Mr Fortt contends that the default position on costs on discontinuance should apply. He contends that the claimant's submissions on costs continue to duck the central issue, namely why it was that the claimant persisted in applying to vacate the hearing thereby representing to the court that there remained a serious issue to be tried in that claim. Mr Fortt points out that the defendants' position throughout has been that the claim for judicial review was misconceived in that no evidence has ever been produced to show that the claimant required a PICC line whilst at HMP The Mount.

118. Mr Fortt submits that the claimant's solicitors' shifting focus on the proposed amendment of the claim to embrace issues arising from the impact of the Covid-19 pandemic (see paragraphs 38-49 above) was misconceived in that those were quite distinct issues; any challenge would have required the issue of a new claim. Mr Fortt repeats the concern expressed in his submissions in relation to setting aside the notice of discontinuance, that the claimant's solicitors were holding open the possibility of pursuing the claim in the future once the Covid-19 crisis is over and restrictions lifted: see their letter of 22 April (quoted at paragraph 45 above).

119. Mr Fortt submits that in applying to vacate the hearing on 30 April the claimant was in effect seeking to defer a ruling on the transfer issue, and that the refusal of the

application to vacate demonstrated that the claimant was not entitled to such a deferment.

Discussion

120. CPR r.38.6 provides as follows:

> "(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

121. The relevant principles emerge from the various authorities referred to in the White Book at paragraphs 38.6.1 and 44.9.3. A particularly helpful review of the relevant principles is to be found in the judgment of Moore-Bick LJ, at [6] in *Brookes v HSBC Bank plc* [2011] EWCA Civ 354; [2012] 3 Costs LO 285. In summary:

> (i) the burden is on the claimant to show a good reason for departing from the presumption;
> (ii) the fact that the claimant would or might well have succeeded at trial is not in itself a sufficient reason for doing so;
> (iii) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption; the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption; if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he is not himself contributed;
> (iv) however, no change of circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all circumstances provides a good reason for departing from the rule.

122. In the course of his judgment, Moore- Bick LJ referred to the decision of the Court of Appeal in *Messih v MacMillan Williams* [2010] EWCA Civ 844; [2010] C.P. Rep 41, an authority on which Ms Weston relies. There the claimant brought proceedings against two firms of solicitors seeking damages for the loss of a commercial lease which, he alleged, had been caused by their separate failures to give him proper advice. He settled the claim with the first defendant and discontinued the claim against the second defendant, seeking an order that he be under no liability for the second defendant's costs. The claimant argued that by settling the claim with the first defendant he had obtained all that he had been seeking and by discontinuing against the second defendant he had acted reasonably and responsibly by avoiding the need for a trial with its attendant costs and use of court time.

123. In rejecting this argument Patten LJ said [at 30]:

> "No judge encourages litigation about costs and a major theme of the CPR is the avoidance of unnecessary disputes and the costs which they can generate. But the avoidance of the costs of the trial is the necessary consequence of any discontinuance and cannot, of itself, justify a departure from the normal rule that the discontinuing party pays the other side's costs up to the date of discontinuance. There has to be something more than that to justify that departure. Otherwise the normal would be displaced in every case."

124. Moore-Bick LJ concluded in *Brookes* at [10]:

> "It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances… [A] claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment. That principle also underlies the decision of this court in *Messih*…".

125. As to change of circumstances, Ms Weston relies on the Court of Appeal's analysis in an earlier case referred to in *Messih* at [17], where the judge, in listing the matters he took into account, had made no reference to the relevance of any change (or absence of change) in circumstances between the date when the proceedings were started and the date when the decision to discontinue was taken:

> "In other words, he left out of account any consideration as to why a claim which was started on the basis of certain expectations should be discontinued without an order for costs against the claimant in circumstances where the expectations have not, in fact, changed – even though they may have been re-evaluated."

Conclusion

126. Having considered all the parties' submissions in the light of the relevant principles I am satisfied that there is no good reason in the present case to depart from the normal rule that the claimant must pay the defendant's costs of discontinuing the claim. My reasons are as follows.

127. First, there was in reality no change of circumstances so far as the merits of the basis of the claim for judicial review were concerned. The impact of the Covid-19 restrictions did not affect the central factual issue, namely whether the evidence supported the proposition that the claimant could not receive the medical treatment he required whilst detained at HMP The Mount. The evidence on that issue was all one way. The witness statement of Michael Coates made it clear that should the situation arise, on the medical evidence, that the claimant required treatment via a PICC line, the necessary arrangements would be made for him to receive that treatment. His evidence was uncontradicted. A firm assurance was given in the detailed grounds of defence (see paragraph 26 above) that should treatment via a PICC line become

necessary requiring transfer to another part of the prison estate, an appropriate decision would then be taken.

128. Second, for the reasons I have already explained, the claim was predicated on a misinterpretation of the state of the medical evidence in October 2019; there never had been medical opinion expressed that the claimant presently required a PICC line which necessitated his transfer to open prison conditions. That may well have been the long term goal, but he was receiving appropriate oral medication. That continued to be the position as the updated medical records eventually demonstrated.

129. Third, for the reasons I have already explained in refusing to set aside the notice of discontinuance, the reality was that the claim was bound to fail had it proceeded to a hearing on 30 April. This must have been recognised by the claimant's legal team. In the claimant's solicitors' letter of 22 April (quoted at paragraph 45 above) the claimant was indicating a clear intention to revive the claim at a future date should the application to vacate be granted. That claim challenged the defendants' continuing refusal to re-categorise and transfer him to open conditions as a breach of Articles 2 and 3 ECHR and a breach of their duties under the Equality Act 2010. It is not correct to suggest that those issues in the judicial review had become academic. That is precisely why the application to vacate was refused.

130. Fourth, had the hearing proceeded on 30 April, and had it then become apparent that justice could not be done because (for example) the claimant's solicitors had been unable to obtain the necessary medical evidence owing to the Covid-19 restrictions, it would have been open to the claimant at that stage to apply again (at the hearing) for an adjournment. Although the practical difficulty of a further medical examination was raised in some of the email exchanges before the application to vacate was determined, it is rightly conceded in the claimant's written submissions (30 April), at paragraph 5, that "this perhaps could and should have been spelled out in more detail in the application to vacate". As it was, the application to vacate was put principally on very different grounds.

131. Fifth, to the extent that the Covid-19 pandemic did change the circumstances (which I do not accept), it was certainly not a change of circumstances brought about by any form of unreasonable conduct on the part of the defendants (as identified by Moore-Bick LJ in *Brookes:* see paragraph 121(iv) above). In this regard, the proposed amendment of the claim to embrace fresh decisions which might or might not be taken on Covid-related issues was, in reality, a distraction from the central issue in the judicial review. The amendments never materialised in any event.

132. I appreciate and make full allowance for the difficulties faced by the claimant's solicitors (not least as a charity) in seeking a practical outcome by pursuing ROTL instead, and the unfortunate (but probably inevitable) delay in their receiving the defendants' definitive response on the options open to the claimant set out in the very full letter of 22 April. However, this does not in my view amount to any justification, still less a "cogent reason" for departing from the normal rule on costs. The judicial review claim itself was already unsustainable.

133. Sixth, it cannot be said that this is a case where the claimant has obtained the outcome he set out to achieve in his claim for judicial review, thereby making the

continuation of the proceedings academic. The purpose of expressing my view on the overall merits of the claim, as in *Davis*, is to ensure that the same or substantially the same claim will not be revived unless there is some very good reason for the court to exercise its discretion under CPR r.38.7 to permit such a claim.

134. Accordingly, for all these reasons the normal rule will apply, and the claimant will pay the defendants' costs of the claim up to and including the date on which notice of discontinuance was served, namely Monday 27 April 2020.

135. Because the claimant is legally aided, and in view of his current circumstances, it is unlikely the defendants will actually receive those costs. I will make the usual order, namely that the order for costs shall not be enforced save following and in accordance with a determination by a costs judge of the amount which it is reasonable for the claimant to pay, in accordance with section 26 (1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The costs of the cross-applications

136. The reality is that neither the claimant nor the defendants have succeeded in their respective applications. The claimant failed to persuade the court to depart from the normal order for costs on discontinuance. The defendants failed to persuade the court to set aside the notice of discontinuance.

137. In these circumstances it is appropriate that there shall be no order for costs between the parties after the date on which the notice of discontinuance was served, Monday 27 April 2020.

138. For the avoidance of doubt, it is my intention that the defendants' costs should include the preparation of Mr Fortt's written submissions served at 14.15 hrs on 27 April, even though they addressed setting aside the notice of discontinuance as well as the issue of costs. They are properly part of the costs incurred by the defendants "…on or before the date on which a notice of discontinuance was served", as CPR r.38.6 provides. It was reasonable for the defendants to consider the implications of discontinuance even though ultimately their application to set aside the notice failed.

ORDER

BEFORE The Honourable Mr Justice Spencer

UPON the Claimant having served notice of discontinuance on Monday 27 April 2020 in advance of the hearing of his judicial review listed on 30 April 2020

AND UPON the Claimant's application pursuant to CPR r. 38.6(1) that the Claimant should not be liable for the Defendants' costs incurred on or before the date of discontinuance

AND UPON the Defendants' application pursuant to CPR r.38.4(1) to set aside the notice of discontinuance and/or for other relief

AND UPON the Court being satisfied that it is just and proportionate to determine the said applications on written submissions

AND UPON considering the written submissions of the Claimant and the Defendants in relation to the said applications

AND UPON the Court being satisfied that the observations at paragraphs 108-110 of the judgment handed down on 4 June 2020 afford the Defendants sufficient and proportionate relief should the Claimant apply under CPR r.38(7) for permission to make another claim against the Defendants for judicial review out of the same or substantially the same facts

IT IS ORDERED THAT:

1. **The Claimant's application pursuant to CPR r.38(6) (1) is dismissed. The Claimant shall pay the Defendants' reasonable costs of the judicial review proceedings incurred up to and including 27 April 2020 when notice of discontinuance was served, such costs to be assessed on the standard basis if not agreed.**

2. **The Claimant's liability to pay the said costs shall not be enforced save following and in accordance with the determination of a Costs Judge of the amount which it is reasonable for the Claimant to pay, in accordance with section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.**

3. **The Defendants' application to set aside the notice of discontinuance is dismissed.**

4. **There shall be no order as to costs between the parties in respect of any costs incurred after service of the notice of discontinuance on 27 April 2020, save in accordance with paragraph 118 of the said judgment.**

Dated: 4 June 2020