



Neutral Citation Number: [2023] EWHC 1072 (Admin)

Case No: CO/2799/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before:

MR JUSTICE CHAMBERLAIN

Between:

ANTHONY RAE

Appellant

– and –

UNITED STATES OF AMERICA

Respondent

Rebecca Hill (instructed by **Payton's Solicitors**) for the **Appellant**
David Perry KC and Richard Evans (instructed by the **Crown Prosecution Service**) for the
Respondent

Hearing dates: 29 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

- 1 On 5 December 2022, I concluded that District Judge Tempia (“the judge”) had been wrong to decide, on the information before her, that the appellant had failed to establish that he would be subject to a real risk of treatment contrary to Article 3 ECHR if convicted and imprisoned in Texas; and that the fresh evidence adduced before this Court did not displace that conclusion: [2022] EWHC 3095 (Admin) (“the first judgment”). I made a request to the Texas authorities in the form annexed to the judgment for further information about the conditions in which the appellant would be held if imprisoned in Texas.
- 2 The response came in the form of a letter dated 11 January 2023 from Jason Clark, Chief of Staff of the Texas Department of Criminal Justice (“TDCJ”). On 27 February 2023, the respondent filed a skeleton argument referring to a TDCJ report dated December 2022 entitled *Monitoring of Temperature and Temperature-Related Deaths Fiscal Year 2022 Report*, (“the Temperature Report”) and the report was later produced.
- 3 By way of response, the appellant drew my attention to three documents: a report published in July 2022 by the Hazard Reduction and Recovery Centre at Texas A&M University and Texas Prisons Community Advocates entitled ‘Extreme Temperatures and Covid19 in Texas Prisons’ (“the Texas A&M Report”); an article dated November 2022 entitled ‘Provision of Air Conditioning and Heat-related Mortality in Texas Prisons’; and a new report in the Texas Observer on 15 November 2022 entitled ‘Heat Kills Hundreds in Texas Prisons.
- 4 The question I must now answer is whether the further information filed, viewed in its totality, enables me to discount the existence of a real risk that the appellant, if convicted and imprisoned in Texas, would be subject to treatment contrary to Article 3 ECHR. This judgment should be read with the first judgment.

The new evidence

Mr Clark’s letter of 11 January 2023

- 5 Mr Clark’s letter of 11 January 2023 addresses personal space in the following way:
 - (a) the assurance he had given in May 2022 to make a “good faith effort” to place the appellant in a conforming housing area (at least three square metres of personal space) during the term of his incarceration “still stands”;
 - (b) approximately 13.1% of the inmate population was housed in a cell providing less than 3 sq. m. of personal space per inmate;
 - (c) TDCJ makes housing allocation decisions based on a number of factors including but not limited to security (e.g. an inmate may be moved to a different facility after an altercation with staff or inmates), programming (e.g. an inmate may be moved to undertake a sex offenders’ treatment course) and medical need;

- (d) there may also be a need to move an inmate (generally temporarily) due to unforeseen circumstances, such as tornadoes, floods and hurricanes;
- (e) in the event of an operational or inmate need for transfer, the agency would continue to make a good faith effort to place the appellant in a conforming housing area and “the potential of detention in non-conforming housing would be minimal and only for specific circumstances”.

6 Temperature is addressed as follows:

- (a) there are approximately 100 prison facilities within the TDCJ, of which 31 have air conditioning in inmate housing areas and another 55 have partial air conditioning;
- (b) while outdoor temperatures during the summer can reach 110°F (43C), the average daily outdoor temperature ranges from 85-95°F (29-35C);
- (c) indoor temperatures, determined from measurements taken at 3pm at every TDCJ facility which is not fully air conditioned, do not exceed outdoor temperatures and generally average from the mid 80s to the low 90s;
- (d) prior to the start of each summer, representatives from all TDCJ divisions meet to determine best practices concerning preventive care and precautions;
- (e) heat mitigation measures include: (1) initial inmate intake screenings to ascertain conditions or medications that would make an inmate more susceptible to the heat for consideration on housing assignments; (2) air-conditioned respite areas are available 24/7; (3) water/ice is available at all times; (4) transport during the coolest hours of the day where possible; (5) cooling towels are available; (6) allowed to wear shorts and tee-shirts; (7) additional showers are allowed when possible and the water temperature is lowered for single-temp showers; (8) educational posters are placed to remind of heat precautions; (9) portable fans are allowed for inmates in all custody levels; (10) utilizing a fresh air exchange system and air flow is increased by blowers when appropriate; (11) training regarding excessive temperature conditions; (12) staff/medical personnel coordinate to identify heat-related illness susceptible inmates and conduct wellness checks; (13) all heat-related illnesses are evaluated, tracked and reported; (14) additional precautionary measures are taken when excessive heat conditions last for three or more consecutive days; and (15) TDCJ has added or is adding air conditioning for approximately 9,500 beds and has nearly 20 air conditioning installation projects in various housing facilities;
- (f) heat-related illnesses are reported to the TDCJ’s Emergency Action Center;
- (g) during fiscal year 2022, there were no heat-related deaths or heat strokes for inmates and only 11 heat-related illnesses throughout all TDCJ facilities (including general heat-related illness, exhaustion and dehydration).

The Temperature Report

7 The Temperature Report details the following “heat mitigation protocols”:

- As inmates arrive at intake facilities, a staff member from the medical department conducts an initial screening to ascertain if the inmate has any conditions, or is on any medication, that would make them more susceptible to the heat. Heat sensitivity is considered when making housing assignments;
- The agency makes air-conditioned respite areas available for inmates 24 hours per day, seven days per week. They are permitted to stay in the respite area as long as necessary. Inmates requesting access to a respite area are not required to be seen by medical staff unless they are exhibiting signs or symptoms of a heat-related illness;
- Water is available at all times and additional ice water and cups are provided in inmate housing areas, recreational areas, and during mealtimes;
- Psychiatric inpatient inmates are transported to other facilities via airconditioned transfer vehicles only, and inmates are transported during the coolest hours of the day, when possible;
- Inmates can utilize and carry cooling towels, and wear shorts and t-shirts in dayrooms and recreational areas;
- Inmates are allowed additional showers when possible, and the water temperature is lowered for single-temperature showers in inmate housing areas;
- Posters are placed in housing areas reminding inmates of heat precautions and the importance of water intake. Outside activity (work hours) is restricted in accordance with agency policy. All inmates and staff working in areas of extreme heat such as field, maintenance, and yard squads are provided frequent water breaks;
- Portable fans are allowed for inmates in all custody levels, including restrictive housing and disciplinary status;
- The fans in TDCJ facilities are used to draw air through the structure and exhaust outside. Full advantage of the fresh air exchange system or prevailing winds is taken to assist in the movement of air as applicable. Air flow is increased by using blowers, normally used to move hot air in the winter, when appropriate. Ribbons are attached to vents to ensure blowers are functioning appropriately. Window screens are cleaned so as not to restrict air flow;
- Staff and inmates are trained regarding excessive temperature conditions. Refresher training is provided on a regular and frequent basis throughout the duration of the excessive heat period;
- TDCJ staff and medical personnel coordinate to promptly identify and communicate needs of inmates susceptible to temperature-related

illnesses due to medical conditions. Security staff conduct wellness checks for inmates identified as sensitive to heat during normal security checks of the housing areas;

- All heat-related illnesses are evaluated, to include the conditions surrounding the incident, such as water intake, location, and what the inmate was doing before becoming ill. Additionally, “cluster illnesses,” or illnesses occurring in inmates in the same housing areas, are tracked and reported; and
- Additional precautionary measures are taken when excessive heat conditions last for three or more consecutive days. Such conditions require activation of the Incident Command System (ICS). The ICS provides a system for the effective management of personnel and resources that respond to the incident as it escalates. Once ICS is deactivated, the unit officials conduct a debriefing to evaluate unit operations during the excessive heat warning to identify any areas requiring improvement.

8 The Temperature Report then sets out temperatures, measured at 3pm every day in 2022 inside a cell or other inmate housing area.

The Texas A&M Report

9 I have read the Texas A&M Report carefully. It provides an indication that mitigation measures implemented by the TDCJ have not been free of problems. Rebecca Hill for the appellant drew my attention to a number of passages in the body of the report. She placed particular reliance on the passages dealing with the provision of water and ice (one third of respondents reported not having access to ice), showers (which were withdrawn in some places due to Covid-19), cooled respite areas (limited availability, crowded with poor conditions) and fans and blowers (many did not have access and in many cases the fans were broken).

Personal space

10 David Perry KC for the respondent submitted that the information in Mr Clark’s letter was sufficient to show that there was no real risk that the appellant would be held in conditions contrary to Article 3 ECHR. Mr Clark had confirmed that the assurance to make a good faith effort to place the appellant in a conforming housing area still stood and that “the potential of detention in non-conforming housing would be minimal and only for specific circumstances”.

11 Ms Hill submitted that Mr Clark’s letter provides no additional material detail that assists the respondent. The first judgment assumed that, leaving the assurance aside, the risk of being placed in non-conforming housing was somewhere between 5% and 13%: see [77]. Mr Clark’s letter shows that it is right at the top of that range. It also shows that the reasons which can justify moving a prisoner can include security, programming and medical need. Even if it may be hoped that a move for security reasons would be short, there was no guarantee of that. A move for “programming reasons” might be of longer duration; and it was quite possible, given the offences with which the appellant was charged, that he might be required to undertake sexual offending programmes,

which could last several months. A move for health reasons was also not a remote possibility and such a move might be for a significant period. Overall, the Texas authorities had every opportunity to give assurances which enabled the court to discount the real risk that the appellant would be housed in non-conforming accommodation. It had not done so.

- 12 Mr Clark's letter provides two material extra pieces of information. The first is that the proportion of prisoners in non-conforming accommodation is 13.1%. This fact obviously does not assist the respondent. It shows, as Ms Hill submitted, that the figure is at the top of the range taken as the factual basis for the first judgment. It follows that, leaving the good faith assurance out of account, the chance of being housed in non-conforming accommodation is greater than one in eight.
- 13 Second, until Mr Clark's letter of 11 January 2023, there was limited information about the circumstances in which a prisoner might be held in a non-conforming cell and no information about the duration of any such stay: see [76] of the first judgment. Now, there is further detail as to what might give rise to the need to move a prisoner and as to what would happen in the event of such a need.
- 14 On a first reading of Mr Clark's letter of 11 January 2023, the possibility that initially concerned me was that the appellant might be moved to non-conforming accommodation and remain there for a significant period while he undertook a programme (for example to address sexual offending). The question for me is whether there is a real risk of that happening. In answering that question, it is necessary to read the letter as a whole and to take Mr Clark's assurances at face value. Approaching the letter in that way, I read the letter as saying that, even if the appellant is moved (whether for security, programming or medical reasons or because of an unforeseen weather event) the authorities would still make a good faith effort to ensure he was housed in conforming, with the result that the potential for detention in non-conforming accommodation would still be "minimal and only for specific circumstances".
- 15 Although I accept that the word "minimal" is not precise, the letter as a whole satisfies me that the "good faith assurance" (which clearly applies even if it is necessary to move the appellant for one of the reasons set out in the letter) reduces the risk that the appellant will be accommodated in a cell with less than 3 sq. m. per detainee so that the risk is no longer a "real" one for the purposes of Article 3 ECHR.

Temperature

- 16 Mr Perry submitted that the Temperature Report did not substantiate the evidence of Ms Deitch that outdoor temperatures of 110°F (43C) were experienced for weeks on end, nor that indoor temperatures were higher than this. More importantly, the heat-related mitigations went well beyond addressing the incidence of heat-related illnesses and, taken together, were such as to reduce the risk of treatment contrary to Article 3 ECHR below the level at which it could be said to be a "real" one.
- 17 Ms Hill submitted that the Temperature Report showed very high temperatures at many TDCJ prisons for long periods in June, July and August 2022. The temperatures were higher than those recorded in the Strasbourg cases in which findings of a breach of Article 3 were made: see [82]-[83] of the first judgment. The Texas A&M report

showed that the heat mitigation measures were often ineffective and did not reduce the risk of inhuman and degrading treatment below the “real” level.

- 18 In my judgment, the Temperature Report provides a good basis for assessing the actual temperatures in Texas prisons which do not have air-conditioning. The data was gathered using a consistent methodology (measuring in-cell temperatures at 3pm). Although the data is from one year only, it does not show any facility where the temperature reached the level reported by Ms Deitch on any day, nor does it show that indoor temperatures were substantially higher than outdoor temperatures. It is right, however, to acknowledge that there were a few facilities where temperatures remained in the high 90s or low 100s°F (35-40C) for several days on end. This makes it important to consider the extent and effectiveness of the heat-mitigation measures.
- 19 My principal concern about the analysis of the District Judge was that it focussed on measures designed to address heat-related illnesses. The information contained in Mr Clark’s letter and in the Temperature Report shows that the measures are not limited in that way. They include the provision of cooling towels, additional cold showers, provision of water and ice, portable fans and air exchange systems. Importantly, they also include the provision of air-conditioned respite areas which, if the information in the Temperature Report is taken at face value, are available for use 24 hours per day.
- 20 The Texas A&M Report demonstrates that the provision of these facilities is not always effective and that the respite areas are sometimes overcrowded and unpleasant. Some of the criticisms made by survey respondents are linked to Covid-19 mitigation measures or concern hygiene problems whose salience is heightened by Covid-19. In my judgment, the report does not detract significantly from the impression derived from Mr Clark’s letter and the Temperature Report – which is that the TDCJ makes considerable efforts to mitigate the effect of high temperatures in the summer and to monitor the effectiveness of these measures through grievance processes.
- 21 The other material relied upon by Ms Hill suggests that heat-related illness remains an issue, but taking that material together with the Temperature Report, it appears that the incidence of serious illness had reduced in recent years and that substantial measures are in place to address this risk.
- 22 Overall, the new material submitted by the Texas authorities satisfies me that, while the summer temperatures remain unpleasant in several of the TDCJ’s facilities, there is no real risk of treatment meeting the very high threshold necessary to give rise to a breach of Article 3 ECHR.

Conclusion

- 23 For these reasons, despite the errors identified in my first judgment, the US authorities have satisfied me that there is no real risk that the appellant will if convicted be detained in conditions contrary to Article 3 ECHR. The appeal must therefore be dismissed.