Neutral Citation Number: [2020] EWHC 978 (Admin)

Case No: CO/1389/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2020

Before:

LADY JUSTICE RAFFERTY
MR JUSTICE JAY

- -

Between:

THE QUEEN **(oao ROY DAVIS)**	**Claimant**
- and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

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- -

Leslie Thomas QC (instructed by **Instalaw Solicitors**) for the **Claimant**
Sir James Eadie QC, Russell Fortt, Catherine Dobson and **Shane Sibell** (instructed by **GLD**) for the **Defendant**

Determined on written submissions

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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 Friday 24th April 2020 at 2.00pm.

LADY JUSTICE RAFFERTY and MR JUSTICE JAY:

1. The Claimant is a terminally ill prisoner currently incarcerated at HMP Stocken. He has a lengthy criminal record and is serving a sentence of 8 years' imprisonment imposed for an offence of robbery, assault with intention to rob and possession of an offensive weapon. His conditional release date is 29th December 2020. An OASys assessment as recent as 18th March 2020 describes his risk of serious harm to the public in the event of being released into the community as "high" although we bear in mind that the level of that risk will reduce as the Claimant's physical condition deteriorates. His consultant urologist has stated that his life expectancy is in the region of 9-18 months subject to the nature and timing of any medical interventions for his cancers in the interim.

2. In line with NHS Guidelines the Claimant has been identified as "extremely vulnerable" on account of his medical conditions, and has been advised to "shield" himself from others for 12 weeks. Given that he now requires a wheelchair, the Claimant is being held in a single-occupancy cell with its own shower. He has refused to be shielded because he fears that his food might be tampered with by prison officers, but measures have been put in place to protect him as far as possible from the risk of infection from Covid-19. Were he to agree to shielding the prison says that additional measures would be taken in relation to the disinfecting of mobile phones, exercise facilities and eating arrangements.

3. Applications were made in 2019 for permanent release on compassionate grounds under s.248 of the CJA 2003 but these were refused. In mid-February 2020 a further application was made, supported by the Claimant's GP, a probation officer and the prison governor. On 2nd April the application was refused by the Defendant because there was no clear prognosis of death in the near future (ordinarily under PSO 6000, a life expectancy or less than 3 months is required), the risk the Claimant posed to the public remained high, there was 8 months of his prison sentence to be served, and there were no other exceptional circumstances which merited release. The Defendant also stated that the Claimant's eligibility to be released on a temporary basis ("ROTL") was being reassessed and that a decision would be forthcoming as soon as it reasonably could.

4. On 9th April the Defendant issued supplemental guidance on ROTL in the context of the current public health emergency. It is pointed out on the Claimant's behalf that this guidance was not immediately placed into the public domain. Pursuant to this guidance, prisoners in the exceptionally vulnerable category are proactively identified by those responsible for healthcare within the prison estate. Accordingly, on 16th April the Claimant completed and signed an application form for ROTL. His solicitors say, and we accept, that they were unaware of this. As matters stand, the Defendant's decision on this ROTL application will be forthcoming in the near future.

5. This application for judicial review was filed on 13th April 2020 and the bundle in support extends to over 900 pages. The gravamen of the Claimant's pleaded case is that the Defendant's positive obligations under articles 2 and 3 of the ECHR mandate his immediate release on compassionate grounds. Given the Claimant's ignorance of the ROTL policy, the focus of the challenge was immediate permanent release under s.248. Amidst the Claimant's copious material is evidence from at least three experts

explaining that the risk of his contracting Covid-19 is unacceptably high in a prison environment.

6. Given the importance and urgency of the issue, Julian Knowles J made a series of stringent case management orders on 16th April designed to lead to a "rolled up" hearing (at that stage, linked with another case which has since settled) on 22nd April. The hearing was later put back one day but the Defendant met the deadlines imposed on it. We have noted the detail and thoroughness of the Defendant's evidence and skeleton argument/summary grounds of defence which were filed and served at 16:36 (six minutes late) on 20th April. We have also noted that four counsel were involved in that exercise, which is testimony to the amount of work required and the importance of this case to the Defendant: there are, we understand, other cases in the pipeline. The industry that these proceedings has required is not limited to the parameters of the Defendant's legal team.

7. The Defendant's primary line of defence is that its operational duty under articles 2 and 3 of the Convention does not require the Claimant's release because reasonable steps are being taken to mitigate the risk. It is also pleaded that:

> "In any event, permanently releasing the Claimant under s.248 CJA 2003 cannot be a necessary or reasonable step as compared with releasing the Claimant on temporary licence under Rule 9 of the Prison Rules 1999 (as to which no decision has yet been taken)."

We read this as an alternative submission.

8. At midday on 21st April the Claimant's solicitors invited the GLD to agree to vacate the hearing (then still timetabled for the following day) pending the resolution of the ROTL application. Dependent on the outcome, it was contended that these proceedings would either fall away or be heard after 30th April, possibly on the basis of amended grounds.

9. At 14:40 the GLD refused to agree to vacate the hearing. Two points were taken. First, that the possibility of temporary release should not have been a revelation to those advising the Claimant. Second, and in any event, the point of principle raised by the Claimant's primary case remained apt to be determined, and this Court was fully geared to achieving that goal.

10. At 16:04 on the same afternoon, the Claimant filed an application to vacate the hearing. This largely reflected the arguments raised in correspondence although there was a degree of refinement. The submission was made that the operational duty under articles 2 and 3 of the Convention required the Claimant's immediate release but the precise legal mechanism – viz. section 248 permanent release, or ROTL – is a matter for the Defendant.

11. In the circumstances, we invited a prompt response from the Defendant and this was forthcoming at 10:34 on 22nd April. Again, the submissions made had been largely prefigured. It was stressed that the Court was fully equipped to resolve the article 2/3 issue, which remained important and urgent, with a Divisional Court convened at short notice to determine it. Further, the issue remained the hard-edged one of

whether the positive obligations imposed by these Convention provisions demanded the Claimant's immediate release, and this fell to be determined without reference to the possibility of ROTL. Temporary release would be the means of discharging the Defendant's positive obligations only on the premise (which the Defendant denied) that they arose. This last submission reflected para 13(4) of the Defendant's skeleton argument (see para 7 above) and was not novel.

12. At 11:03 the parties were informed that the application to vacate had been refused by us, with reasons to follow in due course. We do not believe that it would have been difficult for the parties to divine what those reasons were. Our intention at that stage was to incorporate them into our judgment on the substantive issue following the hearing the next day. We are able to confirm that we refused the application to vacate because we agree with paras 5 and 7 of the Defendant's submissions, as summarised under para 11 above. The issue of principle could be determined without the outcome of the ROTL application being known and was clearly of wider importance. We would add only this: that litigants should not underestimate the difficulties in arranging Divisional Court hearings at short notice, that the case was fully prepared by the parties and ready to start on 23rd April, and that a considerable amount of pre-reading had already been undertaken.

13. Next in the sequence of events, at 11:29 on 22nd April a Notice of Discontinuance was filed. This was described as a notice discontinuing part of the claim because the Claimant was seeking to depart from the normal rule as to costs in such cases. Submissions on the issue of costs were said to "follow shortly". We invited clarification of this notice and were informed that the whole claim was indeed being withdrawn (*pace* the section of the notice that was completed) with the court's determination being sought on the discrete costs issue.

14. At 15:02 on 22nd April the Claimant's solicitors filed their costs submissions. The essential point that was made was that this application for judicial review would not have been brought had the Claimant's advisors been made aware of the Defendant's Covid-19 ROTL policy. This was not disclosed until 21st April although its essential ingredients had been summarised in the Defendant's skeleton argument.

15. At 15:21 the Defendant filed submissions on the issue of discontinuance – and, by implication, on the issue of costs. It was said that the notice was a blatant and abusive attempt to circumvent the Court's decision not to vacate the hearing. The Defendant's fear was that, in the event that the ROTL application was refused, the Claimant would then seek to revive all his arguments on nature and scope of the positive obligation under articles 2 and 3 of the Convention because no *res judicata* would arise in a situation where the claim had been discontinued. In such circumstances, a trio of options was suggested. First, that the Claimant agree to a declaration that there was no obligation under articles 2 and 3 of the Convention to release him. Second, that the notice of discontinuance be set aside under CPR r.38.4 and the issue of principle be determined forthwith. Third, that the Court should record the circumstances in which this claim has been discontinued and make such observations as are appropriate on what has happened to date.

16. We invited further submissions from the Claimant, and these were filed at 17:36 on 22nd April. We have examined paras 6-8 closely. The first sentence of para 7 – "a decision cannot be made tomorrow about whether, if ROTL is refused, article 2/3 will

require the Claimant's permanent release" – cuts across our decision not to vacate the hearing. The submission in para 8 –

> "… the Claimant does not intend to place all matters in issue, including the substantive question of whether A2/3 mandates permanent release, in the event that the ROTL decision proves to be adverse. Whether or not he does will depend on the particular circumstances existing at that time."

- does not give the Defendant or the Court any degree of comfort. In our view "the particular circumstances existing at the time" might very well impel the Claimant to argue the very case that he now seeks to discontinue.

17. We accept that from the Claimant's perspective it matters not by what mechanism he is released provided that he achieves his liberty. Accordingly, had he been informed before 13th April that a decision on temporary release under Rule 9 of the Prison Rules 1999 was imminent, the practical reality is that he would not have brought this claim. However, we do not conclude that there has been any secrecy or failure to disclose his hand on the part of the Defendant or those advising his department. The letter of 2nd April said in terms that the Claimant's eligibility for ROTL was being reassessed. If the Claimant were in any doubt as to what this meant, or as to the likely timescales, his advisors need only have inquired. Instead, an expensive and time-consuming process was launched with all the ramifications we have identified.

18. It is unsurprising that in these circumstances the Defendant has strongly resisted the Claimant's attempts to vacate this hearing. From the department's perspective, the issue of principle remains salient and there is every advantage in having it judicially resolved. Had the Claimant decided to wait until the ROTL application had been determined before initiating this claim, the Defendant would obviously have had no difficulty with that – although the issue of principle would no doubt have arisen in relation to a different prisoner. The point we are making is that once the die was cast on 13th April, and demanding court orders made three days later, both the interests of the Defendant and the public interest strongly militated in favour of an early resolution of that point of principle.

19. Although the Claimant's personal interests have little to do with the wider public interest considerations we have referred to, we must of course accord considerable weight to the latter. Furthermore, the application to vacate the hearing has the appearance of being tactical. The Claimant's outstanding ROTL application did not render this judicial review otiose: it had not been determined; it might in due course be refused (in the event that the view were taken that the Claimant's risk remained unacceptable and/or could not be effectively managed in the community); and, in the event that he succeeded on the broad point of principle before us, his release, by whatever means, would be secured. Had we been minded to uphold the claim on this broad issue of principle, our decision would have been given very quickly, if necessary with reasons to follow.

20. The speed with which the Notice of Discontinuance was filed after our decision on the application to vacate was made known has been commented on by the Defendant. The Claimant's legal team had in all likelihood decided to discontinue this claim if our decision were adverse in advance of it being made. Be that as it may, in our opinion

the inference that the Claimant was seeking to circumvent our decision not to vacate the hearing date is very strong. It is unnecessary to go further than that.

21. It is not inevitable that costs follow the event after the filing of a Notice of Discontinuance, but in the circumstances of this case we are satisfied that the Claimant should pay the Defendant's costs of the claim on the usual terms. The Claimant is legally aided and the standard costs protection provisions are applicable.

22. This leaves the Defendant's three options as outlined under para 15 above. The first option can have no application because the Claimant clearly does not agree to the declaratory relief sought. The second option entails the Defendant's application to set aside the Notice of Discontinuance under CPR r.38.4. There is force in the Defendant's submission that the notice could properly be set aside under this provision, but the point is not free from difficulty and in our judgment the Claimant would have to be given a further opportunity to respond to this contention, both in writing and orally. We decided that it would not be fair to the Claimant to determine this point as rapidly as the Defendant had sought. The Defendant's r.38.4 application may therefore be held in abeyance, to be returned to if necessary.

23. In any event, the Defendant's third option appears to us to be the preferable one in the circumstances of this case. In our judgment, CPR r.38.7 is applicable. 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."

24. Not merely would the Claimant require further public funding to bring a further claim, he would undoubtedly need the permission of the Court because (a) the Defendant has filed summary grounds of defence, and (b) the further claim would arise out of substantially the same facts, if not the same facts, as this claim. In the event, therefore, that the Claimant's ROTL application were adverse, he would need to bring an application under r.38.7 before filing any further judicial review application. At that stage the Court would need to bear in mind all the circumstances of the case including the history we have been careful fully to set out as well as the overall strength of the claim in the light of the evidence and submissions that have been filed. We do not comment on the Claimant's underlying claim save to observe that the positive obligation under articles 2/3 of the Convention has been overstated. Given that these are public law proceedings, the Court would also wish to know whether other proceedings have been brought which would effectively determine the same issue of principle. Furthermore, if permission were granted under r.38.7, the Court would also wish to decide whether this claim should be proceeding on the same accelerated basis as that ordered previously.

25. The r.38.7 issue does not require a Divisional Court. The issue is fit to be determined by a single judge and it is reserved to Jay J. He would decide in the first instance whether the application should be determined orally or on the papers, and the extent to which the Defendant's involvement is required. In the event that permission under r.38.7 were granted, Jay J would also make appropriate directions in connection with the fresh claim for judicial review.

26. We invite the parties to draft an Order which reflects the terms of this judgment.