



Neutral Citation Number: [2019] EWCA Civ 367

Case No: C1/2017/1201 and C1/2017/1216

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**MR JUSTICE LEWIS**  
**[2017] EWHC 727 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

**THE MASTER OF THE ROLLS**  
**SIR TERENCE EHERTON**  
**LORD JUSTICE HAMBLEN**  
and  
**LORD JUSTICE HADDON-CAVE**

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Between :

**NADIR SYED**

**Appellant/  
Respondent**

- and -

**THE SECRETARY OF STATE FOR JUSTICE**

**Respondent  
/Appellant**

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**Mr Dan Squires QC (instructed by Birnberg Peirce Ltd) for the Appellant**  
**Sir James Eadie QC and Mr Andrew Sharland QC (instructed by Government Legal**  
**Department) for the Respondent**

Hearing date : 13<sup>th</sup> February 2019  
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**APPROVED JUDGMENT**

**LORD JUSTICE HADDON-CAVE :****Introduction**

1. The issues in this appeal concern the lawfulness of the transfer of a prisoner to the “*Managing Challenging Behaviour Strategy Unit*” (“MCBS Unit”) at HMP Woodhill on 2<sup>nd</sup> November 2016.
2. In his appeal (C1/2017/1201), Nadir Syed (“NS”) challenges the judgment of Lewis J dated 7<sup>th</sup> April 2017 whereby the Judge held that NS’s transfer to the MCBS Unit at HMP Woodhill did not amount to a “*removal from association*” within rule 45 of the Prison Rules.
3. In the cross-appeal (C/2017/1216), the Secretary of State for Justice (“SSJ”) challenges Lewis J’s finding that the restrictions imposed on NS in the MCBS Unit amounted to an interference with NS’s right to respect for private life under Article 8(1) of the European Convention on Human Rights (“ECHR”), *i.e.* Article 8 ECHR was engaged, and the interference was required to be justified under Article 8(2).

**The Facts***Arrest, remand and conviction*

4. On 20<sup>th</sup> November 2014, NS was arrested on terrorist charges and remanded in custody. He was aged 21 at the time. NS was initially remanded to HMP Wandsworth. On 18<sup>th</sup> May 2015, NS was transferred to HMP Belmarsh.
5. On 9<sup>th</sup> December 2015, NS was convicted by a jury at Woolwich Crown Court of doing an act preparatory to committing an act of terrorism contrary to s.5 of the Terrorism Act 2005 (“TA 2005”). NS had earlier been prevented from travelling abroad to Syria where he intended to join the so-called Islamic State (Daesh). NS subsequently purchased a large kitchen knife with the intention of attacking an innocent member of the public in the street and beheading them. He was planning to carry out an attack on a date close to Armistice Day in 2015.

*Segregation custody – December 2015 to November 2016*

6. Following conviction on 9<sup>th</sup> December 2015, NS was made subject to a “*removal from association*” order under Rule 45 of the Prison Rules and placed in segregation. The prison authorities had received intelligence reports that NS had been planning to behead a member of the prison staff should he be convicted.
7. On 15<sup>th</sup> December 2015, NS was transferred to HMP Thameside. Thereafter, NS remained in segregation for the next 11 months until his transfer to the MBCS Unit at HMP Woodhill on 2<sup>nd</sup> November 2016 (see further below). His segregation was thereafter reviewed regularly by the Segregation Review Board and the Deputy Director for Custody in accordance with Rule 45 of the Prison Rules.
8. On 7<sup>th</sup> January 2016, disturbances took place in which NS was involved. Throughout the morning, NS and two other prisoners were heard banging on their cell doors, shouting “*Allahu Akbar*”, shouting at staff that they (the staff) were oppressing Muslims and making threats of beheading. One officer heard NS say that if the staff violated one “*brother*” they violated all. An officer reported that at 12:15 pm he had been attending a prisoner in a neighbouring cell when NS came to the observation hatch in

his cell and shouted that he would behead “*us all*” (which Lewis J took as a reference to prison officers) and that the officer in question would be first.

9. On 22<sup>nd</sup> January 2016, NS was transferred to HMP Whitemoor.
10. On 23<sup>rd</sup> June 2016, NS was sentenced to life imprisonment with a minimum term of 15 years imprisonment. The sentencing judge, Saunders J, said that he had no doubt that NS was dangerous and “*will remain dangerous until the threat from Islamic terrorists has gone*”.
11. In September 2016, consideration was given to transferring NS from segregation to a “*Closed Supervision Centre*” (“CSC”). On 22<sup>nd</sup> September 2016, the relevant committee decided not to transfer NS from segregation to the CSC but to transfer him to the MCBS Unit at HMP Woodhill. In the decision letter dated 22<sup>nd</sup> September 2016, which is the subject of NS’s challenge in this appeal, Governor Tempest explained:

“Mr Syed's level of risk to others does need to be further assessed and considered, and that a main wing location at this time would therefore not be appropriate. The decision was therefore that he will be managed and supported under the Central MCB (Managing Challenging Behaviour) Strategy, and transferred to a Central MCB Unit once a space becomes available. This will enable him the opportunity to access the ERG [Extremist Risk Guidance] assessment, and other assessment and intervention work deemed appropriate with a multi-disciplinary team. He will also be able to access a greater regime, and association with a small group of others subject to risk assessment, and if/when risk assessed as appropriate an opportunity for reintegration back onto a normal location.”

*NS’s transfer to MCBS Unit – 2<sup>nd</sup> November 2016*

12. On 2<sup>nd</sup> November 2016, NS was transferred to the MCBS Unit at HMP Woodhill. He had been there for over 4 ½ months by the time the matter came before Lewis J on 21<sup>st</sup> March 2017.
13. Lewis J made the following detailed findings of fact regarding the nature of NS’s regime in the MCBS Unit (at paragraphs [19]-[26] of his judgment):

*“Association with other prisoners*

19. *Between arrival on 2 November 2016 and 6 (or 7) November 2016, NS did not have any association or contact with other prisoners but was held alone in his cell. The Defendant accepts that, during this period, he was removed from association, or in segregation (albeit within the Unit) and as such authorisation for removal was required pursuant to rule 45(2) of the Rules. The Defendant contends that such authorisation did exist and authorised removal from association up to 15 November 2016: see the witness statement of Carolyn Lund dated 24 March 2017. NS contends that the authorisation expired on 2 November 2016: see paragraph 4 of the note dated 28 March 2017 and fourth witness statement of NS. As no challenge is made in these proceedings to the*

*decision to segregate NS (the challenge is to the decision to transfer him to the Unit), it is not necessary in these proceedings to resolve that specific dispute.*

20. *From 7 (or 8) to about 24 November 2016, there were two groups of prisoners in the Unit. NS was able to associate with other prisoners, outside of his cell, for 2 hours and 15 minutes on four days a week, two hours and 5 minutes on a fifth day a week, and for periods of 95 minutes on the remaining two days a week. See Claimant's 1<sup>st</sup> witness statement dated 20 December 2016 at paragraph 34 and the timetable attached to Mr Waldron's first statement dated 24 February 2017.*

21. *From about 24 November to 20 December 2016, the evidence is that there were three groups of prisoners in the Unit, and NS was able to associate with prisoners in one of those groups for under 2 hours a day on 5 days a week and 1 and ½ hours on each of the remaining two days in the week (see Claimant's 1<sup>st</sup> witness statement dated 20 December 2016 at paragraphs 35 and 36).*

22. *From about at least 21 December to about 24 February 2017, the evidence is unclear. Certainly, as at 6 March 2017, NS's evidence is that there were seven prisoners held in two groups (see NS's 2<sup>nd</sup> witness statement dated 6 March 2017). NS does not indicate at what date the number of groups went down from three to two groups. The evidence of Mr Waldron is that as at 24 February 2017 there were two groups in the Unit. His evidence is that there were usually two groups and dividing prisoners into three groups was always a temporary measure (see paragraph 6 of Mr Waldron's second witness statement) although NS disputes this. The likelihood is that at least from 24 February 2017, and quite probably earlier, there were two groups and the time NS had for association is as set in paragraph 19 above. At some stage between 20 December 2016 and 24 February 2017, therefore, the number of groups reduced from three groups (when NS had less than two hours a day to associate with other prisoners) to two groups (when NS would have had the time set out in paragraph 19 above for association with other prisoners).*

23. *From 11 March 2017 to either 14 March 2017 (on the Defendant's case) or to the 17 March 2017 (NS's case), there were again three groups with the result that the time that NS had for association with other prisoners would be less than 2 hours: see paragraphs 3 to 5 of Mr Waldron's second statement. Thereafter to the date of the hearing on 21 March 2017 there appears to have been two groups and the time for association was as in paragraph 20 above.*

#### *Other Time Spent Outside the Cell and Engaging in Other Activities*

24. *From the 7 (or 8) November 2016 to the present, NS has had one hour of exercise each day (which he could undertake alone or with 1 other prisoner). On 5 days a week, he was able to leave his cell and carry out domestic chores for 30 minutes a day but was alone for this period and locked in the place where the chores were performed.*

25. *From the 2 February 2017, NS has been able to go to the library (which is located elsewhere in the prison, not in the Unit). He is able to visit the library with one other prisoner and is escorted by prison officers. Other prisoners do not use the library at the time that he does. There may be prisoners working in the library but NS has never seen them. The total time taken up by this activity is 45 minutes a week.*

26. *On 17 March 2017, he was permitted to attend Friday prayers for the first time. The religious service itself took 45 minutes and the entire time outside the cell lasted 70 minutes. NS has also been given approval to undertake Islamic Studies classes but had not yet started to attend classes at the time of the hearing.”*

## **The legal framework**

### *Prison Act 1952*

14. Under s.12 of the Prison Act 1952, a prisoner may be confined in any prison. Section 47 of the Prison Act 1952 empowers the Secretary of State to make rules for the regulation and management of prisons and other institutions for the classification, treatment, employment, discipline and control of persons required to be detained in a prison.

### *Prison Rules*

15. As regards privileges, including association with other prisoners and work, the Prison Rules provide as follows:

#### **“8. Privileges**

*(1) There shall be established at every prison systems of privileges approved by the Secretary of State and appropriate to the classes of prisoners there, which shall include arrangements under which money earned by prisoners in prison may be spent by them within the prison.*

*(2) Systems of privileges approved under paragraph (1) may include arrangements under which prisoners may be allowed time outside their cells and in association with one another, in excess of the minimum time which, subject to the other provisions of these Rules apart from this rule, is otherwise allowed to prisoners at the prison for this purpose. ...*

#### **31. Work**

*(1) A convicted prisoner shall be required to do useful work for not more than 10 hours a day, and arrangements shall be made to allow prisoners to work, where possible, outside the cells and in association with one another.*

16. The Prison Rules also lay down provisions which may involve association between prisoners, such as the opportunity to attend religious services (Rule 16); the provision of physical education (Rule 29); the opportunity to spend time in the open air (rule 30); the opportunity to use educational facilities (Rule 32); and the opportunity to use a library (Rule 33).

17. Rule 45 provides as follows in relation to “*removal from association*”:

**“45. Removal from association**

*(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association for up to 72 hours.*

*(2) Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.*

*(2A) Such authority may be renewed for subsequent periods of up to 14 days.*

*(2B) But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days starting with the date the prisoner was removed under paragraph (1).*

*(2C) The Secretary of State may only grant leave for a maximum period of 42 days, but such leave may be renewed for subsequent periods of up to 42 days by the Secretary of State.*

*(3) The governor may arrange at his discretion for a prisoner removed under this rule to resume association with other prisoners at any time.*

*(3A) In giving authority under paragraphs (2) and (2A) and in exercising the discretion under paragraph (3), the governor must fully consider any recommendation that the prisoner resumes association on medical grounds made by a registered medical practitioner or registered nurse working within the prison.*

*(4) This rule shall not apply to a prisoner the subject of a direction given under rule 46(1).”*

18. Rule 46 relates to CSCs and permits the transfer of prisoners to a CSC. It provides:

**“46. Close supervision centres**

*(1) Where it appears desirable, for the maintenance of good order or discipline or to ensure the safety of officers, prisoners or any other person, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the Secretary of State may direct the prisoner's removal from association accordingly and his placement in a close supervision centre of a prison.*

*(2) A direction given under paragraph (1) shall be for a period not exceeding one month, but may be renewed from time to time for a like period, and shall continue to apply notwithstanding any transfer of a prisoner from one prison to another.*

(3) *The Secretary of State may direct that such a prisoner as aforesaid shall resume association with other prisoners, either within a close supervision centre or elsewhere.*

(4) *In exercising any discretion under this rule, the Secretary of State shall take account of any relevant medical considerations which are known to him.*

(5) *A close supervision centre is any cell or other part of a prison designated by the Secretary of State for holding prisoners who are subject to a direction given under paragraph (1).”*

19. On 12<sup>th</sup> May 2017, the Prison Rules were amended to insert Rule 46A:

**“46A Separation centres**

(1) *Where it appears desirable, on one or more of the grounds specified in paragraph (2), the Secretary of State may direct that a prisoner be placed in a separation centre within a prison.*

(2) *The grounds referred to in paragraph (1) are—*

*(a) the interests of national security;*

*(b) to prevent the commission, preparation or instigation of an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in a prison or otherwise;*

*(c) to prevent the dissemination of views or beliefs that might encourage or induce others to commit any such act or offence, whether in a prison or otherwise, or to protect or safeguard others from such views or beliefs, or*

*(d) to prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.*

(3) *A direction given under paragraph (1) must be reviewed every three months. ...*

(6) *In this rule— ... “separation centre” means any part of a prison for the time being used for holding prisoners who are subject to a direction under paragraph (1)...”*

**Grounds**

20. On 21<sup>st</sup> December 2016, NS brought judicial review proceedings in respect of the decision taken by the prison authorities on 22<sup>nd</sup> September 2016 to transfer him from segregation to the MCBS Unit at HMP Woodhill. He contended that the decision was unlawful on 5 grounds:

(1) The Secretary of State had no statutory power to direct a prisoner’s removal from association to the MCBS Unit;

- (2) The decision to transfer NS to the MCBS Unit was taken in breach of the applicable policy governing such transfers;
- (3) NS was not given a fair opportunity to make representations prior to the decision being taken to transfer him to the Unit;
- (4) NS was not provided with adequate reasons for his transfer;
- (5) The transfer to the MCBS Unit breached his Article 8(1) ECHR rights to respect for private life.

### **Decision below**

21. In his order dated 7<sup>th</sup> April 2017, Lewis J allowed NS's claim for judicial review on Grounds 2, 3 and 5 of the claim, but refused the application on Grounds 1 and 4. The Secretary of State conceded that his 22<sup>nd</sup> September 2016 decision was procedurally flawed (Grounds 2 and 3) and should be quashed on that basis. Lewis J held that NS's reasons challenge (Ground 4) was therefore academic.
22. As to Ground 1, Lewis J concluded that NS's transfer to the MCBS Unit on 2<sup>nd</sup> November 2016 did not amount to a "*removal from association*" within Rule 45 of the Prison Rules.
23. As to Ground 5, Lewis J concluded that: (i) the restrictions imposed on NS in the MCBS Unit *post* 2<sup>nd</sup> November 2016 did amount to an interference with his Article 8 ECHR right to respect for private life; (ii) such an interference was justified but was not in accordance with the law because of the acknowledged breaches under Grounds 2 and 3; however, (iii) the finding of a violation was just satisfaction and no damages would be awarded.

### *Permission to appeal*

24. Permission to appeal was granted by Lewison LJ on 9<sup>th</sup> January 2018 to NS in respect of Ground 1 and to the SSJ in respect of Ground 5(i) by way of cross-appeal.

### **The issues**

25. Thus, there are two issues for determination by this Court on appeal:
  - (1) NS's appeal: Did the conditions under which NS was detained in the MCBS Unit at HMP Woodhill amount to "*removal from association*" within the meaning of rule 45 of the Prison Rules?
  - (2) SSJ's cross-appeal: Did the same conditions amount to an interference with NS's right to respect for private life under Article 8(1) ECHR?

### **(1) Did the conditions under which NS was detained in the MCBS Unit at HMP Woodhill amount to "*removal from association*" within the meaning of rule 45 of the Prison Rules?**

26. The first issue involves a question of construction of Rule 45 of the Prison Rules.

*Judge's ruling on construction*

27. Lewis J held that the phrase "*removal from association*" in Rule 45 meant "*to take away the opportunity for the prisoner to be able to interact with other prisoners outside his cell*". He said that the word "*association*" contemplated a prisoner not being locked in his cell but being able to interact with other prisoners outside his cell; and the use of the words "*removal from*" was in contradistinction to 'reduction of' or 'limitation of' (paragraph [41]).
28. Lewis J considered that this interpretation was reinforced by Rule 46. Under Rule 46, the SSJ may direct the "*prisoner's removal from association*" and "*his placement in a close supervision centre of a prison*". Under rule 46(3), a prisoner may "*resume association with other prisoners, either within a close supervision centre or elsewhere*". Accordingly, such a prisoner will no longer be subject to removal from association, as s/he can associate with other prisoners in the CSC (paragraphs [41]-[44]).

*The parties' submissions on construction*

29. Mr Squires QC's submissions on behalf of NS can be summarised as follows. First, prison authorities can only direct a prisoner's "*removal from association*" in accordance with Rules 45 or 46 of the Prison Rules. Second, an order for a prisoner's "*removal from association*" other than in accordance with the relevant rules is unlawful (*Padfield v. Minister of Agriculture, Fisheries and Food* [1968] QC 997). Third, the phrase "*removal from association*" in Rules 45 and 46 meant removal from 'normal' or 'ordinary' association with other prisoners, *i.e.* removing a prisoner from the mainstream of the prison but not denying the prisoner all interaction with other prisoners. A prisoner on the main wing of HMP Woodhill would typically have up to 8 ½ hours association on weekdays with over 90 other prisoners; whereas a prisoner on the MCBS Unit would be limited to 2 or 2 ¼ hours association with just a handful of other prisoners on the Unit. Fourth, accordingly, NS's transfer to the MCBS Unit amounted to a "*removal from association*" and was not made in accordance with Rules 45 or 46 and was, therefore, unlawful.
30. Sir James Eadie QC on behalf of the SSJ submitted, in summary, that on its true construction, the phrase "*removal from association*" in Rule 45 referred to removal from *all* association with other prisoners; and NS's transfer to the MCBS Unit did not, in fact, amount to a "*removal from association*" under Rule 45 because the MCBS Unit regime still permitted NS a degree of association with other prisoners.

Analysis

31. In my judgment, NS's construction is incompatible with the wording of the Prison Rules and the SSJ's construction of Rules 45 is to be preferred. The following points are pertinent.
32. First, the plain ordinary meaning of the phrase "*removal from association*" in Rule 45(1) means removal from all contact with other prisoners. The literal meaning of "*removal*" is to 'take away' (*c.f.* the Oxford English Dictionary). It does not mean 'reduction' or 'limitation' (as Lewis J noted at paragraph [41]). It is instructive that Rule 45(1) allows "*removal from association*" where it appears desirable that a prisoner should not associate with other prisoners "*either generally or for particular purposes...*", *i.e.* at all.

33. Second, the phrase “*removal from association*” is a synonym for segregation, *i.e.* the removal from *all* association with other prisoners. Lord Reed said in *R (Bourgass) v Secretary of State for Justice* [2016] A.C. 384 at [1]: “*These appeals are concerned with the procedure following when a prisoner is kept in solitary confinement, otherwise described as “segregation” or “removal from association”.* Similarly, in *R (Dennehy) v Secretary of State for Justice* [2016] EWHC 1219 (Admin) at [3], Singh J (as he then was) said: “[*T*]he Claimant has been in what is commonly called “segregation” (strictly “removal from association”). It is no coincidence that the same phrase “removal from association” is used in both Rules 45 and 46.
34. Third, Mr Squires QC is wrong to suggest that there is ‘little to separate’ the regimes under the CSC and the MCBS Unit. He said that both are forms of “*extreme custody*” as described by the Chief Inspector of Prisons in his report “*Close Supervision Centre System*” dated March 2015. There are, however, significant differences between the two regimes and they have different roles. The CSC is reserved for the most difficult, dangerous and disruptive prisoners and for some prisoners involves complete segregation, *i.e.* a prisoner being denied all contact with other prisoners. The MCBS Unit, however, is a step down from this. As the Directorate of High Security explained in the “*Managing Challenging Behaviour (MCBS) Policy Document*” dated February 2012: “*The MCBS bridges the gap between segregation units and the CSC system, providing a co-ordinated system for managing prisoners leading up to selection into, and following de-selection from, the CSC*” (p. 5). The MCBS Unit does not involve complete segregation. Lewis J accepted the evidence of Mr Stephen Waldron, the Population and Complex Case Manager for High Security Prisons Group, in this regard which he set out in paragraph [17] of his judgment:

“17. Mr Waldron explains that the regime on the Unit is aimed at normalising the days within the confines of a high security custodial setting. He explains that prisoners are unlocked from their cells in accordance with a published schedule. There is association time where prisoners are free to mix with other prisoners in the Unit and play board and card games or pool. There are two exercise facilities, one is a gym and the other is described as cardio-vascular exercise room. There is room for one prisoner at a time in one facility and two prisoners in the other facility. There is an exercise yard. The number of prisoners, and the number of groups, in the Unit varies. That has an impact on the amount of time that the prisoners can spend interacting with other prisoners. If there are two groups, half the total time allocated for association is given to each group. If there are three groups, 1/3 of the time for association is given to each group.”

35. Fourth, Mr Squires QC’s construction requires the reading in of the word ‘normal’ into Rule 45, *i.e.* “*removal from [normal] association*”. Mr Squires QC relied upon the language of the NOMS (National Offender Management Service) Policy set out in Prison Service Order 1700 dated September 2015 which refers to prisoners being “*denied normal association with the mainstream prison population*” (at paragraph 1.3). There is, however, no warrant for such a construction or insertion in Rule 45 of the Prison Rules. Rule 45 operates satisfactorily without additional words (see further below). Furthermore, it makes little sense to introduce a concept as a legal trigger which is lacking in certainty and will depend on the varying circumstances, including exceptional circumstances. As Lord Reed explained in *R (Bourgass) v Secretary of State for Justice* (*supra*) at [122], a prisoner has no private law right to enjoy the company of other prisoners and the extent of association allowed will vary:

“122. ...[T]he degree of association which he is in consequence permitted to have with other prisoners, will depend on an assessment by the prison authorities of a variety of factors, such as the number and characteristics of the prisoners held in the prison, the number of staff on duty, security concerns, disturbances in the prison, and other contingencies such as industrial action by prison officers. The extent of association may therefore vary from one prison to another and from one day to the next. It is thus dependent on the exercise of judgment by those responsible for the administration of the prison.”

36. Fifth, it is a basic canon of statutory construction that the words are intended to bear the same meaning where they appear in the same statutory or regulatory context provision. The word “*association*” appears three times in Rule 45 (in sub-sections 45(1), (3) and (5)) and twice in Rule 46 (in sub-sections 46(1) and (3)). Rule 46(3) provides: “46(3) *The Secretary of State may direct that such a prisoner as aforesaid shall resume association with other prisoners, either within a close supervision centre or elsewhere.*” There is no reason to suppose that the word “*association*” was intended to bear a different meaning in Rule 46(3) than in the preceding rules. Accordingly, on Mr Squires QC’s case, for consistency, the word ‘normal’ would have to be inserted so that Rule 46(3) read “*shall resume [normal] association with other prisoners*”. However, this makes no sense because, by definition, prisoners who are incarcerated in the special CSC segregation unit, cannot be said to have ‘normal’ association with the mainstream prison population.
37. Sixth, it is reasonably clear how Rule 45 is intended to operate. On the SSJ’s construction, both Rule 45 and Rule 46 were ‘authorisation’ provisions. Sir James Eadie QC submitted that this was clear from the words of Rule 45(1) (“*Where it appears desirable... the governor may arrange for the prisoner’s removal from association...*”) read in conjunction with Rule 45(3). He submitted that Rule 45(1) authorised a prison governor to hold a prisoner in conditions in which he did not associate at all with other prisoners; but Rule 45(3) gave the governor a wide discretion to arrange for a prisoner “*to resume association with other prisoners at any time*”. Rule 45 was, therefore, flexible and gave the governor (a) the discretion under Rule 45(1), if he deemed it “*desirable*”, to remove a prisoner from all association with other prisoners; (b) a discretion or option then to allow the prisoner to have some association or interaction with other prisoners “*at any time*”; and (c) a continuing discretion under Rule 45(1), if he deemed it “*desirable*” at any stage, to remove that prisoner from any association with other prisoners once again. He submitted that a similar analysis applied to Rule 46.
38. In my view, the SSJ’s construction is supported by the fact that Rule 45 expressly uses the language of ‘authorisation’ in several places, viz.:

“45(2) *Removal for more than 72 hours may be authorised by the governor in writing who may authorise a further period of removal of up to 14 days.*

(2A) *Such authority may be renewed for subsequent periods of up to 14 days.*

(2B) *But the governor must obtain leave from the Secretary of State in writing to authorise removal under paragraph (2A) where the period in total amounts to more than 42 days...*” (Emphasis added)

39. It is relevant also to note that both Rule 45 and Rule 46 have in-built checks and balances. There are rolling time limits for the periods for which a prisoner's "*removal from association*" may be authorised and the requirement for regular reviews. Under Rule 45, the initial removal may be authorised for up to 72 hours, and then for periods of up to 14 days. Under Rule 46, a prisoner's "*removal from association*" may be renewed monthly. Reviews are carried out by the Segregation Review Board and the Deputy Director for Custody.
40. On the SSJ's construction, therefore, Rules 45(1) and 46(1) are intended to be 'authorisation' provisions which continue to apply even in circumstances when it may no longer be said to continue to be "*desirable*" for the prisoner in question to be deprived of *all* association with other prisoners and some, albeit limited, association is permitted under Rule 45(3) or Rule 46(3). This could include, for instance, limited association in small groups of 2 or 3 outside the cells in the CSC or Segregation Unit (or even sharing cells).
41. I essentially agree. The SSJ's construction may not be consistent with all the wording of Rule 45 and Rule 46, or with the concession by Sir James Eadie QC in argument that the conditions of Rule 45(1) and Rule 46(1) have to be satisfied throughout the entire period that each Rule is said to apply. In my view, however, the SSJ's construction - which gives the word "*desirable*" in 45(1) and 46(1) a more fluid meaning (encompassing the idea of something which is generally desirable, while permitting some limited association in order to monitor and reflect improvements in the prisoner's state and situation) - is more consistent with the wording of Rule 45(1) and Rule 46(1) and a purposive interpretation of both Rules, as well as producing a pragmatic outcome consistent with operating a sensible prison regime.
42. Finally, I agree with Lewis J that it was not necessary or appropriate to have resort to *Pepper v Hart* [1993] AC 593 in this case (judgment, paragraph [53]).

*Summary on NS's appeal*

43. For all the above reasons, I hold that the SSJ's construction is correct. Accordingly, I would dismiss NS's appeal.

**(2) Did the same conditions amount to an interference with NS's right to respect for private life under Article 8(1) ECHR?**

*ECHR*

44. Article 8 of the ECHR provides as follows:

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

45. The SSJ cross-appeals Lewis J's finding that Article 8 (1) ECHR became engaged when NS was transferred to the MCBS Unit (see above).

*Judge's findings of fact*

46. Lewis J held on the facts in the context of Article 8:

*“Interference within the Meaning of Article 8(1) ECHR ...*

60. *The context in which the transfer arose is that NS was assessed as posing a risk to the safety and lives of others. He had been removed from association with other prisoners, and segregated, for about 11 months. The authorities judged that removal from association, or segregation, could end. NS was still assessed as posing risks and needed to be dealt with in the context of the strategy on managing challenging behaviour. That strategy provides a framework for the management of prisoners whose behaviour is dangerous, disruptive or particularly challenging to manage. In that context, NS was transferred from segregation to the Unit rather than being returned to a main wing. NS continued to be segregated, that is removed from association and kept alone in his cell, for the period from 2nd to 6th (or possibly 7th) November 2016. Thereafter, the arrangements in place for his management was broadly, as follows.*

61. *From the period from 7th November 2016, NS was allowed out of his cell for one hour each day for exercise, either alone or with one other prisoner. He was also allowed out of his cell for 30 minutes a day for 5 days a week to perform chores during which time he was alone and locked in the area where he performed the chores. He was also allowed to associate with other prisoners in the Unit. The precise amount of time varied, depending in particular, whether there was one or more groups of prisoners. The precise time allowed out of the cell for association would vary from 2 and ¼ hours on some days to about 1 and ½ hours on other days (see above at paragraphs 19 to 22). In addition, some periods of association have been reduced due to shortages of staff to supervise prisoners.*

62. *In addition, NS was not able to have access to any activities off the Unit from 2 November 2016 to 2 February 2017. On that day, he was granted permission to go to the library once a week to exchange books (he goes there with one other prisoner and officers). This involves time outside his cell of approximately 35 to 40 minutes once a week. On 17 March 2017, NS was given permission to attend Friday prayer services. The service lasts approximately 45 minutes and the total time spent outside the cell amounts to approximately 70 minutes. NS has been approved to attend education classes but has not yet commenced attendance.*

63. *In summary, therefore, the context is that restrictions are considered necessary to control the risk presented by NS. That has required him to be placed in the Unit with a small number of other prisoners. He has daily exercise and time outside his cell for domestic chores (Monday to Friday). He has limited opportunities for association with prisoners. He had no opportunity to participate in activities outside the Unit until 2 February 2017 (since which time he has had once-weekly access to the library). On 17 March 2017, he was able to attend*

*Friday prayers. In my judgment, the nature of the restrictions and their duration, together with the context in which they are imposed, do amount to an interference with the right to respect for private life and do need to be justified under Article 8(2) of the ECHR. The restrictions go beyond the restrictions and limitations inherent in lawful detention and need, therefore, to be justified.”*

47. Lewis J therefore found that the amount of time during each day when NS was locked in his cell and had no association with other prisoners often ranged between 20  $\frac{3}{4}$  and 21  $\frac{1}{2}$  hours. There is no challenge to the Judge’s findings of fact.

#### *Judge’s reasoning on Article 8*

48. Lewis J held that Article 8 was engaged in this case. His reasoning was threefold.
49. First, restrictions and limitations ‘ordinarily’ consequent on prison life and discipline during lawful detention may not amount to an interference with the detainee’s private life or family life (see *Nowicka v Poland* [2003] 1 FLR 417 at para 72 and *R (Munjaz) v Mersey Care NHS* [2006] 2 AC 148 at para 88 per Lord Hope) (paragraph [57]).
50. Second, however, restrictions which go beyond that may amount to an interference with the right respect for private life and may, therefore, require to be justified in accordance with Article 8(2) (see *Shahid v Scottish Ministers* [2016] AC 429 (where the existence of interference with Art 8(1) was conceded following 56 months of segregation)); and *R (Dennehy) v Secretary of State for Justice (supra)* where Singh J concluded that the prisoner’s right to respect for private life was interfered with following a period of two years segregation) (paragraph [58]).
51. Third, the nature of the restrictions and their duration in the present case, together with the context in which they are imposed do amount to an interference with the right to respect for private life and do need to be justified under Article 8(2) of the ECHR. The restrictions go beyond the restrictions and limitations inherent in lawful detention and need, therefore, to be justified (paragraph [63]). This conclusion is consistent with the House of Lords’ decision in *R (Munjaz) v Mersey Care NHS Trust (supra)* (paragraph [64]).

#### *Submissions*

52. The SSJ’s case was that Lewis J’s analysis was wrong for essentially three reasons.
53. First, because his conclusion was inconsistent with the House of Lords’ decision in *R (Munjaz) v Mersey Care NHS (supra)* which, properly understood, held by a majority (Lord Bingham at paragraph [32], Lord Hope at paragraph [81] and Lord Scott, at paragraph [101]), that Mr Munjaz’s Article 8 rights were not interfered with by the seclusion regime to which he was subject. The SSJ sought to argue that Lewis J was wrong to accept (at paragraph [64]) Singh J’s analysis in *R (Dennehy) v Secretary of State for Justice (supra)* (at paragraphs [130]-[158]) whereby Singh J held that Lord Scott had agreed with Lord Steyn and Lord Reed and they, therefore, formed the majority view that Article 8 was engaged.
54. Second, in any event, Lewis J’s conclusion in the present case was legally flawed because the position of patients with a mental illness being treated in hospital is different to that of prisoners convicted of serious terrorist crimes. As the House of Lords made clear in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532

at 537 G-H, by virtue of his conviction and custodial sentence a prisoner's rights are inevitably curtailed.

55. Third, there was no cogent evidence that the MCBS Unit restrictions had an adverse effect on prisoners' (NS's) "physical and psychological integrity" to such an extent as to engage Article 8(1) (in contrast to segregation and solitary confinement where there is extensive evidence of such an adverse impact, see *R (Bourgass and Hussain) v Secretary of State for Justice (supra)*).
56. As Sir James Eadie QC elegantly acknowledged, the tide of case law has, however, been drifting against him.

### Analysis

*Recent decision in R (AB) v. SSJ [2019] EWCA Civ 9*

57. We were referred to the very recent decision of *R (AB) (by his Mother and Litigation Friend CD) v. Secretary of State for Justice [2019] EWCA Civ 9* handed down on 18<sup>th</sup> January 2019. The case involved Feltham Young Offender's Institution and compliance with Rule 49 of the Youth Offender Institution Rules, where a young offender had been made subject to a "removal from association" order under that rule and placed on a 'single-unlock' regime. It was similarly argued in that case by the SSJ that Singh J was wrong to hold that he was bound by what he analysed was the majority decision in *R (Dennehy) v Secretary of State for Justice (supra)* or by *Shahid v Scottish Ministers (supra)* to hold that Article 8 was engaged. The Court of Appeal in *AB* (Lord Burnett LCJ, Moylan and Singh LJ) rejected the SSJ's submissions and endorsed the analysis and decision of Singh J in *R (Dennehy) v Secretary of State for Justice (supra)* as follows:

*"155. Mr Weisselberg submits that, in any event, article 8 was not engaged on the facts of this case. First, removal from association was monitored by professionals throughout the period of segregation, reviewed on a weekly basis, with no evidence that the removal had an adverse impact on AB's health. Secondly, the removal from association was partial, limited, and for a comparatively short period of time.*

*156. We do not accept those submissions for the Secretary of State. For essentially the same reasons as Singh J gave in the case of Dennehy we would hold that article 8 can in principle be applicable in cases of this type, in particular because removal from association with others constitutes an interference with the right to respect for private life as interpreted by the Strasbourg Court and by domestic courts. It therefore needs to be justified under article 8(2) .*

...

*159. Furthermore, we adopt his conclusion at [150]:*

*"The issue is one which has been recently considered by the Supreme Court [in Shahid ]. Although ... the point was the subject of concession, nevertheless Lord Reed expressly endorsed that concession and stated that it reflected the approach taken by the European Court in Munjaz . Furthermore, Lord Reed went on to deal at length with the*

*question of justification under article 8(2) . He would not have needed to do so if he not been of the opinion that article 8(1) was in principle applicable to seclusion of prisoners."*

*160. Furthermore, we consider that on the facts of the present case there was clearly an interference with AB's rights under article 8 . He was prevented from associating with others at Feltham in a way which would have been permitted if he had not been subject to the special regime which was regarded as being necessary in the unusual circumstances of his case.*

*161. However, for the reasons we have set out earlier when considering AB's appeal, we have reached the conclusion that the interference with his article 8 rights would have been justified under para. (2) of that article, since it was necessary and proportionate. Accordingly, it would have been lawful had it not been for the fact that it was not in accordance with the law."*

### *Summary*

58. Sir James Eadie QC acknowledged that, in the light of the Court of Appeal's recent decision in *R (AB) v. SSJ (supra)*, it was no longer open for the SSJ to argue that Singh J's analysis of *Munjaz* in *R (Dennehy) v SSJ (supra)* was wrong. He reserved the right, however, to do so in another place.
59. He confined the SSJ's argument to submitting that Lewis J was wrong to have concluded on the facts that the MCBS Unit restrictions placed on NS, which fell short of complete segregation, were sufficient to interfere with NS's Article 8 rights, particularly in the context of NS's serious offending and threats to prison officers. He further submitted that there was a distinction between cases involving detention for mental health reasons and detention for reasons of criminality (see above).
60. In my view, however, the Judge's above unchallenged findings of fact are effectively determinative of the matter. As stated above, he found that NS had been locked in his cell for between 20 <sup>3</sup>/<sub>4</sub> and 21 <sup>1</sup>/<sub>2</sub> hours a day for a period of over 4 <sup>1</sup>/<sub>2</sub> months from 2<sup>nd</sup> November 2016 to the hearing before him in mid-March 2017.
61. In a judgment of admirable thoroughness and clarity, Lewis J applied the correct principles to the facts and arrived at an answer which he was both entitled to, and right to, reach, namely that the restrictions to which NS was subjected under the MCBS Unit regime did sufficiently interfere with NS's right to a private life such as to engage Article 8(1). He went on to hold that such restrictions, although pursuant to a legitimate object and proportionate, were not in accordance with the law and were therefore not justified under Article 8(2). He held, however, that no damages would be awarded.

### *Summary on the cross-appeal*

62. For these reasons, in my view, the SSJ's cross-appeal should be dismissed.

**Conclusion**

63. In conclusion, therefore, for the reasons set out above, I would dismiss both NS's appeal and the SSJ's cross-appeal.

**LORD JUSTICE HAMBLÉN**

64. I agree.

**SIR TERENCE ETHERTON**

65. I also agree.