Neutral Citation Number: [2024] EWHC 2829 (KB)

Case No: KA-2023-000186

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HIGH COURT APPEAL CENTRE
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th November 2024

Before :

The Honourable Mrs Justice Tipples DBE

- -

Between :

Abdullah Ahmed Ali	**Appellant**
- and -	
Secretary of State for Justice	**Respondent**

- -
- -

Ms Eleanor Mitchell (instructed by **Broudie Jackson Canter**) for the **Appellant**
Mr Robert Talalay (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 16th July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 12 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Tipples DBE:

Introduction

1. This is an appeal against the order of HHJ Baucher sitting at the County Court in Central London made on 1 September 2023 in which she dismissed the appellant's claim and ordered him to pay the respondent's costs of the claim on the standard basis (not to be enforced save pursuant to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

2. The appellant's claim form identified his claim in these terms:

> "The claimant's claim is made pursuant to section 7 and section 8 of the Human Rights Act 1998 for violations of article 9 of the European Convention of Human Rights. The aforesaid claim arises from the defendant's conduct between 9 March 2014 and 19 August 2016, namely the failure to facilitate obligatory weekly Friday prayers on numerous occasions during the relevant period while the claimant was located in the High Security Unit (HSU) at HM Prison Belmarsh".

3. The relief sought by the appellant was:

   (1) a declaration that the respondent "unlawfully breached the [appellant's] human rights under article 9(1) of schedule 1 to the Human Rights Act 1998, pursuant to section 8(1) of the Human Rights Act 1998";

   (2) damages pursuant to section 8 of the Human Rights Act 1998; and

   (3) costs.

4. The trial of the claim took place before HHJ Baucher on 25 and 26 July 2023. The judge handed down her written judgment on 16 August 2023. The claimant was granted permission to appeal on 13 March 2024 on two grounds. A further third ground was added, without objection, at the start of the hearing on 16 July 2024.

5. The appellant's grounds of appeal are threefold:

   (1) the county court erred in concluding that the "prescribed by law" requirement in article 9(2) of the European Convention on Human Rights ("**ECHR**") had no application to this case. The court also erred in concluding that, if the "prescribed by law" requirement did apply, it was satisfied;

   (2) the county court erred in refusing to determine whether article 9 required the respondent to conduct an individual risk assessment of the appellant's attendance at communal worship in the main prison of HMP Belmarsh, where no alternative service was offered in the High Secure Unit of HMP Belmarsh ("**the HSU**"); and

   (3) if and insofar as the county court concluded that the respondent's positive obligations under article 9 of the ECHR were limited to establishing a system for facilitating Jumuah, it erred in doing so.

6. The court was provided with detailed skeleton arguments from each party in advance of the hearing, and assisted by oral submissions from counsel at the hearing.

7. The relevant facts are not in dispute, and were not in dispute before the trial judge. Likewise, there was no real issue between the parties as to the applicable law. The issue in dispute on the appeal was how that law applies to the particular facts of this case, and the findings of fact made by the trial judge.

Facts

8. The trial judge set out the factual background, together with her findings of fact, in detail in her judgment: see paragraphs 6 to 34, 42 to 55, 89 to 90, 92 to 94, 111 to 118, 123 to 129.

9. For present purposes, the facts can be briefly summarised as follows. In 2008 and 2009 the appellant was convicted of offences of conspiracy, including conspiracy to murder persons unknown, associated with a plan to detonate explosives on a transatlantic flight. He was sentenced to life imprisonment with a minimum term of 40 years.

10. In March 2014 the appellant was transferred to the HSU at HMP Belmarsh, and he was held there for a period of over two years. The HSU is a special unit within HMP Belmarsh and holds prisoners classified as "Category A" or "High Escape Risk" (and the appellant never challenged his transfer to the HSU, either by way of complaint or judicial review). The HSU is, in effect, a prison within a prison. This is because the prisoners in the HSU are held separately from all other prisoners at HMP Belmarsh.

11. Jumuah is a communal prayer service attended by Muslim men on a Friday, which is the most important day of the week in Islam. The appellant is a practising Muslim and believed the attendance at Jumuah to be a requirement of his faith. At HMP Belmarsh the respondent makes arrangements for a Jumuah service to be held in the HSU and another Jumuah service in the other or main part of the prison (which the appellant refers to as "**the main prison**"). The Jumuah service can only take place if there is an Imam to give a sermon and at least three congregants to pray behind him. In this regard there were three relevant policies in place: two nationally applicable Prison Service Instructions (PSI 51/2011 entitled "*Faith and Pastoral Care for Prisoners*" which was in force until 31 May 2016 ("**PSI1**"), when it was replaced by PSI 05/2016 ("**PSI2**")), and a local policy (referred to as Operating Instructions) specific to the HSU which provided that:

> "[6.9.3] Religious services must be held within the HSU for Exceptional Risk and High Risk Category 'A' Prisoners.
>
> [6.9.4] Category 'A' Prisoners located within the HSU will not attend services held outside the Unit unless approved by the Director of High Security Prisons".

12. In the eight month period between 18 December 2015 and 15 August 2016 there were fourteen occasions when the Jumuah service in the HSU did not take place (although on 89% of occasions when the appellant was in the HSU, Jumuah went ahead as planned). The fourteen occasions the Jumuah did not take place was because, amongst other things, there were a low number of Muslim prisoners in the HSU or the Imam was on sick leave.

The appellant asked to attend the Jumuah in the other part of the prison outside the HSU, and this request was refused. The appellant maintains that there was no proper basis for this refusal, particularly as there was no individual risk assessment. In the autumn of 2016 the appellant was moved from HMP Belmarsh and is now held at HMP Full Sutton.

13. Based on these facts the appellant maintains that his rights under article 9(1) of the ECHR have been breached. The respondent accepted at trial that: (a) the appellant had a sincere belief in Islam and that communal prayer is a manifestation of that belief protected by article 9 of the ECHR; and (b) the failure by the respondent to provide the Jumuah service in the HSU on fourteen occasions engaged those rights. However, the respondent did not accept those rights had been breached or that the appellant was entitled to any of the relief sought.

14. It is well established that prisoners during their imprisonment continue to enjoy all fundamental rights and freedoms, save for the right to liberty: see *Korostelev v Russia* (2022) 75 EHRR 17 at [57]. Article 9 of the ECHR – Freedom of thought, conscience and religion - provides:

> "[1.] Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> [2.] Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

15. Article 9, as with other convention rights, gives rise to two related sets of obligations on the state, which can be broadly categorised as "positive" and "negative" obligations. The "positive" obligations are obligations to take "reasonable and appropriate measures to secure" article 9(1) rights as required by article 1 of the ECHR: see *Jakobski v Poland* (2012) 55 EHRR 8 at [47] ("***Jakobksi***"); *Yalcin v Turkey (No 2)* (2023) 76 EHRR 23 ("***Yalcin***") at [29] to [30]. The negative obligations are obligations to refrain from limiting or interfering with article 9(1) rights unless the limitation is justified under article 9(2). Justification has two key components: the "prescribed by law" requirement, and the requirement of necessity and proportionality (or "fair balance"). The principles governing positive and negative obligations are recognised as "broadly similar" (see *Jakobski* at [47]). The appellant maintains that the relationship between the negative and positive obligations arising under article 9 is central to his grounds of appeal.

The trial judge's decision

16. The judge identified that she had to determine the following issues (and there is no dispute that the judge correctly identified the issues in dispute), namely:

    (1) Should the case be considered by reference to article 9(1) or by reference to article 9(2)?

(2) Whether, if there was any interference with his rights under article 9, it was prescribed by law.

(3) Whether the defendant was in breach of its positive obligation under article 9.

(4) Whether any interference was reasonable and proportionate.

(5) What relief should be awarded for any breach of article 9.

17. In relation to these issues the judge determined that the case should be determined by reference to article 9(1) and her conclusion on this issue was set out at paragraphs 69 to 71 of her judgment, where she said this:

> "[69.]Looking at this case objectively it is clear this case is all about the defendant's facilitation of the claimant's rights. In that respect the case is entirely on all fours with *Jakobski* and *Yalcin* … In this case the claimant is seeking to manifest his religion by access to corporate prayer. That can only happen by the facilitation or action on the part of the defendant. It is a positive act, not the removal of any right. There was no deprivation; to the contrary the defendant was endeavouring to facilitate Jumuah.
>
> [70.] …In my view a review of the authorities establishes that a positive obligation case is assessed by reference to the state's obligations to take measures to secure an individual's rights contained in article 9(1). The facts in the case of *Yalcin* could not be more apposite. The instant case is not one where the defendant has sought to take away or reduce the claimant's rights. The operation of Jumuah led by an Imam could only occur through the actions of the defendant. The defendant was seeking to facilitate that.
>
> [71.] I find that Ms Mitchell's approach would be to manipulate what is truly a facilitation case into a restriction case. I am satisfied the approach the court should adopt should be by reference to the defendant's positive obligation..."

18. The judge held that, in the light of her findings, it was unnecessary for her to consider the second issue, namely the appellant's case on "the prescribed by law requirement" (paragraph 72). However, she did go on to consider this in the event she was wrong on the first issue and there had been an interference with the appellant's rights under article 9(2). Here the judge considered the relevant policies in place, namely PSI 51/2011, PSI 05/2016 and the HSU's Operating Instructions, and concluded that there was nothing in these policies which permitted the appellant to leave the HSU and attend Jumuah in another part of HMP Belmarsh in the event that the Jumuah in the HSU could not take place. The appellant advanced two arguments on this issue, both of which were rejected by the judge: see paragraphs 73 to 97 of her judgment. Accordingly the judge concluded that, if the "prescribed by law" requirement did apply, it was satisfied.

19. The judge held that the respondent was not in breach of its positive obligation under article 9(1) and her findings are set out at paragraphs 115 to 118:

> "[115.] I am satisfied that the defendant had a system in place. It was not perfect or "ideal" but in the main it operated well. It is not a fair reflection on the defendant's system to say that the claimant was prevented from attending Jumuah on some 40% of Fridays. I consider a more accurate representation of whether the claimant's article 9

rights were breached is to consider the entirety of his period within the HSU; over that period, he was able to attend Jumuah 89% of the time. I am satisfied that as in [*R (*] *Soltany* [*) v SSHD [2020] EWHC 2291 (Admin)* ("***Soltany***")] and *Wojciechowski* [*v Poland (26 June 2018)*] a system, albeit imperfect, does not render the defendant in breach of article 9.

[116.] Further, if one breaks down the period, as Mr Talalay suggests, then I consider there is force in his submission that until June 2016 the defendant could not have foreseen that there would be an issue with the provision of Jumuah. I am not persuaded that because the defendant was having to supplement numbers on occasions until then that they should have been aware that there was something intrinsically wrong with the system. Further beyond that date the defendant expressly stated in is PSI that Jumuah would not be offered if there were "fewer than three Muslim prisoners".

[117.] At the end of May and early June 2016 Mr Osman refused to attend Jumuah and an Imam had a heart attack. I am satisfied that these index events are not such as to render the defendant in breach of its article 9 obligations.

[118.] I am satisfied there was no breach of the defendant's positive obligation when Jumuah was not able to be offered for reasons beyond its control."

20. The judge then went on to consider the fourth issue, namely whether there were any other proportionate measures that could have been undertaken to provide Jumuah, in case she was wrong on her determination of the earlier issues. It was in relation to this issue that the appellant argued that he should have been able to attend the Jumuah in the other part of HMP Belmarsh, and outside the HSU, in the circumstances which had arisen. This argument was dismissed by the judge in these terms:

"[123.] … In my view such a submission was in any event totally divorced from reality. It could not be more evident that it would have been highly inappropriate to release the claimant from the HSU to the main prison for the purpose of a Jumuah service. Such a course of action would not have reflected the balance required between the claimant's article 9 rights and the rights of others."

21. Then, at paragraph 129, the judge concluded that she was satisfied that the respondent had taken all reasonable and appropriate measures to secure the appellant's article 9 rights and, in the light of her findings, the appellant was not entitled to any relief on the claim. Nevertheless, the judge held that, if the appellant had been entitled to any relief (which he was not), she would have made a non-pecuniary award of £1,000.

The relevant law

22. The appeal court will allow an appeal where the decision of the lower court was – (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceeds in the lower court: CPR Part 52.21. Further, an appellate court must not interfere with a trial judge's findings of fact, unless it is compelled to do so. That applies not only to findings of primary fact but also to the evaluation of those facts, and the inferences to be drawn from them. An appellate court will interfere with findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified. This has been spelt

out on a number of occasions in decisions of the House of Lords and Supreme Court (see, for example, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at paras [58] to [67], per Lord Reed; and the summary of authorities in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5 at paras [114] to [117], per Lewison LJ).

23. This is a case where the appellant maintains that the judge's decision was wrong as a matter of law. There is no challenge to any of the judge's findings of fact.

24. Before turning to the grounds of appeal, it is important to remember that the first issue at trial the judge was required to determine was whether the case should be considered by reference to article 9(1) or article 9(2). She determined that, on the facts article 9(1) applied, and there was therefore no need for her to consider the appellant's case on the "prescribed by law requirement". However, the judge went on to do so in the event her conclusion on the first issue was wrong. It is in this context that the appellant has had to add the third ground to his grounds of appeal as, without any challenge to the judge's determination of the first issue, it is difficult to see how the appeal can get off the ground.

25. The third ground therefore needs to be considered together with the first ground.

Grounds of appeal

Ground 3 and 1: The judge's conclusions in relation to article 9(1) were wrong

The appellant's submissions

26. The appellant contends that the judge was wrong to conclude that "looking at the case objectively it is clear that this case is all about the defendant's facilitation of the claimant's rights" and that article 9(1) applied to this case: see paragraphs 69 to 71 of her judgment. Accordingly, the judge was wrong to conclude that the respondent's positive obligations were limited to a system for establishing Jumuah (**Ground 3**) and, as to the "prescribed by law" requirement, the judge was wrong to conclude that it had no application to the appellant's case (**Ground 1**).

27. Ms Mitchell for the appellant made a number of main points in support of this submission (which were set out at paragraphs 32 to 39 of her skeleton argument, and expanded on in her oral submissions).

28. First, the judge's analysis that the case concerned a positive act, namely the operation of Jumuah led by an Imam (which could only occur through the actions of the respondent), failed to take into account that on each of the fourteen occasions when there was no Jumuah in the HSU a quorate Jumuah service was being operated in the main prison. The appellant argues this is a "critical factor" and the respondent – in reliance on para 6.9.4 of the HSU's Operating Instructions – prohibited him from attending the Jumuah in the main prison. Paragraph 6.9.4 provided that: "Category 'A' Prisoners located within the HSU will not attend services held outside the Unit unless approved by the Director of the High Security Prisons". Therefore, although the respondent may have been "endeavouring to facilitate" the Jumuah in the HSU the respondent was, at the same time, actively preventing him from attending the Jumuah in the main prison, which was the only service available. This, says

the appellant, was a prohibition on his freedom to manifest his religion. The appellant maintains that on the fourteen occasions where no Jumuah was offered in the HSU, the direct consequence of this prohibition was that he was unable to participate in any Jumuah at all and, but for that prohibition, he would have been able to participate in the Jumuah in the main prison. Thus, the appellant argues, the prohibition operated as a limitation on his ability to manifest his religion in communal worship, which attracted the "prescribed by law" requirement under article 9(2).

29. Second, the cases of *Jakobski*, *Soltany*, *Kovalkovs v Latvia* (35021/05) 31 January 2012 ("***Kovalkovs***") and *Yalcin*, which the judge considered at paragraphs 59 to 69 of her judgment, do not lead a different conclusion. This is because the appellant maintains that the facts of these cases are not about prohibition, which is distinct from facilitation.

30. Third, in prison cases where this element of prohibition has been present, the European Court of Human Rights has recognised the existence of a limitation attracting the "prescribed by law" requirement: see, for example, *Poltoratskiy v Ukraine* (2004) 38 EHRR 25, [163]-[171]. Ms Mitchell argues that the appellant's case is directly analogous as there was a distinct element of prohibition which was not "prescribed by law".

31. The appellant argues that the prohibition was not prescribed by law because the respondent failed to follow its own policies, namely PSI1 (paragraphs 4.2 and 4.3) and the HSU's Operating Instructions (6.9.4), and specifically failed to observe the safeguards in paragraph 4.3 of PSI1. The appellant says that the policy framework was present to enable him to attend the Jumuah in the main prison. However, the respondent failed to give any consideration so that he could do so and, as no consideration was given, then no decision was ever taken to formally exclude him. The consequence of this is that, when a prison authority has limited a person's convention rights and not followed the relevant policies, any such limitation is not prescribed by law: see *Malcolm v Secretary of State for Justice* [2011] EWCA Civ at 1538 at [42]. Further, the appellant maintains that even if the respondent had followed the published policies, the policy framework did not have the "quality of law" required by article 9(2). This is because the respondent is unable to show the policies governing the alleged prohibition on his attendance at the Jumuah in the main prison were "accessible, foreseeable and sufficiently clear" and, in particular, because paragraph 6.9.3 to 6.9.4 of the HSU's Operating Instructions were never shown or read to the appellant.

The respondent's submissions

32. Mr Talalay for the respondent submits that the starting point on this appeal is to identify what the judge decided. In short, he maintains that that is the beginning and the end of this appeal. This is because the judge identified and applied the correct legal framework and, having done so, determined that this case was governed by article 9(1). Having done so, she determined that it was unnecessary for her to consider the appellant's case on the prescribed by law requirement: see paragraphs 71 and 72 of the judgment. The judge then considered the way in which the respondent fulfilled his obligations to facilitate his right to communal prayer. She concluded that the respondent had a system in place which was not "perfect or "ideal" but in the main it operated well" and, as a result, the defendant was not in breach of article 9: see paragraphs 115 and 118 of the judgment. There is no error of law in the judge's approach and she evaluated undisputed facts in reaching her conclusion

and, as a result, her decision cannot be challenged on appeal. Further, the judge was well aware that there was a Jumuah provided in the main prison. However, on the facts she concluded that the appellant could not be released from the HSU into the main prison for the purpose of a Jumuah services as that "would not have reflected the balance required between the claimant's article 9 rights and the rights of others": see paragraph 123 and 129 of the judgment. There is therefore no basis on which the judge could or should have allowed the appellant out of the HSU in order to attend the Jumuah in the main prison which is the main thrust of the appellant's appeal.

Discussion

33. First, it is important to remember that this is a case based on undisputed facts where the judge made a number of findings. Those findings are not, and cannot be, challenged on this appeal.

34. Second, there is no dispute that, if communal or congregational Friday prayers are to take place in a prison, that can only happen through the positive intervention of the state. This has, most recently, been set out in *Yalcin*, a decision of the ECHR. In that case the applicant was held in High-Security prison and he asked the prison to offer congregational Friday prayers in a room at the prison to fulfil one of the requirements of his religion, Islam. The prison refused on the basis, amongst other things, that it was a High-Security prison and that there were risks in collective gatherings. The applicant appealed and the ECHR held that there had been a violation of article 9. The ECHR explained:

> "[29.]It is common ground that the applicant was able to perform individual acts of worship in his cell and to obtain and possess books or other written material relating to his religious beliefs. While it is true that the Government argued that the applicant could have practised congregational prayers in his own cell, given that he had been housed with three other persons at the material time, the Court is unable to subscribe to that argument, given that it is not possible to ascertain whether the applicant's cell mates were also willing to offer congregational Friday prayers.
>
> [30.] Furthermore, the Court observes that the applicant's complaint centred on the authorities' refusal to make the necessary arrangements in the Diyarbakir D-type High-Security Prison enabling him to offer congregational Friday prayers with other inmates in a separate place allocated for that purpose. Viewed from this angle, the Court considers that the present case lends itself to an assessment of the positive obligations of the State under article 9 of the Convention (see *Kovalkovs v Latvia* (dec.) no. 35021/05, [62], 31 January 2012). The Court will therefore seek to ascertain whether the domestic authorities struck a fair balance between the competing rights and interests, that is, on the one hand, the applicant's freedom of collective worship in the Diyarbakir D-type High-Security Prison and, on the other hand, the public order interests …, by adducing relevant and sufficient reasons for refusing the applicant's request relating to Friday prayers." (underlining added)

35. Third, on the facts of this case the judge found that the appellant was seeking to manifest his religion by access to corporate prayer and that could only happen by the facilitation or action on the part of the respondent, which is a positive act. These findings of fact are

unchallenged and, as a result, the judge determined this was a case to which only article 9(1) applied.

36. The appellant seeks to criticise these findings on the basis that the judge overlooked the fact that, when there was no Jumuah service in the HSU, there was a Jumuah being operated in the main prison and the appellant was prohibited from attending it by dint of paragraph 6.9.4. of the HSU's Operating Instructions. This criticism is without foundation. The judge was very well aware that Jumuah was provided in the main prison. However, the appellant was located in the HSU, a separate prison in HMP Belmarsh, with no entitlement or right to leave the HSU and enter the main prison, whether to attend Jumuah or for any other reason. Further, the judge specifically found, having heard and accepted the evidence of Governor Louis, that "the claimant was not permitted to attend the main prison service for Jumuah without the express authorisation of the Director which Governor Louis said would not have been forthcoming given the nature of the claimant's office and the reason he was transferred to the HSU at Belmarsh" and that "it would have been highly inappropriate to release the claimant from the HSU to the main prison for the purpose of a Jumuah service": paragraphs 94 and 123.

37. In these circumstances the appellant's argument that, in effect, the judge made inadequate findings of fact and that the respondent "prohibited" him from attending the Jumuah in the main prison, when there was no Jumuah in the HSU is, in my view, wholly contrived. The fact there was a Jumuah in the main prison is and was irrelevant. The appellant had no right to attend a Jumuah outside the HSU, whether in the main prison or anywhere else. He was a category A prisoner assigned to the HSU, and had to remain in the HSU, and the appellant's transfer to the HSU was never challenged.

38. I therefore agree with Mr Talalay that there is no basis on which the judge can be criticised for approaching the issue before her by reason of the positive obligations under article 9(1). Rather, she was correct to do so and that meant that there was no need for her to consider any of the appellant's arguments under article 9(2). There is and was no "prohibition" as alleged by the appellant and all those arguments fell by the wayside.

39. Fourth, having determined that this was a facilitation case and that article 9(1) applied, the next step was for the judge to assess the positive obligations of the respondent under article 9(1) and consider whether the respondent had fulfilled those obligations by striking a fair balance between the competing rights and interests of the individual and the community as a whole. The test here is whether the state, in this case the respondent, had put in place "reasonable and appropriate measures" to secure the individual's rights, and regard must be had to the fair balance I have just identified. It is clear that the state enjoys a "certain margin of appreciation in determining the steps to be taken in compliance with the Convention": *Kovalkovs* at [47], *Jakobski* at [47] and *Soltany* at [367] to [368]. It is also clear that the right to practise one's religion under article 9(1) is not breached in every case in which the circumstances in which an individual can practice his or her religion are sub-optimal: see *Soltany* at [368] to [369], per Cavanagh J. This means that there is no breach of article 9 where the right to pray is not offered to all prisoners on every possible occasion: see *Wojciechowski* at [69].

40. The judge heard oral evidence from Reverend Jacquet and also from Governor Louis (the then Deputy Governor and now the Governor of HMP Belmarsh). Having heard the evidence at trial the judge determined on the facts that the respondent had a system in place

which, in the main, operated well. She recognised that it was not a perfect system but, in the entirety of the time that the appellant had been in the HSU, he was able to attend Jumuah 89% of the time. The judge concluded that as there was a system, albeit imperfect, the respondent was not in breach of article 9: paragraph 115. The judge also concluded that, when the Jumuah could not be offered for reasons beyond the respondent's control, there was no breach of the respondent's obligations under article 9(1). The judge thereby rejected the appellant's argument that, because there has been 14 occasions when Jumuah had not been provided in the HSU, the respondent had failed to comply with its positive obligations under article 9(1). Those were the judge's decisions having evaluated the facts and applied the correct law. They are unimpeachable.

41. Fifth, those conclusions meant that the appellant's claim had failed and fell to be dismissed. Again, the judge's conclusion here was correct: paragraphs 71, 72, 123 and 129. The judge quite properly considered the fall-back position, namely what if she was wrong in relation to the conclusions she had reached as to the respondent's obligations under article 9(1). It is obvious that, on this appeal, the appellant is seeking to challenge the judge's conclusions on this fall-back position. That is a hopeless approach, given the undisputed findings of fact made by the judge and her conclusion that the respondent had positive obligations under article 9(1) to provide facilities for corporate worship for the respondent.

42. The judge was therefore correct to dismiss the appellant's claim for the reasons she gave.

Ground 2: Alleged requirement for individual risk assessment of appellant's attendance at Jumuah at HMP Belmarsh outside HSU

43. The appellant's arguments were set out at paragraphs 67 to 74 of Miss Mitchell's skeleton argument, and Ms Mitchell added briefly to these in her oral submissions.

44. The appellant submits, amongst other things, that the respondent's positive obligations under article 9(1) required an individual risk assessment to be prepared in relation to the appellant's attendance at the Jumuah in the main prison, before he was prohibited from attending that Jumuah when there was no Jumuah within the HSU. No such assessment was carried out until summer 2016. The appellant submits that, without such a risk assessment, it was neither necessary nor proportionate to prevent him from attending the Jumuah in the main prison, on the days when there was no Jumuah in the HSU.

45. The respondent submits that the appellant had no free-standing right to an individual risk assessment as a substantive right under article 9(1) and the judge was correct to reject this argument as otiose.

46. This ground does not take the appellant anywhere. The judge found as a fact that the respondent had a system in place to provide Jumuah in the HSU which, although not perfect, complied with its positive obligations under article 9(1). The appellant was able to attend the Jumuah in the HSU, which was available to him 89% of the time he was held there. Further, there was no requirement for an individual risk assessment in order that he could do so. When there was no Jumuah in the HSU, the appellant had no right or entitlement to attend the Jumuah in the main prison. Rather, that needed the express authorisation of the Director of the High Security Prisons, and the judge accepted the evidence of Governor Louis that such authorisation would not have been given for the

appellant given the nature of his office, and the reason he had been transferred into HMP Belmarsh (paragraph 94). It would have been pointless for the respondent to carry out an individual risk assessment for the appellant in the circumstances he suggests, and there was no basis under article 9 requiring the respondent to do so. This ground of appeal therefore also fails.

Conclusion

47. The appeal is dismissed.