

Summary of Napier Barracks Judgment

Introduction

1. On 3 June 2021, the High Court handed down judgment in *R (NB & Ors) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), finding that the Home Secretary's decision to use Napier Barracks to accommodate destitute asylum seeking men was unlawful and irrational. In particular, the Court found that in fundamental ways, the arrangements and conditions in which asylum seekers were held, posed significant risks that their physical and mental health would be harmed.
2. The purpose of this Note is to provide background to the decision to use Napier Barracks, the Court's findings on the barracks' arrangements and conditions, the Court's findings in law and where matters stand now.

Background

The Barracks (Paragraphs 38-41 of the Judgment)

3. The Barracks are surrounded by an 8-foot fence which, until very recently, was topped by barbed wire. The Barracks comprise two rows of eight red brick, single storey, accommodation blocks. There are also administrative buildings on site, including a dining hall with capacity for up to 200 people.
4. The Barracks have the capacity to accommodate 523 people but, for the purposes of accommodating asylum seekers, capacity was reduced to 431 purportedly to allow for social distancing. It is difficult to get an absolutely accurate picture from the evidence but, in broad terms, 15 of the 16 blocks could accommodate up to 28 people. The blocks are divided into two dormitories, which each housed about 14 men. The 28 men shared toilet and bathroom facilities, which, at the time of *NB and Ors*, consisted of two toilets, two communal shower cubicles (with two shower heads in each of the cubicle) and a bank of urinals.
5. Prior to the repurposing of the barracks for use as accommodation for destitute asylum seekers, it was used from time to time by the Ministry of Defence for training exercises. According to an MOD response to a Freedom of Information Act request, the barracks were in reality used on a very ad hoc basis for military exercises on 12 occasions in the 12 months prior to the barracks being repurposed for use as asylum accommodation. On only one occasion did 320 military personnel stay in the barracks and only for 2 nights; on three occasions, about 150 stayed in the barracks, and for a maximum of 10 nights. The maximum length of stay on a given occasion in the barracks was 29 days, and that was only with 73 military personnel.

Decision to Repurpose the barracks as asylum accommodation (Paragraphs 45-72 of the Judgment)

6. In September 2020, the Home Secretary approved the use of the Napier military barracks to house around 400 single male asylum seekers. The decision was said to be precipitated by a substantial increase in demand for asylum accommodation owing to the cessation of evictions during the pandemic. Although hotel accommodation had been used to address the issue, according to evidence filed by the Home Secretary, civil servants were given a “very clear steer to eliminate the use of hotels for contingency accommodation”.
7. Prior to the decision to repurpose the barracks, Home Office officials were warned by Public Health England that communal open dormitory-style accommodation in the barracks would not be suitable in the midst of the coronavirus pandemic, and the government's own efforts to curb covid-19 transmission by introducing the 'rule of 6' banning gatherings. However, the Home Office disregarded that warning. The Ministerial Submission dealing with this is at paragraphs 65 to 70 of the Judgment. Of particular note, the submissions stated that instead of adhering to the public health warning about the use of the barracks, the Home Office would introduce quarantining of residents prior to transfer to the barracks, bubbling of residents in the barracks and other measures to prevent mixing of residents between blocks. None of these were actually implemented as the evidence disclosed in the *NB and Ors* proceedings showed.
8. Although the original proposal was for mixed use of the barracks, the MOD only agreed to its repurposing on the basis that it would only house single men, not families or women and children. A suitability assessment criteria was introduced, which was intended to be used to identify single male asylum seekers who should not be accommodated in the barracks because of their particular circumstances, including their mental or physical health or other vulnerabilities arising from experiences before coming to the UK, such as torture, serious ill-treatment and human trafficking / modern slavery.
9. The first men moved into the barracks on 22 September 2020. By 1 October 2020 there were 155 residents, and the numbers rose to a peak of 414 in mid-November 2020. At the time of the Covid-19 Outbreak in the barracks in mid-January 2021, there were around 380 residents on site. Residents were not told how long they would be in the barracks.

Accommodation arrangements in the Barracks (paragraphs 73-83 of the Judgment)

10. The evidence considered by the Judge showed that:
 - a. The site was overcrowded and felt to residents like a prison
 - b. The environment was reminiscent for the residents of previous experiences of detention and torture
 - c. Canteen facilities were insufficient, accommodating 80 at most, and meal times were not staggered;
 - d. The dormitories lack any privacy and are noisy, with centrally controlled strip lighting, leading to disturbed sleep for residents;

- e. The dormitories are dirty and not cleaned properly or frequently and were poorly ventilated because the windows were not opened;
- f. Shower facilities were inadequate for the numbers accommodated and frequently broken or unusable, dirty or unsanitary;
- g. Shower facilities in the dormitory blocks are communal, with four shower heads in each. They do not have lockable doors. There is no privacy for the men using them, which was particularly humiliating for those with visible scarring from torture;
- h. The shower and toilet facilities were filthy, with visible and significant mould accumulation on the ceilings of the shower rooms caused by poor ventilation, broken pipes, non-functioning toilets and other plumbing issues. There were additional portable facilities outdoors but were not in use until November 2020 and were not always functional;

Fire Safety (paragraphs 95-114 of the Judgment)

- 11. The accommodation arrangements were unsafe owing to the excessive use of combustible wooden partitions in the dormitories, pipes and cables not being fire stopped, fire detectors not correctly sited, and emergency doors being secured in a manner which prevented them from being easily and immediately opened.
- 12. No fire safety inspection was carried out until 24 November 2020, over two months after Napier began operating. That inspection identified fire safety risks requiring remedial action, noting that: *“the failure to ensure that the premises and any fire precautions equipment are maintained in an efficient state, in efficient working order and in good repair has resulted in a consequent failure to ensure that relevant people are appropriately protected from serious risks.”*
- 13. The inspection identified a number of fire risks arising from the use of dormitory accommodation, including combustible materials (sheets used for privacy) in shared spaces, smoking within residential blocks, and no effective fire safety measures in place. A number of measures identified serious risk, including six serious risk areas where no remedial measures were planned.
- 14. The overall assessment was that the Napier accommodation presented a high fire safety risk, requiring immediate interim measures and full controls within 3 months of the assessment. Despite that assessment, remedial actions do not appear to have been carried out until after the fire of 29 January 2021 and were still ongoing at the beginning of March, at which point, fire doors had not yet been repaired and residents were still smoking in the dormitory blocks.
- 15. The ICIBI/HMIP report noted *“serious concerns about fire safety at Napier that had not been fully addressed”* even at the time of the inspection on 15 February 2021.

Covid-19 Outbreak (paragraph 115-125 of the Judgment)

16. On 15 January 2021, six residents tested positive for Covid-19. At this stage there were 381 residents on site. A letter was written to all residents which told them that they should not leave the site under any circumstances and this was reiterated to them orally through interpreters where necessary.
17. On 17 January 2021, the first mass testing of residents was carried out and this produced 123 positive results out of 234 tests. On 19 January 2021, 289 tests produced positive results for 128 residents and 9 staff. The staff included 5 of the cleaners and 2 catering staff. There were 100 residents who tested negative and other results were inconclusive or awaited. 92 residents were refusing to take the test.
18. An Outbreak Control Group ("OCG") led by Kent County Council Public Health Team was set up and there was an increase in the number of multi-agency forum meetings to manage the situation. These meetings were led by Mr Roy Millard, Head of Partnership at the South East Strategic Partnership for Migration ("SESPM") and the forum included representatives of Kent Police, NHS England and local health care providers. A number of the members of these bodies were very critical of the way in which the known risk of Covid-19 infection had been managed or, rather, not managed. Key points which emerged from documents disclosed in the proceedings were found by the Judge to be as follows (paragraph 118 of the Judgment):
 - a. Gail Locock, Director of Infection Prevention and Control at Kent and Medway Clinical Commissioning Group carried out an inspection and prepared a report dated 20 January 2021. At a SESPM meeting that day she expressed the view that the outbreak had been "inevitable" given the number of people, their living conditions and the arrangements on site, and given the lack of any effective measures on site to address the risk of infection.
 - b. There were residents who had tested positive in every single block and too many people in each block to allow adequate social distancing and prevent the spread of infection. In addition to this, there was not enough space on site to allow people to move around safely. "Nowhere on the site [was] Covid secure".
 - c. There was a number of clinically vulnerable people on site. The age range of the residents was 19 to over 60 but there were also people who were clinically vulnerable because of particular conditions.
 - d. There were high levels of anxiety amongst residents which were exacerbated by the fact that they were not permitted to leave site.
 - e. Given the numbers on site and the numbers of infections, the only way forward was to transfer substantial numbers of residents out of the Barracks.
19. Between 23 and 28 January 2020, about 103 residents were moved out of the Barracks. That still left around 270 in the barracks.
20. The six claimants who brought the claims in *NB and Ors* were among the residents who were not moved out of the barracks during this period of time.

Findings by the High Court

21. The High Court found that

- a. the dormitory style accommodation, with 24 men to a block, the filthy and unhygienic state of the limited communal toileting facilities, the lack of privacy, and the constant noise and commotion in tight communal living quarters contributed significantly to the deterioration in the mental and physical health of residents housed at the barracks.
- b. in repurposing the barracks for asylum support purposes, the Home Secretary intentionally disregarded, without reason, crucial Public Health England advice against doing so, and failed to even implement the measures she considered necessary for the health and protection of destitute asylum seekers within the barracks.
- c. the effect of these fundamental failures meant that *“it was virtually inevitable that large numbers of residents would contract Covid-19, a disease which was capable of causing hospitalisation, long-term harm and / or death.”* The Covid-19 outbreak in the Barracks, which ran from mid-January to early March 2021, infected more than 120 residents.
- d. during the Covid-19 outbreak, the residents who remained in the barracks were prevented from leaving the barracks, were not separated on the basis of whether they tested positive and the mixing of residents exacerbated the outbreak. By restricting the residents’ movement, the Home Secretary also acted unlawfully in effect imprisoning them;
- e. the failure to address the serious fire risks identified in the Crown Premises Fire Safety Inspectorate’s report mean that there was no adequate protection in place for asylum seekers against serious risks of fire;
- f. despite accepting that the Barracks were not suitable to accommodate vulnerable asylum seekers, the Home Secretary failed fundamentally to put any reasonable system in place that was capable of the most basic inquiries to ensure that no asylum seeker who was vulnerable was allocated to Barracks accommodation.
- g. the Home Secretary also failed to put in place any reasonable system capable of detecting and promptly removing vulnerable people from the Barracks after allocation;

Current situation

22. By 2 April 2021, the Home Secretary had emptied the Barracks of residents, but on 9 April 2021, she decided to repopulate the Barracks with new residents. The decision to do so had the following features:
- a. At the time the decision was made, the Home Secretary was in receipt of the highly critical report from the ICIBI / HMIP in draft (sent to the Home Secretary on 21 March 2021);
 - b. No further advice was sought from Public Health England as to whether continued use of the barracks was in line with public health advice, in circumstances where the arrangements had caused an inevitable Covid outbreak. There remained concerns from PHE that a further outbreak (of Covid or another infectious disease) remained inevitable;
 - c. No structural or substantive changes were made to the dormitory arrangements.
23. The use of the barracks changed such that the barracks were used not only to house destitute asylum seeking single men, but also to process their asylum claims. No legal advice or assistance provision was available on site.
24. When the embargoed judgment in *NB and Ors* was circulated on 27 May 2021, it is now known that a decision was made to suspend the transfer of new residents into the barracks. There remains around 200 residents in the barracks. Residents were told they would be in the barracks for 60-90 days, but there remained no system for identifying those who are vulnerable and who should not be in the barracks under the Home Office's suitability assessment criteria.

Dated 30 June 2021

SHU SHIN LUH
Doughty Street Chambers