IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-0099
[2017] NZHC 136

UNDER THE	The Judicature Amendment Act 1972 The New Zealand Bill of Rights Act 1990 The Declatatory Judgments Act 1908
BETWEEN	PHILLIP JOHN SMITH
	First Plaintiff
	NIKKI DAVID ROPER
	Second Plaintiff
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS
	Defendant

Hearing:	15 July 2016
Counsel:	First plaintiff in person Second plaintiff in person V McCall and A Dixon for defendant
Judgment:	10 February 2017

JUDGMENT OF KATZ J

This judgment was delivered by me on 10 February 2017 at 4:45pm pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors: Crown Law, Office of the Crown, Wellington

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Introduction

[1] Phillip John Smith and Nikki David Roper are serving prisoners. Mr Smith is serving a term of life imprisonment for the murder of the father of a boy he had sexually abused. Mr Roper is serving a term of life imprisonment for the murder of his former girlfriend.

[2] Section 47 of the Corrections Act 2004 ("Act") requires that all prisoners who are serving sentences of more than three months' imprisonment be assigned a security classification by the Department of Corrections ("Corrections"). The classification is intended to reflect the level of risk posed by the prisoner while inside or outside prison (for example while on a release to work program), including the risk of escape and the risk that escape would pose to the public. The security classification of each prisoner must be undertaken and reviewed "in the prescribed manner".[1] The Act and the Corrections Regulations 2005 ("Regulations") provide some guidance as to the correct process. Further guidance is contained in internal Corrections' guidelines and other documents.

[3] There are five different security classifications: maximum, high, low-medium, low and minimum.[2] From 8 March 2013 Mr Smith had been classified as a minimum security prisoner. On 6 November 2014, during a temporary release from custody, Mr Smith boarded a flight to Chile. On 12 November 2014 he was apprehended in Brazil. He was returned to prison in New Zealand on 29 November 2014. On his return Mr Smith was reclassified as a maximum security prisoner. That classification was maintained in his next two reviews, although his security classification has since been reduced to high.

[4] Mr Smith challenges, by way of judicial review, the security classification review processes that were undertaken from late 2014 to early 2016. Mr Roper challenges his security classification review processes during 2015. Both plaintiffs

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1 Section 47(3)(a).

2 These bands were set by instructions issued by the Chief Executive, which are permissible under s 196(1) of the Act. The bands are therefore administrative, rather than legislative: *Taylor v Chief Executive of the Department of Corrections* [2015] NZHC 2196 at [7].

allege that there were a number of errors in the processes that were followed, resulting in them being wrongly classified as maximum security prisoners. Mr Smith also challenges Corrections' decision to dismiss him from his prison-based employment.

[5] The plaintiffs seek declaratory relief. They also seek orders that the challenged decisions be quashed and that future security classification reviews be completed at regular six-month intervals. Mr Smith also seeks a declaration that a decision to dismiss him from his prison-based employment was unfair, in breach of natural justice and unreasonable. He seeks an order quashing that decision or referring it back for reconsideration. Many of the grounds of review overlap. The key issues, however, can be summarised as follows:

(a) Were Mr Smith and Mr Roper's legitimate expectations that Corrections' policies would be consistently applied frustrated?

(b) Were material factual errors made in Mr Smith's 13 August 2015 security classification review and his 17 September 2015 reconsideration?

(c) Were Mr Smith's 25 February 2016 security classification review and 14 March 2016 reconsideration unreasonable?

(d) Was Mr Smith's 25 June 2015 security classification review decided by an invalid delegation?

(e) Were the plaintiffs' security classification reviews unlawful because they were not completed within the statutory timeframe?

(f) Were inadequate written reasons provided for the plaintiffs' review and reconsideration decisions, in breach of the Act and natural justice?

(g) Are prison-based employment decisions made by Corrections amenable to judicial review? If so, was the decision to dismiss

Mr Smith from his prison employment made under dictation, procedurally unfair or unreasonable?

The security classification framework

[6] The process of assigning, reviewing and reconsidering the security classifications of prisoners is governed by ss 47 and 48 of the Act and regs 44 to 52.

[7] All prisoners who have been sentenced to a term of imprisonment of three months or more must be assessed and assigned a security classification. This classification is based on the risks they pose both inside (internal risk) and outside the prison environment (external risk), including in particular the risk of escape and the risk that escape would pose to the public.[3] This enables Corrections to appropriately manage prisoners within the prison environment.

[8] It is well recognised that classification decisions have a profound impact on the day-to-day lives of prisoners.[4] Such impacts include the availability of rehabilitative programmes, the hours they spend in their cell, and the availability of visits. On the other hand, the need for prisons to function effectively and efficiently is an important consideration,[5] as is the fact that Corrections is generally in a better position to assess security risk than the Courts.

[9] When initially assigning a security classification to a prisoner, the assessing officer is required to take into account the seriousness of the most serious offence for which the prisoner is imprisoned; the duration of their sentence; any history of escape or attempted escape, violent behaviour or mental ill health; whether the prisoner is awaiting trial or sentencing on further charges and the nature of the charges; and any additional matter specified in writing by the chief executive.[6] A prisoner must be assigned the lowest classification at which they can "safely and securely be managed given the assessment of the level of risk posed by [them]", and

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3 Corrections Act, s 47(1).
4 See *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [81]; *Taylor*, above n 2, at [24] and [103].
5 *Taylor v Chief Executive of the Department of Corrections* [2016] NZHC 1805 at [2].
6 Regulation 45.

should be placed and managed within a facility and regime consistent with that classification, as far as is practicable.[7]

[10] A prisoner's security classification must then be reviewed at least once every six months or whenever there is a significant change in the prisoner's circumstances.[8] The latter is called an "events-based review". It could arise, for example, when a prisoner has been charged with an assault within the prison, or has attempted to escape. The security classification review must consider both the risk factors addressed at the initial assessment stage (as outlined at [9] above) and also subsequent developments, such as the prisoner's behaviour in prison, their current mental health, their motivation to achieve the objectives set out in their management plan, and the remaining duration of their sentence.[9]

[11] The security classification process is completed once all of the following steps are completed:[10]

(a) a risk assessment has been undertaken;

(b) the staff member undertaking the risk assessment has notified the chief executive or prison manager of the security classification that, in his or her opinion, ought to be assigned to the prisoner;

(c) the chief executive or prison manager has decided whether the security classification recommended under (b) is appropriate and either:

(i) has approved that recommended classification; or

(ii) has assigned a different classification.

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7 Regulation 44.
8 Section 47(3).
9 Regulation 48.
10 Regulations 46 (for the initial assessment) and 49 (for a review).

[12] Prisoners must be promptly informed in writing of their security classification and the reasons that that classification was assigned.[11] If a prisoner is dissatisfied with the security classification that has been assigned, he or she may apply for a reconsideration, which must be considered promptly.[12] The prisoner must also be informed in writing of the reconsideration decision.[13]

[13] The reconsideration process is governed by reg 51, which provides:

> If an application is made to the chief executive for the reconsideration of a security classification under section 48(2) of the Act, the chief executive must—
>
> (a) ensure that the process that was followed in assigning or most recently reviewing that classification as the case requires, is reviewed; and
>
> (b) decide whether or not the prisoner's current security classification is appropriate and either—
>
> (i) confirm that classification as the appropriate security classification; or
>
> (ii) assign a different security classification to the prisoner.

[14] Regulation 52 provides that any person undertaking the assignment, review, or reconsideration of a prisoner's security classification must:

> (a) be given access to the prisoner's file kept by the department; and
>
> (b) take into account any relevant information in any form that is readily available to the person; and
>
> (c) record in writing the person's recommendation or decision and the reasons for it.

[15] The security classification process is completed electronically in what is known as the Integrated Offender Management System ("IOMS"). To give effect to the statutory and regulatory regime, Corrections has devised a points-based classification system, the details of which are set out in guidelines headed "Completing Male Review Security Classification Guidelines" ("Guidelines"). The Guidelines were issued by the Chief Executive pursuant to his powers under s 196(1) of the Act. Each risk factor or other relevant matter is assigned a point value. All

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11 Section 48(1).
12 Section 48(2).
13 Section 48(4).

questions are answered through the selection of an appropriate score. The Guidelines are highly prescriptive and outline the criteria that must be taken into account when choosing the appropriate score for each field in the IOMS matrix. A preliminary or indicative security classification is reached based on the total accumulated score. Calculation of the applicable security classification is automatically undertaken upon completion of the IOMS matrix form. While there is no provision for comments in individual sections, supporting comments may be entered in section "C. Assign Security Classification" for the initiating officer, and section "D. Approval" for the recommending officer and approving officer. These comments do not, however, affect the total accumulated score.

[16] The IOMS scoring system assists Corrections officers to make decisions about the appropriate security classification for a particular prisoner, but is not determinative of the outcome. The indicative classification in the IOMS matrix can be overridden when appropriate. This recognises that the Guidelines and associated IOMS matrix may not capture all matters that are relevant to the risk assessment exercise in a particular case. The Guidelines provide, however, that "[a] clear reason must be given for the override" and that "a classification may not be overridden based on a factor that has already been incorporated in the assessment". The Guidelines require the assessing officer to indicate why he or she believes the indicated security classification is incorrect, as a result of additional information not accounted for in the assessment process.

[17] For maximum security prisoners Corrections has, since around May 2015, implemented a further step, involving what is referred to as a "Structured Decision-making Framework". A change in any prisoner's security classification either up to, or down from, maximum security must now be approved by the Chief Custodial Officer. The aim is to ensure that maximum security prisoners are assessed consistently. Given that Auckland Prison is the only facility in the country that is set up to house maximum security prisoners, the possibility that prisoners might be moved around the prison estate, based on the views of different prison directors, is reduced. The Structured Decision-making Framework requires the assessing officer to answer, in narrative form, a series of specific questions about the prisoner, rather than simply relying on the IOMS points allocation system. This provides more

detailed information regarding a particular prisoner, to aid in the risk assessment process. The Chief Custodial Officer considers any proposal for a maximum security classification and makes the final decision on the issue.

Legitimate expectation – Were Corrections' policies for security classification reviews followed and applied consistently?

[18] The plaintiffs claim that they had a legitimate expectation that Corrections' policies for security classification reviews would be applied consistently. They say that their legitimate expectations were frustrated due to Corrections' failure to follow its own policies, including in particular the Guidelines.

Legitimate expectation - relevant legal principles

[19] Sections 5 and 6 of the Act set out the general purposes and principles of the corrections system. In particular, s 6(1)(f) provides that the corrections system must ensure the fair treatment of persons under its control or supervision by providing those persons with information about the rules, obligations, and entitlements that affect them; and ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure.

[20] A procedural legitimate expectation denotes the existence of some process right that the plaintiff possesses as the result of a promise or behaviour by a public body that generates the expectation. Ellis J held in *Taylor* that prisoners have a legitimate expectation that the security classification process will be applied consistently:[14]

> [77] First, it can usefully be observed that, as under PSO 900 in the United Kingdom, the internal and external risks of escape are also the explicit (albeit inclusive) focus of s 44 of the New Zealand Act. Escape risk must therefore be one of the key drivers of the indigenous security classification regime as a whole.
>
> [78] Secondly, it is not disputed that the principal point of the guidelines issued by the chief executive under s 196 (and the associated forms) is to ensure that the assessment of risk is performed as consistently and objectively as possible across the

[14] *Taylor*, above n 2, referring to *R (Lowe) v Governor of Liverpool Prison* [2008] EWHC 2167 (Admin) (footnotes omitted).

> prison estate. The need for fairness is specifically underscored by the principle articulated in s 6(1)(f) of the Act.
>
> [79] Relatedly, and given the fairness obligation and the impact that security classification has on the lives of the prisoners concerned, both immediately and in the long-term, there seems to me to be a solid basis for a legitimate expectation that the s 196 guidelines will be followed and consistently applied. As Sedley J said in *R v Secretary of State for the Home Department ex parte Urmaza*:
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> > ... I would venture to formulate the modern approach to a departmental policy document, whether published or not, in this way:
> >
> > (a) The legal principle of consistency in the exercise of public law powers ... creates a presumption that in the ordinary way the Secretary of State, through his officials, will follow his own policy. This presumption corresponds with the practical purpose of such an internal policy, which is precisely to secure consistency of approach … If there is to be departure from the policy, there must be good reason for it ... I would add that the impact of such a departure in a case otherwise within this particular policy is almost certainly such as to demand that reasons be given.

[21] Ms McCall, for Corrections, did not dispute that prisoners have a legitimate expectation that the Guidelines will be followed and applied consistently. This is part of the fair and reasonable way that decisions about prisoners are made under s 6(1)(f) of the Act. Ms McCall did, however, emphasise the importance of the overarching statutory provisions. In particular, she submitted that Mr Smith and Mr Roper did not have a legitimate expectation that an override would not be applied, nor that the classification indicated by the IOMS preliminary score would be the ultimate outcome of any security classification review. She further submitted that, to the extent that there may have been errors in the process followed, they were essentially immaterial as Mr Smith and Mr Roper would, in any case, have been classified as maximum security prisoners. If necessary, this could have been done by application of an override.

[22] I consider these arguments further below. The key point at this stage, however, is that Mr Smith and Mr Roper were entitled to expect that Corrections' internal policies would be applied consistently and correctly to their respective security classification review processes. I therefore now turn to consider whether those expectations were frustrated, as alleged.

Mr Smith's 3 December 2014 review and 23 January 2015 reconsideration

[23] On 2 December 2014, following Mr Smith's capture in Brazil and his return to New Zealand, an events-based security classification review was initiated. It was completed on 3 December 2014 and resulted in Mr Smith's security classification being increased from "Minimum" to "Maximum". On 15 December 2014 Mr Smith applied for a reconsideration of that review. The following day he was charged with escaping lawful custody and an offence under the Passports Act 1992. The reconsideration was completed on 23 January 2015.

[24] The Guidelines and the IOMS matrix are divided into two parts to reflect the considerations in the Act: "internal risk" (A) and "external risk" (B). Mr Smith submitted that a number of errors were made in the assessment of his internal risk. I address each alleged error below:

(a) *"A.2.1: Time since last escape or attempt"* – the Guidelines state that the "system will determine the most recent escape or attempted escape related incident for which the prisoner *was convicted*" (emphasis added). Mr Smith's last escape was recorded as being one year ago, resulting in eight points being recorded in the IOMS matrix. This is a reference to his absconding from temporary leave. Mr Smith correctly points out, however, that at the time he had not been convicted in relation to his absconding from custody. Rather, at the time of the review, his last conviction for an escape was in 1996. Applying the IOMS matrix, an escape from seven or more years earlier should have resulted in only one point being entered.

(b) *"A.4.2: Most serious current charge"* – the Guidelines provide that "the system will determine the most serious outstanding charge the prisoner is facing". This was assessed as "low", justifying a score of four. Mr Smith submitted that at the time of the review he had no outstanding charges as he had not yet been charged for the absconding. I accept Mr Smith's submission that no points should have been added under this head, as at the date of the initial review.

(c) *"A.4.3: Number of Convictions and Charges under Corrections Act in the past 6 months excluding drugs, violence or escape related offences"*. The assessor added two points, equivalent to one conviction or charge. Again, this was incorrect as at the date of the assessment. No points should have been added under this head.

(d) *"A.4.6: Number of convictions and charges under any other Act in the past 9 months for drugs, violence or escape related offences"*. This section relates to charges and convictions for drugs, violence and escape-related offences under any Act other than the Corrections Act in the previous nine months, excluding the offence for which the prisoner received his initial sentence. The assessor added eight points to the assessment under this head, marking it as greater than or equal to one relevant conviction or charge. Again, this was incorrect. Mr Smith had not been charged or convicted of any relevant offence as at the date of the initial assessment.

(e) *"A.5.2: Compliance with staff requests"* – This section is intended to assess how well a prisoner has complied with staff requests in a range of situations during the prior six months. Mr Smith's compliance with staff requests was assessed as "poor", and six points were accordingly added to his score. An assessment of "poor" means "the prisoner almost never complies with requests or fails to comply in a timely manner". The sources required to assess these factors are listed as "Penal file Sentence Plan File Notes", "IOMS Incident Reports" and "At least 3 other officers' opinions". At the time of the assessment Mr Smith had one minor adverse file note in the previous six months for failing to promptly comply with a staff request. Mr Smith submitted that this could not justify a finding of "poor" compliance. He submitted that he should have been scored "good" for this factor or, at the very least, "average", meaning "the prisoner complies most of the time but sometimes fails to comply in a timely manner". An "average" score would have resulted in the allocation of three points, rather than six points.

(f) *"A.5.3: Positive interaction with staff and prisoners"* – The Guidelines provide that this section is to assess how well "the prisoner interacts with other prisoners and with staff in a range of situations in the past 6 months". The sources to be considered are the same as those for A.5.2 (see above). Mr Smith's interactions were again assessed as "poor", meaning "the prisoner interacts negatively with staff and other prisoners" and six points were accordingly added. At the relevant time Mr Smith had five minor adverse file notes in the previous six months relating to negative interactions with staff in the at-risk unit, over a three-day period. However, he also had 13 positive file notes, reflecting positive interactions with staff, prisoners and members of the public. Against this background, Mr Smith submitted that the assessor's "poor" assessment was not justified and that he should have been assessed as "good" under this heading or, at the very least, "average", meaning "the prisoner interacts positively most of the time but with occasional instances of negative interaction". This would have resulted in three points being added to his score, rather than six.

(g) *"A.5.4: Compliance with prison rules"* – This section "assesses how well the prisoner complies with prison rules in a range of situations in the past 6 months". Again, Mr Smith was assessed as "poor" under this heading, meaning the "prisoner has 3 or more file notes relating to non-compliance with prison rules". Six points were accordingly added. The sources to be considered are the same as those for A.5.2 and A.5.3 (see above). Mr Smith noted that at the relevant time he had only one file note relating to non-compliance with prison rules and three incident reports, which related to one incident of non-compliance. Mr Smith submitted again that, at worst, his compliance with prison rules should have been assessed as "average", meaning "the prisoner has 1 or 2 file notes relating to non-compliance with prison rules". This would have resulted in three points being added to his score, rather than six.

[25] Mr Smith's total score from internal risk categories was 53. Any score above 33 justified an initial maximum security classification. If all of the adjustments proposed by Mr Smith were made, including assessing his compliance as "good" for A.5.2, A.5.3 and A.5.4, then his score would have been 14. If his compliance with those items was assessed as "average" his score would have been 23. If no adjustments were made to items A.5.2 to A.5.4, but the errors to items A.2.1, A.4.2, A.4.3 and A.4.6 were corrected, Mr Smith's score would have been 32, which falls (just) short of the maximum security classification threshold. Obviously, an override could have then been applied, if justified. This did not need to be considered, however, given that Mr Smith's initial (incorrect) assessment in IOMS placed him well above the maximum security threshold.

[26] On 15 December 2014 Mr Smith sought a reconsideration of his 3 December 2014 review. In particular, he requested reconsideration of A.4.3, A.4.6, A.5.2, A.5.3 and A.5.4. The reviewer, Ms Burns, the Regional Commissioner, confirmed the maximum security classification in a letter to Mr Smith dated 23 January 2015. She accepted that A.4.3 had been scored incorrectly and that no points should have been scored in this area. This error was therefore cured by the internal statutory reconsideration process designed for that purpose.[15]

[27] Ms Burns considered, however, that A.4.6, A.5.2, A.5.3 and A.5.4 had been correctly scored. She reasoned as follows:

> A.4.6 … At the time the classification was completed charges had not been laid but were forthcoming. Charges were laid on 16.12.2014 and the points associated with those charges have now been reflected on your classification.
>
> A.5.2 … I am dealing with these three sections together as my comments are reflective of your overall compliance with staff and prison rules. Whilst the file notes captured prior to your alleged escape indicate compliance, your actions in departing New Zealand during rehabilitative release indicate non compliance with prison rules and of staff requests. The classification system does not just take into account what is captured in offender notes but also relies on Incident Reports and officers' opinion. It is considered you were premeditated and methodical in your planned departure from New Zealand. Therefore I consider your non-compliance with prison rules and staff requests to have substance and the points outlined in your classification justified.

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15 See *Calvin v Carr* [1980] AC 574 (PC) at 592.

[28] Mr Smith does not appear to challenge Ms Burns' conclusion regarding A.4.6. I am satisfied that she was correct to assess A.4.6 based on the position as at the reconsideration date, rather than the date of the original review. On that basis, any error made in the original classification of A.4.6 became moot once the charges were laid.

[29] Ms Burns also took the opportunity to reconsider some of the other scores that had been given in IOMS. She said:

> During this reconsideration I have followed the process specified in regulation 51 of the Corrections Regulations, including a review of the ratings of other sections of your classification and comment as follows:
>
> A.5.5 – "Motivation to achieve Offender plan activities". I am amending this area to reflect a "Poor" rating. It is clear as you departed New Zealand that you were not working toward achieving your Offender plan activities set for you. Therefore this will be amended accordingly.
>
> B.3.4 – "Outstanding Court appearances". This area has been recorded as "No" when it in fact should be marked "Yes". This will be amended.
>
> B.3.6 – "Time since last escape". This also will be amended to reflect your recent non return from temporary release.
>
> B.4.9 – "Motivation to achieve Offender Plan activities". As already indicated, this will be reflected as poor.
>
> The classification recognises that you present an increased risk to prison security because you did not return from temporary release when last approved in 2014. I have also had regard to intelligence which suggests your safety may be under threat from other prisoners.

Taking all of these matters into account, Ms Burns approved a maximum security classification for Mr Smith.

[30] Mr Smith submitted that Ms Burns did not correctly apply the Guidelines in her reconsideration. He noted that she had not adjusted the points awarded in respect of item A.2.1 (time since last escape or attempt), presumably because an escape charge had been laid subsequent to the 3 December 2014 decision. Mr Smith noted, however, that the Guidelines are expressly linked to a conviction for such offending, rather than simply a charge having been laid. Ms Burns therefore failed to correct the error made in respect of A.2.1, given that the Guidelines expressly refer to a *conviction* for an escape or escape attempt.

[31] Mr Smith also challenged Ms Burns' reasoning that it was appropriate to assess his compliance with each of A.5.2 to A.5.4 as "poor" due to his subsequent absconding. I accept Mr Smith's submission that the relevant prison records do not support the conclusions that he "almost never complies with requests or fails to comply in a timely manner", or that he "interacts negatively with staff and other prisoners", or has "3 or more file notes relating to non-compliance with prison rules". On the contrary, the relevant prison records indicate that he was largely compliant with each of those criteria, objectively justifying at least an "average" score.

[32] Mr Smith further submitted that a score of "poor" for item A.5.5 could not be justified. This section "assesses how motivated the prisoner is in achieving activities scheduled from and identified in their Sentence Plan over the past 6 months". File notes are checked to confirm that the prisoner attended the activities. A score of "poor" means that "the prisoner failed to attend and complete any Sentence Plan activities scheduled for the previous 6 months". At the time he absconded Mr Smith had completed many scheduled activities including attending available work, maintaining contact with support people and participating in constructive activities. I accept Mr Smith's submission that it cannot be said that he failed to "attend and complete *any* Sentence Plan activities" (emphasis added).

[33] Ms Burns' reasoning appears to be that although Mr Smith complied with staff requests and prison rules and had positive interactions with staff and other prisoners during the relevant period, it would be wrong to give him "credit" for this in all the circumstances. This is because, while superficially behaving in a fairly exemplary manner, Mr Smith was secretly planning to abscond, and was making arrangements to that end.

[34] Similar concerns are evident in the affidavit of Mr Sherlock, the Prison Manager of Auckland Prison at Paremoremo. He deposed that the reason for Mr Smith's continued maximum security classification was that he posed a high risk of escaping custody, and that:

> One of the factors that contributed to Mr Smith's ability to organise his travel to Brazil was that he is an intelligent and manipulative individual who

> managed to fool a large number of both frontline and other staff ... he was manipulating those around him in order to provide the opportunity for him to abscond. I am very careful in the management of Mr Smith because I am very concerned about his ability to manipulate others, particularly those with no knowledge of his history, or other people who may not be as intelligent ...

[35] It is clear that the Guidelines and the IOMS matrix do not adequately capture the type of behaviour described by Mr Sherlock. Mr Smith is therefore a higher risk prisoner than would be suggested simply by applying the IOMS scoring matrix. In response to this difficulty, Corrections staff, in effect, "inflated" the IOMS scores beyond what is suggested by a strict application of the Guidelines. This presumably reflects their view that Mr Smith's good behaviour was not indicative of genuine rehabilitation or a low escape risk, as would normally be the case. Rather, Mr Smith was able to take advantage of the low security status afforded to him by his "good behaviour" to facilitate his escape to Brazil, in part through manipulating others.

[36] I agree that Mr Smith's apparent good behaviour and compliance must be assessed in this broader context. It does not warrant the "credit" that such behaviour normally receives under the highly prescriptive IOMS scoring system. However the appropriate course, in my view, was not to inflate Mr Smith's IOMS scores in a way that could not be supported by the Guidelines. Rather, the appropriate course was to complete the IOMS matrix in accordance with the Guidelines and then apply an override on the basis that, in the unusual circumstances of Mr Smith's case, the IOMS matrix failed to adequately capture the true extent of his escape risk.

Mr Smith's 13 August 2015 review and 17 September 2015 reconsideration

[37] This review took place after the Structured Decision-making Framework had been implemented.

[38] On 4 June 2015 a security classification review was initiated in IOMS. This review was voided on 25 June 2015 and was never approved by the Chief Custodial Officer, as required under the Structured Decision-making Framework.

[39] On 29 June 2015 a new classification review was initiated. It resulted in an initial assessment of maximum security. Pursuant to the Structured Decision-making

Framework this review was ultimately referred to the Chief Custodial Officer who approved a maximum security classification on 13 August 2015.

[40] Errors in the December 2014 security classification review were repeated. A.2.1 was again scored at "8", representing less than a year since the "last escape or attempt". A.4.6 was also incorrectly scored, adding eight points. If those items had been correctly scored, a maximum security classification would not have been generated by IOMS. Again, however, an override could have been applied, if justified.

[41] On 17 August 2015 Mr Smith applied for a reconsideration of the 13 August 2015 review. His maximum security classification was confirmed on 17 September 2015 by the National Commissioner, Mr Lightfoot. Mr Lightfoot did not, however, correct the errors at A.2.1 and A.4.6, possibly because Mr Smith did not challenge these aspects of the IOMS assessment in asking for a reconsideration. That may well be because Mr Smith did not receive a copy of his IOMS matrix at the time. As noted above, however, the Regulations required a full review, not simply a review of the particular issues raised by Mr Smith. Corrections was therefore required to consider the correctness of these two items.

Mr Smith's 25 February 2016 review and 14 March 2016 reconsideration

[42] A further security classification review was initiated in IOMS on 9 February 2016, resulting in a preliminary rating of high security. Mr Beales approved an override to maximum security on 25 February 2016, with Mr Smith notified on 26 February 2016. The override was said to be on the basis that A.2.1 should have been assessed at six points – an escape between one and three years ago, and B.3.4 (outstanding court appearances) should have been assessed at eight points. Although described as an "over-ride" this appears to have simply been a "correction" to the scores recorded in IOMS, rather than an override based on factors that were outside of the IOMS assessment process.

[43] Mr Smith applied for a reconsideration. The maximum security classification was confirmed on reconsideration by Mr Lightfoot on 14 March 2016. In his reconsideration, Mr Lightfoot accepted that A.2.1 was scored incorrectly, as

Mr Smith had not been convicted of an escape or escape attempt at the time. He also accepted that there were errors in the A.5.3 and A.5.5 assessments and that the six points scored for those items should therefore be deducted. Any errors in relation to these items were therefore cured during the reconsideration process.

[44] Mr Lightfoot considered, however, that an override to maximum security was nonetheless justified, on the basis that "there remain[ed] a high level of risk surrounding [Mr Smith's] most recent offending that [was] not taken into account in the assessing officer's review". "[R]ecent offending" in this context refers to the absconding. Mr Lightfoot noted that:

> Compliance, or failure to follow staff requests or offender plan activities, is not relevant to the escape risk in your case. You have a history of compliance and good behaviour while in prison; however, this is accompanied with a history of manipulation and coercion. This was the case in the period leading up to your most recent charge (2014), where the circumstances and opportunity afforded to you because of good behaviour were exploited to facilitate your escape.

[45] Mr Smith submitted that the alleged escape had already been captured in A.4.2, which took into account the "most serious outstanding charge". Mr Smith was given six points, or "moderate" for this. The seriousness of the offence is determined by the Ministry of Justice Seriousness Score. Mr Smith submitted that Mr Lightfoot had applied an override simply because, in his view, the points system did not result in adequate weight being given to Mr Smith's alleged escape.

[46] As I have previously noted, although the Guidelines provide for an override where the matters set out in the IOMS matrix do not "capture all matters that are relevant to the risk assessment", this cannot be on the basis of a factor already "incorporated in the assessment". Mr Smith submitted that Mr Lightfoot had, in effect, penalised him again for his escape attempt, a factor already taken into account in the IOMS assessment. He referred to the following comments of Ellis J in *Taylor*:[16]

> [88] It is tolerably clear that the override option exists precisely because filling out the review form and applying the points system is intended largely to be a mechanical (and therefore objective and consistent) exercise. The possibility of an override recognises the reality that the guidelines and the

[16] *Taylor*, above n 2 (footnotes omitted).

> form may not capture all matters that are relevant to the risk assessment required by s 44 in relation to a particular prisoner. It contemplates that there may be a departure from policy but (in accordance with the principles referred to by Sedley J in the dicta quoted above) requires clear reasons for that to be given. The guidelines also make it clear that there cannot be a departure from policy (an override) simply because an application of the points system does not result in adequate weight being given to one of the matters expressly required to be considered. If that were not the case then consistency would be undermined.
>
> [89] Accordingly the principal question in relation to the override is whether, in the circumstances of Mr Taylor's case, his refusal to transfer voluntarily to Bravo Unit was a matter that justified a departure from policy.
>
> [90] I immediately accept that a prisoner's willingness to co-operate with staff and to participate in a rehabilitation pathway is relevant to the risk posed by him and, therefore, to his security classification. That is clear from reg 45. In an ordinary case, however, those are considerations that the policy and guidelines expressly require to be taken into account and, indeed, are reflected in A.5.2 and A.5.5 of the guidelines. An override would not therefore be permitted on those grounds.

[47] As I have previously noted, it is my view that the IOMS matrix and the Guidelines did not adequately capture all matters that were relevant to the risk assessment required by s 47 in relation to Mr Smith. As Ellis J recognised in *Taylor*, the override option exists because filling out the review form in IOMS and applying the points system is intended largely to be a mechanical (and therefore objective and consistent) exercise. While such a mechanical exercise is likely to adequately assess the relevant internal and external risks in many (indeed possibly most) cases, there will always be some cases where such a mechanical and highly prescriptive approach to risk assessment falls short. This reflects the complexity inherent in any risk assessment exercise – a complexity that was recognised by the introduction of the Structured Decision-making Framework, which provides for more detailed narrative information to be provided to aid in maximum security classification decisions. It is simply not possible for any "standard form" risk assessment tool to accurately predict all of the risk factors that may be present in any given case. Accordingly, while such a tool may adequately assess risk in many cases, there will always be exceptions. The override mechanism provides for such exceptions.

[48] Ms McCall emphasised the importance of the overarching statutory provisions. She submitted (and I accept) that Mr Smith did not have a legitimate expectation that an override would not be applied, nor that the classification

indicated by the IOMS preliminary score would be the outcome of any review. She emphasised that s 47(1) of the Act requires a security classification to reflect "the level of risk posed by [a] prisoner while inside or outside prison, including the risk of escape and the risk that escape would pose to the public". Where the preliminary assessment or Guidelines are inconsistent with that, then the requirements of the Act must prevail. She submitted that, for Mr Smith, his absconding justified a departure from the Guidelines, and an override was therefore appropriate.

[49] Mr Smith has not persuaded me that the application of the override on this occasion breached the Guidelines by, in effect, doubly penalising him for his escape attempt. On the contrary, as I have noted at [36] above, the unusual circumstances of this case justified an override. That is because Mr Smith's escape attempt necessarily colours how a number of the other items included in the IOMS matrix need to be viewed and assessed. The IOMS matrix and associated Guidelines are predicated on the assumption that "good" behaviour in prison, or while on temporary release, will be associated with decreased risk, and "bad" behaviour with increased risk. In this case, however, that general assumption does not apply. The IOMS matrix does not accurately assess risk in the unusual circumstances of this case and an override was therefore justified.

[50] Another area where the Guidelines may not fully capture the level of risk posed by a prisoner relates to item A.2.1, which pertains to the "time since last escape or attempt". As I have noted above, the Guidelines state that the "system will determine the most recent escape or attempted escape related incident for which the prisoner *was convicted*" (emphasis added). I understand that this wording is currently being reviewed (or may have already been reviewed). At the relevant time, however, the wording was as I have quoted. An alleged escape or escape attempt in the period between charge and conviction is not captured under this head even if (as here) there is a strong prosecution case.[17] I do not accept Mr Smith's submission that this particular risk factor is fully captured by A.4.2, which relates to current charges generally, rather than charges relating to escape or attempted escape in

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[17] I note that, despite having pleaded "not guilty" to the charges relating to his "escape", counsel for Mr Smith apparently invited the jury to find him guilty of the charges when the matter came to trial, a week after the hearing before me of these proceedings. He was convicted accordingly.

particular. In assessing future escape risk a current escape-related charge is more relevant (and hence deserving of a higher score) than more general charges, such as an assault within prison.

Mr Roper's 16 December 2015 reconsideration

[51] A security classification review in relation to Mr Roper was initiated in IOMS on 31 October 2015. That review was noted as having been approved by the Chief Custodial Officer on 20 November 2015, when it had not been. Once that error was recognised, the IOMS matrix was reset and the Chief Custodial Officer's approval of a maximum security classification was (correctly) recorded on 23 November 2015. On 25 November 2015 Mr Roper requested a reconsideration of that review. On 16 December 2015 Mr Lightfoot confirmed Mr Roper's classification as a maximum security prisoner.

[52] Mr Roper challenges Mr Lightfoot's 16 December 2015 reconsideration decision. In particular, Mr Lightfoot altered item A.5.5 from "good" to "average" because "while [Mr Roper appeared] to be focused on some areas of [his] rehabilitation, [he has] shown a level of reluctance to address [his] alcohol and drug issues".

[53] Mr Roper noted that "good" is the appropriate score under the Guidelines if "the activities were not available due to events or circumstances beyond the prisoner's control". Mr Roper is not eligible for parole until 2025. He submitted that, pursuant to existing Corrections policies, he is not able to attend any treatment programmes to address his drug and alcohol issues for years to come. I also note that there is an offender note, dated 7 October 2015, which indicates that Mr Roper's "security classification and Alerts" preclude him from a mainstream drug treatment programme. It further notes that he would not decline an offer of a place in the Drug Treatment Unit, though he is realistic about when that might be. Mr Roper therefore submitted that he is not unwilling to address his drug and alcohol issues, but cannot do so due to events outside his control. I accept Mr Roper's submission on this issue. Mr Lightfoot's assessment of A.5.5 was therefore incorrect.

[54] Ms McCall submitted that, even if there were errors in Mr Roper's security classification review, if correctly scored his security classification would have remained at maximum. Alternatively, she submitted that an override would have been justified. That may well be correct, although such a submission is more relevant to the issue of the appropriate remedy, rather than whether there has been a failure to comply with policy, in breach of Mr Roper's legitimate expectations.[18]

Were material factual errors made?

Factual errors – relevant legal principles

[55] Generally, factual matters are not the proper subject of judicial review.[19] Courts are reluctant to interfere with reasonably held factual views and genuine value judgement calls.[20] However, in some circumstances a decision can be set aside in judicial review proceedings if it is based on a material mistake or misconception of an established fact.[21] The precise scope of the review ground is unclear, but the following test from the English Court of Appeal is often cited:[22]

> First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

Were mistakes of fact made in Mr Smith's 13 August 2015 review and 17 September 2015 reconsideration?

[56] Mr Smith submitted that the Structured Decision-making Framework document relating to his 13 August 2015 review and 17 September 2015 reconsideration contained the following factual errors:

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18 See *Huang v Minister of Immigration* [2009] NZSC 77, [2010] 1 NZLR 135 at [8] per Tipping J; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [69] per Tipping J.

19 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 681.

20 *Re Erebus*, above n 19, at 683-684; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [21]; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

21 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 145-149; *New Zealand Fishing Industry Ltd*, above n 20, at 552; *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [61].

22 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66].

(a) A number of offences were listed (mainly relating to sexual offending) under the heading "current" offences that were not current offences as he had already served his terms of imprisonment for those offences.

(b) The document recorded, under the heading "outstanding charges", the following: "Escape lawful custody/Break Penal, Passport Act". It also noted, in the assessment of "escape risk", that Mr Smith had a "current Active Charge for Escape Lawful Custody/Break Penal". Mr Smith submitted that he did not have an outstanding charge for breaking prison, rather, he had failed to return to prison from his temporary release.

(c) In considering the impact on the prisoner if the security classification is reduced, the document records that "Smith is also under Mason Clinic [care]".

(d) In the assessment of "risk of harm to the public" the document recorded that "Smith … has a long history of unlawful sexual connection with males between the ages of 12-16". Mr Smith submitted that he was only convicted of offences in that category in respect of one victim, rather than multiple victims.

[57] Mr Smith raised these issues in his reconsideration application. Mr Lightfoot responded as follows:

(a) Mr Smith's most serious current offence is for murder, which attracts the maximum score of eight points in the preliminary security classification, section A.4.1. As eight points is the maximum, it made no difference that sentences for less serious offences may have expired.

(b) Mr Lightfoot confirmed that "escape from/breaks institution/lawful custody" was "the charge recorded against [Mr Smith]". He also referred to a "current charge against the Passport Act", which is a

more serious charge than "escape from/breaks institution/lawful custody". Ms McCall noted that the Passports Act offence attracts more points in the IOMS matrix assessment and this error could not therefore have had an impact on the security classification. Further, the decision-makers were well aware of the fact of Mr Smith's absconding, and any mis-description could not have had any relevant impact on the assessment.

(c) Mr Smith's focus on the fact that he only had convictions in respect of one boy was an attempt to minimise his offending. The fact remained that he had been convicted of multiple charges for sexual offences. Ms McCall accepted there was an error but emphasised that Mr Smith was convicted of multiple offences against his victim over a period of time, many of which were serious. She submitted that it was unlikely to have made any difference to the classification.

(d) Mr Smith was correct that he was not under the care of the Mason Clinic. Mr Lightfoot accepted that this was an error but concluded that it did not impact on his maximum security status.

[58] Ms McCall submitted that any errors can be considered "technicalities" that did not impact on the decision. She submitted that the key reasons for maintaining maximum security throughout the relevant period were his demonstrated desire to abscond and the risks posed by his manipulative nature. I agree with this assessment. While some (relatively minor) factual errors appear in the Structured Decision-making Framework document, there is nothing to suggest that any of them had a material impact on the ultimate security classification.

Was Mr Smith's security classification initiated on 4 June 2015 made pursuant to an invalid delegation?

[59] Mr Smith submitted that the security classification review initiated on 4 June 2015, and checked by Mr Shead on 25 June 2016, was a decision made pursuant to an invalid delegation. He submitted that the classification was decided by the Movements Manager and not the Chief Custodial Officer.

[60] Under reg 46(c) the chief executive or prison manager is authorised to decide whether a recommended security classification is appropriate. A security classification is only assigned when a risk assessment is undertaken, the staff member undertaking the risk assessment has notified the chief executive or prisoner manager that the preliminary security classification ought to be assigned, and the chief executive or prison manager has decided that the recommended security classification is appropriate (or has assigned a different classification).

[61] Section 13(1) of the Act allows the prison manager to delegate to any other person who has powers or functions under the Act, or who is an employee of Corrections, any of the powers or functions of the prison manager under the Act or Regulations, including those delegated to him or her.

[62] The delegation for completing maximum security classification reviews was elevated, from 11 August 2014, from the Movements Manager to the Chief Custodial Officer. Mr Smith submitted that Mr Shead, the acting Movements Manager, decided the result of the 25 June 2015 security classification review. He submitted that Mr Shead had no lawful delegation to complete the 25 June 2015 security classification review, and it was therefore decided by an unlawful delegation and in bad faith.

[63] Mr Shead did not, in fact, assign a security classification on 25 June 2016. The preliminary security classification was "High" and this was overridden. Mr Shead indicated approval of that override. However, the assessment then records "Void, data error, retain at Maximum security. New review to be conducted". Ms McCall submitted that the document was never approved. Mr Sherlock, the Prison Director of Auckland Prison at Paremoremo, deposed that he approved the maximum security classification on 18 June 2015. However, when he sought approval from the Chief Custodial Officer, the discussion revealed that the IOMS matrix assessment did not properly reflect factors concerning "reputational risk". The IOMS matrix assessment was therefore voided. A new classification was subsequently initiated on 29 June 2015. This was approved by the Chief Custodial Officer on 13 August 2015, and was signed off by Mr Shead, noting Chief Custodial Officer approval. At that point a classification decision had been made.

[64] In other words, the delegated process was followed as it was intended. Chief Custodial Officer approval was required in assigning the classification. The Chief Custodial Officer, Mr Beales, did not approve it and voided it. Mr Shead did not make any actual decision to assign a classification.

Were the reviews unlawful because they were not completed within the statutory timeframe (six months)?

[65] The security classification of each prisoner must be reviewed at least once in every six months, unless an exemption from this requirement is prescribed; or whenever there is a significant change in the prisoner's circumstances.[23] The plaintiffs claim that a number of their security classification reviews were not completed within this time frame.

[66] Mr Smith's 3 December 2014 review was an events-based review. He was entitled to a review of that classification on or before 3 June 2015. His next review was initiated on 4 June 2015, but was not completed until 13 August 2015. There is no dispute that this security classification review was not completed in time.

[67] Ms McCall submitted that Mr Smith's next review was required to be completed within six months of his (late) 13 August 2015 review, namely by 13 February 2016. Mr Smith submitted that he was entitled to security classification reviews at six-month intervals from the 3 December 2014 review, regardless of when the subsequent (late) reviews were completed. On this approach he was entitled to a further review by 3 December 2015, less than four months after his 13 August 2015 review.

[68] I prefer Ms McCall's interpretation. The statute requires that the security classification of each prisoner be reviewed at least once in every six months. If a review is conducted late, then the next review must be conducted within six months of that review. The approach advocated by Mr Smith would be impractical and would likely lead to considerable uncertainty for both prisoners and Corrections staff as to precisely when the next review was due.

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[23] Corrections Act, s 47(3)(b).

[69] Mr Smith's next review was therefore required to be completed by 13 February 2016. It was not. Although it was initiated on 9 February 2016, it was not completed until 25 February 2016. This was out of time. His next review was due to be completed by 25 August 2016, six months after 25 February 2016. It was initiated on 24 May 2016 and was completed on 27 June 2016. This was well within time.

[70] Turning to Mr Roper, he was assigned a maximum security classification on 28 April 2015. His next review was therefore due by 28 October 2015. It was initiated on 31 October 2015. Mr Roper submitted that it was completed on 18 November 2015, Ms McCall submitted that it was completed on 23 November 2015. In either case, it was not completed within the prescribed time.

[71] Mr Roper's next security classification was initiated on 4 May 2016, and completed on 17 May 2016. This was within time.

[72] The plaintiffs seek to have each late security classification review quashed. In other words, they claim that, by virtue of the lateness, the decisions were ultra vires, and therefore cannot operate as a security classification review which operates to reset the clock under s 47(3)(b)(i).

[73] Whether a failure to follow a procedure set out in a statute makes a decision unlawful depends on the circumstances as a whole, including the nature of the provision, and the degree and effect of non-compliance.[24] In this case, Parliament has "cast its commands in imperative form without expressly spelling out the consequences of a failure to comply".[25] The question therefore, is whether Parliament intended the outcome to be invalidity.[26] The word "must" may not necessarily mean "mandatory" in the sense that any decision which fails to follow that procedure, as in this case, is unlawful, though it may be an indication.[27]

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24 *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA) at 319-321.
25 *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 at [14].
26 *Soneji*, above n 25, at [15].
27 See *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC) at [94]-[98]; *New Zealand Sports Drug Agency v Bray* HC Auckland AP36-SW00, 7 July 2000 at [24]: "… the categorisation of a requirement as either directory or mandatory may not be determinative of the legal effects of non-compliance".

[74] In *Wang v Commissioner of Inland Revenue* the Privy Council considered whether the decision-maker's failure to make a decision "within a reasonable time" meant that he lacked jurisdiction to issue a late decision.[28] The Board said:[29]

> … their Lordships consider that when a question like the present one arises – an alleged failure to comply with a time provision – it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?
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> …
>
> If the commissioner failed to act within a reasonable time he could be compelled to act by an order of mandamus. It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed.

[75] Parliament clearly intended Corrections to comply with the six-month time provision and it is unsatisfactory that several of the reviews I have considered were outside of the statutory time frame. Late reviews are both a potential security risk and unfair to prisoners. It is therefore a reviewable error if Corrections fails to allocate a security classification within the six-month time frame.

[76] It does not follow, however, that security classifications completed outside of the statutory time frame are invalid or ultra vires. It is difficult to see how s 47(3) can be read as requiring, as a condition precedent to a valid classification, that it be completed within six months after the previous review. This would create the absurd situation where, upon failing to complete a review within six months after the previous review, Corrections would no longer have any jurisdiction to review a prisoner's security classification. On the approach advocated by the plaintiffs, a further review could only be undertaken in the event that there was a "significant change in the prisoner's circumstances" justifying an events-based review.

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[28] *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 (PC), cited with approval in *Waikanae Christian Holiday Park Inc v New Zealand Historic Places Trust Maori Heritage Council* [2015] NZCA 23, [2015] NZAR 302 at [55]; *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 532 at [48]-[60].

[29] At 1296.

[77] Such an interpretation would undermine the statutory purpose and aggravate the exact mischief that the plaintiffs seek to confront here. Prisoners would lose their ongoing entitlement to have their security status reviewed at six-monthly intervals in the event that one of the six-month deadlines was missed. Parliament clearly could not have intended that, once one delay occurs, a security classification review cannot be completed thereafter. On the contrary, Corrections has an ongoing obligation to complete regular security classification reviews. I therefore reject the submission that reviews completed outside the statutory time frame are invalid or ultra vires.

Were inadequate written reasons provided for some decisions, in breach of the Act, Regulations, and natural justice?

[78] The plaintiffs allege that Corrections breached the Act, the Regulations and natural justice by failing to provide adequate written reasons (including copies of the IOMS preliminary assessment and Structured Decision-making Framework documents) for a number of the review and reconsideration decisions.

[79] While Ms McCall accepted that the statutory requirement to give written reasons was breached on some occasions, she denied that this had resulted in a breach of natural justice. In essence, Ms McCall submitted that Mr Smith and Mr Roper knew perfectly well why they had been assigned maximum security classifications and were accordingly not prejudiced by any failure by Corrections to give adequate reasons on some occasions.[30]

Provision of written reasons - relevant legal principles

[80] The Act provides that if a security classification is assigned to a prisoner, or is changed, the manager must ensure that the prisoner is promptly informed in writing of that classification (or change), and the reasons for the assignment (or change).[31]

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30 See *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.
31 Section 48(1).

[81] Similarly, whenever a security classification is assigned or reconsidered, the prisoner must be informed in writing of the decision.[32] The Guidelines augment these requirements by providing that "[p]risoners must be advised in writing of their security classification and the reasons for the classification within 72 hours of its approval" and must be "informed of their right to a review under s 48(2)". Regulation 52(c) provides that the person undertaking the review or reconsideration must record in writing the person's recommendation or decision, and the reasons for it.

[82] Where there is a statutory obligation to provide reasons, the breadth and level of reasoning required will depend on all the circumstances. Generally, reasons required by statute must be proper and adequate, and must deal with the points in contention, providing appropriate findings on material questions of fact. Where necessary, the reasons provided must refer to relevant law and legal principles, with an explanation of how that law has been applied to the facts as found.[33] In the present context the provision of reasons for a review promotes consistency and transparency, and enhances the prisoner's right to seek reconsideration on a fully informed basis. Provision of reasons for both reviews and reconsiderations also enables prisoners to seek judicial review if there appears to have been a serious deficiency in the process followed.[34] Reasons should be sufficient to enable the prisoner, the person undertaking the reconsideration, and the court, to understand why the decision was made.[35]

[83] Turning now to natural justice, the precise requirements depend on the context. In *Daganayasi v Minister of Immigration*, the Court of Appeal stated:[36]

> The requirements of natural justice vary with the power which is exercised and the circumstances. In their broadest sense they are not limited to

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32 Section 48(4).

33 *Singh v Chief Executive Officer of the Department of Labour* [1999] NZAR 258 (CA) at 263; *Patel v Removal Review Authority* [1994] NZAR 560 (HC) at 565.

34 The importance of providing sufficient reasons for a decision is well recognised. See *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010 at [75]-[76]; *Naden v Auckland Racing Club (Inc)* HC Auckland M72/95, 21 May 1996 at 16-18; see for example *Smith v Waikato County Council* (1983) 9 NZTPA 362 (HC) at 365-366.

35 *Re Vixen Digital Ltd* [2003] NZAR 418 (HC) at [43]; *Diwaan v Department of Labour* HC Auckland CRI-2006-404-256, 8 September 2006 at [12].

36 *Daganayasi*, above n 21, at 141, cited with approval in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

> occasions which might be labelled judicial or quasi-judicial. Their applicability and extent depend either on what is to be inferred or presumed in interpreting the particular Act … or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation …

[84] Relevant factors were noted by the House of Lords in *Durayappah v Fernando*:[37]

> … first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

[85] Ms McCall relied in particular on a statement by Elias J (as she then was) that "surprise and potential prejudice" are key elements:[38]

> If, therefore, there is no surprise in an allegation or if, even if there was surprise, there could be no prejudice because further notice would not have assisted the person affected to meet the allegation, then there is no unfairness in process.

[86] In terms of the right to be heard, her Honour said:[39]

> Fundamental to the principles of natural justice is the requirement that where the circumstances of decision making require that someone affected by it be given an opportunity to be heard, that person must have reasonable opportunity to present his case and reasonable notice of the case he has to meet. The more significant the decision the higher the standards of disclosure and fair treatment.

[87] In this case, the natural justice requirements are fairly high, given the profound effect that classification decisions have on the day-to-day lives of prisoners.[40] Corrections' decision-making process is prescribed and constrained by statute, regulations and policy. A failure to give adequate reasons bears upon the ability of prisoners to adequately challenge security classification decisions through the statutory reconsideration process.[41] It is important for prisoners to be sufficiently

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37 *Durayappah v Fernando* [1967] 2 AC 337 (HL) at 349.
38 *Ali v Deportation Review Tribunal*, above n 30, at 220.
39 At 220.
40 *Bennett*, above n 4, at [81]; *Taylor*, above n 2, at [24] and [103].
41 See *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL) at 551.

informed as to why a decision was made, so as to render the right to reconsideration effective, and for the reviewing court to be able to ensure that the decision was lawfully made.[42] Without this requirement, the reconsideration procedure cannot effectively function. It is particularly important that reasons be given for departures from policy, such as overrides.

[88] In *Bennett v Superintendent, Rimutaka Prison* the Court of Appeal noted that the right to seek review (called "reconsideration" under the current Act) would be illusory if the prisoner was not provided with the reasons for assigning the security classification, and that it would be both a breach of statute and of natural justice if the review was carried out in circumstances in which the reasons had not been adequately conveyed.[43] However, while reasons were not given in writing to Mr Bennett before he applied for the review, "he had been made well aware why he had been reclassified and clearly understood the reason".[44] The absence of written reasons was accordingly held to be a breach of statute, but not a breach of natural justice.

[89] In *Smith v Attorney-General* Miller J observed that:[45]

> … it is appropriate, when considering any given decision, to have regard to earlier reviews to the extent that they elaborate on the reasons for [a prisoner's] classification in any given instance … It is also appropriate to consider the scores assigned on each preliminary security rating, as they provide some reasons relating to each area scored … Lastly, it is appropriate to have regard to any recommendations accepted by the decision-maker, since they may supply the reasons relied upon.

[90] In essence, Miller J's point, adapted to the present case, is that reasons can be inferred from the IOMS matrix itself, other material provided to the prisoner, and their previous security classification. His Honour suggested that where no formal written reasons are given it can be inferred that the reasons in the recommendation documents (in this case, the IOMS matrix and Structured Decision-making Framework) are the reasons for the classification. He concluded, in that case, that reasons would have elicited information that Mr Smith already had, particularly

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42 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [76]-[80]; *Potter v New Zealand Milk Board* [1983] NZLR 620 (HC) at 624.

43 Above n 4, at [79].

44 At [79].

45 *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [154].

where past reasons for a classification had not been mitigated.[46] He therefore declined relief, although there was a statutory failure to give reasons.

Mr Smith's 3 December 2014 review and 23 January 2015 reconsideration

[91] Mr Smith submitted that the reasons he was given for the 3 December 2014 review decision and 23 January 2015 reconsideration decision were insufficient. In particular he challenged the "Remarks" of the Approving Officer, Mr Dickenson, in section D.2 of the IOMS matrix. Those remarks state that "Section A has been checked with numerous IOMS faults which have been noted above. Prisoner is suitably rated at Maximum security". Mr Smith submitted that this is insufficient to meet the requirement to give reasons.

[92] As noted above, however, reasons can be inferred from the totality of the information contained in the IOMS matrix, read together with the Guidelines, and not just from the "Remarks" section. I further note that a number of "faults" were expressly noted in the IOMS assessment. It appears that these "faults" resulted in the scores in the IOMS matrix being amended to reflect what Mr Dickenson believed was the correct position. The reasons for the assignment of a maximum security classification are therefore clear from the IOMS matrix itself, and from the additional explanations provided by Mr Dickenson on the document. A preliminary security classification of "Maximum" was reached as a result of the points scored in the matrix. The matrix was amended by Mr Dickenson, but a maximum security classification was still considered appropriate. The reasons for this view are sufficiently clear.

[93] In respect of the reconsideration decision, Mr Smith submitted that there were significant departures from policy, which required equally significant reasons. The Regional Commissioner's (Ms Burns) reconsideration decision, however, does set out her reasoning, including in particular the reasons why she made alterations to the preliminary assessment in the circumstances.

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[46] At [158].

[94] Overall, I have not been persuaded that there was any statutory failure to give reasons in relation to these two decisions.

[95] Mr Smith also submitted that he was not given an opportunity to be heard in relation to certain new matters that were taken into account by Ms Burns at the reconsideration stage, in breach of natural justice. For example, reference was made to "intelligence which suggests [Mr Smith's] safety may be under threat from other prisoners". This factor does not, however, appear to have had any impact on the assessment process, as it was not factored into the (revised) points scored in the IOMS matrix, and no override was applied.

[96] Mr Smith was also not given an opportunity to respond to further changes made to his preliminary score, for example as a result of charges being laid after the preliminary assessment, and to A.5.2 to A.5.5. I do not consider there to be a breach of natural justice arising from this, however. Unlike the situation in *Taylor*, where overrides to normal policy were made during the reconsideration process,[47] here the changes were made to errors in the preliminary matrix score itself. In my view the statutory framework does not envisage a right to be heard before amendments are made in order to correct errors in the preliminary score. Indeed a key purpose of the reconsideration process is to enable this to occur.

[97] Nor do I accept that Mr Smith was taken by surprise or prejudiced by the fact that a criminal charge, laid after the original assessment but before the reconsideration decision, was taken into account without him being given the opportunity to be heard on that matter. Again this was a factor included in the IOMS matrix and Mr Smith would have reasonably anticipated that, as part of the reconsideration process, the IOMS matrix would need to be updated to reflect the current position.

[98] The present circumstances can be distinguished from those in *Taylor*, where Ellis J held there was a breach of natural justice in circumstances in which a reconsideration decision had applied an override on the basis of a reason that had not

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47 *Taylor*, above n 2, at [103].

been previously heralded, and to which Mr Taylor had not had the opportunity to respond.

Mr Smith's 13 August 2015 review and 17 September 2015 reconsideration

[99] By August 2015 the Structured Decision-making Framework had been introduced. Mr Smith's evidence was that he was provided with a copy of the Structured Decision-making Framework document that related to his 13 August 2015 review, but not the IOMS matrix. As a result, he says that he was not given adequate reasons as to why he had been assigned a maximum security classification. Indeed, Mr Smith submitted that neither document contained adequate written reasons for his classification, whether considered together or separately.

[100] In my view, if both documents had been provided to Mr Smith, he would have been provided with adequate written reasons for the decision. Considered together, the scores in the IOMS matrix and the matters referred to in the Structured Decision-making Framework document would have sufficed.

[101] I accept Mr Smith's evidence, however, that he was not provided with a copy of the IOMS matrix. I note that section "E" of the IOMS matrix – which provides for the prisoner to sign to acknowledge receipt of the document, or for the Advising Officer to sign if the prisoner refuses to do so, is left completely blank. The Structured Decision-making Framework document was not sufficient, on its own, to fully inform Mr Smith of the reasons for his security classification. There was accordingly a breach of s 48 of the Act. The failure to provide Mr Smith with the IOMS matrix also breached natural justice. As a result of this failure, Mr Smith was prevented from responding to a number of errors in the IOMS assessment when seeking a reconsideration.

[102] The reconsideration decision was also based on the IOMS matrix that Mr Smith was not provided with or given an opportunity to respond to. This was also a breach of natural justice.

Mr Smith's 25 February 2016 review and 14 March 2016 reconsideration

[103] In respect of his 25 February 2016 security classification review, Mr Smith was provided with a copy of the IOMS matrix, but not the Structured Decision-making Framework document. He submitted that the IOMS matrix contains no written reasons. The only words that appear in box D.2 are: "Chief Custodial Officer approval – MAXIMUM".

[104] A number of the reasons can be inferred from the scoring adopted in the IOMS matrix, although the matrix appears to have only resulted in a security classification of "High", with an override being applied to achieve a recommendation of "Maximum". It is necessary to refer to the Structured Decision-making Framework document to fully understand the reasons for the override.

[105] The Act clearly envisages that a prisoner will be provided with sufficient information to be fully informed as to the reasons for a security classification decision. This enables them to participate in a meaningful way in the reconsideration process, and to identify any particular areas of concern or dispute. If the information in a Structured Decision-making Framework document adds little or nothing to the information in the IOMS matrix there may be no need to provide it. Where, however, the document contains significant additional material that is relied on to support a maximum security classification then the requirement to provide reasons will usually require that either a copy of the document is provided or, as a minimum, a summary is given of the information in the document that underpins or justifies the security classification decision. This will enable a prisoner to fully understand the reasons for the relevant decision and, if he wishes, challenge them by seeking a reconsideration. This is likely to be of particular importance where the IOMS preliminary assessment is "High" and an override to "Maximum" is applied during the course of the Structured Decision-making Framework process.

[106] I acknowledge Ms McCall's submission that the Structured Decision-making Framework document may contain confidential or sensitive information important for the maintenance of security and good order, as well as intelligence information. The requirements of natural justice will not always require that the relevant

documents be disclosed in their entirety. For example, the document may contain information provided by an informant whose own security would be prejudiced by the release of identifying information. Such information may need to be redacted, to the extent that it directly or indirectly identifies third parties. I suspect that such cases will be rare, however. Generally speaking, in the absence of exceptional circumstances, at least the substance or the gist of the relevant documents should be disclosed, to the extent that such material underpins the relevant classification decision.[48] I note that Ms McCall did not suggest that any of the information contained in the Structured Decision-making Framework document in this case was sourced from intelligence information, or was otherwise confidential.

[107] For the reasons outlined I am satisfied that there was both a breach of the statutory requirement to give reasons and an associated breach of natural justice in relation to Mr Smith's 25 February 2016 review and 14 March 2016 reconsideration. Mr Smith should have been provided with either a copy of the Structured Decision-making Framework document or (as a minimum) a summary of the reasons contained within that document that supported the maximum security classification decision.

Mr Roper's 28 April 2015 review and 29 May 2015 reconsideration

[108] Mr Roper was provided with a copy of the IOMS matrix in relation to his 28 April 2015 review. He submitted that that document did not include sufficient reasons for the classification. He noted that the only remarks that appear in box D.2 of the IOMS matrix are "maximum security classification supported by CSM and Prisoner Manager. Approved by Chief Custodial Officer 28/04/2015".

[109] The scores in the IOMS matrix explain why Mr Roper was initially categorised as a maximum security prisoner. Amendments (described as overrides) to reflect errors in the original scoring were also explained. These amendments did not change the preliminary security classification. No overrides were applied in relation to matters that were not already addressed in the IOMS matrix. Adequate written reasons were therefore provided for these decisions.

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48 *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA) at [72]-[73].

Mr Roper's 23 November 2015 review and 16 December 2015 reconsideration

[110] Mr Roper challenged his 23 November 2015 review and 16 December 2015 reconsideration on the basis that he was not provided with a copy of the Structured Decision-making Framework document.

[111] Mr Sherlock, the Prison Manager, recommended in the Structured Decision-making Framework document that Mr Roper be classified as a high security prisoner, but this was overridden by Mr Beales to a maximum security classification. The document notes his high risk of escape, his high risk of harm to the public and his mixed behaviour, but suggested that he could be managed at high security with a well structured management plan. This classification was supported by the Movements Manager, and by Mr Sherlock, the Prison Manager. Mr Beales concluded, however, that a review of incident reports and file notes supported the continuation of a maximum security classification.

[112] Mr Roper cannot be assumed to have been aware of the reasons for the override. He should have been provided with either a copy of the Structured Decision-making Framework document or, at the very least, a summary of the reasons for Mr Beales' override. The failure to do so was a breach of both the statutory requirement to give reasons and of natural justice.

Were the 25 February 2016 review and 14 March 2016 reconsideration decisions relating to Mr Smith unreasonable?

[113] Mr Smith submitted that the 25 February 2016 review and 14 March 2016 reconsideration were unreasonable.

[114] The traditional, *Wednesbury* approach is one of manifest unreasonableness. In that case the English Court of Appeal held that "if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can intervene".[49] However, the standard of unreasonableness may vary depending on the subject-matter, and more rigorous examination may be required in

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[49] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 230.

cases involving fundamental human, civil and political rights.[50] The focus is on the unreasonableness of the outcome itself, rather than the unreasonableness of its reasons.[51] Whether the decision-maker *acted* unreasonably, as opposed to whether the decision itself was unreasonable, is covered by other judicial review grounds, such as error of law, mistake of fact and illegality.[52] The question is whether the *outcome* was something that no reasonable decision-maker could have arrived at.

[115] Mr Smith advised that "unreasonableness is argued in the context of the totality of the procedural impropriety". This particular ground of challenge therefore appears to be inextricably related to the various other grounds of review and does not add anything material to those grounds.

[116] As will be apparent from the comments I have made above, whatever errors may have been made in the process, I do not accept that the outcome of the 25 February 2016 review and 14 March 2016 reconsideration was unreasonable. Mr Smith was considered to pose a high risk of escape and a high risk of harm to the public, particularly given his absconding and his history, including his manipulative nature.

Mr Smith's prison-based employment

[117] Mr Smith submitted that a decision to dismiss him from his prison-based employment was made under dictation, was procedurally unfair, and was unreasonable.

Relevant facts

[118] In September 2015 Mr Smith was employed as a landing messman in the maximum security wing of Paremoremo prison. He served breakfast and dinner to prisoners, served hot drinks at meal times, and collected and gave out laundry on

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50 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 403; *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47].

51 See for example *Central Hutt Residents Group Inc v Hutt City Council* HC Wellington CIV-2003-485-1395, 6 October 2003; *Wolf v Minister of Immigration*, above n 50.

52 Compare *Wheeler v Leicester City Council* [1985] AC 1054 (HL) at 1064. See generally Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [14.39]-[14.40].

Sunday and Wednesday afternoons. He was paid $14 a week, with $2 of that used to rent a television.

[119] On 18 March 2016 Mr Smith's prison employment was terminated. He was told by the unit Principal Corrections Officer, Mr Kapua, that the decision to terminate him was to allow him more time to focus on his civil proceedings. The written record of the decision confirms this.

[120] Corrections' position, however, is that this was not the real reason why he was dismissed. Mr Sherlock, the Prison Manager, deposes that in early March 2016 it came to his attention that Mr Smith was working. He considered that Mr Smith was not suitable for such a role because working as a messman gave him access to other prisoners. Given his history of manipulating Corrections staff and others, Mr Sherlock's view was that it was possible that he would find a way to use that access to his advantage, for example by manipulating or coercing others to do things that he himself was not able or willing to do (as had occurred previously). Mr Sherlock deposes that he discussed the issue with Ms Burns, the Regional Commissioner. They both thought that Mr Smith was not a "trusted prisoner" and that he should be removed from his messman role. On 18 March 2016 Mr Sherlock emailed Mr Kapua advising him to terminate Mr Smith's employment. Mr Kapua then did so, telling Mr Smith that the decision was to allow him more time to focus on his court proceedings.

[121] Mr Sherlock acknowledges that he was aware that Mr Smith was working on a number of legal matters. He thought that one advantage of Mr Smith not being required to work was that he would have more time to focus on these matters, including at times of day where he could call a lawyer, and discuss his case with other prisoners such as Mr Roper. He did not think it was necessary or appropriate to tell Mr Smith directly that he could not be trusted with the messman job. He denies that Mr Smith's employment was terminated in retaliation for him bringing these proceedings.

[122] Mr Smith viewed the original reason he was given for the termination of his employment with some scepticism. He says that he did not lack time to work on his

proceedings. As for what is now said to be the real reason behind the decision, Mr Smith's view is that working as a messman does not allow him to manipulate, take advantage of, or coerce other prisoners or staff. He remains of the view that his employment was terminated for reasons of retaliation.

[123] Mr Smith applied for an interim injunction to be reinstated to his employment. On 30 May 2016 Edwards J dismissed that application.[53]

Is the decision to dismiss Mr Smith amenable to judicial review?

[124] Prison-based employment is governed by s 66 of the Act. That section relevantly provides:

> **66 Work and earnings**
>
> (1) Every prisoner … may, while in custody,
>
> (a) be employed in any work that is directed or provided by the prison manager; and
>
> …
>
> (5) Prisoners may–
>
> (a) be employed under this section only in work of a kind described in subsection (6) that is approved by the chief executive and under the conditions approved by the chief executive; and
>
> (b) only be directed, under subsection (1)(a), to perform work of a kind specified in subsection (6)(b).
>
> (6) The work referred to in subsection (5) is work that is—
>
> (a) intended to provide the prisoner with work experience or to assist his or her rehabilitation or reintegration into the community; or
>
> (b) intended to reduce the costs of keeping prisoners in custody (for example, cooking, cleaning, and maintenance with the prison or any other prison).
>
> (7) Any work in which a prisoner is employed under this section must be carried out in accordance with any prescribed requirements

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53 *Smith v Attorney-General* [2016] NZHC 1004.

[125] No express criteria is set out in either the Act or the Regulations to guide the prison manager in making decisions regarding prisoner employment. Any decisions do, however, need to be exercised in accordance with the broader purpose of the Act. Under s 12 the prison manager must exercise powers and functions to ensure "that the prison operates in accordance with the purposes set out in section 5 and the principles set out in section 6" and to "ensure the safe custody and welfare of prisoners received in the prison". Section 5, amongst other things, provides that the purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by ensuring that sentences are administered in a safe, secure, humane, and effective way; to provide for Corrections facilities to be operated in accordance with the Act, Regulations and international standards; and to assist in the rehabilitation and reintegration of offenders through programmes and interventions**.** Relevantly, s 6 is similarly worded:

> **6 Principles guiding corrections system**
>
> (1) The principles that guide the operation of the corrections system are that—
>
> (a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:
>
> …
>
> (f) the corrections system must ensure the fair treatment of persons under control or supervision by—
>
> (i) providing those persons with information about the rules, obligations, and entitlements that affect them; and
>
> (ii) ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure:
>
> (g) sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision:
>
> (h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:

> (2) Persons who exercise powers and duties under this Act or any regulations made under this Act must take into account those principles set out in subsection (1) that are applicable (if any), so far as is practicable in the circumstances.
>
> (3) Subsection (1) does not affect the application or operation of any other Act.

[126] Under reg 150(1), "discipline and order must be maintained with firmness and fairness", and under reg 150(3) "[n]o officer may take disciplinary action against a prisoner if that action is retaliatory in nature or inconsistent with acceptable standards of treatment for a prisoner in similar circumstances". Under reg 196 a prisoner does not have any legitimate expectation of being accommodated in, or being provided with, the same or similar conditions during the whole term of his or her sentence, or being provided with the same or similar programmes or opportunities during the whole term of his or her sentence. Prison-based employment is not one of the prisoner's minimum entitlements under s 69 of the Act.

[127] Both the Court of Appeal and this Court have recognised that courts should be slow to interfere with operational decisions about day-to-day prison management.[54] The courts have recognised a wide range of factors that are relevant to the administrative decisions made in the course of the day-to-day operation of a prison, and the judgment and experience of the prison manager in assessing and weighing those factors should be given considerable deference.[55]

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[54] See for example *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [85]–[86]; *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112 at [29]; *Mitchell v Attorney-General* [2013] NZHC 2836. In *Mitchell* the Court noted at [35]:

> … requiring the High Court to assess the appropriateness of the mattresses provided to Ms Mitchell and whether she was appropriately deprived of a mattress for the six days she complains of, would involve the High Court "micro-managing" the prison system and trivialising the High Court's procedure.

See also *Taylor v Chief Executive of the Department of Corrections* HC Wellington CIV-2006-485-897, 11 September 2006 at [75]; *Ericson v Chief Executive of the Department of Corrections* [2013] NZHC 3035 at [11]-[16], describing the scope of judicial review of prison management decisions as "restricted", and [21] where it is stated that "[t]he limitations on the scope of judicial review of decisions of prison management which [the Judge] discussed mean that these decisions are not amenable to judicial review …" and noting at [20], with respect to the factors that prison management may take into account, that "assessment of weight is essentially a matter for the prison authorities and it is not permissible for [a court] to substitute its own view of that risk"; *Bennett v Attorney-General* HC Rotorua CP61/00, 9 August 2001 at [25].

[55] *Taylor* (CA), above n 54, at [26], where it is noted that "decisions about the best use of scarce resources or the balancing of delicate priorities … are best left to the discretion of the responsible authorities". See also *Bennett*, above n 54, at [25].

[128] Prison authorities are at liberty to change any conditions, as required for disciplinary or other purposes consistent with the legislation, so long as entitlements under the Act or regulations are not affected.[56] There is no statutory or regulatory "entitlement" to prison employment.[57] Rather, prison-based employment comes within the scope of day-to-day operational decisions made by prison staff. It is well established that there is little scope for review of managerial decisions of prison officers.[58] In *Daemar v Hall* McMullin J said:[59]

> The very nature of a prison institution will require that "on the spot" decisions be made by prison officers the effect of which will be to impose some restrictions and possibly punishments on inmates. I do not intend by this judgment to suggest that the power of those officers will be in any way curbed. If it were otherwise the day-to-day running of a prison institution might be jeopardised and the life of prison officers made a nightmare. Interference with that kind of day-to-day activity would be as unthinkable as interference by the civil Courts with the actions of a non-commissioned officer on a parade ground.

[129] Further, a court adjudicating such decisions would be impinging upon the management and operation of prisons as it would be capable of significantly inhibiting a discretion which may sometimes need to be exercised in circumstances of considerable urgency and importance. This would see the court crudely monitoring and directing the day-to-day operational decisions of prison management.[60]

[130] In *Greer v Prison Manager at Rimutaka Prison*,[61] the Court observed that the actions of Corrections administration would not ordinarily be susceptible to judicial review and that to do so would involve the courts micro-managing prisons. Mr Greer sought to judicially review decisions by prison authorities relating to access to legal papers and to a computer. Ronald Young J observed:[62]

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56 *Taylor* (CA), above n 54, at [31].

57 In *Taylor* (CA), above n 54, at [32] and [35], which involved non-contact visits, the word "entitlement" was said to mean an actual statutory entitlement, rather than an entitlement arising as part of the overall statutory purpose.

58 See *Morgan v Chief Executive of the Department of Corrections* HC Auckland CIV-2004-404-70, 15 July 2005 at [26].

59 *Daemar v Hall* [1978] 2 NZLR 594 (SC) at 603-604.

60 *Taylor v Chief Executive of the Department of Corrections (No 2)* HC Auckland CIV-2011-404-3227, 5 August 2011 at [69]. See also *Smith v Attorney-General* [2016] NZHC 1145 at [28]-[29].

61 *Greer v Prison Manager at Rimutaka Prison* HC Wellington CIV-2008-485-1603, 18 December 2008.

62 At [9].

> Many of Mr Greer's causes of action are essentially complaints that the prison administration has not acted in a way that he considered fair or appropriate. While the actions of Corrections administration might be frustrating to Mr Greer these actions would not ordinarily be susceptible to judicial review. If the Courts were to involve themselves in judicially reviewing management decisions at the level of much of what Mr Greer complains about then they would be unlikely to have time for any other work. They would essentially be left with the task of micro managing the prisons. Although I consider the lawfulness of Corrections conduct relating to each cause of action, most of these causes of action are management decisions not susceptible to review.

[131] Courts are reluctant to involve themselves in judicially reviewing management decisions of prison authorities, and the micro-managing of prisons is avoided. For example, decisions on applications for temporary release are not amenable to review given the wide discretion given to Corrections.[63]

[132] The overall tenor of the Act, the Regulations, and the case law as a whole demonstrates that without specific statutory or regulatory requirements it is unlikely that operational decisions of prison managers, including in relation to prison employment, will be subject to review by a court. The need to maintain security and discipline militates against restricting the discretionary ability of Corrections in this context,[64] as do the circumstances of urgency in which these issues arise, and the specific judgment and expertise of the prison manager in each case.

[133] Taking the principles I have outlined into account, I accept Ms McCall's submission that the decision to terminate Mr Smith's employment was an operational decision which is not amenable to judicial review. Subjecting decisions such of this nature to court oversight would constitute unacceptable and unworkable micro-management of day-to-day prison operations.

Summary and conclusions

[134] Mr Smith and Mr Roper have challenged a number of security classification reviews undertaken by Corrections that resulted in them being assigned maximum security status. In particular, they allege that there were serious deficiencies in the

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63 *Ericson*, above n 54, at [16].
64 *Taylor* (CA), above n 54, at [29].

processes that were followed, including a failure by Corrections to follow its own internal Guidelines.

[135] I will summarise my key findings in relation to each ground of review before turning to consider the issue of relief.

Legitimate expectation

[136] Mr Smith's 3 December 2014 and 13 August 2015 reviews and 23 January 2015 and 17 September 2015 reconsiderations were conducted in breach of Corrections' policies, as set out in the Guidelines.

[137] One of the key difficulties faced by Corrections in its security classification review processes for Mr Smith was that the highly prescriptive IOMS matrix used to assess risk required it to give Mr Smith "credit" for various types of "good behaviour" in prison. In the unusual circumstances of Mr Smith's case, however, his good behaviour in prison during the period preceding his escape was not indicative of genuine rehabilitation or low escape risk, as would normally be the case. On the contrary, Corrections view was that Mr Smith had been able to take advantage of the low security status afforded to him by his previous "good behaviour" to facilitate his escape to Brazil, in part through manipulating others. Mr Smith is therefore a higher risk than would be suggested by a strict application of the IOMS scoring matrix.

[138] It appears that, to some extent at least, Corrections' response was to "inflate" Mr Smith's IOMS scores beyond what could be supported by a strict application of the Guidelines. I have found that such an approach breached Mr Smith's legitimate expectation that Corrections would follow its own internal policies, including those set out in the Guidelines. The appropriate course in the circumstances was to score Mr Smith in accordance with the Guidelines and then apply an override to maximum security, if justified. Such an override would reflect that the IOMS matrix failed to adequately capture the true extent of Mr Smith's escape risk.

[139] I have concluded that Mr Smith's 25 February 2016 review and 14 March 2016 reconsideration, when considered together, did not breach the Guidelines. Any initial breaches were cured through the reconsideration process. The application of

an override to maximum security status did not breach Mr Smith's legitimate expectations.

[140] Mr Roper's 16 December 2015 reconsideration was conducted erroneously and breached his legitimate expectation that it would be conducted in accordance with Corrections' internal policies. That is because Mr Roper was unable rather than unwilling to participate in a mainstream drug treatment program. This was not appropriately recognised in the scoring process.

Factual errors

[141] I have concluded that while there were some relatively minor errors in the Structured Decision-making Framework document, these errors do not appear to have had any material impact on Mr Smith's 13 August 2015 review or 17 September 2015 reconsideration.

Invalid delegation

[142] I do not accept Mr Smith's submission that his security classification initiated on 4 June 2015 was made pursuant to an invalid delegation. As I have indicated, at the point at which a classification had actually been made, the Chief Custodial Officer (Mr Beales) had approved the new classification that was initiated on 29 June 2015. There was therefore no security classification assigned by the Movements Manager (Mr Shead) on 25 June, as Mr Smith alleges.

Statutory time frame

[143] Mr Smith's security classifications of 13 August 2015 and 25 February 2016 were completed outside of the statutory time frame, along with Mr Roper's security classification of 23 November 2015. The relevant security classifications are not, however, invalid or ultra vires. Prisoners are, however, entitled by the Act to have their security classification reviews completed no later than six months after their previous review. It is imperative that Corrections use its best endeavours to comply with this requirement given the profound impact that a prisoner's security classification has on their day to day life in prison.

Inadequate written reasons

[144] Adequate reasons were given for Mr Smith's 3 December 2014 review and 23 January 2015 reconsideration. Inadequate reasons were given, however, in relation to his 13 August 2015 review and 17 September 2015 reconsideration. Provision of the Structured Decision-making Framework document without the IOMS matrix was not sufficient to properly inform Mr Smith of the reasons for his security classification. This was a breach of the Act, Regulations, and of natural justice.

[145] Similarly, Mr Smith was not provided with adequate reasons in relation to his 25 February 2016 review and 14 March 2016 reconsideration. On this occasion he was not given a copy of the Structured Decision-making Framework or a summary of the reasons contained within that document, but only the IOMS matrix. Again, this was a breach of the Act, Regulations, and of natural justice.

[146] Mr Roper was given adequate reasons in relation to his 28 April 2015 review and 29 May 2015 reconsideration. However, he was not given adequate reasons in relation to his 23 November 2015 review and 16 December 2015 reconsideration. In particular, he was not provided with a copy of the Structured Decision-making Framework document or a summary of the reasons for the override. Again, this was a breach of the Act, Regulations, and of natural justice.

Unreasonableness

[147] Mr Smith's 25 February 2016 review decision and 14 March 2016 reconsideration were not unreasonable.

Prison-based employment

[148] The decision to terminate Mr Smith's employment within prison was an operational decision based primarily on the need to ensure safety and security within the prison. Subjecting decisions of this nature to court oversight would constitute unacceptable and unworkable micro-management of day-to-day prison operations. The challenged decision is not amenable to judicial review.

What is the appropriate relief?

[149] I now turn to consider the appropriate relief.

Relief in judicial review proceedings – relevant legal principles

[150] The plaintiffs seek declarations of breach in respect of any grounds of review that are upheld. They also seek orders that any maximum security classification decisions that are "tainted" by procedural errors be quashed and that future security classification reviews take place at six-monthly intervals.

[151] Relief in judicial review proceedings is discretionary.[65] Courts are, however, more reluctant to grant a remedy where it is futile to so,[66] or where the proceedings are moot or of academic interest only.[67] Notwithstanding this, the court retains jurisdiction even in moot proceedings. Where the issues are of general and public importance, particularly involving public authorities and public law issues, the discretion remains.[68] The discretion is categorised as being for exceptional circumstances, or where issues have a wider significance and will affect a wide group of people.[69]

[152] Similarly, courts are reluctant to quash and remit decisions where there is no point in directing the defendant to reconsider the decision.[70] On the other hand, successful judicial review applicants are entitled to vindication, in particular via a declaration, unless there are special considerations to the contrary or extremely strong reasons for refusal.[71] It is also important that justice is seen to be done,

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65 Judicature Amendment Act 1972, s 4(1).

66 *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78; *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502-503; *Crusader Meats New Zealand Ltd v New Zealand Meat Board* HC Wellington CP85/02, 16 December 2002 at [107]-[112].

67 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, LexisNexis, Wellington, 2014) at 841; *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) at 199.

68 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [17]-[21].

69 Philip Joseph, above n 67, at 842.

70 *Crusader Meats*, above n 66, at [111].

71 *Williams v Auckland Council* [2015] NZCA 479, (2015) NZ ConvC 96-013 at [99].

and judicial review may serve a deterrent function.[72] In *Air Nelson Ltd v Minister of Transport*, the Court of Appeal stated:[73]

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
>
> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment*, Lord Bingham of Cornhill described the discretion as being "very narrow" whereas Lord Hoffmann said cases in which relief would be declined were "exceptional".
>
> [61] In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief. The usual assumption is that where there is "substantial prejudice" to the claimant, a remedy should issue: *Murdoch v New Zealand Milk Board*. This is evident from *Unison Networks Ltd v Commerce Commission*, where this Court refused to grant relief, notwithstanding a finding that the Commerce Commission had acted unlawfully, on the basis that overturning the Commission's decision would occasion considerable disruption to the electricity industry and its consumers. The majority nevertheless took note of "strong cautions against exercising the discretion not to set aside an unlawful decision": at [81].

[153] The Court of Appeal in *Rees v Firth* noted that the observations in *Air Nelson* were directed towards situations where the claimant had suffered substantial prejudice, and that a more nuanced approach might be necessary in the generality of cases.[74]

[154] In *Percival v Attorney-General*, judicial review highlighted errors in the procedure of a disciplinary hearing to determine whether prisoners were guilty of tampering with urine samples taken for drug control purposes.[75] The prisoners had served their sentences, so there was no decision to re-make. However, the Court held that quashing the findings could still practically impact on their lives, such as

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72 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 553.

73 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 (citations omitted).

74 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]. See also *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [91].

75 *Percival v Attorney-General* [2006] NZAR 215 (HC).

through impacting their eligibility or consideration for parole.[76] The decisions were therefore set aside and declared invalid.

[155] In *Reekie v Chief Executive Officer of the Department of Corrections*, Mr Reekie applied for judicial review of a decision to transfer him between prisons, and other decisions relating to his time in prison.[77] After examining the merits and concluding on each point, Rodney Hansen J held:

> [81] I have found that the prison authorities failed to give proper notice of Mr Reekie's transfer to Spring Hill and of the reasons for it and to give him prompt written notice of the reasons for the directed segregation orders made against him. The effects of these oversights were, of course, relatively short-lived and were of no consequence to the substantive decisions themselves. They are now well and truly spent. A remedy will achieve nothing. In such circumstances, there is no reason to make the declarations sought by Mr Reekie. The Court's role is to resolve live disputes, not to rule on matters that have been rendered of academic importance.

[156] In *Bennett v Superintendent of Rimutaka Prison* Gendall J held that there had been errors of law in the context of disciplinary action at a prison, later confirmed by a visiting justice of the peace.[78] The complainant was no longer an inmate, and had served his penalties. The relevant breaches were the failure of the deputy superintendent to hear submissions on penalty, and the failure of the visiting justice to grant Mr Bennett an adjournment whilst he awaited legal advice. However, the conviction was rightly entered, as was the penalty. His Honour noted that the court will not normally give a remedy if it is useless to do so (citing the law on mootness on appeal).[79] While it was inappropriate in the circumstances to make an order quashing the decision or penalty imposed by the superintendent, his Honour was willing to make a declaration as to the breach of natural justice.[80] In relation to the decision of the visiting justice, his Honour stated that although no reconsideration of the merits of the appeal was possible, the deterrent function of judicial review and the need for justice to be seen to be done were still operative factors. Mr Bennett had lost the chance to pursue one of his rights, and was "entitled to have relief at the end of the spectrum which at least provides some vindication

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76 At [55]-[57].
77 *Reekie v Chief Executive Officer of the Department of Corrections* [2013] NZHC 271.
78 *Bennett v Superintendent of Rimutaka Prison* HC Wellington CP86/02, 11 March 2003.
79 At [34]-[35].
80 At [36].

through having the justice's decision quashed".[81] The decision was therefore set aside.

Appropriate relief in this case

[157] Turning to this case, neither Mr Smith nor Mr Roper were still maximum security prisoners at the time of the hearing before me, as a result of their security classifications having been reduced in subsequent reviews. None of the challenged decisions are still operative. Mr Smith submitted that the (now historic) maximum security classifications could still carry some weight in a parole context and should therefore be quashed. I doubt, however, that the relevant security classifications are likely to impact on the plaintiffs' future parole prospects. I note that Mr Roper is not eligible for parole until 2025. Further, the Parole Board will have the benefit of this judgment (to the extent relevant) and the various findings I have made regarding the security classification processes that were followed.

[158] There is also some uncertainty surrounding the impact of quashing the past security classifications decisions. It would obviously be pointless to remit the decisions for further consideration, considering they no longer apply. The implications of there being a lacuna in Mr Smith and Mr Roper's past security classification status are unclear, given that the Act requires that all prisoners serving terms of imprisonment of three months or more be given a security classification. I have accordingly not been persuaded that any purpose would be achieved by quashing the impugned maximum security classifications and in my view it would be inappropriate to do so.

[159] The position in relation to declaratory relief is more difficult. I accept Mr Smith's submission that the breaches of legitimate expectations, the failure to give adequate reasons and the lateness of the reviews are not merely technical errors. The security classification process has a significant impact on the day-to-day lives of prisoners and they are entitled to expect that the process will be conducted in a fair, transparent and consistent manner, in accordance with the Act, the Regulations and Corrections' own internal policies (as set out in the Guidelines and other documents).

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[81] At [38].

They are also entitled, by statute, to have their security classification reviews completed at intervals of no more than six months, and to be given adequate reasons for security classification decisions. I have found that there were a number of procedural shortcomings in relation to the processes that were followed for Mr Smith and, to a lesser extent, Mr Roper.

[160] Ms McCall submitted that if correct processes had been followed, the outcome would have been the same (namely a maximum security classification). That may well be the case, but it cannot justify the procedural breaches that occurred. The situation here is different to the Court of Appeal decision in *Bennett*,[82] where the breach was minor and had no material impact on the prisoner.

[161] Ms McCall further submitted that the apology Corrections had made to Mr Smith in respect of his late security classification reviews was sufficient to remedy those breaches.

[162] Courts are often reluctant to grant relief where decisions are no longer operative. The difficulty in this case, however, given the requirement for six-monthly security classification reviews, is that by the time any challenge comes to trial there will have been a further review. Declining relief in such circumstances would mean that Corrections would effectively be free of court oversight in respect of the security classification review process, no matter how egregious any procedural errors might be. That would be of concern given the impact of the security classification process on prisoners' lives.

[163] I have concluded that, despite the particular security classifications under review having been superseded, there is still some utility in making declarations in respect of the specific procedural errors that have been proven. Such a course will hold Corrections accountable for the procedural shortcomings that have occurred in this case, while at the same time providing some guidance as to what is required in the future.

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82 Above n 4.

Result

[164] I declare that:

(a) The assessment of Mr Smith's security classification reviews (including the associated reconsiderations) of 3 December 2014 and 13 August 2015 were conducted in breach of legitimate expectation and s 6(1)(f)(ii) of the Act.

(b) The assessment of Mr Roper's reconsideration of 16 December 2015 was conducted in breach of legitimate expectation and s 6(1)(f)(ii) of the Act.

(c) Mr Smith's 13 August 2015 and 25 February 2016 security classification reviews were completed out of time, and Mr Roper's 23 November 2015 security classification review was completed out of time, in breach of s 47(3)(b)(i) of the Act.

(d) The failure to provide adequate reasons for Mr Smith's security classification reviews of 13 August 2015 and 25 February 2016 (including the associated reconsiderations) was in breach of natural justice, s 48(1)(b) of the Act and reg 52(c) of the Regulations.

(e) The failure to provide adequate reasons for Mr Roper's security classification review (including the associated reconsideration) of 23 November 2015 was in breach of natural justice, s 48(1)(b) of the Act and reg 52(c) of the Regulations.

[165] The plaintiffs are self-represented and have presumably not incurred any legal costs. They are entitled, however, to reimbursement of any reasonable disbursements, including any Court filing fees. Such disbursements are to be fixed by the Registrar, in the event of disagreement between the parties.

Katz J