[2019] EWHC 3031 (Admin)

Case No: CO/2275/2019

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

Date: 11/11/2019

Before :

HIS HONOUR JUDGE COTTER Q.C.
(sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN on the application of
PHILIP RYLE **Claimant**

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

- -
- -

Paul Skinner (instructed by Clarke Kiernan) for the Claimant
Robert Talalay (instructed by Government Legal Department) for the Defendant

Hearing dates: 5th November 2019

- -

JUDGMENT

His Honour Judge Cotter QC :

Introduction

1. The Claimant who is a serving prisoner challenges the decisions of the Defendant made on 23rd November 2018 and 18th March 2019 to re-categorise him from a category D prisoner to a category C prisoner.

2. The claim was received in the administrative court office on 12th June 2019. Time to challenge the first decision was extended, and permission to apply granted, by the order of His Honour Judge Bidder QC made on 13 August 2019.

Outline facts

3. Following the Claimant's conviction for defrauding the revenue on 28th September 2019 he was sent to HMP Bristol and was initially categorised as being a Cat D prisoner. On receipt of information from HMRC that it had initiated confiscation proceedings against the Claimant for a very significant sum of money, and that it was believed that if he was afforded the privilege of open conditions he may use the opportunity to access his assets and dissipate or hide them to frustrate the ongoing confiscation process, the Claimant was re-categorised as a Cat C prisoner on 23 November 2018. The decision to affirm the Claimant's categorisation as Cat C was taken by Governor Lucas in HMP Guys Marsh on 18 March 2019.

4. On 1st May 2019, following his return to HMP Bristol from HMP Guys Marsh, the Claimant was seen near the exit to the prison unsupervised. This set in train a series of events ending with the Claimant being placed on the escape list (E-list) and re-categorised to Cat B. These decisions were challenged in a further claim. In due course the Claimant was removed from the E-list completely and re-categorised to Cat C on 4 October 2019. In the circumstances, the Claimant has withdrawn his further claim and the issues contained within it are no longer live matters before the Court.

Issues

5. The issues for the Court to determine are as follows:

    a. Whether the decision to re-categorise the Claimant on 23rd November 2018 and/or the decision to affirm the re-categorisation on 18 March were unlawful
    b. If either decision was unlawful, whether the Claimant should be entitled to any remedy and, if so, what.

Classification: the legal framework

6. The power to categorise is found in rule 7(1) Prison Rules 1999.

> "Subject to paragraphs (1A) to (1D), prisoners shall be classified in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3"

7. So there is a specific statutory requirement to follow any relevant policy of the Secretary of State (in addition to any common law duty to follow stated policy).

8. Male adult prisoners (those aged 18 or over) are given a security categorisation soon after they enter prison. These categories are based on a combination of the type of crime committed, the length of sentence, the likelihood of escape, and the danger to the public if they were to escape. Although categorisation decisions relate to the management of risk within the prison estate, they are decisions which may impact significantly on a prisoner, not only as to the current level of restriction placed upon their liberty[1], but also as to eligibility for future release on licence.

9. The legal framework in re-categorisation cases is uncontroversial (see generally the judgment of Kenneth Parker J in *R (Manning) v Secretary of State for Justice* [2013] EWHC 1821 (Admin). The Secretary of State has a discretion as to the appropriate category into which a prisoner falls, to be exercised in accordance with normal public law principles. These relevantly include:

   (a) the requirement to follow published policy; see **Mandalia-v-Secretary of State for the Home Department** [2015] UKSC 59, [2015] 1 WLR 4546;
   (b) that the decision must leave out of account irrelevant considerations.
   (c) the decision must be rational, as *per* Saunders J in **R (Smith)-v-Secretary of State for Justice** [2009] EWHC 84 (Admin) at [10]:

> "Decisions as to categorisation are for the defendant and not for the courts. The Prison Service, who advise the defendant, are the people who have the responsibility for preventing escapes and they are the ones with experience of security matters. This court can and only will interfere if it decides that the decision to upgrade was irrational"

10. The relevant categories in this case are C and D defined as follows:
    (a) Category C; prisoners who cannot be trusted in open conditions but who do not have the resources and will to make a determined escape attempt
    (b) Category D; prisoners who present a low-risk; can reasonably be trusted open conditions and for whom open conditions are appropriate.

[1] Category A, B and C prisons are called closed prisons, whereas category D prisons are called open prisons.

11. A re-categorisation review is conducted every twelve months and every six months in the last two years of custody. In addition a prisoner may have their categorisation reviewed when there is a significant change in circumstances or behaviour which impacts upon the level of security required.

Policy

12. The Defendant's policy is contained in PSI 40/2011 "categorisation and re-categorisation adult male prisoners". It states at paragraph 1.1 that

> "the purpose of categorisation is to assess the risks posed by a prisoner in terms of
>
> - the likelihood of escape or abscond
> - the risk of harm to the public in the event of an escape or abscond
> - any control issues that impact on security and good order of the prison and the safety of those within it
>
> and then to assign to the prisoner the lowest security category consistent with managing those risks."

13. Under principles of categorisation it is stated

> "3.1 All prisoners must have assigned to them, the lowest security category consistent with managing their needs in terms of security and control and must meet all the criteria of the category for which they are being assessed (i.e. for Category D this will mean that they are low risk of harm, can be reasonably trusted not to abscond and for whom open conditions are appropriate i.e. will usually be within the time to serve limit)."
>
> And
>
> "3.2. Categorisation decisions must be fair, consistent and objective
>
> - categorisation decisions are individual risk assessments which must be in line with current policy.
>
> And
>
> "3.7 responsibilities of staff
> ……
> It is the responsibility of all persons completing the ICA1 and RC1 forms to ensure that only information relevant to an assessment of the risks of
> i. Escape/abscond or
> ii. risk of harm to the public in the event of an escape or abscond
> iii. the safety of others within the prison
> iv. the good order of the prison
>
> contribute to the categorisation allocation decisions

14. Section 5 deals with re-categorisation. It states

> "5.1 The purpose of the re-categorisation process is to determine whether, and to what extent there has been a clear change in the risks the prisoner presented at his last review and to ensure that he continues to be held in the most appropriate conditions of security"
>
> And

"5.2….. Due account should be taken of any intelligence, held either within the prison received from a law enforcement agency… that indicates the prisoner is involved in ongoing serious criminal activity

15. Paragraph 5.9 lists changes that might trigger a categorisation review (i.e. other than the prescribed regular reviews):

"In addition to the prescribed timetable of reviews, prisoners may have the security category reviewed whenever there has been a significant change in the circumstances or behaviour, which impacts on the level of security required. Changes might include those listed below, although other circumstances might also arise :

…

- A confiscation order is enforced
- serious crime prevention order (SCPO) is imposed
- new or additional information comes to light. For example during completion or updating the OASys assessment which highlights additional risk factors
- there is cause for concern that the current categorisation decision is unsound (there must be corroborative evidence to support that concern)

..

16. Annex A to the policy document contains an algorithm (the ICA1) for what is described as "initial" or "provisional" categorisation of adult male prisoners. Within that document consideration has to be given to, amongst numerous other things, whether there has been

"within the past three years; and abscond, failure to surrender, breach of bail

and whether there is

"outstanding : confiscation order"

17. After the algorithm is applied there is then an assessment as to whether there are any circumstances which might indicate the prisoner

"..should be placed in a higher security category than indicated by the algorithm. i.e.

- security information
  ..
- Circumstance of offence, pattern of offending.
- Intelligence indicating involvement in ongoing serious criminality
  ..
- Confiscation order, consider whether amounts and default sentence imposed might increase the risk of abscond

18. Annex D provides guidance on the completion of the re-categorisation form RC1 which must be completed whenever a prisoner's category is reviewed. It is stated at paragraph 1

"..it is vital that the form provides an accurate and full record of the decision process"

19. It also states within the same paragraph that

"information relevant to the assessment will include

security information-any SIRs, relevant historical information about previous escape or trust failures, information from the Police Intelligence Officer

…..

New or outstanding charges, (including enforced Confiscation Orders) must be assessed for the likely impact on the prisoners escape/abscond risk or because they might indicate the prisoner presents an increased risk to the public. Establishments should seek more information from the enforcement authorities as to the level of risk. PSI 16/210 provides more information on confiscation orders.

20. Under paragraph 5, part 3 "risk assessment for re-categorisation to high security" it states,

"This section assesses whether and the extent to which the prisoner has increased his risks and whether categorisation to a high security category and greater levels of supervision are required. Risk assessment for a higher security category (and any subsequent reallocation) will normally be nonroutine and in response to a significant change in risk or behaviour… issues which may necessitate re-categorisation to a high security category are :

- Security intelligence suggesting the prisoners involved in criminal activities
- …
- Further charges of a serious nature
- confiscation order enforced
- sentence increased
- Deportation Order served

..

21. In respect of re-categorisation to category D it is stated

" 9. The amount of any outstanding Confiscation Order must be taken into account. Existence of a confiscation order does not of itself preclude a prisoner from categorisation to Category D and subsequent allocation to open conditions. However the impact on abscond risk of the amount of the Order; the prisoner's willingness/ability to pay it ; the additional time to be served in lieu of non-payment must be considered. Establishments should seek more information from the enforcement authorities as to the level of risk. Prisoners at high risk of absconding for any reason should not be categorised to Category D."

22. PSI 16/2010 concerns confiscation orders. It requires governors to have systems in place to ensure that establishments are compliant with the orders and sentences of the court in cases where an offender is subject to a confiscation order. It provides a paragraph 2.2 that

"Governors must have a system in place to ensure that when a confiscation order is received from the court the relevant Prosecution Enforcement Unit and RCU are informed by email when the particular prisoner concerned

..

Is to be re-categorised to category D/open conditions.

And in relation to transfer to open conditions

"3.20 The fact that a prisoner is subject to a confiscation order should not necessarily preclude a transfer to open conditions. However the following factors should be considered when assessing risk ; particularly the risk of abscond:

- Whether the offender is in default and the size of the outstanding confiscation order;

- Whether the offender may have hidden his/her assets abroad and therefore may abscond to be able to access them or make it harder for the authorities to find them by no longer being able to be questioned on their whereabouts or to sign powers of attorney over them

It is important to contact the relevant enforcement agencies who may have information that will assist when making decisions in the circumstances

3.21 If a prisoner is already in open conditions when a confiscation order is imposed, this is an issue which may necessitate re-categorisation."

23. It was a central tenet within Mr Skinner's submissions on behalf of the Claimant that it is clear that the Secretary of State, in formulating the above polices, had taken an informed decision that an increase in risk of absconding does not come until a confiscation order has been made. There is no reference within either policy to there being any increased risk as a result of Proceeds of Crime Act ("POCA") proceedings being on foot.

Evidence and relevant facts

24. The essential facts in this matter were not in dispute.

25. The Defendant relied upon the statement of Mark Douglas, an offender supervisor at HMP Bristol, who made the decision on 23rd November. He stated that prior to the receipt of the 20th November 2018 memo

> "the Claimant was already of concern to us because of his previous escape".

However it is noteworthy that such concern had not prevented him being given D category status upon application of the algorithm because the conviction for the offence arising from the escape was in 1996 (23 years earlier).

26. Mr Douglas stated

> "As the Claimant's offender supervisor, I decided to do a categorisation review based on the information we had just received from HMRC, that they were pursuing confiscation against the claimant to recover alleged criminal benefit. HMRC believed if the claimant was afforded the privilege of open conditions or release, he may use the opportunity to access his assets and dissipate or hide them to frustrate the ongoing confiscation process. I perceived a substantially greater risk of the claimant escaping (as trying to escape) the prison due to this information from HMRC and the risk of escape that had been specifically outlined. I carried out a categorisation review of the claimant on 23 November 2018, completing the RC1 form of PS 40/2011, Annex A. I re-categorised the claimant from category D to category C prisoner, recording my reasons within the RC1…. I detailed how the risks are increased and stated
>
> > "we have just been notified by HMRC that they are pursuing confiscation proceedings [against the claimant] to recover alleged criminal benefit (this could be a very large amount). The confiscation case is scheduled for completion in March 2019. HMRC believe if Ryle is afforded the privilege of open conditions or release before then he may use the opportunity to access his assets and dissipate or hide them to frustrate the ongoing confiscation process.

> Ryle was given a six-month sentence in 1996 for an escape from lawful custody. Ryle has multiple aliases."

27. There was also a statement produced from James Lucas, formerly a governor at HMP Guys Marsh. He referred to his stated reasoning when dismissing the Claimant's complaint and his reference to the opportunity to access assets and dissipate or hide them to frustrate the ongoing POCA process and that

> "…other factors that are taken into consideration are your previous convictions and that you have previously served a sentence for escaping from lawful custody"

28. Mr Skinner pointed out that the statement did not directly address whether Mr Lucas thought there was actually a confiscation order in place or not at the time he made his decision, despite the Claimant's allegation that he had made a mistake (believing there was an order in place when there was not).

29. Other statements in the bundle, prepared in relation to the further claim which has now been discontinued were treated as part of evidence in this claim. However they were not directly relevant to the issues before the court.

30. Very helpfully Counsel produced an agreed chronology to which I have added some references from the documents in the following brief history.

31. On 28th September 2018 the Claimant was sentenced by HHJ Longman to three years and eight months imprisonment following his conviction (upon a guilty plea) for defrauding the revenue of VAT. He was on bail before and after his plea i.e. before sentence. The learned Judge set a timetable for the POCA application in the usual way with a mention hearing scheduled for 18th March 2019. The Claimant was imprisoned in HMP Bristol where he underwent an initial categorisation assessment resulting in him being categorised as Cat D. Although he was not moved to a Category D prison he was told that transfer was only dependent on a space being available (e.g. notes of 13th October 2018 and 15th November 2018).

32. On 9th October 2018 it was noted in the Claimant's National Offender Management Information Service ("NOMIS"),

> "Alert Security and Financial Order made active",

and in the transfer report

> "following service of the Section 16 notice, the benefit figure is calculated as £1,445,042.22 and the available amount as £822,596.04. If categorisation/ROTL is being reviewed over further information contact the HMRC offender management enforcement team..

So as at this date it was known that POCA proceedings were in process and that there was a very large benefit figure and a much lesser but also very large available amount according to the HMRC.

33. On 20th November 2018 a document was created for the attention of the governor HMP Bristol. As Mr Skinner pointed out it states under the title "security categorisation decision" that "HMRC-the enforcing agency-have informed HMP Bristol of concerns regarding open conditions for Philip Ryle" which would suggest that the document was an internal prison service document and not an/the original document from HMRC. However, Mr Talalay confirmed that his instructions were that the defendant had complied with its disclosure obligations and there were no other documents; so the matter could be taken no further. The balance of the document states

> Risk(s) to the ongoing confiscation process.
>
> HMRC is currently pursuing confiscation proceedings against RYLE to recover alleged criminal benefit. Confiscation case is scheduled for completion in March 2019. HMRC believe if Ryle is afforded the privilege of open conditions or release before then he may use the opportunity to access his assets and dissipate or hide them to frustrate the ongoing confiscation process.
>
> Ryle is under restraint, but it is believed significant assets are hidden and by its nature is outside our control.
>
> HMRC believes there is a real risk of Ryle absconding before the confiscation is set, or before the proceeds of his crime are recovered. He is known to have escaped from custody before.
>
> Ryle is understood to be a fraudster who has used multiple identities. His access to multiple names may afford him the opportunity to conceal himself from law enforcement, should he wish to do so.
>
> HMRC further believe Ryle is a recidivist offender, having history of fraud in the UK and abroad.
>
> Ryle has multiple aliases
>
> Ryle was given a six-month sentence in 1966 for escape from lawful custody."

34. On 23rd November 2018 Senior Officer Douglas conducted a review of the Claimant's categorisation recommending re-categorisation to Cat C. A copy of the RC1 form was not provided to the Claimant at the time (as it should have been).

35. On 7th January 2019 the Claimant was transferred to HMP Guys Marsh.

36. On 16th January 2019 a case administrator at HMP Guys Marsh considered the Claimant's file and noted that information had been provided in relation to the POCA section 16 notice which contained the benefit figure and the amount said to be available. A request was made of HMRC for information as to whether the matter was still going to be pursued through a POCA as

> "this sort of information will be useful in the future reviews and possible request to transfer as any outstanding actions will have an impact on the decisions taken".

The response of 17th January 2019 referred to the previous figures in relation to benefit amount and available amount and added little in terms of substantive information.

37. From November 2018 onwards the Claimant made various complaints about his re-categorisation (made at both HMP Bristol and then HMP Guys Marsh). The complaints at HMP Guys Marsh escalated to Governor Trickey and then ultimately to Governor Lucas. The Claimant referred to the fact that he had been on unconditional bail before sentence and that POCA proceedings, as opposed to an order, should not impact on categorisation.

38. On 18th of March 2019 Governor Lucas upheld the decision for the Claimant to be categorised as Category C. The confirmation to the Claimant stated

> " I have fully reviewed the decisions that have been made in relation to your current categorisation and am satisfied that the most recent categorisation review which was carried out at HMP Bristol on 23rd November 2018 was appropriate and that due to ongoing HMRC investigations you will remain in category C conditions"

39. Governor Lucas then set out paragraph 9 (see paragraph 21 above) which relates to the position when confiscation order has been made. He continued.

> "The current benefit figure is calculated as £1,445,042.22.
>
> Governor Trickey spoken to about the information we received from HMRC in relation to ongoing investigation into your case. This information is also considered when carrying out re-categorisation reviews. There are concerns that if you are offered the privilege of open conditions you may use the opportunity to access your assets and dissipate or hide them to frustrate the ongoing confiscation process. Other factors that are taken into consideration your previous convictions and that you previously served a sentence for escaping from lawful custody. Until the HMRC investigations are concluded you are likely to remain in category C conditions.

40. As I shall consider in due course, it is the Claimant's case that Governor Lucas fell into material error as he was under the impression that it is said that the note shows that he believed that a confiscation order had been made (hence the reference to paragraph 9). However, although the reference to paragraph 9 is somewhat puzzling as I shall set out later in my judgment the balance of the letter supports the view that he believed that there were "ongoing investigations" (and an ongoing "process"), and that he was not under the illusion that an order had been made. It is unfortunate that Governor Lucas' witness statement did not directly address this point.

41. On 24th April 2019 the Claimant was transferred back to HMP Bristol.

42. On 1st May 2019 the Claimant was said to have been found unescorted, in the grounds of HMP Bristol very near to the exit. This incident is denied by the Claimant, who asserts that the incident actually took place on 24th April 2019 on which day he had in his possession a movement slip to go to the music room. On 3rd May 2019 he was placed on the E-list. This decision was the subject of the further proceedings which were eventually compromised with the Claimant being given permission to withdraw the claim (as he had been removed from the E-list on 6 September 2019)

Grounds

43. The claim was formulated and pursued through to virtually the eve of the hearing by the Claimant himself. He did not enumerate specific grounds. At the outset of the hearing I confirmed with Mr Skinner that they were five grounds maintained.

Ground one

44. It is the Claimant's case that both the decision on 23rd November and that of 18th March 2019 departed from the Defendant's clear policy that the increase in risk as a result of confiscation proceedings occurs only at the point that the Confiscation Order is made, not before.

45. Mr Skinner submitted that the Secretary of State, in formulating the policy in this way, had available all the resources of the executive to decide where the appropriate line was to be drawn and it was, it is to be as assumed, drawn where it was for good reason. It was, and is, not for prison staff (or the Court) to second guess the Defendant's decision as to why he drew the line where he did. Insofar as it might not be appropriate to follow the Defendant's policy in a particular case, the reasons for such a departure require to be articulated. What has happened here by contrast, is that the Defendant's officials simply did not take on board where the dividing line on risk was set out in the Defendant's policy and have, without registering the fact, unlawfully departed from it.

46. In response Mr Talalay submitted that the decisions were wholly in line with the policy and there had been no departure.

Ground two

47. The second ground was that, contrary to the policy, there was a failure to obtain any or any adequate information before the November decision and when enquiries were eventually made in January, they were inadequate.

48. Mr Skinner submitted that there had been departure from the clear policy which states (see paragraph 32 above) that

> "Establishments should seek more information from the enforcement authorities as to the level of risk."

No follow up information was sought from HMRC prior to the November decisions and only very limited further information was obtained prior to the March decision. He submits that there should have been enquiry as to the relevant amounts set out in the POCA proceedings, including the assets figure, and also the extent of restraint on the claimant's (and his wife's) property. He argued that the failure to seek such information was important because HMRC appears not to have disclosed that

i. the Claimant was made bankrupt in 2017 (in which bankruptcy HMRC claimed) so he foreseeably had very limited, if any, assets against which a confiscation order could be made,
ii. HMRC accepted that it had double-counted the equity in the Claimant's wife's house (in the sum of £657,122) and
iii. That there was a restraint order over the Claimant's wife's property, so it is not possible for the Claimant to dispose of it.

Mr Skinner suggested that each of these matters were relevant to the question of the risk of dissipation.

49. Mr Talalay submitted that there was adequate information available for both decisions and there was no requirement to seek any further detail. Further, the three matters referred to by Mr Skinner took matters no further forward as the concern of HMRC was in relation to "significant hidden assets", being by their nature "outside of [HMRC's] control". Such assets would not been declared in the bankruptcy and did not relate to the equity in the wife's house.

Ground three

50. Ground three was that the 23rd November 2018 decision took into account old matters, which are, again, outside the scope of what can be taken into account by PSI 40/2011. This provides that absconding etc can only be taken into account if it occurred within the last 3 years. Here the absconding taken into account by the Defendant took place more than 23 years ago. It was not capable of being a relevant consideration and vitiates the decision.

51. In response Mr Talalay submitted that whilst it was only history of absconding of failing to surrender/breach of bail within the last three years that was relevant within the algorithm for the provisional categorisation, such categorisation was clearly only "provisional" and the algorithm only a "rough and ready" initial tool. Re-categorisation under the policy was a very different process and it was specifically set out and under Annex D that information relevant to the assessment will include;

> "security information-any SIRs, *relevant historical information about previous escapes* or trust failures ; information from the police intelligence officer" (emphasis added)

So the policy did not restrict relevant historical information about previous escapes to those within the last three years and the fact that the claimant had

been convicted in 1996 was a factor that could be properly taken into account under the policy.

Ground four

52. The fourth ground is that paragraph 9 on p.33 of PSI 40/2011 (see paragraph 34 above) states that it is prisoners at "high risk of absconding" that should not be categorised to Category D. Nowhere is an assessment made that the Claimant poses a "high risk". HMRC simply assessed that he posed a "real risk". Accordingly, the threshold set by the policy has not been followed.

53. In response Mr Talalay submitted that statement within the policy was only to the effect that prisoners at high risk absconding should not be categorised to category C. It did not say that prisoners who were at risk, but not a high risk, could not be categorised to category D. Nowhere in PSI 40/2011 is there such a high bar placed on re-categorising prisoners from Category D. In any event the information provided by HMRC was that there was a "real risk" of the claimant absconding, which broadly amounted to the same thing and court should not be concerned with fine issues of semantics.

Ground five

54. The fifth ground is that Governor Lucas fell into material error when arriving at his decision on 18th March 2019. Not only did he simply follow the same erroneous approach which led to the November decision, he fell into further error, by forming the view that the Claimant was subject to a confiscation order (for which the benefit figure was £1,445,042.22), when in fact he was not.

55. In response Mr Talalay submitted that it was clear from a full reading of the decision note that Governor Lucas did not erroneously believe that an order had actually been made; it is clear that he knew there was an ongoing investigation/process.

Other grounds

56. For the avoidance of doubt, I should set out that the Claimant did not advance a free-standing irrationality ground. Further no ground was maintained in relation to a failure to provide full reasons for the re-categorisation.

Analysis

57. I will take the grounds in turn.

58. Mr Skinner accepted that in an appropriate case, and with adequate evidence, an allegation of the possibility of tampering with/dissipating/hiding assets could properly be relevant to the categorisation process. However, he submitted that this was not such a case.

59. The first ground, as he advanced it, rested upon an argument that an impending confiscation order (or ongoing POCA proceedings) is not expressly mentioned in PSI 40/2011 as being relevant to re-categorisation decisions, as opposed to other factors including the enforcement of confiscation orders. Mr Skinner argued that confiscation orders can only become a relevant consideration when made or enforced. He conceded that it could be possible on appropriate facts for ongoing POCA proceedings to be relevant to a re-categorisation decision but that would require there to be a legitimate departure from the policy. As Mr Talalay did not submit that this is a case where there has been such a legitimate departure from policy (rather that the Claimant's interpretation of the requirements of the policy is wrong) the issue for the court was one of interpretation of the policy (this being a matter for the Court see **Mandalia-v-Secretary of State for the Home Department** [2015] UKSC 59, [2015] 1 WLR 4546; Judgment of Lord Wilson at paragraph 31).

60. Initially Mr Skinner framed his argument as one that related to the substantive reclassification decision alone. However, as I pointed out, if his argument is correct it would also apply to the trigger for consideration of reclassification i.e. if the fact of ongoing POCA proceedings was irrelevant under the policy then there could have been no significant change in risk such that reclassification could even be considered (as the Claimant's previous conviction for absconding was known at the time of the initial classification to category D[2]).

61. I also pointed out with regard to what was set out within the (non-exhaustive) list of changes at paragraph 5.9 which might amount to "a significant change", which could lead to a categorisation review, that the reference was to "confiscation order *enforced*" and not simply "confiscation order imposed/made" (another item on the list being "serious crime prevention order is imposed"). So the guidance did not give as an example the imposition of an order but rather its enforcement. PSI 16/2010 refers at paragraph 3.13 et seq to "failure to pay/enforcement of the order" and it is clear that enforcement refers to the default term to be served if the defender does not pay all of the confiscation order. Such sentences are very significant being five years for sums "more than £10,000 but no more than £500,000". I have no doubt that the reference to enforcement within paragraph 5.9, followed as it is directly by references to sentence being increased, is a reference to a default period being imposed. This would of course potentially have a huge effect upon a prisoner

[2] Given that the print out from the police national computer setting out previous convictions also has "alias names"; it may also have been the case that there was also reference to aliases used by the Claimant within the documentation available at the prison. However, given that the Claimant says that this related to a time long in the past there is insufficient evidence to make any finding.

(the default term could even be longer than the original term) and necessitate a reconsideration of the degree of risk of absconding etc. This would mean that on Mr Skinner's analysis of the strict wording of the policy, even the making of a confiscation order (as opposed to its enforcement) would not be a relevant consideration that could trigger a review.

62. I cannot accept Mr Skinner's analysis that, properly interpreted, the policy restricts consideration of issues which may trigger a reclassification and then which may justify a reclassification, such that ongoing POCA proceedings cannot be relevant.

63. The list of significant changes in circumstances which may impact on the level of security required is clearly not exhaustive; so much is obvious from the wording of para 5.9 ; "changes *might* include those listed below, although *other circumstances* might also arise " (emphasis added). Further there is reference on the list to the (no doubt deliberately wide) categories of "new or additional information coming to light" and "cause for concern that the current categorisation is unsound". The width of such factors would be wholly inconsistent with the narrow and restrictive approach contended for by Mr Skinner. There is no reason why the information provided by HMRC could not properly be considered as "new or additional information" and/or giving cause for concern that the current categorisation was unsound.

64. Likewise, the list of issues set out as ones which may necessitate re-categorisation (including that a confiscation order is enforced) is, in my judgement, clearly not intended to be exhaustive and prescriptive. It would be illogical if a factor could be taken into account in the decision to undertake reconsideration, but not within the substantive reconsideration itself. The guidance points out that "categorisation decisions are individual risk assessments".

65. It is also my view that the references within the provisional assessment process to "outstanding" confiscation orders, and also to circumstances which might indicate the prisoner should be placed in a higher security category than that indicated by the algorithm including "confiscation order, consider whether amount and default sentence imposed might increase risk of abscond", do not mean that the existence, and implications for the prisoner, of POCA proceedings (short of /before an order) cannot be potentially relevant consideration under the policy. There would be clear conflict with paragraph 5.2 which states that risk levels may increase or decrease depending on individual circumstances and that "due account *should be taken* of *any* intelligence, held either within the prison received from a law enforcement agency that indicates that the prisoners involved in *ongoing serious criminal activity*". In the present case the difference between the benefit figure and the available amount was known (from 9 October 2018 onwards) to be £622,446.18 and the hiding of assets to frustrate the ongoing confiscation process (which HMRC stated was its belief) could clearly constitute serious

criminal activity. It would be an extraordinary position if the proper interpretation of the policy was such that this was not a potentially relevant consideration (unless there was deviation from the policy).

66. I accept the submission of Mr Talalay that it was not necessary for either decision maker to "step outside" of the policy and in my judgment the first ground must fail.

67. Turning to the second ground I note that the requirement in Annex D referred to by Mr Skinner, which states that establishments "should seek more information from the enforcement authorities as to the level of risk. PSI 16/2010 provides more information on confiscation orders", relates to "new or outstanding charges, including enforced confiscation orders". The Claimant was not actually subject to a confiscation order let alone the enforcement of one. So strictly speaking this section does not apply.

68. In any event I accept Mr Talalay's submission that there was clearly adequate information available, specifically from the document of 20 November 2018, and it is difficult to see how any further information would have provided material assistance on the relevant issues to be considered. The fact that the house was subject to a restraint order and the claimant the subject of a bankruptcy would not in any way negate, or indeed impact upon, the stated belief of HMRC that the Claimant had significant hidden assets out of the control of enforcement agencies (and the trustee in bankruptcy). Clearly a very significant sum was unaccounted for. As I suggested to Mr Skinner during submissions any request for further information about the hidden assets from HMRC would have been likely to elicit the response not much was presently known about them as they were hidden; hence the ongoing investigation.

69. In my judgement Mr Skinner seeks to place too great an inquisitorial burden on the prison. HMRC is a government enforcement agency and it can properly be assumed by a decision maker, without more, that when taking the trouble to provide information to a prison, such as its belief that the Claimant had hidden significant assets (supported by the figures provided) that it was doing so on a bona fide, adequate and rational basis. That being so I believe that it is a step too far to require a prison to call for the detail/basis of and/or evidence supporting that belief. I see no valid argument based on the wording of the policy, or the limited residual common law duty of the decision maker to investigate (see **R (Khatun and others) -v-Newham LBC** [2004] EWCA Civ 55, [2005] QB 37[3]), that the either decision maker failed to adequately investigate and/or seek to obtain necessary information. Ground two must fail.

[3] per Laws LJ at paragraph 35; "it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such"

70. At first blush ground three had significant merit given the clear wording of the algorithm that only absconding in the last three years was to be counted and the age of the conviction for escaping from lawful custody (1996). However the algorithm is only used for an "initial" and "provisional" assessments and is then subject to an assessment whether there are any circumstances which indicate that the prisoner should be placed in higher security category than that indicated by the algorithm including "security information….", which could make an incident of absconding more than three years old relevant to the categorisation assessment.

71. More importantly this claim is not a challenge to the initial/provisional assessment, which did not take the 1996 conviction into account, rather it attacks the subsequent reclassification after the provision of information by HMRC. The guidance upon re-categorisation at Annex D to the policy sets out that that information relevant to the assessment will include

> "security information-any SIRs, *relevant historical information about previous escapes* or trust failures ; information from the police intelligence officer" (emphasis added).

The process of considering re-categorisation therefore allows wider consideration than that allowed within the first stage of the initial /provisional assessment. The policy does not restrict relevant historical information about previous escapes to those within the last three years. As a result the fact that the Claimant had been convicted of escape from custody as long ago as 1996 was a factor that could be properly taken into account under the policy, particularly as it was part of an overall presentation of risk provided by HMRC. The document of 20th November 2018 refers to a real risk of the Claimant absconding before the confiscation is set or before the proceeds of crime are recovered given that it is believed that he has significant hidden assets and is known to have escaped from custody before and may be able to access multiple names to conceal himself. So although the fact of the conviction was known, and played no part in the initial assessment, this did not mean that it could not have relevance in a wider context given the other features outlined. Whilst I was somewhat concerned about the age of the conviction, it could properly be taken into account as potentially relevant and thereafter the importance/weight to be attached to it was a matter for the decision-maker.

72. Ground four appeared to me to be wholly misconceived. There is no statement within the policy (or indication to the effect) that prisoners who are at risk, or as HMRC suggested a "real" risk, but not a "high" risk, of absconding could not be categorised to category C i.e. should be category D. The likelihood of escape or abscond is stated to be a matter of individual assessment in each case given the need to assign the prisoners the lowest security category consistent with managing the risks that he/she presents. As regards category D prisoners the policy states they must meet all the criteria of the category which will mean that they

> ".. can be reasonably trusted not to abscond…".

This means that if a person cannot be reasonably trusted not to abscond they should not be category D. This is a lower threshold than "high risk". This ground also fails.

73. Ground five depended upon proper interpretation of Governor Lucas' written reasons for his decision given on 18th March 2019 revealing that he fell into error by assuming/believing that the Claimant was subject to a confiscation order (for which the benefit figure was £1,445,042.22), when in fact he was not. I do not accept that interpretation is correct. Rather, as Mr Talalay submitted, Mr Skinner places a weight upon the analysis in the document that it cannot bear. In my judgement when the document is read as a whole it is clear that Governor Lucas knew there was an "ongoing investigation" and not as Mr Skinner suggested merely steps post a confiscation order to enforce it. Accordingly this ground also fails.

Conclusion

74. For the reasons which I have set out this claim fails.

75. I leave it to the parties to seek to agree a consequential order, and in default of agreement to notify the court which issues remained for determination and with their views as to how they should be determined (whether by exchange of written submissions, telephone hearing or further oral hearing).