Neutral Citation Number: [2023] EWHC 2230 (Admin)

Case No: CO/1606/2022

IN THE HIGH COURT OF JUSTICE
SITTING AT LEEDS COMBINED COURT CENTRE
ADMINISTRATIVE COURT

The Courthouse
1 Oxford Row, Leeds, LS1 3BG

Date: 7 September 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE QUEEN
(on the application of)

FAJR ELLIS

Claimant

- and -

(1) SECRETARY OF STATE FOR EDUCATION

- and -

(2) SECRETARY OF STATE FOR JUSTICE

Defendants

- and -

STUDENT LOANS COMPANY LIMITED

Interested Party

- -
- -

Mr Philip Rule KC (instructed by **Kesar and Co Solicitors**) for the **Claimant**
Miss Jennifer Thelen (instructed by **Government Legal Department**) for the **Defendants** and the **Interested Party**, which is a limited company wholly owned by the First Defendant

Hearing dates: 14-15 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 04.15pm on 7 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. On 19 July 1996 the Claimant was sentenced to life imprisonment for attempted murder by deception, involving considerable concerning exacerbation, theft and an attempt at arson; the tariff initially imposed was reduced on appeal to seven years. He is accordingly over 20 years post-tariff. He has at various times been transferred to Rampton Hospital with a diagnosis of psychopathic personality disorder. He was, at the times relevant to the matters raised in the pleadings in this case, imprisoned at HMP Hull. He is currently held at HMP Isle Of Wight ("IOW").

2. The Claimant was 19 at the date of his first imprisonment and without qualifications. He obtained an undergraduate degree from the Open University ("the OU"), and on 1 October 2018 began a research-based MSc in sustainable development from the School of African and Oriental Studies ("SOAS"), University of London. He had unavoidable interruption due to serious illness however, his studies continued and on 18 February 2019 he applied for a student loan, which after initial rejection was accepted and awarded by the Secretary of State for Education.

3. This application for judicial review challenges the application of a set of regulations pertaining to student loans, what is argued to be in generalised terms "*the prejudicial treatment of prisoners in comparison to those in the community accessing higher education*", and a particular decision concerning removal of a laptop and access to IT facilities.

4. The skeleton argument on behalf of the Claimant from Mr Philip Rule KC, who appears for him asserts a broad-based challenge in terms that "*the present regulation and/or system and/or actions or omissions of the Defendants unlawfully impeded the Claimant from pursuing his education*".

5. The claim which was issued on 5 May 2022 sought to challenge:

    i) ("The regulations' challenge") An alleged unlawful violation of the Claimant's right not to be denied an education. This is said to arise because the applicable regulations permitting an eligible prisoner to apply for a loan, allows such a loan to cover "*the whole or part of the fees of the designated course (but not towards other costs)*". The limitation regarding other costs does not apply to those who are not within the prison estate. Such students may put the student loan, that is any surplus after paying the fees, towards any cost, further, such a loan may be received directly "*except for eligible prisoners*". This, says the Claimant, interferes unlawfully with his right to access to education. He draws a parallel with the cases of *R (OA) v Secretary of State for Education* [2020] EWHC 276 (Admin), and *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820. In the premises, he says the interference in his education is discriminatory. He wrote a letter of complaint to the Student Loans Company on 9 July 2021 in respect of the surplus funds (the first payment of the loan instalment had been made to him in June 2020).

ii) ("The generalised restriction of access challenge") Restricted access to specialist books, the university's online library, restricted access to photocopying and difficulty in receiving materials (amongst other inconveniences). This represented an alleged unlawful lack of access to a library or to online resources or ownership of books within the prison or word processing facilities comparable to non-detained students. He argues that the facilities offered to him (and by implication to prisoners generally) are unlawful on grounds of a denial of rights guaranteed by Article 2 Protocol 1 ("A2P1"), to education and/or are unlawfully discriminatory in violation of Article 14 ECHR as being in the ambit of his right to access education. The limitations to his A2P1 rights are not in pursuit of a legitimate aim nor proportionate to it. The restrictions are arbitrary and unreasonable. He relies upon the cases of *Velev v Bulgaria* [2014] 37 BHRC 406 and *Mehmet Arslan v Turkey* [Application numbers 47121/06, 13988/07 and 34750/07 (18 June 2019)]. The Claimant asserts a similarity between his position and that of the Claimant in *Mehmet Arslan,* and the finding that a fair balance had not been achieved in that case between a right to education and imperatives of public order. His case shows failure also of the prison to abide by its own policy and regulatory framework. The case has been added to over time.

iii) ("The Chromebook challenge") A particular decision to withdraw use of his Chromebook and to restrict his access to IT at the prison which made completion of his coursework difficult, and the lack of use of a computer for a significant period of time when he was working towards his final dissertation constituted unlawful interference with his right to education as well as evincing an unlawful decision-making process also not in accordance with policy.

6. Issue is taken by the Defendants that all the challenges are neither prompt nor within three months, that issue was reserved to the Court hearing the application for judicial review.

CHRONOLOGY

7. To give a flavour of the Claimant's complaints it is convenient to set out a chronology of some of the facts said to give rise to this judicial review, and record evidence with regard to the particular decisions of which complaint is made.

1995	Claimant, then aged 19, is imprisoned for attempted murder.
2002	Claimant's tariff expired.
2017	Claimant is transferred to HMP Hull.
2017/18	Claimant completes an undergraduate course at the OU in a broad range of business and science subjects.
1 Oct 18	MSc in sustainable management course begins at SOAS (money advanced by charity to enable start until loan decided).

Mar 19 Student Finance England granted Claimant a student loan after initial refusal (monies advanced by charity repaid).

Jan 20 Non-Hodgkin lymphoma diagnosed – postgraduate studies suspended for one year.

Apr 20 First payment of student loan received.

Feb 21–onwards

Various complaints about HMP Hull not printing education materials, not delivering course materials, and other issues including the failure of the Student Loans Company to pay his loan direct to him rather than to the university, computer access requests, delays in receiving materials, use of social videolink time for study purposes etc.

14 Jul 21 Email sent to Dr Annabel de Frece (the Claimant's supervisor at SOAS) from Danny Birch, Distance Learning Coordinator ("DLC") for the Claimant at HMP Hull, on 14 July 2021 at 13:54 copied to Nick Parkinson at justice.gov in the following terms:

"*Hi Annabel, I hope you are well. Mr Ellis has asked me to ask you if you could recommend any seminal books* ***on the following – WAQF –*** *solar powered furnace (small scale) – aero forestry-halophytic plants/crops – guide to building your own blockchain – latest i.s.o standard for management*". (Emphasis added.)

Sept 21 and Dec 21

Pre-action protocol letter sent by Claimant's representatives – listing numerous difficulties over time and raising the loan payment point raised in this case. Letter answered by the Defendants 19 January 2022 (no judicial review issued).

24 Jan 22 Dr de Frece, Programme Director of the Claimant's degree, writes to Nick Parkinson indicating the various problems for the Claimant, including destruction of materials sent to the prison by SOAS, lack of books and IT issues etc.

28 Jan 22 Claimant's Chromebook removed because an allegedly unauthorised document was found on it regarding an Islamic charity, WAQF – treated as a removal of privileges issue by HMP Hull, formal complaint launched the same day by the Claimant.

The Claimant's Learning Services Manager ("LSM") telephoned his tutor at SOAS and explained his concerns over the phone, reading out passages of the material. Ms Anderson (giving the Defendants' evidence) says the LSM was told that whilst they knew the Claimant had mentioned WAQF previously, he was not aware of this work and did not see it as part of the Claimant's then current module. The LSM then had a conversation with the Claimant, during which he concluded that the Claimant could not clearly

explain the intended purpose of the material for his current studies, and made "*ambiguous claims about the materials potentially being used for further studies. He was not able to explain how the materials were being used for his master's degree.*" The Claimant has said to his solicitor that he showed the LSM correspondence with the university about WAQF but to no avail.

28 Jan 22 Decision reached in following terms:

"*Mr Ellis was provided with a Chromebook device to aid his university studies. Whilst carrying out checks on Mr Ellis's written material before printing or writing by Mr Ellis that is not related to his degree has been found. The writing relates to an Islamic charitable organisation and is not in line with his degree subject or a part of any assignment, this has been confirmed by his university tutor. This is a direct breach of the learners compact and has resulted in the removal of the Chromebook device from Mr Ellis. SO [Security Officer]Atkin has authorised a ban of any further use of a Chromebook or similar device due to improper use until further investigation has been carried out.*"

28 Jan 22-6 Apr 22

Period of no access to the virtual campus computer (known as the "VC2") system in the Education Department for the Claimant.

8 Feb 22 Claimant's complaint of 28 Jan rejected by Jamie Smith, the LSM, in the following terms:

"*The transparent and open enquiry into your complaint was conducted by Jamie Smith Learning and Skills Manager. It involved investigations into coracle Chromebook device compact agreement breaches, discussions with Annabel de Phrace (sic) (your university lecturer) and discussions with security department.*

Your university lecturer states that although you have mentioned the WAQF in the past, she was not aware of this piece of work being conducted and was not expecting to receive the work in question. Furthermore, there was not one reference to the subject matter of your degree.

It was clearly explained to yourself and stated with in the compact agreement that you singed (sic) and agreed to, that the device must not be used for anything other than completing distance learning work. This includes but is not limited to, writing legal or personal letters and materials. It was clearly explained and is stipulated in the compact that this would result in an incentive level warning and removal of the device.

We understand that you are studying a research led degree. However, on this occasion there has been a breach of the compact by using the chrome book to create written material that is not a direct part of your degree. Although it may be in line with you (sic) subject area, the writing in question was not directly linked to your current degree module. Therefore, you have been banned from using a chrome device not because of the content written

but because you have used the device to write unauthorised materials which is a direct breach of contract."

10 Feb 22 Claimant appeals 8 Feb 22 decision with representations about the material on WAQF, asserting it was part of his research.

14 Feb 22 Claimant's books and notes and course papers taken from his cell after a security search triggered by materials found on the Chromebook.

15 Feb 22 Anthea Walker, Education Manager at HMP Hull, rejects Claimant's complaint in the following terms (with similar "*transparent and open enquiry*" introduction and reference to the agreement governing use of a Chromebook signed by the Claimant and the responses of Jamie Smith):

"*A review of the compact agreement signed by yourself and the documents you produced using the Coracle Chromebook. I also spoke with Officer Atkin in the Security department at HMP Hull.*

Having carefully considered all aspects of your complaint on behalf of HMPPS and having reviewed this issue as above, I have been unable to uphold your complaint for the following reasons:

Through my investigations and the aforementioned review of the compact, complete response from Jamie Smith and the documentation you produced on the coracle Chromebook it is evident that the documentation you produced is not in relation to your studies and you were in breach of the agreement.

Your complaint has been concluded by the decision above which means the outcome will be:

your access to ICT has been removed as you are no longer in a trusted position to have ICT access as agreed with Officer Atkin from the Security Department at HMP Hull. The IEP warning will remain for the aforementioned reasons."

15 Feb 22 Dr de Frece made a further communication indicating her concern regarding transmission of materials and saying further as to the WAQF material:

"*Finally, I would like to confirm the material written by Fajr on Waqf (which was not sent to me) was part of his dissertation. Whilst not immediately central to the main piece of work, he was using the work as an example of how communities may go about gaining funding and personnel for sustainable projects. His dissertation is on creating sustainable desert communities through the use of a system of multiple green technologies and community management. I believe it was meant to be something he could include in the appendix. I hope this clarifies the matter*."

Ms Anderson deposes the following in answer to this evidence:

"*The tutor also confirmed that the WAQF material was part of the Claimant's dissertation. The tutor's comments were considered by the education and security departments. There was concern that the tutor had contradicted her*

previous assertion that she was not aware of the work and that it was not part of the Claimant's current module, shortly after having spoken to the Claimant. Furthermore, the tutor had not seen the material in question. There was concern that as the tutor had no prior experience working with prisoners, she may have been unduly influenced by the Claimant. It was considered that the Claimant has a history of subversive behaviour and therefore he may operate in a manipulative manner. Therefore, it was decided by the education and security departments that there was no basis for revisiting the decision – the Claimant had breached the compact as the material was deemed to be for his 'own business' and not related to his current master's degree."

16 Feb 22 Claimant raises complaint about cell search.

25 Feb 22 Complaint of 16 Feb rejected saying:

"*… because of security protocols, it was necessary to temporarily remove the documents found in the cell search so we could check that the content of your work did not go against prison compacts or protocols.*"

The Security Department also said, materially:

"*The paperwork taken has been analysed and it has been confirmed that the subject in your dissertation is a subject that does not go against prison guidelines, therefore I have arranged for the paperwork taken to be returned to you and I have also contacted the education department with regards you been allowed [sic] to be put back on your training course.*"

3 Mar 22 The explanatory evidence of Dr de Frece, (necessarily given before Ms Anderson's statement was made) contained in a letter of 3 March 22 to the Claimant's solicitor states, that she had received a telephone call from a member of prison staff asking if the course the Claimant was studying had required him to write adverts for jobs or positions in a charity. She answered no, and asked what he was referring to. He told her they had found some materials on the computer he'd been using concerning some sort of advertisement looking for people to join an organisation or charity. He asked if this was part of the course she said no, it was not clear to her what he was talking about; at the time she was not aware of such a "job" or task. When he started to describe what it was for, she began to see it was related to his dissertation study, relating to customary practices of property endowment. She told him she knew what this was and although it was not directly integral to the dissertation, the concept of WAQF, which is a form of the endowment of property, was being explored as a mechanism for local land management and endowment concerning the development of green landscapes in the Sahara. She thinks he asked if the student was required to put an advert out or if there was any need to advertise for a position and she said no, and tried to explain what she thought it might be; the telephone call ended shortly after that. She explained the Claimant had been studying property endowment, and the central theme of the dissertation was developing a systems model for various technologies, and he had been looking into the concept of WAQF and the institution for its local relevance as a form of local land management.

13-15 Mar 22

Letters of protest from the Claimant's solicitors.

6 Apr 22 Head of Security, Mr M Crosby, considers the new information but refuses the return of the Chromebook to complete studies, however the Claimant is permitted to resume accessing sessions in the Education Department where he uses the VC computers. **[The challenged decision].**

5 May 22 Judicial review claim issued enumerating complaints from early 2019 through to a challenge to the decision dated 6 April 22.

10 Jun 22 Defendants' Summary Grounds of Resistance.

6 July 22 Claimant's "Supplementary submissions" and Reply.

24 Aug 22 Permission granted.

20 Oct 22 Defendants' detailed grounds of resistance.

[Various requests/responses/applications made and received between May 22 and March 23.]

17 Feb 23 Claimant's application to adduce and rely upon further evidence in respect of all matters and new ones alleged to arise at HMP IOW.

THE DISPUTES

8. In broad terms, the Claimant's challenges fall into three categories:

   i) With respect to the student loan facility and the provisions of the relevant regulations (access to loan April 2020; letter of complaint and response 2021).

   ii) In respect of a set of decisions concerning access to a laptop (January, February and (final) April 22 decisions).

   iii) As to his access to education in generalised terms.

9. The first category challenges the fact that his student loan is paid directly to the university, rather than to him, under the Education (Postgraduate Master's Degree Loans) Regulations 2016 (the "2016 Regulations") which does not happen unless a person is in prison.

10. The Claimant characterises the asserted failures at (ii) as a failure by the Second Defendant to adhere to its policy regarding education provision. It is not offering "*learning provision that is appropriate to the needs and aspirations of its prisoners*" he argues. Restriction to online resources is another instance of this unlawfulness. The prison library is he says inadequate for his use, and not comparable to academic libraries

such as that at SOAS; further, he required reasonable access to the internet. Again, its absence is an indication of the failure of the Second Defendant to implement its own policy. The same is said of restrictions upon online access, such as storage of research, word processing, and access to time on the computer and so forth. It is asserted that a prisoner has an equal entitlement to access to the same quality and level of education and access to it as a person outside the system.

11. Whilst admitting that some matters are out of time, the Claimant states these are an ongoing breach and a continuing act which would allow the Court jurisdiction to determine the lawfulness of the earlier decisions.

12. The third category concerns the subject of the piece of work on WAQF (a charitable concept of relevance to Islamic law) and the consequential denial of use of a laptop computer, which was removed by the prison authorities for alleged breach of the protocol governing its use on 28 January 2022. The Claimant asserts that the reason why the Chromebook laptop was removed was founded upon a misunderstanding as to WAQF research which was part of his coursework; the prison authority did not accept it had been part of the course. Materials were also uplifted from his cell which he characterised as an example of the Second Defendant applying policies that unlawfully restricted his access to education. The Claimant also alleges a series of public law errors in respect of the Claimant's argued inability properly to participate in the processes of investigation or adjudication, following the confiscation of his computer in January 2022. The warning on the Incentive and Earned Privileges scheme (the "IEP scheme") as a result of which the Chromebook was taken away, was unfair. He denies any breach of his compact agreement for use of the computer and asserts a misunderstanding of an established fact which would found a judicial review.

13. Further, and by a set of new documentation, the Claimant seeks to raise issues that pertain to his new establishment, namely HMP IOW, to which establishment he was transferred from HMP Hull on 18 November 2022. He claims in the fresh allegations that he has not been afforded a fair opportunity to commence a PhD or other further education.

14. In broad terms he lists a series of what he characterises as impediments to his access to education which taken as a whole are illustrative of the unlawful difficulties put in the way of prisoners acquiring education, and which are not faced by those who are not within the prison estate. Accordingly, whilst the examples given are personal, the Claimant seeks to make a systemic challenge as well.

FRAMEWORK

15. The legal framework is as follows:

16. Under section 86(1)(b) of the *Apprenticeships, Skills, Children and Learning Act 2009*, the Second Defendant is obliged to "*secure the provision of such facilities as he or she considers appropriate*" for education suitable to the requirements of those who are subject to adult detention.

17. Rule 32 of the Prison Rules 1999 (the "Prison Rules") provides that:

"*(1) Every prisoner able to profit from the education facilities provided at a prison shall be encouraged to do so.*

(2) Educational classes shall be arranged at every prison and, subject to any directions of the Secretary of State, reasonable facilities shall be afforded to prisoners who wish to do so to improve their education by training by distance learning, private study and recreational classes, in their spare time."

18. Under Rule 33 of the Prison Rules, each prison must have a library and prisoners shall be allowed to have library books and exchange them.

19. Under reg.12(2) of the 2016 Regulations:

"*An applicant whom the Secretary of State would consider to be an eligible prisoner may apply for a postgraduate master's degree loan to cover the whole or part of the fees of the designated course (but not towards other costs), but such postgraduate master's degree loan cannot be more than £11,836.*"

20. For students in the community reg.12(1) provides that loans may cover "*the costs of undertaking a designated course*".

21. Regulation 13(3) of the 2016 Regulations states:

"*In the case of an eligible prisoner, the Secretary of State must pay the postgraduate master's degree loan for which an eligible prisoner qualifies to the institution to which the eligible prisoner is liable to make payment for the fees or to such third party that the Secretary of State considers appropriate for the purpose of ensuring the payment of fees to the relevant institution.*"

22. Regulation 13(4) of the 2016 Regulations states:

"*The Secretary of State must not pay the whole or part of the postgraduate master's degree loan until the Secretary of State has received from the academic authority confirmation (in such form as may be required by the Secretary of State) of the student's attendance on the course.*"

23. Paragraph 3.1 of the *Prison Education & Library Services Policy Framework* (the "Prison Education & Library Framework") indicates that prisons should offer learning provision "*appropriate to the needs and aspirations of its prisoners*", taking account of the prisoner cohort; prisoners should be engaged and supported to access the learning and education that best meets their needs; and all prisoners should regularly be able to access appropriate stocked libraries which support them in their learning and personal development.

24. Internet access by prisoners is governed by PSI 25/2014 IT Security Policy (the "IT Policy"). The relevant provisions are:

"*16.6 Access to the Internet by Prisoners*

The basic principle that applies to all forms of communication – preventing the transfer of information that might aid crime, threaten prison security or aid escape from custody

and the protection of victims must be applied with regards to Internet access for prisoners and supervised individuals in the community.

16.7 Access to Internet facilities may allow prisoners or supervised individuals in the community to abuse [or harass] victims either through direct, electronic communication or by indirect proxy contact outside the prison and these considerations must be weighed against any perceived advantages.

16.8 The risk exists that prisoners could use the Internet to commit, prepare for or encourage crime whilst in custody. Additionally, they could access material that might endanger the security of the prison e.g., access to bomb-making techniques.

16.9 The accessibility of learning materials by prisoners in custody must be balanced against security considerations. Access to the Internet will only be granted following a thorough risk assessment on a case-by-case basis of the system, hardware, software and connectivity. Prisoners access to IT whilst in custody is subject to individual assessment as per the National Security Framework and advice on appropriate access controls can be obtained from security group, the IPA team.

16.10 Prisoners must not be allowed uncontrolled access to the Internet and/or to a computer or IT system whilst in custody that has software installed enabling Internet connectivity without seeking approval from security group, the IPA team and the completion of a thorough risk assessment.

16.11 All IT systems providing internet access for prisoners must be risk assessed by the MOJ Technology IA prior to prisoner access being granted.

16.12 All prisoners must be subject to an individual risk assessment before having access to IT and or electronic storage devices of any kind.

16.13 All IT and electronic storages devices for prisoners use whilst in custody must be subject to an MOJ Technology IA assessment.

16.14 All prisoners must sign a compact whilst in custody detailing the acceptable use requirements of the device and or service." (Emphasis added.)

25. The relevant provisions in the compact he was required to sign concerning use of the Chromebook were:

"*[t]he Chromebook is to be used for distance learning courses/CV creation/Shannon Trust Mentoring & Learning and must not be used for any legal work or in association with any business that you may have*".

THE DEFENDANTS' POSITION

26. The Secretaries of State, represented by Miss Jennifer Thelen, argue the following as a complete answer to the Claimant's case:

i) There is no challenge which is in time.

ii) The allegations are too vague and are unconnected to an operational or other decision taken by the Defendants within HMP Hull and, in those cases where a decision was taken, it was a reasonable response to the factual position at the time. As to later matters, the Court should not undertake a rolling judicial review.

iii) Whilst it is accepted that A2P1 and Article 14 may, in an appropriate case be engaged, it is denied that on the facts of this case there has been any infringement of the Claimant's rights. More particularly, the challenge to the regulations and the payment of loan directly to the course provider, and only in respect of the costs of the course, even if in time, is not a breach of principle and in any event represents an academic challenge since the Claimant was provided with books from other sources, completed his dissertation for which an extension of time was given, and achieved a merit. In this case, the Defendants say that in any event the Claimant was not disadvantaged by the application of the 2016 Regulations to him.

27. By way of background, Ms Anderson, the Head of Prison Education Policy at the Ministry of Justice, deposed that the usual route to further education was via the OU in prison, although other establishments could be utilised. Where they were, there was an acknowledged possibility of extra difficulties given the courses were not adapted to the prison environment as they were at the OU. She said:

"*Higher education in prisons is primarily geared towards prisoners studying OU courses. The vast majority of prisoners across the prison estate, studying undergraduate or postgraduate degrees, undertake an OU course. The OU tailor-makes its curriculum, creates bespoke study packs and offers personalised support for prisoners. The MoJ is a partner of the OU and worked with the OU to create a 'Virtual Campus' ('VC'), a computer system that allows students to access their learning materials in digital form whilst maintaining security standards. Further, the MoJ provides grant funding to the OU. For April 2020 to March 2023, a grant of £2,505,000 is in place. The purpose of the grant is to help enable prisoners to access higher education, by helping to cover costs related to the provision of learning materials (the OU produce bespoke textbooks and associated workbooks), tutor support, administration and advice, and other costs that arise by virtue of the student being located in prison. I note that the MoJ also has a memorandum of understanding place with the OU. In light of the above, prisoners are encouraged to study higher education courses through the OU whose courses are designed so that prisoners receive all the materials they need, and do not need to seek out additional resources. It is open to prisoners to study through other universities and course providers, as the Claimant has done. However, prisoners may naturally encounter some practical difficulties in pursuing these courses, as such courses are not designed to be studied by prisoners. It is ultimately a decision for a prison's governor as to whether a prisoner may study a particular course.*"

28. The position regarding usual access at HMP Hull was described by Ms Anderson as follows:

"*The Claimant is able to attend nine sessions per week at HMP Hull's education department. Currently, the education department runs five morning sessions per week*

(8.30-11.30) and four afternoon sessions per week (13.30-16.30). The Claimant attends the morning sessions but was also recently added to the afternoon sessions – so that he has access to 27 hours a week of study in the education department – which goes significantly beyond the status quo, and beyond what prisoners studying on an OU course or other forms of distance learning are afforded. The education department is fitted with VC computers, allowing the Claimant access to IT throughout this period for his studies. The Claimant is able to save his work at the end of each session on to a shared drive that can also be accessed by education department staff, and he can also request that staff upload this work on to his VC account. There is no limit to how much work the Claimant can save or how long the documents he saves can be. He is able to use Microsoft Word and access the internet, subject to security restrictions."

29. She stated that there had indeed been some operational difficulties with delivery of books and materials but said that in many cases the Claimant had not followed the appropriate channels, for example, by having study materials posted to the prison, addressed to him, without first notifying staff (materials should be addressed to the person who is his liaison – the DLC). There had been a discussion with his tutor on 22 September 2022 after which it was said that the Claimant's tutor was not previously aware of how to package correspondence directed to the Claimant, but that the issue been resolved, she had thereafter marked the correspondence with university markings and/or a cover letter. It was agreed there was a need to be clear about what resources were being sent to the Claimant.

30. Ms Anderson said:

"*Each prisoner is limited to having four books from the library at a time. However, the library does on occasion allow a prisoner to take out more books if they have a good track record – i.e., regularly returning books undamaged. In the Claimant's case, the library at HMP Hull confirmed that it was fine for him to take out additional books...*"

It appears the Claimant was allowed eight books at a time.

Further,

"*It is possible for prisoners to obtain books from community libraries, which the prison library can seek to arrange upon request. Whilst the library's role includes loaning books to assist with studies, it cannot always meet the Claimant's requests – he has frequently requested books that are not available from other libraries, or where the supplier is out of print. Further, the library is aware of the course the Claimant is studying, however on occasion still has to refer the request to security, as it is not always clear how the books relate to his studies.*"

Further,

"*Where a prisoner is studying a course and requires a book, they would be expected to discuss this with their DLC. However, Mr Ellis has not always done this. On previous occasions, the Claimant had not made the DLC aware that he was ordering books for his studies, or that his tutor would be sending materials to the prison. Furthermore, his tutor had not sent these books (or other printed material) in official packaging or with anything else that made it clear these were study materials. As a result, these*

materials were returned by the security department, as they had not been sent to the prison following the requested procedures."

She concluded (in her 20 Oct 22 statement):

"*Following discussions with both the Claimant and his tutor, this issue has now been resolved; the Claimant now makes his DLC aware prior to books and other course materials arriving, and the tutor now appropriately marks the materials.*"

31. In summary, the Defendants say, as set out in their skeleton argument, the Claimant had significant assistance and facilities available to him including the following :

    i) Local Prison Support: The Claimant at HMP Hull had designated local long distance learning support, with a DLC, who acted as an intermediary between the Claimant and his course provider, printed out resources on request, arranged telephone tutorials and provided support with various things, such as academic writing. There was also a LSM and a Learning and Education Manager.

    ii) Printing and Post: HMP Hull printed course work for the Claimant, who had been asked to make regular requests for printing to ease the burden. The problems with receipt of materials from the university arose because the materials were not properly marked, and advance notification was not provided to relevant prison staff. A review of procedures took place with the Claimant and university tutor, to ensure receipt of coursework and books by post, which arrangements the Defendants said were working well at the time of the response to the judicial review.

    iii) IT Facilities: The Claimant normally had access to the internet via the VC2 within the Education Department, with sessions of up to 27 hours per week in the Education Department on the VC2. There was no limit to the amount of work he could save on the VC2.

    iv) Site access: The Education Department provided access to sites that were cleared as safe "*white sites*". Prior to leaving HMP Hull, the prison was looking into how the Claimant could be given independent access to the university website which was not on that list.

    v) Until 28 January 2022, the Claimant also had access to a Chromebook. It appears this access has been restored at HMP IOW.

    vi) Tutor Access: At HMP Hull the Claimant could make as many telephone calls in a day as desired to approved numbers, including calling his tutor from his cell. Across the prison estate it is the case that a call may only last 15 minutes. After 5 minutes another call can be made. He was able also to use one of his two video calls per month to speak to his tutor face to face.

    vii) A system was set up for the Claimant to exchange drafts of his dissertation with his tutor for feedback.

32. The Defendants submit that whilst there were admitted difficulties on occasions these were due to operational impediments such as illness of his designated personnel, the

failure properly to mark parcels and operational delays in the usual way, and it is impossible to characterise the provision as systemically inadequate or in breach of the obligations imposed by the framework (as set out above).

33. It appears from the evidence that Chromebooks were a new addition to HMP Hull's education provision, available for distance learning and only from December 2021. The Claimant was one of the first students to receive one and the IT system hitherto had been accessible via the Education Department. At HMP Hull access was generally available to the internet via the VC2, within the Education Department, and the sessions described above.

34. Ms Anderson admits the Claimant did not have access to the IT facilities in the Education Department between 28 January 2022 and 6 April 2022, whilst the security department conducted investigations. She seeks to justify this on the basis of the steps they reasonably required to take and points to the positive outcome with the Claimant in fact receiving his degree.

35. The Defendants submission regarding the WAQF document is that it is difficult to see how it was part of the Claimant's dissertation, given that it reads as a job advertisement. They say it does not mention WAQF itself (although in fact it contains an email address with the letters WAQF included, and the name at the bottom of the version before the Court includes the initials also). In summary the Defendants argue that the Chromebook was provided to the Claimant, reasonably, on a set of conditions, some of which he breached. In accordance with prison policy, they were necessary and proportionate in the context of prison security; the Chromebook was removed until an investigation had been carried out. Written material was found upon the Claimant's Chromebook which they reasonably concluded did not relate to the course he was engaged upon. When questioned, his university tutor did not suggest that conclusion was wrong. She was not aware that the piece of work in question concerning WAQF was being conducted by the Claimant and was not expecting to receive it and was not referred to in the subject matter of the degree. The prison, say the Defendants, reasonably concluded this was a breach of the compact since it evidenced use of the device for a matter other than completing distance learning work. They concluded the work was not directly linked to his current degree module, even if it was in line with his subject area, even understanding that he was conducting a research-led degree. The prison concluded that the material was directed to charity not to the university and fell within the definition of being within his own personal business, which was proscribed by the agreement he had entered.

36. The Defendants defended the removal following a cell search on 14 February 2022 of books, documents and course papers. They conducted an analysis and arranged in due course for the papers to be returned having decided that the materials did not go against prison guidelines. Access to IT facilities, study groups and the VC2 in the Education Department was re-commenced. They argue that the Claimant has at no time been banned from accessing the Education Department, the only inhibition was in respect of IT facilities, although the Claimant says the return of papers was not prompt and they were all available to him only on 26 April 2022.

THE CLAIMANT'S APPROACH

37. I indicated to Mr Rule KC that in my judgement I would not be helped by material that referred to the Claimant's time in incarceration at HMP IOW. I was prepared to note matters that took place after the grant of permission in the judicial review in order to understand the context or the consequences of earlier decisions that were properly under challenge. Decisions in respect of HMP IOW were in my determination, a new judicial review for which permission had not been granted and the Defendants had had inadequate time to gather and produce evidence.

38. It is accepted that the Claimant now has access to IT in HMP IOW but there were, it is said, some four months before that became the case. He has not yet found the PhD course he is looking for. He has taken an exam on Islamic finance but no course in Islamic law as yet. It would appear that access to a computer has not been available in order to source a degree although once enrolled on a degree, that access is made available.

39. The Claimant was able to send off his dissertation at HMP Hull, and he did gain his MSc degree, with credit. He argued on this application that that mark would likely have been a distinction had he not encountered the impediments to his study which he recounts.

40. Mr Rule KC's starting proposition was that education was both in the interests of the prisoner who may thereby rehabilitate for a role in society, and in the general interest in seeing prisoners rehabilitated. That right of education in prison was in his submission unreasonably hampered by the conduct of the Defendants: it had an impact on the Claimant's ability effectively to take advantage of the right of education, which right the Defendants acknowledge. He characterises the treatment as discriminatory in a manner which is unjustifiable, there were restrictions upon him and an absence of facilities which meant he could not compete and succeed as well as he ought to have been able. His course was materially interrupted, and significant delays impacted his final grade.

41. Whilst it was not a problem which he laid at the door of the Defendants, Mr Rule KC submitted it should be noted that the Claimant had had serious interruptions by reason of a cancer diagnosis and his treatment during illness in 2019. In respect of this degree, having already acquired an undergraduate degree in prison, he achieved an award from the Longford Trust in late 2020 to enable him to begin his MSc before the inception of funds from a grant. That grant was initially refused but received after legal action.

42. A further general submission on behalf of the Claimant is that he sought to resolve such disputes as arose internally but where resolutions were achieved, they were delayed. The quality of his work was impacted: allowing correction to his dissertation on only one occasion had a material impact.

43. It was not always easy to distinguish, as was accepted, which among his complaints were purely personal relating to his individual treatment within prison and which systemic complaints were brought generally against the system. He uses as an example of complaints that extend to the systemic, a delay in receiving information and/or materials and delay in resolving the issue of his dispute concerning removal of a Chromebook laptop, and removal of the papers needed for study, from his cell. The

issue of the decision in January 2022 to remove his computer was not resolved until April 2022.

44. Another example is the inability to obtain textbooks necessary for his degree. His books were stopped at the prison and sent back to the university, in some instances, and his study thereby impacted.

45. The incident that gave rise to the removal of his Chromebook was indefensible in the Claimant's submission. There was reference in earlier notes (which were shown to the Court) of the acronym WAQF in discussions via his educational referee to his tutor. He was required to communicate through an intermediary and the reference to the particular Islamic charitable notion of WAQF is referred to in a document to him. However, when the prison noted his searches online for an Islamic charitable organisation and the construction of an advertisement in respect of it, they queried any relationship with his degree. The answers from his tutor appear above in the chronology. He relies upon her answer in respect of those questions which gave full details of why in fact it was related to his degree but appears not to have been accepted.

46. Mr Rule KC submitted the response of the prison service was unreasonable and prejudicial and ought to be quashed.

47. In more general terms he submitted a duty of reasonable access existed upon the Secretary of State allowing a prisoner to study on an equal footing with others. This had been impeded by the inherent inadequacies of the system. There were delays and time restrictions, an absence of literary resources and an inability to edit work product through word processing, all of which had an objective impact upon his performance ability. Accepting that flexibility and reasonableness played a part in examining the duty his submission however was that although there will be some element of unavoidable problems, for example fixing a printer, the cumulative effect of all of the impediments meant there was no reasonable provision of education as is the Secretary of State's duty. If there are to be restrictions on the duty to provide education, they must be subject to some justification by the Secretary of State.

48. As a systemic issue, what was characterised as "*restriction of access*" was highlighted. There was no provision for educational video slots. If a video encounter with a tutor was necessary a social visit slot which was of a restricted length, had to be utilised. Each prisoner is restricted to two of these a month. Indeed, on one occasion, his professor was refused engagement because she was not a social visitor. In other words, in order to access part of the educational provision for his degree, he had to compromise his access to social contact. Legal visits are not time-limited, only social visits, and yet the study videos were time-limited.

49. Further, in respect of telephone communication, telephone calls are as a blanket rule, 15 minutes in length. There is then a five-minute break and another 15 minutes begins. That is destructive of an effective tutorial system, says the Claimant, the 15-minute rule is a limit that is imposed upon social contact. There is no such thing as provision for educational telephone calls. In a similar manner, a family member's name had to be ousted from the list of acceptable contacts in order to insert those that are necessary for educational matters.

50. The Defendants explain, he accepts, that there is, under the system, no direct contact by email with course tutors, therefore no express direct communication, it must all go through a conduit. In this case Officer Birch was the education representative, and Mr Rule points to what he says was inadequacy, illustrated by a misreading of one of the communications - shown to the Court - in which the representative had not understood the title of a publication required by the Claimant. Further, with respect to Officer Birch, he also had been off sick, and there was a general delay. It was possible to impair access through delay: in oral submissions Mr Rule KC referred to *A v Essex County Council(National Autistic Society intervening*) [2010] UKSC 33 and the discussion by Lady Hale, refusing to strike out a claim, of the effect of 18 months absolute denial of education being capable of being a breach of duty , although the facts there were not yet known.

51. Mr Rule argued a prisoner was entitled to achieve the same as a notional student in the community, and that they both started from the same position - he did not accept there should be any difference in treatment, but differences as there were required justification.

CONSIDERATION

52. Turning to the issues, the answers and the reasons for those answers are as follows:

"*New materials: Should the Claimant be given permission to rely upon the additional statement of facts in support of the grounds of claim, and adduce the Claimant's witness statement and additional evidence?*"

53. I am clear that the Claimant may not expand this judicial review to challenge a running selection of incidents complained of after this claim was issued or at the new establishment. As noted by Miss Thelen, the application was made very late, contained a plethora of factual assertion, and the Defendants have had insufficient time to respond in appropriate detail. This appears to be the fourth change to the Claimant's factual case and/or evidence since inception, and although the new material is contained in a new bundle for the Court it is not agreed. Further, as a matter of principle, (indeed, as set out in the Administrative Court Guide), by reference to the case of *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326, [118], citing *R (Spahiu) v Secretary of State for the Home Department* [2018] EWCA Civ 2604, [2019] 1 WLR 1297, [62]-[63]:

"118. *This Court has also deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment: see Spahiu, paras. 60-63. Although, as Coulson LJ said, at para. 63, "there is no hard and fast rule", he was right to say that it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving". In our view, that is particularly so in a context like the present, where the regulations have been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time. As we have mentioned, at one time, there was an application to amend the grounds so as to permit a challenge to be made to the regulations that were made*

on 3 July 2020. Fortunately, we did not have to determine that application, since it was not pursued, but we consider that this is precisely the kind of case in which "rolling" judicial review challenges should not be brought."

54. See also *R (Delve) v Work and Pensions Secretary CA* [2021] ICR[2021] ICR paragraphs [21]-[28].

55. This case is one of those where the state of the evidence is central to the assertions made. Further, in the present context as Ms Anderson's evidence explained, the provision of education is, within broad policy parameters, one that is devolved upon individual Governors and in this case the Claimant has been moved to a different establishment. The evidence available to the Court suggests that the Claimant's position evolved significantly both at HMP Hull and at HMP IOW, in that the application through the Security Department for IT access for educational need was made and permission was granted on 24 February 2023. Accordingly, the Defendants have attempted by letter to seek to assist the Court and answer questions raised by the new information. They indicate for example that a discussion concerning laptop provision was underway; a process for obtaining regular printing is set out in that letter, as are such answers as have been obtained so far to the new points raised. It is noteworthy that HMP IOW's Education Manager has also planned to meet the Claimant to discuss ways forward and as to how the prison might provide assistance in his research. The Claimant has asserted that he has approval to study an MA in Islamic Law, and the Claimant acknowledges in his most recent statement that facilitation of that degree by the prison is likely possible.

56. Nonetheless, it is inappropriate to treat this application for judicial review as a continuous process whereby the Court reviews the ongoing decision-making, insofar as it is brought to its attention, of a new establishment not the subject of the judicial review for which permission was granted. This is as Miss Thelen submitted, approaching a case of the kind averted to by Munby J in *R (P) v Essex County Council* [2004] CWA 2027 (Admin), where he drew a distinction between monitoring and regulating the performance of public authorities, and challenges to discrete decisions. The latter being the proper purview of the Administrative Court. However, the real difficulty is that the Defendants have submitted there has been no opportunity to take detailed evidence as would be required in a matter so connected to the day-to-day evidence at HMP IOW, where systemic challenges are again sought to be made on the basis of allegations of individual practical failings.

57. Turning to the three discrete areas of challenge.

(i)The Regulations' Challenge

Is the Claimant's challenge to the 2016 Regulations out of time?

Do the 2016 Regulations breach A2P1 by providing "eligible prisoners" with student loans only for post-graduate education tuition fees, and not other expenses?

58. The Claimant is long out of time for this challenge. The 2016 Regulations under challenge were first given effect in respect of this Claimant in April 2020. As noted, in 2021 a challenge was articulated but not followed through. It is far too late for this

matter now to come before the Court. As stated in the headnote to *R (Badmus) v Home Secretary* (CA) 1 WLR [2020] 1 WLR:

"*… that in order to determine when the grounds to make the claim first arose for the purposes of CPR r 54.5(1) it was necessary to identify what was sought to be judicially reviewed;…. , further, grounds for making a judicial review claim first arose when a person was affected by the application of a challenged policy or practice, regardless of whether the policy or practice was applied to the Claimant automatically or by the making of an individual decision.*"

59. I should, nonetheless, say although firmly by way of *obiter dictum*, that I regard the Claimant's argument as in any event, doomed to fail. The distinction between provision for those students who are incarcerated as compared with those who are not, is plainly founded upon the absence of the requirements for living expenses and other outgoings which fall upon the latter but not upon the former category of student. The Claimant asserts a breach of A2P1 by reason of his less expansive access to funding. However, in my judgement it is based upon the false premiss that students outside the prison estate will necessarily be in a position to dispense any funds available over and above tuition fees, for the purchase of books. It is, particularly in respect of post-graduate loans, I suggest, likely this will not be the case. There is no equal comparator in the present circumstances, in my judgement, between those within the prison estate and those outside in the current case, accepting of course (see *R (Stott) v Secretary of State for Justice* [2018] UKSC 59) that the state of prisoner constitutes a status for the purpose of Article 14.

60. As was set out by Mr Paul Williams, Deputy Director for Student Funding Policy, at the Department for Education in his statement:

"*19. The rationale behind this decision was to recognise that prisoners do not have <u>living</u> expenses in the same way as community students. The most obvious examples of living expenses are accommodation, utility bills and food, all of which are provided to prisoners by the State. Community students studying a master's degree do not receive dedicated maintenance loans, and most need to find additional funding to cover their living costs, given that master's fees are typically close to, or above, the maximum loan available to them. It was considered reasonable, therefore, to allow them access to the full loan to assist, in part, in meeting their living costs, should their fees be lower than the maximum loan amount.*"

61. At paragraph [58] of *Arslan*:

"*As noted above, the right of access to pre-existing educational institutions falls within the scope of Article 2 of Protocol No. 1. Any limitation on this right has, therefore, to be foreseeable, to pursue a legitimate aim and to be proportionate to that aim. Although Article 2 of Protocol No.1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions (ibid., § 34).*"

Even were there to be a restriction upon access for the Claimant by the unavailability of any surplus, it could not in the circumstances be described as in any way arbitrary or unreasonable. I also recall the words of Nicol J in *R (OA) v Secretary of State for Education* [2020] ELR 290; [2020] EWHC 276 (Admin) at paragraph [49]:

"*(iv) I also recognise that student loans are a form of social benefit. As Lord Hughes explained in Tigere at [53] a considerable proportion of the loans are never re-paid and the scheme of loans is therefore properly to be considered as a form of subsidy. The executive has particular expertise and democratic responsibility for deciding how such benefits are to be distributed. The respect which must be accorded to their decisions is accordingly enlarged.*"

62. It is further not the case that the Claimant was without books – they were provided for by charitable funds. Other students, not in prison, are likely to be in the same or a similar position requiring recourse to other funds or sometimes to family or charity to pay fully for all that is necessary to pursue their post-graduate study.

(ii) <u>The generalised restriction of access challenge</u>

63. The Claimant suggests that the Second Defendant violated A2P1 through the absence of facilities made available to the Claimant, or the imposition of restrictions upon him. I reject this challenge. I accept, as submitted by Miss Thelen, that on the facts, the difficulties faced at HMP Hull were operational impediments - such as mis-addressing materials, illness, and the requirement to use sometimes indirect means of communication (through the DLC, for example) and not systemic under-provision nor denial of access to education in the sense understood by the authorities. To the extent that there were security checks on materials arriving at the prison, or set processes for receipt of study material, or the indirect nature of some communications with teachers and teaching institutions, it is impossible to say that they were not proportionate to the circumstances and the inevitable (perhaps occasionally somewhat disruptive) requirements of the prison security regime.

64. As the Defendants point out in their skeleton argument, in *Arslan* (*supra*), the Claimants were denied <u>all</u> access to a computer and Internet, where that access was vital for the continuation of their higher education studies. In the present case a number of initiatives and workarounds, including access to a non-OU "*tailored*" post-graduate course of study, have been put in place for the Claimant and the fact that the provision of and access to higher education may differ from what may be available outside prison is not evidence that it is unlawful and infringes the Claimant's rights. Even though on occasions evidencing a clunky system and some management hiccoughs (books sent back when arriving without warning, the need to use a social video slot for an academic encounter for example), even taking the picture as including long out of time examples, the whole does not add up to a breach of the obligation to afford access to education to the Claimant.

65. The list of accommodating strategies that HMP Hull employed, set out in the evidence of Ms Anderson (above at paragraph [31]), make clear this was not in any event a picture of failure that produced a lack of access; the Defendants have sought to remedy the issues that affected the Claimant adversely personally within the necessary constraints of the regime at HMP Hull. The strategies they used were comfortably adequate to afford him lawful access to education whilst in prison. It is unreal to expect that there will be entirely hindrance -free learning given the fact of the security imperative (see for example the provisions of the IT Policy contained in PSI 25/2014 IT Security Policy).

(iii)The Chromebook challenge

Is the challenge in time?

66. This challenge has a different character from the previous two submissions.

67. I accept that the challenge to the Chromebook decision is within time. The Claimant was in my judgement entitled to seek a challenge by internal mechanisms to the 28 January 2022 decision to remove the use of his Chromebook; indeed, the decision was reconsidered, and a further decision apparently reached (see below) in light of representations, culminating on 6 April 2022 with a decision from the Security Officer.

Did the Second Defendant violate A2P1 through the Chromebook Decision or breach their obligations under domestic law?

68. In my judgement they did breach domestic law obligations, but not A2P1.

69. The first decision on 28 Jan 22 was in these terms:

> "*The writing relates to an Islamic charitable organisation and is not in line with his degree subject or a part of any assignment, this has been confirmed by his university tutor. This is a direct breach of the learners compact…*"

70. On 8 February 2022 it was said:

> "*Your university lecturer states that although you have mentioned the WAQF in the past, she was not aware of this piece of work being conducted and was not expecting to receive the work in question. Furthermore, there was not one reference to the subject matter of your degree.*
>
> *It was clearly explained to yourself and stated with in the compact agreement that you singed (sic) and agreed to, that the device must not be used for anything other than completing distance learning work.*"

71. It is important to recollect the wording of the proscription contained in the Chromebook compact. It is to the effect that:

> "*It is to be used for distance learning courses/CV creation/Shannon Trust Mentoring & Learning and must not be used for any legal work or in association with any business that you may have.*"

72. The wording does not say that only an assignment given by a tutor i.e., a piece of work he or she has requested and/or is expecting to receive, may be constructed on a Chromebook. It does not say that it may not be used for research or potential projects or aspects of study that are connected with and might be described as coming within research for or exploration of "*distance learning courses*".

73. In this case Anthea Walker, the Education Manager, perhaps came closest to a feasible test when she stated her conclusions, refusing appeal, on 15 February thus:

> "*It is evident that the documentation you produced is not in relation to your studies and you were in breach of the agreement.*"

74. However, the evidence did not justify such a conclusion, in particular in light of further material from Dr de Frece, or certainly not without exploring with her the import of her further evidence, received on the day of this decision.

75. In this case there had been previous email correspondence in 2021 to which the prison was copied, mentioning books on the subject of WAQF, the Claimant adverted to references to WAQF, and Dr de Frece was aware of the subject matter, but the narrow, closed questions asked of her at HMP Hull gave no reasonable opportunity for a proper explanation at the start. When she provided more detailed explanation, the response of the Defendants, via Ms Anderson, was surprising:

"***There was concern that the tutor had contradicted her previous assertion that she was not aware of the work and that it was not part of the Claimant's current module, shortly after having spoken to the Claimant***. *Furthermore, the tutor had not seen the material in question. There was concern that* ***as the tutor had no prior experience working with prisoners, she may have been unduly influenced by the Claimant***. *It was considered that the Claimant has a history of subversive behaviour and therefore he may operate in a manipulative manner.* ***Therefore, it was decided by the education and security departments that there was no basis for revisiting the decision.***" (Emphasis added.)

76. This conclusion is not, without more sustainable. It appears to misunderstand the questions she was initially asked, and the answers given, it misunderstands that she was not "*contradicting an assertion*" previously made, and dismisses her evidence, given when more clearly aware of the questions asked, on the basis of a hypothesis. It appears to have been reached without further reference either to Dr de Frece or to the Claimant and casts apparently unwarranted aspersions upon at least, the Professor. It is not suggested she has been asked to look at the relevant document. It is unsustainable as a logical conclusion on the basis of the evidence and is procedurally unfair.

77. The final decision made about the WAQF material on 6 April 2022 was in terms that:

"*... Mr Ellis's university lecturer states that although he mentioned the Islamic Trust WAQF in the past, she was* ***not aware of this piece of work being conducted and was not expecting to receive the work in question***. *Furthermore, there was not one reference to the subject matter in his degree.*

I understand that Mr Ellis is studying a research led degree. However, on this occasion there has been a breach of the compact by using the chrome book to create written material that is not a direct part of his degree. ***Although it may be in line with the subject area, the writing in question was not directly linked to the current degree module***. *Therefore, Mr Ellis has been excluded from using the chrome book device, not because of the content written, but because Mr Ellis used the device to write* ***unauthorised materials*** *which is a direct breach of compact.*

…

It is deemed that the writing in question is not a part of his dissertation. The work was not meant for the university, and his lecturer was not aware that she would be receiving it." (Emphasis added.)

78. The Defendants say that the 6 April letter only records the 28 January 2022 decision, which was unsuccessfully appealed, but that does not seem to me entirely the case, nor how it would appear to the reader. The letter expresses the writer's analysis and uses rather different language than hitherto. It begins with:

> "***Firstly with reference to removal of a Chromebook from MR Ellis's cell, I find the following***. *Mr Ellis's university lecturer states that although he mentioned the Islamic Trust WAQF in the past, she was not aware of this piece of work being conducted and was not expecting to receive the work in question. Furthermore, there was not one reference to the subject matter in his degree.*" (Emphasis added.)

79. It states particularly that no issue is taken with content. The decision went on to say:

> "*Mr Ellis was [?has] subsequently received an intelligence led search on the 15 March 2022 and a number of items were removed from Mr Ellis's cell for further investigation. The investigation has now concluded and no further action has been taken. The items will be returned to Mr Ellis. Mr Ellis may now resume Distance Learning sessions that entail using IT facilities. We will continue to support his Distance Learning provision were possible and access to education. It is always disappointing when a prisoner's learning is disrupted for security investigations and I can assure you that all efforts are taken to keep this to a minimum, whilst balancing security related issues and risks to the public.*"

80. The Defendants conclusion that the work was not within the scope of the Chromebook compact, even if it was in line with his subject area, even understanding that he was conducting a research-led degree, and particularly in light of the further evidence from Dr de Frece, is not in my view sustainable. The conclusion reached cannot be safely justified on the basis of the evidence, (*R (Wells) v Parole Board* [2019] EWHC 2710 (Admin)).

Was the Chromebook Decision unlawful?

Either on the basis that it failed to take into account a relevant matter, or to conduct an adequate and sufficient inquiry, or was it otherwise Wednesbury unreasonable. Was the Chromebook Decision decision-making process procedurally unfair?

81. I have concluded that the decision was unlawful as set out above. It was concluded at an early stage that there were no over-arching content concerns with the material – see 8 February 2022 conclusion:

> "*... the writing in question was not directly linked to your current degree module. Therefore, you have been banned from using a chrome device* ***not because of the content written but because you have used the device to write unauthorised materials…***" (Emphasis added.)

Accordingly, the core reasoning was the absence of authorisation for something with acceptable content, but beyond what were understood to be the parameters of "*used for distance learning courses".* To that extent, the decision showed too narrow a reading of the compact and, in light of the previous evidence regarding WAQF and that of Dr

de Frece, failed to take relevant material into account alternatively reached a logically unsustainable conclusion.

82. Overlaid on this picture, however, and importantly, were two cell searches, and no issue is taken with the fact of the searches – rather complaint is made about delay until April before access was given to IT and full access to his papers was resumed, at a time when the Claimant was under pressure with regard to completion of his dissertation.

83. The evidence of Ms Anderson about the searches, referring to the contemporary notes in NOMIS was to the following effect:

"*This search was triggered by the materials found on the Claimant's Chromebook. The purpose of this search was not to gather more information to consider further the LSM's decision to remove the Chromebook. That decision had already been taken. This search was to investigate whether the Claimant had in his possession any materials that might be considered an abuse of data access, and therefore a security breach. The relevant NOMIS case notes entry dated 14 February 2022 reads as follows:*

> *'At approx. 10:00 on 14/02/2022 DST conducted an intelligence led cell search of cell I-1-24 occupied solely by A9911AA ELLIS. Full search was conducted at gymnasium by Officer [redacted] and [redacted] and body scan conducted at reception ¿ nil found. Ibad dog was used to initially search cell ¿ nil found. Cell search conducted by Officer [redacted] and [redacted], all captured on BWVC 504813, a quantity of paperwork was seized in relation to the intelligence received surrounding a chrome book. This will be passed on to prison prevent lead [redacted] who has been investigating these issues. Once the paperwork has been reviewed anything that is cleared will be returned to ELLIS as was explained to him once the search was complete, he is aware of what has been taken and is happy with the search and what we have done, he had no complaints to raise. IR, NOMIS and obs book updated, O1 aware.*'"

and

"*At approximately 08:45 on 15/03/22 J1-24 A9911AA ELLIS subject to Intel led cell search by DST. All HMPS guidelines and local searching strategy followed by search team, prisoner compliant throughout. Items seized include; P06417308 Assorted paperwork ¿ websites, business plans and social media. P06417310 emails from potential wife + pre marriage contract. Contained within are emails from KEITH ELLIS church street, Nuneaton, Warwickshire CV11 4AD listed on his contacts on NOMIS as his uncle but content is from ¿AISHA¿ asking about marriage details etc. P06417311 8x new scientist magazines with pages marked: Multiple bookmarks on viruses. 07/03/20 ¿ Online extremists 25/04/20 ¿ Weapons 31/10/20 ¿ Super bugs and gene weapons 0/01/21 ¿ Mind control 22/05/21 ¿ Mind hacking 04/07/20 ¿ Dominate and influence P06417313 Microbiology and infection book. P06417314 4x books on psychology and influence. BWVC 418694.*"

84. The evidence however, shows that once the security issues were resolved and whilst they were being resolved, steps were taken to afford the Claimant a degree of access to learning, and to the writing of his dissertation. There were mitigation measures to ensure the Claimant's degree could be taken, and his tutor assisted him by obtaining an

extension for submission of his dissertation - as stated, he was successful in obtaining the qualification.

85. Accordingly, I quash the decision reiterated in the letter of 6 April 2022 to the effect that the withdrawal of privileges was justified in terms of the removal of the Chromebook. The withdrawal of the Chromebook apparently had some ramifications at HMP IOW, at least at the start, where it was a black mark against him in respect of internet and other access. This therefore should not form part of his record at HMP Hull.

86. I accept that for the period in question there was interruption to study, but this did not in my judgement amount to an interference with the Claimant's A2P1 rights. There were, as set out, security concerns which prompted the cell searches. The delays whilst these intelligence led searches were conducted and paperwork uplifted and considered cannot in my view be considered as constituting unjustifiable refusal of access to education on the part of HMP Hull. The delay in question was (in total) from the end of January until at the latest, 26 April 2022, when the Claimant accepts everything was returned although Chromebook access not resumed. Furthermore, the evidence does not show that the absence of the Chromebook (a new facility), or IT access made study impossible during that time, accepted that it was more difficult. Necessarily, infringement must be considered in the following light, as stated in *Aslan*:

> "*... [58] ... the right of access to pre-existing educational institutions falls within the scope of Article 2 of Protocol No. 1. Any limitation on this right has, therefore, to be foreseeable, to pursue a legitimate aim and to be proportionate to that aim. Although Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions.*"
>
> and
>
> "*... [59] In its Kalda judgment (cited above, § 45), in particular, the Court noted that imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information. It considers that Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners*."

87. Accepting that in certain circumstances delay may inform a breach of the A2P1 obligation, and that delay or lack of personal IT access is frustrating and inconvenient, it is clear in my view the interruptions to full access to education, such as were caused by the predominantly security-imposed delays, are within the prison system, plainly reasonable, proportionate and are not arbitrary. Even if the WAQF document did not cause individual concern, it is impossible to say (and was not said) that the subsequent searches were unlawful. The delay was regrettable, but sufficient accommodation for the problems afforded that it cannot in my judgement be said that the Claimant's rights, were infringed. There is no breach of A2P1.

SUMMARY OF CONCLUSIONS

88. The three areas of dispute are decided thus:

i) The challenge to the 2016 Regulations is rejected. It is out of time and in my view hopeless.

ii) The general restrictions on access challenge is rejected; the impediments to learning are generally not systemic nor policy based, they are particular operational difficulties that arise from time to time, and which are generally mitigated by discussion of processes and ad hoc access where required. Where general differences exist, there are defensible reasons for the differences in access between the prison population and those not incarcerated.

iii) The Chromebook challenge succeeds as a public law breach but is not a breach of obligations arising out of A2P1.