Neutral Citation Number: [2024] EWHC 2251 (Admin)

Case No: AC-2024-CDF-000073

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 11 September 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

STEFANOS NEOPHYTOU	**Claimant**
- and -	
(1) THE GOVERNOR OF HMP BERWYN	
(2) SECRETARY OF STATE FOR JUSTICE	**Defendants**

- -
- -

Philip Rule KC (instructed by **Hackett & Dabbs LLP**) for the **Claimant**
William Irwin (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: 2 August 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. The claimant is a prisoner at HMP Berwyn in Wrexham. He is detained there pursuant to a warrant issued in consequence of his default in payment of a confiscation order sum.

2. On 20 October 2023 the claimant made a formal application for early release on compassionate grounds ("ERCG") by the second defendant, the Secretary of State for Justice. On 22 December 2023 the first defendant, the Prison Governor, decided not to progress the application further and refused to submit the application to the Public Protection Casework Section ("PPCS") of the Ministry of Justice ("MOJ"), which handles applications for ERCG on behalf of the Secretary of State. The Governor has since maintained that refusal.

3. With permission that I gave on 21 May 2024, the claimant seeks an order quashing the Governor's refusal to pass the application to the Secretary of State for final determination. He contends that the decision is vitiated by procedural unfairness and by legal and/or factual error.

The Legal Framework

4. The Secretary of State has power to release prisoners on compassionate grounds, both under the Royal Prerogative and by statute. Section 258 of the Criminal Justice Act 2003 provides in relevant part:

> "(1) This section applies in relation to a person committed to prison—
>
> (a) in default of payment of a sum adjudged to be paid by a conviction, or
>
> …
>
> …
>
> (4) The Secretary of State may at any time release unconditionally a person to whom this section applies if he is satisfied that exceptional circumstances exist which justify the person's release on compassionate grounds."

5. The meaning of "exceptional circumstances" was considered by Lord Bingham of Cornhill C.J. in *R v Kelly* [2000] QB 198, 208:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

As appears from the same judgment at 208H, the Court of Appeal there considered "singly and cumulatively" the matters relied on as exceptional circumstances.

6. The meaning of "compassionate grounds" was considered by Stanley Burnton J in *R (A) v Governor of Huntercombe Young Offenders' Institution* [2006] EWHC 2544 (Admin), in the context of a materially identical provision in section 102(3) of the Powers of Criminal Courts (Sentencing) Act 2000. With reference to the facts of that case, he said at [36]:

> "The Governor thought that compassionate grounds would only exist if there was serious or terminal illness or something of equal severity. I do not think that compassion arises only in cases of death or illness. There are compassionate grounds whenever there is pain or suffering or distress or misfortune. The narrow scope of the power under section 102(3) results more from the requirement of exceptional circumstances than the element of compassion. In the present case, the repeated indications of immediate release, or that it would be forthcoming if the judges so recommended, must have given rise to real feelings of upset and disappointment on the part of the Claimant, and indeed of his family. It would be an act of compassion to release him in such circumstances."

7. At the material time the Secretary of State had a relevant policy, *Early Release on Compassionate Grounds (ERCG),* ("the Policy"), which was implemented on 13 May 2022 and re-issued on 16 August 2023. The Policy is addressed to HM Prison & Probation Service and its various agencies and personnel, including prison governors. In the present case, no challenge is made to the legality of the Policy. The Policy does not, however, affect or limit the legal meaning of "exceptional circumstances" or "compassionate grounds": see *R (Bruton) v Secretary of State for Justice* [2017] 4 WLR 152, at [42].

8. The following parts of the Policy may be noted here.

> "1. <u>Purpose</u>
>
> …
>
> 1.4 The fundamental principles underlying the approach to ERCG are:
>
> a) *The early release of the prisoner will not put the safety of the public at risk.* In all applications for ERCG, the Secretary of State must be satisfied that the prisoner can be safely managed in the community.
>
> b) *There is a specific purpose to be served by early release.* There must be a clear reason to consider the early release of the prisoner before they have served the sentence imposed on them by the sentencing court.

c) *A decision to approve ERCG will not be based on the same facts that existed at the point of sentencing and of which the sentencing or appeal court was aware*."

"3. Requirements

…

Process requirements

3.2 All applications for ERCG should be submitted in line with the guidance set out in Section 4 of this Policy Framework.

3.3 PPCS will process and consider applications for ERCG.
…

…

3.5 Where ERCG is recommended by PPCS, the final decision to allow early release will be taken by the Secretary of State or an official with delegated authority."

"4. Guidance

Eligibility

4.1 All determinate sentenced prisoners and those serving terms of imprisonment, including civil imprisonment, may be considered for ERCG by PPCS at any point in the sentence or term.

…

Making an application

4.14 Any member of staff within the prison, the prisoner, their family or a representative, may bring the circumstances of a case to the attention of the Prison Governor in order that they be reviewed and where appropriate an application made for ERCG. All members of staff should familiarise themselves with the fundamental principles underlying the approach to ERCG found at paragraph 1.4.

4.15 The Prison Governor may take the decision to assign a member of prison staff overall responsibility for managing and progressing an ERCG application, particularly if the case is complex and will involve several agencies/departments. The member of staff assigned to the case must keep the prisoner's record and the OMU updated with the progress of the application at all times to avoid any delays in case of illness or leave.

4.16 When preparing an application, consideration should be given to the length of the sentence still outstanding and any remarks made by the judge at sentencing. This will be especially relevant if the court was aware of the circumstances pertinent to the ERCG application at the time of sentencing, but the situation has changed significantly since the point of sentencing which is why an application is now being made. The prison making an application should request a copy of the Judge's Sentencing Remarks, unless already kept on file, from PPCS …

Guidance for applications due to a prisoner's health and/or social care needs

4.17 Applications may be made where the prisoner is incapacitated or has health conditions such that the experience of imprisonment causes suffering greater than the deprivation of liberty intended by the punishment. Conditions could include paralysis, those who have experienced severe strokes, respiratory illnesses, cardiovascular disease and different types of dementia. This is not an exhaustive list but is intended to provide examples of the types of illness that may be considered to meet the criteria for ERCG.

4.18 ERCG may also be considered for prisoners suffering from a terminal illness who are in the last few months of life and medical advice provides that the prisoner would be better accommodated at a hospice/hospital or in some cases, a domestic setting providing the necessary care can be provided.

4.19 Conditions which are self-induced, for example a prisoner refusing food or medical treatment, will not in themselves qualify the prisoner for ERCG. However, should such conditions result in the prisoner meeting the criteria set out in paragraph 4.17, an application should be made.

4.20 Resource and cost implications of maintaining staff on bed-watch duties at an outside hospital/hospice are not grounds to justify ERCG.

4.21 Where the criteria due to the prisoner's health and/or social care needs are met, the case must be submitted to PPCS, irrespective of whether the Prison Governor supports release or not. The Prison Governor has delegated authority to refuse an application where it is clear the criteria as set out in paragraphs 4.17 or 4.18 are not met.

…

Completing the application form

4.24 The application form in Annex A to the Policy Framework should be completed for applications due to a prisoner's health and/or social care needs. All sections of the application are required to be completed …

…

4.28 The Secretary of State must be satisfied that the principles of ERCG are met as set out in paragraph 1.4—including that the early release will not put the safety of the public at risk—and that adequate arrangements can be put in place for the prisoner's care and treatment outside of prison custody.

Guidance for non-medical related applications

Tragic family circumstances

4.29 Applications being made due to tragic family circumstances would need to demonstrate that the circumstances of the prisoner or their family have changed to the extent that if the prisoner were to serve the sentence imposed, the family's hardship would be of exceptional severity, greater than the court could have foreseen.

4.30 In cases where a partner or parent is terminally ill, early release would depend on what other help or support is available to them and/or any risk posed to the welfare of children or vulnerable adult(s) in their care.

…

4.32 The Prison Governor must be in support of the early release of the prisoner where the application is due to tragic family circumstances. If the Prison Governor is not in support of early release because it does not meet the fundamental principles set out in paragraph 1.4 and does not address the criteria in paragraph 4.29, the application should not be submitted. The Prison Governor has delegated authority to refuse the application where the criteria are not met.

4.33 The Secretary of State would need to be satisfied there is a real and urgent need for the prisoner's permanent presence with their family and that early release will bring significant benefit to the prisoner or their family,

> equivalent quality of which cannot be provided by any other person or agency. The Secretary of State must be satisfied that the principles of ERCG are met as set out in paragraph 1.4 – including that early release will not put the safety of the public at risk.
>
> *Other exceptional circumstances*
>
> 4.34 Other unprecedented circumstances may arise which are exceptional and would fall to be considered in line with this Policy Framework. The Prison Governor should be informed of any such circumstances, in order that they may be reviewed and if appropriate an application submitted for ERCG.
>
> 4.35 Any application would need to establish that there is a genuine and vital reason for the prisoner's permanent early release and the circumstances cannot be dealt with by either temporary release arrangements (refer to ROTL information in paragraphs 4.09 to 4.10) or any other person or agency.
>
> 4.36 The application will be considered in the same way as those for tragic family circumstances. The Prison Governor should only submit the application if in support of early release based on the information available in relation to the circumstances affecting the prisoner. The Prison Governor has delegated authority to refuse the application if it does not meet the exceptional threshold described in paragraph 4.35. The Prison Governor should not support an application if it does not meet the fundamental principles set out in paragraph 1.4."

The Facts

9. The claimant was born, in Birmingham, on 29 October 1990 and is therefore 33 years of age.

10. In January 2014 the claimant was kidnapped, falsely imprisoned and subjected to both physical and psychological torture of a severe nature. The perpetrators were tried and convicted later that year and received lengthy prison sentences. The claimant gave evidence at the trial but only after attempts had been made to intimidate him into not doing so.

11. In October 2016 the claimant pleaded guilty to the offence of being concerned in the operation of a brothel. He was sentenced to a term of imprisonment for 27 months and was classed as a vulnerable prisoner. He was released on licence in 2017. He has no other criminal convictions.

12. Confiscation proceedings were brought against the claimant under the Proceeds of Crime Act 2002. In 2021 a confiscation order was made against the claimant in an amount exceeding £3,000,000. He paid £49,000, but in excess of £3,000,000 remains unpaid.

13. On 25 November 2021 a default term of imprisonment of 10 years was activated on account of the claimant's failure to pay the full amount of the confiscation order. The point underlying such a default term is that the prisoner is taken to have sufficient available funds with which to comply with the confiscation order and so has the remedy for his incarceration at his own disposal. The default term of imprisonment is, as Dyson LJ said in *R (Lloyd) v Bow Street Magistrates' Court* [2004] EWHC 2294 (Admin), [2004] 1 Cr. App. R. 11, at [34], "one weapon in the armoury of those seeking to enforce that [scil. confiscation] order".

14. On 23 August 2022 the claimant was detained at HMP Berwyn.

15. On the instruction of the claimant's solicitors, he was examined by medical experts under the auspices of Harley Med Clinic: first, on 30 December 2022 at HMP Berwyn, by Professor Sam Lingam, a First Contact Physician and Consultant Paediatric Neurologist; then, on 11 April 2023 virtually, by Dr Ahmed Shoka, a Consultant Psychiatrist. They produced a joint report in April 2023. The report recorded psychological sequelae of the incident in 2014 and "extreme symptoms" (including claustrophobia, traumatic flashbacks, anxiety & panic attacks) that the claimant had suffered during his initial prison sentence. It noted that after his release on licence the birth of his first child, in 2018, had been a significantly positive event and that his condition after release had significantly improved, but that his condition had greatly worsened since his return to custody. I shall set out limited, but lengthy, extracts from the (rather repetitious) report.

16. Professor Lingam wrote:

> "Since being imprisoned, Stefanos' symptoms have returned significantly once again due to the experience of imprisonment and the high stress levels associated with his environment.
>
> Once again, he is suffering from traumatic reliving of the kidnap through flashbacks & nightmares, awakes during the night screaming & crying, often having urinated himself, claustrophobia and a general sense of panic and anxiety. The violent and high stress environment being a constant trigger of his symptoms, the prison cell & being locked up causing him to relive the traumatic event where he was locked in a room for many hours, without support to calm him when he suffers.
>
> When not suffering from the forced reliving of the event, Stefanos has a constant 'fear of the unknown'. He has spent the last few years trying to put the kidnap & memories of the gang behind him, yet once again, he is within a system where a fear of retribution causes constant psychological suffering. The unnatural & violence atmosphere causes him to be constantly

scared and paranoid which put all together is having an overall negative effect on his health.

Stefanos symptoms are frequently & easily triggered. Often unexpectedly, during the night, checks by officers can cause a fright that develops into a panic attack. Confrontation between prisoners & acts of violence cause Stefanos to hyperventilate & tremble uncontrollably and graphic, disturbing intrusive thoughts plague him most days.

He has been sharing a cell with other prisoners although as a result of the panic attacks (screaming, crying & general erratic behavior [sic]) the prison are helping to allocate him a single cell.

Attempts to access mental health care have been either inadequate or inappropriate. Despite bringing his symptoms to the attention of mental health since being imprisoned in August, he has not seen a psychologist.

…

Stefanos general suffering as a result of his symptoms is intolerable. He is desperate to find a solution. He feels that he cannot take the pain anymore and does not have where to turn. Stefanos is scared of what this is doing to his long-term mental health, he does not want to be a victim but is noticing significant change in himself as a result of his suffering.

Stefanos' deterioration is having a negative impact not only on him, but his family also. He wants to be a good & strong father for his family like he once was, especially for his 4 years old daughter. He has a significant sense of loss and urgently wants to regain his livelihood.

…

It was evident [on 30 December 2023] that having been exposed to such horrific trauma, that Stefanos case was complex. Furthermore, failure to address this trauma in previous years via therapy, has clearly had a significant impact of the severity of the PTSD Stefanos is suffering from. Often such avoidance to directly address disorders that follow from exposure to events of a traumatic/horrific nature, manifests into complex PTSD and are characterized by the very symptoms Stefanos is experiencing.

…

Since the appointment on the 30th December 2022, I have had sight of Stefanos' medical records which details the history of his condition since the attack. It is evident that previous attempts

of therapy were traumatic for Stefanos (as they generally are for events of this level). This resulted in an avoidance by Stefanos to continue which has allowed the unaddressed trauma to manifest into complex PTSD.

…

Due to the traumatic events that Stefanos was exposed to, I strongly advise against any form of therapy being undertaken in a prison environment. It is clear that despite previous years of 'coping mechanisms', that prison is having a severe negative impact on Stefanos' condition. It is a reoccurring reason for his condition being 'triggered' due to the relation of imprisonment and the events he was exposed to.

…

The significance of Stefanos' trauma and how it relates to surroundings would make it much more traumatic for him to undergo therapy in a prison. Doing so would cause unnecessary pain and intolerable exposure to the event. This could manifest into long-term damage to his mental wellbeing and could leave him in an unstable condition.

…

Overview & Analysis

I have concluded that Stefanos requires urgent treatment in order to stop the deterioration of his mental state as a result of the continued exposure to the symptoms of PTSD and to prevent the condition becoming chronic and difficult to treat. Stefanos needs therapy to address the trauma in a stress free, relaxing environment that would allow his condition to remit fully. Small doses of medication would be offered alongside to complete the treatment.

I strongly emphasise my advice that urgent therapy to address the trauma, due to the complexity of his condition and level of trauma he was exposed to is not carried out in a high-stress unsupportive environment such as prison. Doing so could have devastating consequences for his mental stability. I suggest that the therapy is conducted in a supportive environment where Stefanos feels safe and secure and the surroundings would be suited to dealing with his condition and enabling his recovery.

Post recovery, Stefanos would need to continue ongoing treatment in a comfortable environment to achieve full remission from the symptoms and ensure the recovery is long term, finally achieving full remission.

I have referred Stefanos case to Dr Shoka for a detailed diagnosis and treatment/management plan."

17. Dr Shoka wrote:

"*Mental State Examination (MSE)*

- Appeared quite well.
- Good eye contact.
- Reasonably euthymic reactive mood during the whole course of the conversation and interview.
- Clear coherent speech, well-articulated and expressed himself freely.
- No active suicidal intentions or plans, however, at times, he feels that life is not worth living and becomes very pessimistic being trapped.
- Did not disclose any active florid psychotic symptoms in the form of formal thought disorder or fixated persecutory paranoid delusions or hallucination in any modality. However, he described fleeting paranoid thoughts with marked anxiety and as if not trusting anybody around him, as well as looking over his shoulder and he described this as a continuous fear of the unknown.
- No manic symptoms.
- He also described that his sleep has been affected by initial insomnia and difficulty in falling off to sleep as well as non-stop vivid nightmares and as if reliving the traumatic experience which he has been through.
- He is experiencing claustrophobic type of attacks especially at night-time and during the day if it is triggered by anything around him. When he experiences the panic attacks, he feels as if he is going to die and lose control.
- Intact cognitive functions in all spheres.
- Stefanos has a very good level of insight into his current mental health symptoms and difficulties as well as having a fair degree of judgement and appraisal of the whole situation. He is keen to have some form of help in order to address all the issues caused by this horrific trauma he had encountered in 2014.

Stefanos mentioned that he has never been seen by a psychiatrist in the prison.

He has tried medications in the past in the form of Sertraline which did not help him, as well as Paroxetine which made him detached, irritable and distant. Both Sertraline and Paroxetine are anti-depressants of the SSRI group which can be prescribed to tackle symptoms of PTSD, anxiety and depression.

Stefanos is not very keen to go down the route of any pharmacological intervention because he does not want to be hooked and dependent on medications which will mask the symptoms rather than dealing with the root cause of the problem which is the trauma in his case.

Diagnostic Formulation

…

In summary, I am with the opinion that Stefanos is suffering a complex post-traumatic stress disorder which is under the criteria of 6B41 in the ICD-11.

Suggested Treatment and Management Plan

It is widely known and evidence based that the best treatment for Complex PTSD and PTSD is Eye Movement Desensitization and Reprocessing (EMDR). This is a pioneer therapy coined and initiated by a famous psychologist in the USA, Francine Shapiro. It is a structured therapy which encourages patients to focus previously on the trauma memory while simultaneously experiencing bilateral stimulation typically eye movement which is associated with a reduction in the vividness and emotion associated with the trauma memories.

…

Stefanos is not keen to pursue any pharmacological intervention because he does not want to be dependent on medication which will treat the associated comorbid symptoms, rather than dealing with the root cause of the trauma and the problem in a way which is similar to how the EMDR will work.

It is very important to mention that the EMDR therapy should be offered to Stefanos in an anxiety-free, supportive, relaxing and conducive environment in order to achieve a full remission from the symptoms of the PTSD and the associated comorbid symptoms of anxiety and depression. After achieving remission with support in a more conducive, suitable and appropriate environment, he can achieve recovery, and hopefully in the long

> term, he can achieve rehabilitation and integration back into the society and into his family life.
>
> It is recognizable that imprisonment is having a clear negative impact on Stefanos's mental health and wellbeing. Being contained in a prison is a constant reminder of the horrific trauma he had suffered and can act as a continuous trigger of the cPTSD symptoms he is currently experiencing.
>
> The EMDR therapy should be offered as a matter of urgency and priority because all the research and the evidence show that if the symptoms of the PTSD and the symptoms caused by the previous trauma have not been dealt with in a timely manner and are left for a long period of time, this can lead to these symptoms becoming protracted, chronic and deeply ingrained. This can also lead to what has been known and called in the literature, post-traumatic stress personality disorder, and in turn, treatment can be rather difficult with the symptoms being resistant to any effective intervention.
>
> So, I would strongly recommend that the EMDR therapy ought to be offered to Stefanos as soon as possible in order to deal with his current symptoms and allow him to have remission of the symptoms and enter the phase of recovery."

18. Having seen Dr Shoka's opinion, Professor Lingam wrote further:

> "Based on my assessments, I advise that EMDR therapy will be the most appropriate & effective method of therapy to improve Stefanos symptoms & remit them.
>
> …
>
> It is important to emphasise that EMDR therapy should be offered to Stefanos in an anxiety-free, supportive, relaxing & conductive environment. The reasoning for this is that, whilst EMDR therapy is generally recognised as a safe & effective approach to dealing with trauma, therapy for patients with a significantly horrific trauma like Stefanos, will be distressing & as a result may leave them with negative post-therapy side effects. An inadequate post – therapy environment could aggravate this & leave Stefanos in an unstable condition.
>
> …
>
> I would not advise that Stefanos undergo therapy in any form that requires recalling the trauma in a prison environment where: a) The sessions may be limited & aftercare inadequate, b) The significantly aggravating trigger in Stefanos condition is the experience of the prison environment & the locked cell.

> …
>
> Therapy within a prison environment for a patient with Stefanos circumstances, where he will be returned to a high stress & triggering environment would be irresponsible & could result in severely negative consequences such as a development of further mental health conditions, suicidal intentions, and general mental instability. Moreover, to allow Stefanos to recall the event & then confine him alone to a room would be inhumane, considering the circumstances of his trauma.
>
> …
>
> Lastly, I advise that the therapy is offered to Stefanos as a matter of urgency. Whereas in previous years, Stefanos has tended to be aware & avoid his triggers, this has not been possible in prison and realistically will not always be possible to apply. As a result, Stefanos is suffering intolerably from his symptoms."

19. Thereafter, the claimant began having weekly sessions with a psychiatrist in prison.

20. On 10 October 2023 Professor Lingam and Dr Shoka conducted a telephone consultation with the claimant, as a result of which they produced a fairly lengthy supplement to the earlier report. It included the following passages:

> "During the call, Stefanos described the psychiatrist being very understanding of his issues. However, he continues to feel unable to address the traumatic memories through any form of direct trauma-based therapy and listed the physical reactions he experiences in response to any exposure to reminders, memories or recalling of the trauma and the distress this causes. Stefanos experiences overwhelmingly realistic sensations of being back at the scene of the trauma, a sense of panic and feeling unsafe as if something terrible is about to happen. This takes place even in the safety of the psychiatrist room and such reactions can arise during attempts to recall less distressing parts of the trauma or even at the very discussion of carrying out trauma-based therapy.
>
> … [H]is fear and mental reluctance to directly address the trauma is exacerbated by the high stress environment of the prison, which happens to be a daily reminder of his trauma and therefore a constant overstimulating trigger of his symptoms. Constant unsuccessful attempts of pushing distressful thoughts out of his mind will only cause further problems in the long term for Stefanos, as it already has, because doing so interferes with how he processes and makes sense of the trauma that took place.
>
> Stefanos has been continuing to experience the symptoms of his C-PTSD (anxiety, hyper alertness, vivid flashbacks of the event, night time claustrophobia, panic attacks, nightmares, intrusive thoughts).

However, he also stated how some of his symptoms have negatively developed over recent months.

Nightmares have increased in intensity and Stefanos often feels 'out of body' experiences and even feelings of physical pain on his body specifically relating to acts that took place during his trauma. This understandably being very distressing for Stefanos, especially when awaking frantically during the night, alone and confined to his cell. Furthermore, his nightmares are often spilling out into his waking life and he sees danger everywhere, causing him to panic. Panic attacks have also increased in frequency and now take place outside of his cell more often than before, in environment where Stefanos is unable to find escape due to the restricted movements within the prison. As a result, Stefanos now feels he is living in a cycle of being 'in fear of fear' – developing a behavioural avoidance by way of being increasingly reluctant to leave his cell.

Stefanos is being fearful of being in a situation (such as work or exercise time) where the intense and unexpected onset of physical sensations from an attack can overwhelm him and he is unable to escape from the trigger/location or find a safe place in order to calm down.

Overwhelming physical sensations include feeling very hot or very cold, trembling, increased heart rate, becoming dizzy and nauseous and a heightened arousal of fight or flight that causes extreme panic. Also infrequently, Stefanos has lost a conscious awareness of his surrounding for a few moments (although not fainted). These reactions understandably being distressing for him in a prison environment, in front of other inmates, where he feels isolated from support or protection.

…

Stefanos' family have noted significant change in his physical, mental, and behavioural state. During nights of high and tense emotions over the phone, or a lack of contact from Stefanos, they have felt it necessary to call and ask the prison to carry out welfare checks on him. The family describe days where Stefanos can be detached or unresponsive, along with infrequent but worrying bouts of confused or disoriented states. This has certainly caused significant anguish for them and concerns for his general wellbeing.

Such display of erratic behaviour is likely to be due continued endurance of his symptoms and the extreme stress this causes Stefanos – possibly causing mental instability. Stefanos himself described infrequent, yet erratic behaviour when in his cell, such as laughing hysterically and then simultaneously beginning to cry his eyes out, which he said confuses him.

> …
>
> I understand from Stefanos that the prison psychiatrist has shown him deep understanding of his mental inability to engage in trauma-based therapy and has nevertheless continued to help him apply alternative methods to help challenge his symptoms. Stefanos actively applies grounding techniques during attacks/flashbacks (using sight, sound, touch in order to find a safe place) and exercises such as nightmare image reverse where attempts are made to change ending of negative, traumatic nightmares into positive ones while awake. He has also tried to understand the sources of his triggers in order to understand and address them. However, evidently these less directive measures are not being successful in decreasing his symptoms and Stefanos' C-PTSD ultimately does require a form of trauma-based therapy that undeniably will be distressing for Stefanos.
>
> Despite the demoralising and unnatural environment of his imprisonment, Stefanos continues to show motivation to collaborate with forms of treatment and has shown resilience even under extreme stress – I commend him for this and explained the importance of him being less self-critical in regards to how he is dealing with his symptoms.
>
> Nonetheless, his mental resistance to consider trauma-based therapy in prison is understandably immense and as previously stated in the medical report, there are grave concerns about the consequences for his mental stability should he attempts any distressing evoking of traumatic memories in prison.
>
> Moreover, less directive methods of therapy may be counter-productive in the long term, as consistent evoking of Stefanos anxiety by application of exercises that ultimately will not succeed in reducing his symptoms, could make matters worse rather than help.
>
> As is such, the treatment plan advised in April continues to be the appropriate route for Stefanos. In fact, the advice is further supported due to how his symptoms have since developed."

21. On 13 October 2023 the claimant's mother suffered a stroke and was admitted to hospital.

22. On 26 October 2023 the solicitor then acting for the claimant submitted an application for ERCG directly to PCCS, under cover of an email that sought urgent consideration on account of "the [claimant's] medical needs and his mother's condition".

23. The representations, comprising 16 pages and 49 paragraphs, were written by Mr Rule KC, who appeared for the claimant before me. They set out the background summarised above and referred to accompanying documents, including the medical

evidence that had been obtained by the claimant. Paragraph 3 put the application clearly on the grounds of the claimant's medical condition:

> "3. The Secretary of State is asked to exercise his power to release Mr Neophytou ('the Applicant') on compassionate grounds. These grounds concern his medical condition and needs. An expert medical report accompanies this application."

Paragraphs 25 and 26 put the matter as follows:

> "25. At the time of the decision to activate the sentence term the severity of the PTSD symptoms of the Applicant could not have been and was not known. There is now clear and compelling evidence available that details the matters set out below that show the exceptional circumstances that justify and require an ERCG to be applied in this case.
>
> 26. The impact of the Applicant's imprisonment has been to worsen and trigger his PTSD symptoms. The prison environment provides direct reminders of his trauma, which is causing the Applicant intense mental suffering, fear and anguish; and it precludes effective treatment. The application is supported by the evidence of a joint medical expert report of Professor Sam Lingam, consultant paediatric neurologist with considerable experience of medico-legal reports for victims of torture, and previous medical assessor member of the Tribunals Service, and Dr Ahmed Shoka, consultant psychiatrist."

(Subsequent paragraphs elaborated on the matter by reference to the medical evidence.) The representations also raised matters concerning the claimant's family circumstances. The first concerned his daughter:

> "22. In 2018 the Applicant's daughter [name[1]] was born. This was a life changing event for him. He is close to her and a caring father. The impact on his daughter of his imprisonment is noted by the Meadows Nursery in a letter dated 25 October 2022."
>
> "43. The Applicant has a positive and supportive loving relationship with his partner [name] of 12 years. His daughter [name] is now 4 years-old. He loves being a father and is a devoted parent. [His partner] juggles work and being in effect a single mother under the present circumstances. The Applicant expresses significant concern about not being able to be a father whilst imprisoned and with what kind of person he will be when released if this was to be only after suffering as he is for a number of years during which time his mental health will continue to deteriorate and compound as the experts have identified."

[1] For this and similar references within square brackets within this paragraph 23, see paragraph 53 of this judgment.

The second concerned his mother:

> "24. On Friday 13 October 2023, the Applicant's mother suffered a stroke and was admitted to hospital. This has considerably impacted the Applicant whose own mental wellbeing is further worsened as a result. The Applicant is deeply anxious to be with his mother to assist in her recovery, particularly as he is her only son and main form of support. Medical evidence from her doctor Dr Tahir confirmed in August 2023 that she was suffering even then from paranoia, anxiety and chronic depression (for which she took medication) and 'is feeling very isolated after her son was imprisoned'."

> "42. In addition to his own health the Applicant is now extremely worried for his mother (who is very close to him as her only child). On 13 October 2023, as mentioned above, the Applicant's mother suffered a stroke and was admitted to the Queen Elizabeth's Hospital in Birmingham. The Applicant believes his mother's stroke may have been exacerbated by her alcohol dependence, which she suffered in relapse after the Applicant's kidnap as well as associated depression. The Applicant's own mental health has deteriorated on hearing the news about his mother who is said to be confused and delirious. As his mother's main form of support, the Applicant is anxious to be able to assist her in her recovery and to help her to take steps to keep her away from alcohol. Her stroke is devastating for the family. It is now even more important the Applicant can be effectively treated and recover so that he can be strong for his mother and his partner [name], so he can provide his care and support. Her incapacitation means that [name] is alone."

Paragraph 45 said:

> "45. In light of the above facts, it would be consistent with the obligations upon the Secretary of State under the Human Rights Act 1998 to release the Applicant on compassionate grounds. Not doing so would conversely not be compatible with the psychological well-being of the Applicant, and indeed the balance of interests of family members also, in light in particular of an absence of risk posed to the public by such proportionate compassionate release."

24. As I understand it, in the light of the representations themselves and of Mr Rule's submissions to me, the application is properly understood to have been put on the basis of the claimant's mental health; that, indeed, is apparent from paragraph 3 of the representations and the medical evidence there referred to. The family circumstances are not relied on as independently justifying ERCG. However, the family circumstances are said to have a twofold relevance: first, that they exacerbate the claimant's anxiety and thus his poor mental health, though they are not the primary cause of his condition; second, that they form part of the totality of the circumstances to be considered cumulatively, so that, although by themselves they may not constitute

an exceptional circumstance, they contribute in some measure to a situation that can properly be said to constitute exceptional circumstances.

25. On receipt of the application, PPCS referred the matter to HMP Berwyn. On 13 November 2023 Mr Simon Keller, the Prison's Head of Public Protection, with Governor grade, sent an email to the claimant's solicitor, noting that there was currently no application being processed and requesting that all communications be sent by email to the Prison. The email ended:

> "If you submit any information that will assist a decision including contact details of parties that can contribute to a decision being made such as Consultants, a point of contact from the family to liaise with and any other agency involved in ongoing care that will be given going forwards. A copy of the Judge's sentencing remarks, along with a rationale why Mr Neophytou's release would be justified in exceptional circumstances I will then make a decision if the Prison supports this application or not."

26. The application was re-submitted, directly to the Prison, on 14 November 2023. The covering email observed:

> "The rationale for why release is justified is set out in the representation documents and supported by the various appendices. As explained in paragraph 10 (c) of the representations document there were no sentencing remarks by a Judge as there was no sentencing exercise. Our client had a default sentence activated in default of payment and his release is unconditional."

27. On 29 November 2023 the claimant's mother was discharged from hospital.

28. Mr Keller considered the available documentation and discussed the application on several occasions with the claimant. He also spoke to the prison psychologist regarding the claimant's condition, his current treatment and the availability of other treatment within prison.

29. On 22 December 2023 Mr Keller made his decision not to submit the claimant's application for ERCG to the PPCS. The decision was communicated by a letter sent under cover of an email to the claimant's solicitors on 2 January 2024. These are the important parts of the letter.

> "This response has been provided by Simon Keller Head of public protection at HMP Berwyn.
>
> I have considered your request for the Prison to apply for early release on compassionate grounds, (ERCG), I am afraid that I do not agree that this meets the threshold for the Prison to support this application. I will set out my rationale for this decision below.

> …
>
> I fully accept that Stefanos is suffering from PTSD caused by the historic kidnap incident and subsequent trial and conviction of those responsible. I also accept that treatment is required to help Stefanos with this through either CBT or EMDR and that either of these treatments are emotionally difficult and that Prison may not be the best environment to undergo this.
>
> I also accept the difficulty caused by the recent deterioration Stefanos' Mum's health and her recent hospitalization.
>
> …
>
> [The fundamental principles in paragraph 1.4 of the Policy] need to be met before Prison can support and apply for ERCG.
>
> If I address the issue of Stefanos' Mum's health first. For ECRG to be considered, the situation needs to be exceptional. Unfortunately, as difficult as it is when a loved one's health suffers it sadly not exceptional and something that is commonly felt by both prisoners and members of the public. I also understand that his Mum was discharged from hospital in the full knowledge of the circumstances she was returning to, and this satisfied their need to ensure this discharge was safe. There are family members who are supporting her including Stefanos' partner. It is clear to me that this does not meet paragraph 1.4b).
>
> Moving on to the impact of PTSD this is a condition that has been diagnosed ahead of his imprisonment, including an earlier sentence that has already been served. This means that the facts existed at the time of sentencing so does not satisfy 1.4c). Whilst there is some merit in leaving the treatment of PTSD through EMDR or CBT they are both treatments that are available in Prison and have not been tried. This decision has been made by Stefanos who is more motivated by the option of release ahead of trying the treatment that is available. Again, from an exceptional point of view the existence of serious mental health problems that escalate the risk of suicide and self-harm are fare to common [sic] with a number of people assessed as needing hospitalisation to manage their mental health. The prison system has safe systems of work to support prisoners through heightened risks of this nature. Which in my view means that Stefanos case does not meet the threshold required to meet paragraph 4.17 …"

30. On 20 February 2024 the solicitors now acting for the claimant wrote to Mr Keller by email, stating that the decision on the claimant's medical condition was a matter for the PPCS and asking him whether he would now be submitting the claimant's application to the PPCS without prison support. The enquiry was repeated on 28 February 2024.

In the absence of a response, the claimant's solicitors sent a Pre-Action Protocol Letter on 5 March 2024.

31. On 6 March 2024, after explaining the Prison Service's timescales for answering external correspondence, Mr Keller replied:

> "I have escalated this to the Deputy Governor, Rachel James to review my decision not to process the request for ERCG on the grounds outlined in my initial response to you. She will provide a response including her view on my decision and the response to your pre-action letter."

32. No contemporaneous documents relating to Ms James's involvement have been produced, but since the commencement of the claim on 25 March 2024 she has made a witness statement dated 21 June 2024. Much of the statement concerns general matters of background and procedure. I summarise the main points regarding her own involvement. Ms James commenced a review of Mr Keller's decision on 6 March 2024. The review was ongoing when these proceedings were commenced; although largely complete it was never formally concluded as attention was instead directed to the proceedings. Having referred to Mr Keller's decision, she continues:

> "16. … Governor Keller confirmed to me that, in making his original decision, he had had before him the bundle of documents provided by the Claimant's solicitor and the ERCG policy. He also met with the Claimant on several occasions to discuss the application and spoke with Dr Abbie Willis, the prison psychologist who is working with the Claimant. The content of these discussions surrounded the nature of the Claimant's condition and his current treatment needs. They also confirmed that other treatment could be obtained in the custodial environment that could support the Claimant. Governor Keller duly sent on to me the information he held on the Claimant to support my review.
>
> …
>
> 20. In the course of starting the review of Governor Keller's decision and then in the course of providing this witness statement I have had the chance to consider the documents and other information which was before Governor Keller at the time of his decision. Having done so, I entirely agree with Governor Keller's decision not to refer the Claimant's ERCG application to the PPCS. To me it is absolutely clear that the facts of the Claimant's case do not meet the threshold set out in the relevant policy. Indeed they do not come close to meeting that threshold. Based on my experience as a Governor, I do not think that the circumstances of this Claimant are exceptional at all. If I had been asked to make this decision, I would have made the same decision as Governor Keller.
>
> …

> 24. The threshold for progressing applications for ERCG under the Policy is necessarily high and will not be applied to frequently arising levels of need as this would effectively create an inordinate volume of applications for ERCG from many prisoners who could argue that the prison environment is detrimental to their mental health, is causing suffering or does not provide as therapeutic an environment as that that could be provided in the community. While the Claimant has presented as being down and anxious at times during his sentence, this cannot be seen as something that could be considered to meet the high bar of presenting need in the case of ERCG considerations as this would introduce far more conjecture into any potential case the Policy ever intended. The Claimant is not currently under consultant care through our approved provider, and it is not possible, especially given the substantial time elapse since assessment and the absence of any legitimate authority, to utilise the views of the professionals within the bundle.
>
> 25. In summary, the First Defendant took the decision not to refer the Claimant application for ERCG to PPCS for consideration as it was considered that the application did not meet the necessary levels of severity and exception. While the prison accepts the Claimant's diagnosis of PTSD and the potential need for treatment and the difficulties caused by his mother ill-health, this is not something that would get him to the threshold of ERCG as the precedence that would be set by a case of this nature would be impossible to manage and would constitute a fundamental abuse of process if there were to be consideration given around preferential treatment settings and possible outcomes where treatment is not received as desired."

The Grounds of Challenge

33. Two grounds of challenge are identified, the first alleging procedural error and the second alleging substantive errors. They are, however, closely related; the Statement of Facts and Grounds, paragraph 79, introduces the second ground with the words, "As well as or in contribution to the procedural failure". The grounds are these:

1) That the Governor made a procedural error in that he failed to refer the application to the Secretary of State but made himself what amounted to a substantive decision on the application;

2) That the Governor made numerous errors of law and fact in making his decision[2]:

    a) He misapplied paragraph 1.4(c) of the ERCG Policy in that (i) he wrongly treated the claimant's present medical condition as the same as that known to exist at the date of activation of the default term of

[2] My enumeration differs in order and division, but not in my view in substance, from the claimant's own.

imprisonment and (ii) wrongly treated the activation of the default term of imprisonment as equivalent to a sentencing exercise.

b) He rejected the expert evidence that the claimant's necessary treatment needed to be undergone at home and not in prison, without having any evidential basis for doing so.

c) He wrongly treated the conditions in paragraph 1.4 of the ERCG Policy as being of universal application.

d) He gave undue weight to the fact that many prisoners suffer from mental illness in prison and may be at risk of self-harm, thereby failing to have proper regard to the evidence specific to the claimant.

e) He failed to consider the absence of punitive necessity or public safety risk, which are present in most prisoners' cases but not in this case of civil imprisonment.

f) He failed to acknowledge that exceptional circumstances may exist by reason of the cumulative impact of all matters; by considering each factor individually he failed to make a holistic assessment.

g) Although paying lip service to the claimant's medical evidence, he failed properly to engage with its contents or the opinions expressed in it.

h) He failed properly or at all to "consider the private and family life rights and interests of others, and in particular the 5-year-old daughter and/or the infirm elderly[3] mother."

Discussion of the Grounds

34. Ground 1 is, in my view, at the heart of the case on illegality. Although it was described as a challenge on procedural grounds, that does not seem to me to capture the point. The complaint is not that the Governor's decision is vitiated by procedural unfairness. It is that the Governor was not entitled to refuse the application but was required to submit it to PPCS. His decision was therefore wrong in law. The matters mentioned under Ground 2 particularise his legal error. For the defendants, Mr Irwin submitted that Ground 1 was in reality a rationality challenge. I agree.

35. The power to grant ERCG is vested in the Secretary of State by section 258 of the Criminal Justice Act 2003. (She has a corresponding power under the Royal Prerogative as a Minister of the Crown.)

36. It is common ground that the Governor was not exercising the Secretary of State's power pursuant to the *Carltona* principle.

37. When an application for ERCG is based on tragic family circumstances, the Governor has delegated authority to refuse the application if "it does not meet the fundamental

[3] Mr Rule accepted at the hearing that the word "elderly" in his skeleton argument was inapt. The claimant's mother was only 55 years of age at the date of the decision under challenge.

principles set out in paragraph 1.4 and does not address the criteria [of exceptional severity] in paragraph 4.29": Policy, paragraph 4.32.

38. When an application for ERCG is based on matters other than "prisoner's health and/or social care needs" or "tragic family circumstances", the Governor has delegated authority to refuse the application "if it does not meet the exceptional threshold described in paragraph 4.35" or "if it does not meet the fundamental principles set out in paragraph 1.4": Policy, paragraph 4.36.[4]

39. However, when an application is based on the prisoner's health and/or social care needs, the Governor "has delegated authority to refuse an application where it is clear the criteria as set out in paragraphs 4.17 or 4.18 are not met." Where the criteria *are* met, the Governor must submit the case to PPCS, irrespective of whether he supports release or not. See Policy, paragraph 4.21.

40. In the present case, the decision letter does not distinguish (i) between the approach required when the application is based on the prisoner's health and the approach required when the application is based on tragic family circumstances or (ii) between supporting an application and submitting it to PPCS. This appears from the introductory paragraphs, before the particular grounds of the application are addressed; I refer in particular to the following text:

> "I have considered your request for the Prison to apply for early release on compassionate grounds, (ERCG), I am afraid that I do not agree that this meets the threshold for the Prison to support this application. I will set out my rationale for this decision below.
>
> …
>
> I fully accept that Stefanos is suffering from PTSD caused by the historic kidnap incident and subsequent trial and conviction of those responsible. I also accept that treatment is required to help Stefanos with this through either CBT or EMDR and that either of these treatments are emotionally difficult and that Prison may not be the best environment to undergo this.
>
> I also accept the difficulty caused by the recent deterioration Stefanos' Mum's health and her recent hospitalization.
>
> …
>
> [The fundamental principles in paragraph 1.4 of the Policy] need to be met before Prison can support and apply for ERCG."

Where an application is made on the grounds of tragic family circumstances, the Governor must be in support of the prisoner's early release; if he is not in support, he

[4] This paraphrase shows how I understand paragraph 4.36. The "delegated authority" is expressly said to apply if the application does not meet the exceptional threshold described in paragraph 4.35. However, if the application does not meet the fundamental principles set out in paragraph 1.4, the Prison Governor should not support it; and, if he does not support it, he should not submit it: this amounts to authority to reject it.

should not submit the application: Policy, paragraph 4.32. That is also the position when the application is made on grounds other than the prisoner's health and social care needs or tragic family circumstances: Policy, paragraph 4.36. However, where the application is made on the grounds of the prisoner's health, the Governor must submit it to PPCS if the specified criteria are met, even if he does not support release: Policy, paragraph 4.21. It does not require an overly legalistic reading of the decision letter to see that it does not observe this distinction. However, this does not in itself vitiate the Governor's decision; it is necessary to consider the entirety of the reasoning in the letter.

41. The decision letter deals separately with the condition of the claimant's mother (as involving tragic family circumstances) and the claimant's own condition (as involving the prisoner's health). I agree with Mr Rule that the matters relied on in an application for ERCG should in principle be considered cumulatively as well as separately. Matters which, viewed individually, may be unexceptional might perhaps be exceptional when viewed cumulatively. Thus in *R v Kelly* the Court of Appeal considered "singly and cumulatively" the matters relied on there: see paragraph 5, above. However, it seems to me that the Governor's decision letter in the present case is not open to criticism on this ground, when the facts of the case are considered. The condition of the claimant's mother could not reasonably be thought to constitute an exceptional circumstance; Mr Rule accepted as much. Insofar as the claimant's application fell to be considered as made on the grounds of tragic family circumstances, the Governor was plainly entitled to refuse to support it, and was thus entitled to refuse it, for the reasons given in the decision letter. The only way in which the condition of the claimant's mother might reasonably be capable of having a cumulative significance for the application made on the grounds of the prisoner's health was that it exacerbated the claimant's ill health by worsening his mental condition. But the Governor had regard to the claimant's mental condition as a substantive ground of the application. Therefore the fact that the analysis did not proceed cumulatively is not a valid ground of criticism, if the decision letter is read sensibly, as a whole and in context. The same, incidentally, can be said about the matters raised concerning the claimant's daughter, which were not separately mentioned in the letter. (The further point, that the Governor failed to consider the private and family rights of the mother and daughter, has no merit at all on the facts of the case. The Governor noted that the claimant's liberty was not required for the mother's care. It is obvious that the fact that the daughter is growing up while her father is in prison is no reason for releasing him.)

42. The real question is whether the Governor fell into error in his treatment of the claimant's health as a ground of the application. The relevant paragraph is the following:

> "Moving on to the impact of PTSD this is a condition that has been diagnosed ahead of his imprisonment, including an earlier sentence that has already been served. This means that the facts existed at the time of sentencing so does not satisfy 1.4c). Whilst there is some merit in leaving the treatment of PTSD through EMDR or CBT they are both treatments that are available in Prison and have not been tried. This decision has been made by Stefanos who is more motivated by the option of release ahead of trying the treatment that is available. Again, from an exceptional point of view the existence of serious mental health

> problems that escalate the risk of suicide and self-harm are fare to common [sic] with a number of people assessed as needing hospitalisation to manage their mental health. The prison system has safe systems of work to support prisoners through heightened risks of this nature. Which in my view means that Stefanos case does not meet the threshold required to meet paragraph 4.17 …"

This paragraph makes three critical points: (1) The claimant does not meet the fundamental principle in paragraph 1.4(c) of the Policy, because his condition was known at the date of sentencing. (2) The claimant's serious mental health problems are not exceptional in the prison context. (3) Therefore the claimant does not meet the threshold requirement in paragraph 4.17 of the Policy.

43. In my judgment, the Governor was wrong to rely on paragraph 1.4(c) of the Policy, for three reasons.

1) The delegated authority under paragraph 4.21 to refuse an application for ERCG made on the grounds of the prisoner's health is limited to the case where it is clear that the criteria in paragraph 4.17 are not met. Paragraph 4.17 refers to the situation "where the prisoner is incapacitated or has health conditions such that the experience of imprisonment causes suffering greater than the deprivation of liberty intended by the punishment." Paragraph 4.17 does not concern the fundamental principles, which are in paragraph 1.4. Paragraph 4.21 does not give the Governor delegated authority to refuse an application (i) where the criteria in paragraph 4.21 are not met or (ii) where the fundamental principles in paragraph 1.4 are not met. It does not refer to paragraph 1.4 at all. This is in contrast to the delegated authority in paragraphs 4.32 and 4.36: under paragraph 4.32 the Governor should not submit the application unless he is satisfied that the fundamental principles and the "tragic family circumstances" criteria are met; under paragraph 4.36 the Governor should not support, and should not submit, an application that does not meet the fundamental principles and has delegated authority to refuse an application that does not meet the exceptional threshold in paragraph 4.35. Mr Irwin submitted that the fundamental principles must be taken to underlie the exercise in paragraph 4.21. He sought support for that submission in Annex A to the Policy, where the Quick Reference Guide for completing the application form for submission to PPCS states, in the third bullet point, "Where the criteria for compassionate release are met, the case must be submitted …" I do not agree with Mr Irwin's submission. The Policy could have given the Governor delegated authority to refuse an application on health grounds if he did not consider the fundamental principles to be met, but it did not do so. Further, whereas the delegated authority in paragraphs 4.32 and 4.36 requires the Governor to refuse an application that he does not support, under paragraph 4.21 the Governor is required to submit an application that he does not support, unless he considers it clear that the specified criterion is not met. The Quick Reference Guide ought to be read in the light of the Policy, not vice versa. I see no reason for the court to re-write the Secretary of State's Policy. It is a matter for her whether she chooses to do so.

2) If (contrary to my view) the delegated authority under paragraph 4.21 extends to the situation where the fundamental principle in paragraph 1.4(c) of the

Policy is not met, the decision letter does not really address the application of that principle to the case of someone serving a default term for non-compliance with a confiscation order. The point of paragraph 1.4(c) is clear enough: if the sentencing court imposed the term of imprisonment despite knowing of the prisoner's condition, the prisoner cannot rely on that same condition as a reason for his early release. This point does not apply in the case of a prisoner who is serving a term of imprisonment imposed not as a criminal sentence but as the default term applicable for non-compliance with a confiscation order. The decision letter does advert to the distinction, in that it refers to the original prison sentence imposed in 2016. However, that was a term of 27 months and was not the 10-year term the claimant is currently serving.

3) The decision letter proceeds on the basis that the fundamental principle in paragraph 1.4(c) was not met because the original sentencing court knew of the claimant's PTSD. However, that paragraph refers to "the same facts that existed at the point of sentencing", not to "the same condition/diagnosis". The distinction is of obvious importance, because a condition (PTSD) that was known of at the time of sentencing might have worsened, or symptoms that once were mild might now be extreme. In the present case, the Governor did not dispute the medical evidence adduced by the claimant. That evidence shows significant exacerbation of the claimant's symptoms in consequence of his imprisonment. However, the decision letter appears to regard any such exacerbation as irrelevant. In my judgment, that is wrong. It may be noted that paragraph 4.16 of the Policy is apt to deal precisely with the situation where the pertinent circumstances were known at the point of sentencing but the application for ERCG has been made because the situation has taken a significant change for the worse.

44. The Governor also considered the question whether the claimant's medical condition was exceptional and thus purported to address the criteria in paragraph 4.17 of the Policy. I was at one stage attracted to the view that the Governor misdirected himself by deciding that the criteria in paragraph 4.17 were not met rather than asking whether it was "clear" that they were not met. The problem is heightened by the fact, already mentioned, that the Governor did not distinguish between a decision to support the application and a decision to submit it to PPCS. However, I have come to the conclusion that the Governor did not misdirect himself in this respect. In my view, to read the words "where it is clear the criteria … are not met" as introducing a test along the lines of unarguability or "no real prospect" would be over-refined and over-complicated. The words simply mean that, if the Governor comes to a clear view that the criteria are not met, he can refuse the application. This simple and common-sense reading of the Policy is supported by two further observations. First, the opening sentence of paragraph 4.21 requires the Governor to submit an application where the criteria are met; there is no mention of the criteria possibly or arguably being met. The second sentence would naturally deal with the converse situation, namely where the criteria are not met. Second, the criteria in paragraph 4.17 call for judgement by the Governor and assessment of the circumstances; this is why examples are given. The wording of the second sentence of paragraph 4.21 is sensibly to be interpreted as directed to the exercise of the Governor's judgement.

45. The crux, therefore, is how the Governor interpreted and applied the criteria in paragraph 4.17 of the Policy. He made two basic points: first, that serious mental health problems, including those creating an increased risk of suicide or self-harm, were fairly common in prison and that the claimant's position was not exceptional; second, that the prison service had systems and facilities to support prisoners with such conditions. These are certainly matters highly relevant to any decision whether to grant ERCG, as is any suggestion (such as made here) that the prisoner is declining treatment within prison because he "is more motivated by the option of release ahead of trying the treatment that is available." The question, I think, is whether they are matters within the scope of paragraph 4.17 or, rather, matters that might properly cause the Governor to refuse to support an application that he nevertheless had to submit to PPCS.

46. Paragraph 4.17 of the Policy is not expressly framed in terms of "exceptional" circumstances, but I agree with Mr Irwin that it is meant to refer to the kind of exceptional circumstances that are capable of justifying ERCG. Two particular points tend to confirm this. First, the final sentence of paragraph 4.17 shows that the examples are intended to illustrate the sort of thing that might meet the criteria for ERCG. This indicates that the opening sentence, which is worded rather broadly, is not intended to state any criterion that is less than what would be required for ERCG. That, in turn, indicates that the criterion in the first sentence is referring to exceptional circumstances. Second, although the Policy is itself addressed to the Prison Service, its guidance for the various bases on which applications may be brought (health, family circumstances, other) is clearly intended to explain the basis on which the Secretary of State will consider applications. See, for example, paragraphs 4.29, 4.33 and 4.35. It is unlikely that paragraph 4.17 is intended to refer to health conditions that are not exceptional. Accordingly, I consider that the Governor was correct to approach the matter in terms of exceptional circumstances.

47. In my judgment, there was nothing irrational about the Governor's conclusion that the claimant's medical condition was not exceptional. Mr Rule criticised the decision for giving undue weight to the prevalence of mental illness in prison and failing to have proper regard to the evidence specific to the claimant. I do not regard that criticism as fair. It is no doubt true that every afflicted prisoner is afflicted in his own particular way. That does not make it exceptional. The Governor must, of course, have proper regard to the circumstances of the applicant for ERCG. But he must do so in the context of his knowledge and experience of the wider prison population. That is the only way in which a judgement can be made as to whether the particular is exceptional. As for the claimant, he was engaging with the prison psychologist, who did not consider his needs to require the support of the Secondary Mental Health Services. Accordingly the claimant was not under consultant care. The Governor was satisfied that further therapy was available within prison. There is obvious merit in Ms James's observation that many prisoners could argue that therapy would be more beneficially received in the community than in prison (though few, I think, would be able to obtain reports from Harley Street specialists to support their argument), but that this does not make their cases exceptional or justify ruling out therapy within prison. In my view, the Governor was not obliged to conclude that the expert reports submitted by the claimant established that the criteria for ERCG were satisfied. He was entitled to form his own view, in the light not only of the material submitted by the claimant but also of his own knowledge and experience of the claimant, the prison estate and the facilities available within it.

48. In conclusion, although I have identified what I take to be some errors in the Governor's reasoning, I consider that the Governor was entitled to make the decision he did, because he made no error of law in deciding that the relevant criteria for early release were not satisfied and that he had delegated authority to refuse the application.

49. If I had reached a different conclusion, I would nevertheless have refused relief, pursuant to section 31(2A) of the Senior Courts Act 1981. It is highly unlikely—I would say, practically impossible—that the outcome for the claimant would have been substantially different on any rational approach to the exercise of the power to grant ERCG. The application must have been refused anyway. For these purposes, I take the Governor's decision to be that of the Secretary of State, via delegated authority. Further, section 31(2A) refers to "outcome" rather than decision. If I were wrong in this analysis of the application of section 31(2A), I would anyway have exercised the court's residual discretion to refuse relief.

50. What I regard as the absurdity of the claimant's application appears from the very first paragraph of Mr Rule's written representations in support of the application:

> "1. Mr Stefanos Neophytou is presently detained under a default term activated as he was unable to pay a sum due under a confiscation order. He is not detained under any criminal punitive sentence or on account of any assessed risk to the public."

The assertion of inability to pay is, quite simply, contrary to the judicially determined position. And the fact that the claimant is serving a default term, not a punitive sentence, is because his imprisonment is intended to get him to pay what he has been ordered to pay from resources judicially determined to be available to him for that purpose. In the Statement of Facts and Grounds, also drafted by Mr Rule, it is said:

> "27. … The Claimant has been unable to pay the confiscation order sum, which sum was arrived at as the result of assumptions about lifestyle offence income and depended upon the assumed existence of undisclosed assets therefrom. He had been unable to rebut the legislative assumptions. …"

The fact that Part 2 of the Proceeds of Crime Act 2002 lays down certain rebuttable assumptions does not detract from the fact that a confiscation order will be made only in an amount that the court has determined the criminal defendant is able to pay. Further, section 23 of the Act enables a criminal defendant who is subject to a confiscation order to apply to the Crown Court for a variation of the order; if the Court finds that the available amount is inadequate for the payment of the sum outstanding under the confiscation order, it "may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just": section 23(3). If the claimant neither pays the due amount nor obtains a variation, he can hardly complain about the effect prison is having on him, far less seek release because of that effect. In short, the statutory scheme means that a criminal defendant who is in prison because he has not paid the moneys due under a confiscation order has, in the eyes of the law, the keys to his own cell.

Conclusion

51. The claim is dismissed.

Postscript

52. This judgment was circulated in draft on 30 August 2024. On 10 September 2024, the day before it was handed down, an application was made on behalf of the claimant for the redaction of the judgment by (i) the removal of mentions of the names of his partner and his child and (ii) the removal of references to his own name and the grant of anonymity.

53. The first part of the application was not opposed by the defendants and I am content to grant it. In my judgment the safety and privacy of the claimant's partner and his young child far outweigh any public interest in knowing their names on the basis of the principle of open justice. The redaction has been simply achieved by the removal of the proper names from the internal quotations in paragraph 23 above and the substitution of other words within square brackets where those proper names appeared.

54. The application for anonymity for the claimant was opposed by the defendants and I refuse it.

55. Three reasons were advanced in support of the application for anonymity: first, that the judgment contains a considerable amount of detail about the claimant's personal and private life; second, that anonymity would protect the claimant from possible reprisals by those who formerly attacked him and then intimidated him in an attempt to prevent him from giving evidence (see paragraph 10 above); third, that anonymity would better protect the privacy of members of his family, including in particular his mother, whose personal and private details were mentioned in the judgment. For the claimant, Mr Rule KC submitted that the public interest in open justice was primarily served by identifying the issues in the case and the identity of the prison and Governor involved in the decision-making, rather than by naming the particular prisoner, and that the interests of the claimant outweighed any public interest in him being named, having regard in particular to events that have previously happened to him and to his present mental condition. He referred me, *inter alia*, to CPR r. 39.2 and to *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 667, at [30]. I have also had regard to the summary statement of the applicable law in *Civil Procedure 2024*, at 39.2.13, and to the decision of the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629. Although that latter case was concerned principally with access of third parties to "records of the court", the discussion there of the principle of open justice and the extent to which this judgment incorporates the text of documents placed before the court mean that the case is of assistance in the present context.

56. In the present case, no application was made for an order for anonymity or reporting restrictions before or even at the hearing, which was held in open court. No explanation has been given for why such an order was not required then but is required now. The circumstances of the claimant's offending and conviction were widely reported at the time of his original sentencing, as was his name. Mr Rule observes that the claimant has a "very distinctive surname". That is true, but the claimant was at liberty during the four years immediately preceding his current term of imprisonment and there is no evidence before me that he changed his name or disguised his identity in that period or subsequently. It is true that this judgment contains a considerable amount of personal information concerning the claimant, but that is because the information was

fundamental to the case he was advancing. In my judgment, the public interest in open and transparent justice extends beyond the mere identification of the principles at issue and to the ability of those who wish to do so to know what this particular prisoner has advanced to the court in an effort to secure his release. Having regard also to the extreme lateness of this application, the balance comes down firmly in favour of openness and against anonymity. I have had particular regard to the position of the claimant's mother but do not consider that this tips the balance the other way. Mr Rule rightly does not contend that the references to her ought to be excised. His contention that they justify, by themselves or in conjunction with other matters, an order for the claimant's anonymity is unpersuasive in the circumstances of this case.