The King (On the Application of Stefanos Neophytou) v The Governor of Hmp Berwyn, Secretary of State for Justice

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
26 March 2025

Case No: CA-2024-002198

Court of Appeal (Civil Division)

[2025] EWCA Civ 348, 2025 WL 00907375

Before: Lord Justice Bean Lord Justice Phillips and Lady Justice Falk

Date: 26/03/2025

On Appeal from the High Court of Justice Administrative Court

His Honour Judge Keyser KC

AC-2024-CDF-000073

Hearing date: 11 March 2025

Representation

Philip Rule KC and Mirren Gidda (instructed by Hackett and Dabbs LLP) for the Appellant.
William Irwin (instructed by Government Legal Department) for the Respondent.

Approved Judgment

Lord Justice Bean:

1. The Appellant Stefanos Neophytou 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 made in the Crown Court against him and his father in the sum of £3,174,809.

2. On 20 October 2023 the Appellant made a formal application for early release on compassionate grounds ("ERCG") by the Second Respondent, the Secretary of State for Justice. On 22 December 2023 the First Respondent, a Governor at the prison, decided not to progress the application further and refused to submit it 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 in the Administrative Court at Cardiff.

3. On 25 March 2024 Mr Neophytou issued a claim for judicial review to quash the Governor's refusal to pass the application to the Secretary of State for final determination. His Honour Judge Keyser KC ("the judge") granted permission on 21 May 2024. The substantive hearing, again before Judge Keyser, took place on 2 August 2024. By a reserved judgment handed down on 11 September 2024 the judge dismissed the claim. Mr Neophytou now appeals against that decision.

The legal framework

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

> "(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 classic exposition of the meaning of "exceptional circumstances" is that of Lord Bingham of Cornhill CJ 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."

6. 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.

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

"1. Purpose

…

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."

8. Applications for ERCG (other than those made on ECHR Article 3 grounds) may be initiated either by the prisoner or by the prison. For applications on the grounds of the prisoner's health and/or social care needs the form at Annex A to the Policy is then completed. Sections 1-6 of this form will be completed by members of the prison staff below the rank of Governor. A Governor (or Director or Registered Manager, as applicable) then completes section 7, which includes giving reasons for supporting the application or not supporting it. The prisoner is given the opportunity to add comments in support of the application at section 8. The form is then submitted by the prison to the PPCS.

The facts

9. I gratefully adopt the judge's account of the facts.

10. The Appellant was born in Birmingham on 29 October 1990. In January 2014 he 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. Mr Neophytou gave evidence at the trial but only after attempts had been made to intimidate him into not doing so.

11. In October 2016 he 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 Appellant under the Proceeds of Crime Act 2002 . In 2021 the confiscation order referred to above was made. He paid £49,000, but more than £3,000,000 remains unpaid. An appeal to the Criminal Division of this court against the confiscation order was unsuccessful: *[2021] EWCA Crim 169* .

13. On 25 November 2021 a default term of imprisonment of 10 years was activated on account of the Appellant's failure to pay the full amount of the confiscation order. The default term of imprisonment is, as Dyson LJ said in *R (Lloyd) v Bow Street Magistrates' Court [2003] EWHC 2294 (Admin), [2004] 1 Cr. App. R. 11, at [34]* , "one weapon in the armoury of those seeking to enforce the confiscation order".

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

15. On the instruction of the Appellant'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 and panic attacks) that Mr Neophytou 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.

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 2022] 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 expressed the opinion that the Appellant was suffering from a complex post-traumatic stress disorder. He recommended a pioneer therapy known as Eye Movement Desensitization and Reprocessing (EMDR). He added:

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

> "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.

…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."

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

21. On 26 October 2023 the solicitors then acting for the Appellant submitted an application for ERCG directly to PCCS, under cover of an email that sought urgent consideration on account of "the [Appellant's] medical needs and his mother's condition". The representations, comprising 16 pages and 49 paragraphs, were written by Mr Rule KC. They set out the background summarised above and referred to accompanying documents, including the medical evidence that had been obtained. Paragraph 3 put the application clearly on the grounds of the Appellant's medical condition:

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

22. Paragraphs 25 and 26 stated:

> "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."

23. The representations also raised matters concerning the Appellant's family circumstances, the effect of his imprisonment on his four year old daughter, and the stroke suffered by his mother. 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. The application was, as the judge noted, made on the basis of the Appellant's mental health. The family circumstances were not relied on as independently justifying ERCG. However, the family circumstances were said to have a twofold relevance: first, that they exacerbated the Appellant's anxiety and thus his poor mental health, though they were not the primary cause of his condition; second, that they formed part of the totality of the circumstances to be considered cumulatively.

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 Appellant's solicitors, 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 Appellant's mother was discharged from hospital.

28. Mr Keller considered the available documentation and discussed the application on several occasions with the Appellant. He also spoke to the prison psychologist regarding the Appellant'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 Appellant's application for ERCG to the PPCS. The decision was communicated by a letter sent under cover of an email to the Appellant'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 [is] 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 Appellant wrote to Mr Keller by email, stating that the decision on the Appellant's medical condition was a matter for the PPCS and asking him whether he would now be submitting the application to the PPCS without prison support. The enquiry was repeated on 28 February 2024. In the absence of a response, the 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 she has made a witness statement dated 21 June 2024 which was before the judge. Having referred to Mr Keller's decision, she continued:

> "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.
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> …
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> 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 [than] 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 [sic] 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 were identified in the Statement of Facts and Grounds, the first alleging procedural error and the second alleging substantive errors. They were:

> "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:

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 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 mother."

The judge's decision

34. The judge said:

"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.

…

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…. 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 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.

…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 [the judge then quoted the paragraph cited above beginning: "Moving on to the impact of PTSD"]. 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…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. [emphasis added]

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:

> "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:

> "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."

35. Accordingly, the judge dismissed the application for judicial review.

The grounds of appeal

36. Asplin LJ granted permission to appeal to this court on all but one of the Grounds of Appeal drafted by Mr Rule KC and Ms Gidda, which were as follows:-

a) Ground 1: The Judge erred in his interpretation of paragraphs 4.17 and 4.21 of the Early Relief on Compassionate Grounds Policy Framework. He was wrong to construe this as providing to the Governor the delegated authority to himself refuse an application on medical grounds if he did not support it;
b) Ground 2: The Judge was wrong to apply a rationality approach to grounds that the public law duties to apply and adhere to the relevant policy, and/or for the decisionmaker to ask himself the right question, were breached;
c) Ground 3: The Judge was wrong to consider that the "outcome" of the claim should not differentiate between a final decision that is to be taken by a prison governor and one to be taken by the Second Respondent. Both the law and the policy do distinguish these two separate decision-makers;
d) Ground 4: The Judge wrongly treated (a) the evaluation of medical grounds for the application (i.e. whether there is satisfaction of the criteria in the policy to forward the application) as simply an equivalent to (b) the ultimate question of whether exceptional circumstances arise on a holistic evaluation of all the circumstances that justify release on compassionate grounds;
e) Ground 5: The Judge failed to give proper regard to the expert evidence;
f) Ground 6: The Judge erred in law in ruling that the fact that the Appellant is imprisoned for default of a confiscation order is irrelevant, and thus excluded that circumstance from the matters that would be capable of holistic assessment, when that is a matter the Second Respondent may lawfully consider;
g) [Ground 7: This ground does not have permission to be pursued]
h) Ground 8: The Judge erred in treating a confiscation order as a judicial determination that the Appellant has "the keys to his own cell". This fails to have proper regard to the Proceeds of Crime Act 2002 provisions that apply assumptions and impose a reverse legal burden upon the accused to discharge, rather than involve a positive finding that the money does in fact exist. In any event release would be no more open to objection than where a person is serving a custodial punitive or preventative imprisonment, and where the objective cannot be secured post-release unlike with payments taken by civil means;
i) Ground 9: The Judge was wrong on the facts and/or the law to dismiss the judicial review. There was procedural irregularity in failing to submit the application for ERCG to the Secretary of State irrespective of the Governor's lack of support. There was no delegated power to refuse the application under the statute, nor Royal Prerogative.

Submissions

37. The Appellant's central submission is that at [46] of his judgment, HHJ Keyser KC was wrong to hold that, contrary to the express wording of the Policy, paragraph 4.17 is "meant to refer to the kind of exceptional circumstances that are capable of justifying ERCG".

38. The Respondents accept that it is not for the Governor to carry out a preliminary assessment of entitlement to ERCG in cases where the application is made on medical grounds; and that, accordingly, it is not for the Governor to determine whether there might be exceptional circumstances using the criteria set out in paragraph 1.4 (e.g. by reference to public safety or the purpose to be served by early release).

39. Mr Irwin submits that the meaning of the Policy is that:-

> "…governors should make a judgment based on their knowledge of the prisoner and the prison; their experience; and bearing in mind the overall nature of the exercise – i.e. that this is an application for ERCG (without pre-empting the exercise of a substantive ERCG consideration)."

He adds that:-

> "The role of the prison in medical cases includes a role in giving an assessment (albeit at a very preliminary stage) of whether or not the medical condition(s) relied upon are of the degree of gravity which might, potentially, result in a finding that the suffering of that prisoner is greater than the deprivation of liberty intended by the punishment. Informing that preliminary assessment the prison can have regard the list of examples in §4.17 of the policy of conditions which might justify release on ERCG. That list is indicative of the gravity of the sorts of condition which might justify release on medical grounds. Where it is clear to a governor that the necessary degree of gravity is not present, he or she does not have to refer the application."

Discussion

40. In contrast to applications for early release on compassionate grounds based on tragic family circumstances, an application on health grounds, provided that it meets the criteria set out in paragraph 4.17 (or 4.18 in cases where that is relevant), must be submitted to PPCS irrespective of whether or not the prison Governor supports release. It is common ground that this is what paragraph 4.21 provides. The Governor has delegated authority to refuse to submit an application only when it is clear that the criteria set out in paragraph 4.17 are *not* met. That brings me to the more difficult question of what is meant (in paragraph 4.17) by a health condition such that the experience of imprisonment "causes suffering greater than the deprivation of liberty intended by the punishment".

41. "Intended" is a surprising word in this context. Sentencing judges do not, or should not, "intend" when imposing a sentence of imprisonment to cause suffering other than what is inherent in deprivation of liberty. The natural meaning of the phrase, in cases where the term of imprisonment is imposed as a punishment on conviction, is to refer to suffering in custody caused by a health condition of which the sentencing court was unaware, unless the prisoner's symptoms have materially worsened since sentence was passed. In order for a governor to decide that it is clear that a case does not fall into this category it may be necessary to examine not only the judge's sentencing remarks (see para 4.16 of the Policy) but also, particularly when the sentencing remarks do not deal in detail with the defendant's state of health, medical evidence which was before the court at the time of sentence, as well as any up to date medical reports obtained either by the prison authorities or by the prisoner. If it is clear that the prisoner's state of health is no different at the time of application from what it was at the time of

sentence or what it would be expected to be thereafter, the Governor may be entitled to refuse even to submit the application to PPCS, but at this stage the prisoner is entitled to the benefit of the doubt.

42. In a case such as Mr Neophytou's, there will have been no consideration of any health conditions at the time the sentence was activated. Further, and as the judge observed, it is clear in this case that Mr Neophytou's symptoms have been significantly exacerbated by his imprisonment. To the extent that Ms James suggested at paragraph 24 of her witness statement that account should not be taken of the expert medical evidence produced on behalf of Mr Neophytou, that is clearly wrong.

43. I do not accept that at the stage of consideration by the Governor there is a requirement of exceptionality as opposed to foreseeability. Plainly it is to be expected that many, perhaps most, prisoners sentenced to a long term of imprisonment will experience depression, anxiety and other common consequences of custody. In routine cases of this kind it is likely that the Governor will find that the criteria in paragraph 4.17 have clearly not been met. However, if there is any real doubt it should be resolved in favour of the prisoner at this stage. I would therefore disagree with the judge's conclusion that the reference in paragraph 4.21 to "it is clear" simply requires the Governor to reach their own view that the criteria are not met.

44. The next question is how these principles apply in the case of a prisoner such as Mr Neophytou who is serving a default sentence imposed pursuant to a confiscation order. The judge observed at paragraph [50] of his judgment that a prisoner serving such a sentence has the "keys to his cell", a view which led the judge to refer to what he saw as "the absurdity of the claimant's application", notwithstanding that he had given permission for the application for judicial review. This may, with respect, be an over-simplification. No doubt there are cases where the prisoner serving a default sentence for failing to pay the sum specified in a confiscation order could do so if he chose; and I am prepared to assume, without deciding the point, that at the stage of a decision by the Secretary of State or the PPCS on her behalf the question of whether the prisoner could obtain his release by paying the sum due might be relevant. But in my view it cannot be relevant at the stage of consideration by the Governor of an application for ERCG on the grounds of health. In a case where the prisoner is serving a default sentence pursuant to a confiscation order the phrase "suffering greater than the deprivation of liberty intended by the punishment" must, therefore, mean suffering greater than that inherent in any custodial sentence of the relevant length.

45. I turn next to Ground 3. The judge held at [49] that even if he had been wrong that the Governor was entitled to make the decision he did, relief would nevertheless have been refused pursuant to section 31(2)(A) of the Senior Courts Act 1981 , it being "practically impossible" that the outcome for the Appellant would have been substantially different on any rational exercise to the power to grant ERCG. He held that "the application must have been refused anyway" and for these purposes he took "the Governor's decision to be that of the Secretary of State via delegated authority". He noted that s.31 (2)(A) refers to the outcome rather than the decision. Alternatively, he would have exercised the court's residual discretion to refuse relief.

46. I consider that Ground 3 is well-founded. Mr Rule is not seeking an order declaring that his client is entitled to early release on compassionate grounds. He is only seeking a finding that the Governor was required by the terms of the Policy to submit the completed application to the PPCS. Paragraph 4.21 does not give the Governor delegated authority to act on behalf of the Secretary of State: the extent of the delegated authority is only to refuse to submit an application to the PPCS where it is clear that the criteria in paragraph 4.17 are not met. The Governor may quite properly indicate when submitting the form that he does not support the application; but it is not for the Governor to form a view that in the end the application for ERCG is most unlikely to succeed and to refuse for that reason to submit the form. On the same basis I do not think it was open to the judge to rely on s.31 (2A) . If the Governor had properly applied paragraphs 4.17 and 4.21 of the Policy the "outcome" would almost certainly have been that the application was submitted to the PPCS.

47. For these reasons I would allow the appeal and quash the decision of Governor Keller refusing to submit the application to the Secretary of State. It is therefore unnecessary to consider the other Grounds of Appeal drafted by Mr Rule.

48. Time has passed since Mr Neophytou's first request for an application to be submitted to the PPCS. I would not make a mandatory order requiring the application to be submitted, not least because it may need to be brought up to date. What I would say is that it should be completed as soon as practicable; and the decision on whether it should be submitted to the Secretary of State, and what recommendation should be made, must be taken by a Governor with no previous involvement with the case. That decision must comply with the terms of this judgment. On the material we have before us it seems to me highly improbable that this decision could properly be that the application will not be submitted to PPCS at all.

Lord Justice Phillips:

49. I agree.

Lady Justice Falk:

50. I also agree.