IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-001998
[2023] NZHC 1051

BETWEEN	MICHAEL (AKA MAXIEN) STEVENS Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Respondent
	PRISON DIRECTOR AT AUCKLAND SOUTH CORRECTIONS FACILITY Second Respondent

Hearing: 8 March 2023

Appearances: G E Minchin for Applicant
V E Squires and S M Kinsler for First Respondent
E A Boshier and A Sawant for Second Respondent

Judgment: 4 May 2023

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 4 May 2023 at 2.00 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date ……..

Introduction

[1] The applicant, Ms Stevens,[1] is a serving prisoner on a sentence of preventive detention. She seeks judicial review of decisions relating to her segregation during her time in custody at Auckland South Corrections Facility (ASCF).

[2] The only means by which prison management can limit a prisoner's ability to associate with other prisoners is as authorised under the Corrections Act 2004.[2] The Act confers the power of directed segregation which is a management tool for prison staff to address safety and security risks posed to and by prisoners.[3]

[3] The grounds of review allege improper use of directed segregation by prison management and inadequate oversight by the Chief Executive of the Department of Corrections of the use of directed segregation.

[4] In substance, Ms Stevens contends that the various segregation orders made against her were in a form of "punishment" for having entered into emotional attachments with male prisoners. She says that the Department of Corrections has cast these relationships as symptomatic of her index offending when in fact the relationships were with adult males capable of making their own informed decisions. She says that emotional (but not sexual) relationships are routinely allowed in the prison environment but says that she was singled out for punitive treatment.

[5] In response, the respondents say that segregation orders are not punitive in either design or effect, that the initial order was properly made under the legislation and that protection either of other inmates or Ms Stevens herself necessitated the subsequent orders and extensions.

[6] At issue is whether the applicant has demonstrated any material error of law – or whether the proceedings are factual and merit-based challenges to matters of evaluation or judgment that do not constitute reviewable errors of law.

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1 The applicant is transgender and I refer to her preferred female pronoun throughout this judgment.
2 Corrections Act 2004, s 57 – 61.
3 *Mitchell v Attorney-General* [2015] NZHC 3295 at [4]. See also *Taylor v Attorney-General* [2022] NZHC 3170 at [84].

Factual background

[7] Ms Stevens was sentenced to preventive detention in July 2016. The sentence was imposed following convictions for knowingly possessing objectionable publications, doing an indecent act on a child under 12, indecent communication with a young person under 16, and breaching an extended supervision order.[4]

[8] Ms Stevens was transferred to ASCF in June 2020.

[9] ASCF is operated by Serco New Zealand Ltd pursuant to a contract with the Chief Executive of the Department of Corrections. It is the only private prison currently operating in New Zealand. The prisoners who are housed in ASCF remain the responsibility of the Chief Executive of the Department of Corrections.

[10] ASCF is managed by a prison director, appointed under the Corrections Act 2004 (the Act). It is a high-security men's prison and has the capacity to house up to 960 prisoners. Throughout 2021, ASCF was operating with an average of approximately 778 prisoners daily.

[11] Prisoners at ASCF are placed in accommodation corresponding to their security classification. Houseblock 1 houses segregated prisoners with security classifications ranging from high to minimum security. Houseblock 2 houses high to low security prisoners and houseblock 3 houses prisoners with low security classifications as well as those who are considered at risk or vulnerable.

[12] Ms Stevens has resided in each houseblock while at ASCF.

[13] Prisoners on directed segregation at ASCF are usually transferred to the separation and reintegration unit (SRU). This is to ensure that they are kept away from other prisoners, and to allow heightened observation in line with the additional risks they may pose to themselves or others.

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4 *R v Stevens* [2016] NZHC 1574.

[14] The SRU is a separate building from the main houseblocks at ASCF. The SRU consists of 14 cells. Two of those cells are known as "dry cells" and are used for directed segregation orders made under s 60 of the Corrections Act 2004, providing for segregation for the purpose of medical oversight. With the exception of the dry cells, the SRU cells have the same amenities as other cells at ASCF. Prisoners held in the SRU are provided their minimum entitlements under the Act, including one hour of unlock time per day.

[15] Sometimes prisoners on direct segregation may remain in one of the main houseblocks. This might occur when the SRU is full or where the prisoner needs to be separated from other prisoners in the SRU. In that case, they will be housed in the most appropriate cell available.

[16] Prisoners who are managed in the SRU will usually not associate with any other prisoners. They are given different unlock and exercise times. Prisoners who are managed in a houseblock will exercise at the same time as other prisoners on directed segregation in that houseblock but will not associate with the rest of the population in that unit.

[17] From 2 December 2020, Ms Stevens was placed in houseblock 1, wing 4. The second respondent says that staff developed concerns about her relationships with other prisoners, including the risk they posed to her and others. The second respondent further says that the appropriateness of these relationships was raised with Ms Stevens on several occasions.

[18] Ms Stevens was subject to various directed segregations orders at different times from May 2021 until she was transferred from ASCF in November 2021. At earlier times she had been managed in voluntary segregation at her own request.

[19] In total, four directed segregation orders were made in respect of Ms Stevens, with the last of these being extended four times. A summary of the various orders made by the prison director is as follows:

(a) Order of 12 May 2021. This was made under s 58(1)(a) of the Act which permits a segregation order in circumstances where the prison manager considers the "security or good order of the prison would otherwise be endangered or prejudiced". This order was revoked on 18 May 2021;

(b) Order of 18 May 2021. This was made under s 59(1)(b) of the Act which permits a segregation order when the safety of the prisoner has been put at risk by another person and there is no reasonable way to otherwise ensure the prisoner's safety. This order was, in turn, revoked on 27 May 2021;

(c) Order of 8 June 2021. This was made under s 60(1)(a) of the Act which permits a segregation order if the health centre manager of the prison recommends it in order to assess or ensure a prisoner's physical health (except against the risk of self-harm). This order was revoked on 9 June 2021 when Ms Stevens was considered to be medically stable;

(d) Order of 9 June 2021. This was made under s 59(1)(b) of the Act and was extended on each of 21 June 2021, 8 July 2021, 6 August 2021 and 8 September 2021.

[20] In practice, the segregation orders are administered by the filling out of a series of standardised forms produced by the Department of Corrections and adapted by SERCO. A F15.01.06 form sets out an initial decision on directed segregation and a F15.01.05 form sets out a continuing directed segregation decision. The prison director sets out their reasons in these forms so the Chief Executive, or their delegate, can make a decision on whether to revoke initial segregation, or whether the segregation should continue for a period greater than 14 days. These forms are provided to the prisoner to inform them of the reasons for the decision.

[21] Ms Shabina Mohammed is the acting senior adviser at Corrections for the Northern region. As part of her role, she holds delegated authority from the Chief Executive for the purposes of reviewing segregation decisions made by prison

directors under the Corrections Act. This includes segregation decisions by the prison director at ASCF. Ms Mohamed reviewed the impugned decisions in this case.

Statutory scheme – directed segregation

[22] Section 5(1)(a) of the Act (Purpose of corrections system) provides that custodial sentences are to be administered in a safe, secure, humane and effective manner. Section 5(1)(b) provides that corrections facilities are to be operated in accordance with rules and regulations made under the Act that are based on, amongst other matters, the United Nations Standard Minimum Rules for the Treatment of Prisoners.[5]

[23] Section 6 of the Act is entitled 'Principles guiding corrections system'. Those specified include the principle (s 6(1)(a)) that the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision.

[24] Section 6(1)(f) reads:

> (f) the corrections system must ensure the fair treatment of persons under control or supervision by—
>
> (i) providing those persons with information about the rules, obligations, and entitlements that affect them; and
>
> (ii) ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure:

[25] Section 58 of the Act reads:

> **Segregation for purpose of security, good order, or safety**
>
> (1) The prison manager may direct that the opportunity of a prisoner to associate with other prisoners be restricted or denied if, in the opinion of the manager,–
>
> (a) the security or good order of the prison would otherwise be endangered or prejudiced; or
>
> (b) the safety of another prisoner or another person would otherwise be endangered.

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5 Known as the Nelson Mandela Rules.

(2) If a direction is given under subsection (1),–

(a) the prisoner concerned must promptly be given the reasons in writing for the direction and any subsequent direction under subsection (3)(c):

(b) the chief executive must promptly be informed of the direction and the reasons for it.

(3) A direction under subsection (1),–

(a) must be revoked by the prison manager if there ceases to be any justification, under subsection (1), for continuing to restrict or deny the opportunity of the prisoner to associate with other prisoners:

(b) may be revoked at any time by the chief executive or a Visiting Justice:

(c) expires after 14 days unless, before it expires, the chief executive directs that it continue in force:

(d) if it continues in force because of a direction under paragraph (c), must –

(i) be reviewed by the chief executive at intervals of not more than 1 month:

(ii) expire after 3 months unless a Visiting Justice directs that it continue in force:

(e) if it continues in force because of a direction under paragraph (d)(ii), must be reviewed by a Visiting Justice at intervals of not more than 3 months.

[26] Section 59 of the Act reads:

Segregation for purpose of protective custody

(1) The prison manager may direct that the opportunity of a prisoner to associate with other prisoners be restricted or denied if—

(a) the prisoner requests that his or her opportunity to associate be restricted or denied and the manager considers, having regard to any information supplied by the prisoner or otherwise available to the manager, that it is in the best interests of the prisoner to give that direction; or

(b) the prison manager is satisfied that –

(i) the safety of the prisoner has been put at risk by another person; and

(ii) there is no reasonable way to ensure the safety of the prisoner otherwise than by giving that direction.

(2) If a direction is given under subsection (1)(a),–

(a) the direction is ineffective unless, either before or after the giving of the direction, the prisoner concerned gives his or her consent in writing to the giving of the direction:

(b) the direction ceases to have effect if the prisoner withdraws his or her consent to the giving of the direction, but the prison manager may give a further direction under subsection (1)(b) without that prisoner's consent if subsection (1)(b) applies.

(3) If a direction is given under subsection (1)(b),–

(a) the prisoner concerned must promptly be given the reasons in writing for the direction, and any subsequent direction under subsection (4)(c):

(b) the chief executive must promptly be informed of the direction and the reasons for it.

(4) If a direction is given under subsection (1)(b), the direction –

(a) must be revoked by the prison manager if there ceases to be any justification, under subsection (1)(b), for continuing to restrict or deny the opportunity of the prisoner to associate with other prisoners:

(b) may be revoked, at any time, by the chief executive:

(c) expires after 14 days unless, before it expires, the chief executive directs that it continue in force:

(d) must, if it continues in force because of a direction under paragraph (c), be reviewed by the chief executive at intervals of not more than 3 months.

The pleadings

[27] There are 12 causes of action/grounds of review pleaded in the amended statement of claim of 8 February 2022. Seven of these are pleaded against the prison director, the second respondent. A further four are pleaded against the first respondent, the Chief Executive of the Department of Corrections, and one is directed at both respondents. Declaratory relief is sought. The causes of action include a failure to meet the statutory criteria (illegality), breach of natural justice (including a failure to follow fair process and a failure to provide reasons for decisions), disproportionality, mistake of fact and unreasonableness.

Discussion

The proceedings in context

[28] These are judicial review proceedings; the statutory context is key. As Isac J held in *Taylor v Attorney-General*, s 58 of the Act imports "a broad subjective standard".[6] So too, in my view, does s 59. In s 58 what matters is the "opinion of the manager" on whether the security or good order of the prison would be endangered or prejudiced without a directed segregation order. Section 59(1)(b) requires the prison manager to be satisfied that the safety of a prisoner has been put at risk and there is no other reasonable way to ensure their safety without a directed segregation order. I agree with Isac J that:[7]

> Parliament's use of a subjective standard confirms a policy choice between the need to ensure adequate protection against abuse of power while acknowledging prison managers and their staff are better placed to make decisions about the day-to-day management of a prison using limited resources.

[29] The powers at issue here are not immune from judicial review.[8] However, it is for the applicant to establish a material error of law within the context of broadly conferred powers relating to day-to-day management of a prison. Segregation decisions are not based on a determination of fact as to whether a particular event has occurred, but rather involve a judgment as to the risk posed to the security or good order of the prison, and whether the particular situation could equally or better be addressed by other measures.[9]

[30] One of the principal complaints Ms Stevens makes is the absence of evidence to support the determinations by the prison director that the "security or good order of the prison" would otherwise be endangered or prejudiced. In judicial review terms,

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6 *Taylor v Attorney-General*, above n 3, at [82].

7 *Taylor v Attorney-General*, above n 3, at [82]. See also *Idea Services Ltd v Attorney-General* [2022] NZCA 470 at [51]–[54].

8 The UK Supreme Court held in *R(Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 at [126] that the court has full jurisdiction to review evaluative judgments, considering their reasonableness in light of the material before the decision-maker, whether the appropriate tests have been applied and whether all relevant factors have been taken into account. The court noted that the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests.

9 *R(Bourgass) v Secretary of State for Justice*, above n 8, at [92].

what Ms Stevens must establish is the high hurdle of an absence of probative evidence to support the impugned decisions.

[31] *Joseph on Constitutional and Administrative Law*[10] describes this strict review threshold as follows:

> In *Bryson*, the Supreme Court imposed a stricter review threshold for mistake of fact than had been the practice. *Bryson* counselled judicial restraint: "An ultimate conclusion of a fact-finding body can sometimes be so unsupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer".[11]
>
> To amount to [an] error of law, a mistake of fact had to satisfy one of Lord Radcliffe's three tests in *Edwards* (*Inspector of Taxes) v Bairstow*:[12] namely, a state of affairs "in which there is no evidence to support the determination", or "one in which the evidence is inconsistent with and contradictory of the determination", or "one in which the true and only reasonable conclusion contradicts the determination".[13] A party asserting contradictory evidence or no evidence faced a "very high hurdle".[14] This "hurdle" guarded against a court persuading itself that a decision-maker had erred because it would have reached a different conclusion on the factual findings.

[32] The Privy Council in *Re Erebus Royal Commission: Air New Zealand Ltd v Mahon* held that as a matter of natural justice, a person making a finding in the exercise of an investigative jurisdiction must base their decision upon evidence that has some probative value:[15]

> What is required by the first rule [of natural justice] is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

[33] In *R(Bourgass) v Secretary of State for Justice*, the UK Supreme Court held that the potential consequences of prolonged segregation on prisoners are so serious that a court will require a cogent justification before it is satisfied that the decision to

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10 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1063.

11 *Bryson v Three Foot Six* [2005] NZSC 34, [2005] 3 NZLR 721 at 733.

12 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

13 *Bryson v Three Foot Six*, above n 11, at [26]; quoting *Edwards (Inspector of Taxes) v Bairstow*, above n 12, at 36.

14 *Bryson v Three Foot Six*, above n 11, at [27].

15 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1993] NZLR 662 (PC) at 671.

authorise its continuation is reasonable.[16] I accept that that approach should also apply in New Zealand.[17]

[34] I address now each of the causes of action in turn.

First ground of review against second respondent: illegality of 12 May order

[35] Ms Stevens pleads that the order of 12 May 2021 was invalid because the prison director was required to obtain verbal authorisation or support from the Chief Executive or his delegate before managing her under directed segregation.

[36] However, as Mr Boshier submitted, verbal authorisation or support from the Chief Executive is not required. This claim is a misreading of the F15 form. Section 58(1)(a) of the Act empowers the prison director to direct segregation. There is no statutory, regulatory or other requirement for verbal authorisation or support from the Chief Executive to be given before the direction is implemented. I agree that if this was required, it would hamper the ability of the prison director and custodial staff being able to act quickly and urgently in evolving situations.

[37] The only statutory requirement is that the Chief Executive is notified promptly.[18] The Chief Executive can then revoke the order if he or she wishes.[19] I note here that the 12 May order was promptly notified to Corrections. On 13 May 2021, the 12 May order was considered and signed by Ms Mohammed, on behalf of the first respondent, in support of the segregation direction.

[38] In his written submissions, Mr Minchin, on behalf of Ms Stevens, submitted that there was "no evidence" that Ms Stevens posed a threat to the security of the prison, where at issue was the "good order of the prison". Ms Stevens denies engaging in any inappropriate relationships and notes that the ASCF does not house minors.

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16 *R (Bourgass) v Secretary of State for Justice*, above n 8, at [126].

17 While the UK legislation differs to the legislation at issue here, the same principles apply. In the UK, the supervisory acting akin to the Chief Executive, the Secretary of State, must *approve* the initial directed segregation decision within 72 hours or it becomes ineffective. In New Zealand, as stated at [20] above, the Chief Executive or their delegate must instead make a decision on whether to revoke initial segregation, or whether the segregation should continue for a period greater than 14 days.

18 Corrections Act 2004, s 58(2)(b).

19 Corrections Act 2004, s 58(3)(b).

Mr Minchin submitted that the respondents cannot point to any recorded entries in the Integrated Offender Management System (IOMS), warnings or any disciplinary action taken by ASCF in regard to any relationships between Ms Stevens and "young, vulnerable men".

[39] Ms Stevens accepts that she has had romantic relationships with at least two fellow prisoners. Her claim that she has been discriminated against and singled out because of her index offending is understandable. However, there is probative evidence to support the making of the 12 May order and Ms Stevens has not established the "very high hurdle"[20] that a legal challenge of this kind requires.

[40] Mr Gerald Smith, the acting prison director at ASCF, states in his affidavit evidence that senior ASCF staff held several meetings with Ms Stevens throughout 2020 and 2021 regarding the appropriateness of her relationships with other inmates and the impact her behaviour was having on others as well as her own situation. He notes that ASCF discourages romantic relationships between prisoners because of the threat such relationships can pose to the safety and good order of ASCF.

[41] On the morning of 12 May 2021, ASCF staff, including the then prison director, Mr Richard Laws, and other senior ASCF staff met to discuss Ms Stevens' situation. The impugned order of 12 May 2021 was subsequently made.

[42] It is also important to recall that a decision under s 58 involves a judgment as to the risk posed to the security or good order of the prison and need not be based on a determination of fact as to whether a particular event has occurred.

[43] There is some merit to Mr Minchin's submission that there is a paucity of paperwork to support the decision. However, the respondents have demonstrated a proper evidential basis for the making of the 12 May order and I find that the first ground of review is not made out.

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20 *Bryson v Three Foot Six*, above n 11, at [27].

Second ground of review against second respondent: illegality of 12 May order

[44] Ms Stevens claims that the 12 May order only restricted her ability to associate with other prisoners when in fact she was completely denied association with them while she was placed in the SRU. However, this claim is again without legal foundation. Section 58 of the Act clearly conferred power on the second respondent to either restrict or deny access.

[45] I accept that the F15.01.06 form does refer to restriction of association rather than denial. However, the impugned decision does need to be placed in context. As the second respondent submitted, a prisoner on directed segregation will have less contact with other prisoners. Whether a prisoner on directed segregation, where their access is restricted, can in fact associate with other prisoners will depend on what is possible within the prison environment and on the reasons for the segregation. The prison director must have regard to the safety of the segregated prisoner and other prisoners, recognising the importance of safety and security as set out in ss 5(1)(a), 6(1)(a) and 6(1)(g) of the Act.

[46] The evidence of the second respondent establishes the real restrictions and limitations that ASCF was operating under:

(a) Prisoners held in the SRU usually will not associate with other prisoners in the SRU, reflecting the various reasons prisoners may be held in that unit.

(b) Ms Stevens was segregated due to concerns about her behaviour towards other prisoners. Some of these included vulnerable prisoners. The Court can take judicial notice of the fact that there are relatively high numbers of prisoners with mental health issues and those who have been the victims of sexual abuse.

(c) Because Ms Stevens remained under voluntary segregation while she was in SRU, she could not associate with mainstream prisoners held in the SRU.

(d) Ms Stevens' non-association alerts meant even greater restrictions on who she could associate with.

[47] I find that the second ground of review is not made out.

Third ground of review against first respondent: procedural unfairness relating to 12 May order

[48] Ms Stevens contends that the acting senior adviser for the Department of Corrections, Ms Mohammed, improperly based her decision on ASCF's characterisation of the alleged behaviour as "imitative" of Ms Stevens' index offending. It is alleged that this is not a qualifying factor in relation to the "good order" requirements of the legislation. It is claimed that Ms Mohammed, as the senior adviser, failed to independently assess whether segregation was warranted.

[49] In relation to the 12 May 2021 decision, Ms Mohammed received the initial directed segregation form (F15.01.06) by email on 13 May 2021. In her affidavit, she outlines that since the risk of prison security or good order was identified as relating to Ms Stevens' offending, she considered her conviction history. Ms Mohammed also noted from the file that the Structured Dynamic Assessment Case Management 21, which is a risk assessment used by case managers to track and respond to the dynamic risk factors that the people they work with present, had an entry from July 2020 that noted a high level of offence mirroring behaviour by Ms Stevens.

[50] Ms Mohammed recorded on the initial directed segregation form that she supported the segregation decision as the "prisoner poses behavioural risks towards other prisoners".

[51] I find that this ground of review is not made out. Ms Mohammed gave proper independent consideration to the issue of segregation.

Fourth ground of review against first and second respondents: disproportionality of 12 May order

[52] This ground of review, directed at both respondents, alleges that prison management acted in a disproportionate manner by placing Ms Stevens on directed

segregation for behaviour she was not otherwise disciplined for. It was submitted that there was an obligation, imposed by s 5(1)(b) of the Act to abide by the United Nations Standard Minimum Rules (the Nelson Mandela Rules) for the treatment of prisoners.[21] Rule 45(1) provides that: "Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible".

[53] The starting point is again the statutory context. As noted above, directed segregation is a management tool, and not a means of punishment. Having said that, I accept that the use of segregation can have punitive consequences and could, in an appropriate case, give rise to an abuse of power and reviewable error. However, there was no abuse of power here. Prison management chose to deal with the concerns around Ms Stevens' behaviour as a matter of management and part of day-to-day prison administration.[22] As McGrath J held in *Drew v Attorney-General* (in relation to the predecessor legislation to the current Act), the statutory regime reflects a particular need in the prison context to maintain order within the institutions.[23] Closely linked to the imperative of continuing order is the maintenance of the integrity of prison security.

[54] The courts have noted in previous decisions that caution is exercised to avoid sitting in a supervisory role over operational on-site decisions or to stray into "micro-managing" the prison system.[24]

[55] The law is unclear as to whether disproportionality is available as a separate ground of judicial review. In any event, the 12 May order was not, in my view, disproportionate. I note also that it was of short duration; the prison director revoked the 12 May order on 18 May 2021.

[56] In relation to the Nelson Mandela Rules, I adopt the findings of Woolford J in the recent decision of *Gorgus v Chief Executive of the Department of Corrections*.[25]

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21 See *Gorgus v Chief Executive of the Department of Corrections* [2023] NZHC 450.
22 *McEwen v Spring Hill Corrections Facility Department of Corrections* [2020] NZHC 724 at [58].
23 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [85]–[86]. These comments remain relevant to the Corrections Act 2004: *Department of Corrections v Taylor* [2009] NZCA 129, [2009] 3 NZLR 34 at [49]–[50].
24 *Mitchell v Attorney-General* [2013] NZHC 2836 at [39].
25 *Gorgus v Chief Executive of the Department of Corrections*, above n 21, at [17].

His Honour referred to the Court of Appeal decision *Attorney-General v Taunoa,*[26] where it was held that the Nelson Mandela Rules are "neither a treaty nor a binding international instrument". The Rules themselves state their own limitations in setting out "what is generally accepted as being good principles and practice in the treatment of prisoners and prison management".

Fifth ground of review against second respondent: illegality of 18 May order

[57] On 17 May 2021, the SRU Board interviewed Ms Stevens. The Board determined that she no longer posed a threat to the security and good order of the prison. On 18 May 2021, the prison director revoked the 12 May 2021 order.

[58] That same day the prison director directed that Ms Stevens be managed on directed segregation for up to 14 days under s 59(1)(b) of the Act on the basis of threats to her safety.

[59] Ms Stevens says she continued to be held in solitary confinement under the same punitive regimes that she had been placed under by the previous order. She claims the order was illegal, again contending there was no proper factual or evidential basis for it.

[60] The background to this decision is set out in the evidence of Mr Burns, Mr Smith and Ms McKibbin for ASCF:

(a) Every wing which could house Ms Stevens on voluntary segregation also housed prisoners who had threatened to harm her. Custodial staff had received threats against Ms Stevens from prisoners in houseblock 1, wing 4 which meant that she would not be safe if she returned to that wing.

(b) Ms Stevens could not be housed in the other wings in houseblock 1 because she had poor relationships with other transgender prisoners who were housed in those wings.

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[26] *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [259].

(c) There was no wing Ms Stevens could be placed in without having to move one or more other prisoners.

(d) The prison director determined that managing Ms Stevens in directed segregation in the SRU was the most appropriate solution while another strategy could be considered and implemented, which may have involved moving other prisoners.

[61] I accept the submission of Mr Boshier that Ms Stevens' placement was again severely restricted by concerns about her own behaviour, threats made against her, non-association alerts and her earlier voluntary segregation status.

[62] I find that this ground of review is not made out. It was not illegal and there is probative evidence to support the decision that was made.

Sixth ground of review against second respondent: mistake of fact/unreasonableness of 18 May order

[63] Ms Stevens alleges that the 18 May order was based on a factual error because it records that she was domiciled in houseblock 1, wing 4, when in fact she was in the SRU when the order was made.

[64] This ground of review is at best an administrative oversight which, in my view, has no bearing on the lawfulness of the order made.[27]

[65] The evidence is clear that Ms Stevens could not be returned to houseblock 1, wing 4, where she had been previously placed. Because of her voluntary segregation status and her previous placement there, that wing was the presumptive placement.

[66] There is no merit to this ground of review.

Seventh ground of review against second respondent: unreasonableness of 18 May order

[67] Ms Stevens claims that the 18 May order was unreasonable for three reasons:

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[27] *Reekie v Chief Executive Officer of the Department of Corrections* [2013] NZHC 271 at [50].

(a) There were no real safety concerns for her in houseblock 1, wing 4 as she had been housed in the SRU since 12 May 2021;

(b) If there were legitimate safety concerns in houseblock 1, wing 4, then the prison director was required to remove those who posed a threat; and

(c) There were other units in ASCF in which she could have been placed.

[68] I find that the decision to segregate the applicant under the 18 May order falls well short of the threshold of unreasonableness.

[69] I accept the evidence of ASCF that it was not practical to move other prisoners immediately to resolve Ms Stevens' placement issue. Prison placement is obviously a complex matter which must take into account the needs of each prisoner, which other prisoners they can associate with, and whether the prisoner poses any particular risks. These are operational decisions about day-to-day prison management.

[70] This ground of review is not made out.

Eighth ground of review against first respondent: unreasonableness of 18 May order

[71] Ms Stevens claims that Ms Mohammed's decision not to revoke the directed segregation decision of 18 May 2021 was unreasonable. She says it was unreasonable for Ms Mohammed, as the senior adviser, to have provided support for the direction on the reasons given. Ms Mohammed recorded on the directed segregation form that "there are concerns for the prisoner's safety if kept in a mainstream environment". Ms Stevens says this is faulty reasoning as she had been on directed supervision for the preceding five days which is not considered "mainstream".

[72] As Ms Mohammed outlines in her affidavit, particular caution is required when there is a risk of harm to a prisoner on the prison site. I find it was a reasonable decision to not revoke the protective custody segregation direction. In my view, Ms Mohammed did give proper independent consideration to the issue; she did not

simply "parrot" the reasons given by ASCF. It is evident that she assessed the threats made by other prisoners against Ms Stevens in making her decision.

[73] This ground of review is dismissed.

Ninth ground of review against second respondent: illegality

[74] The amended statement of claim pleads that Ms Stevens was held in the SRU and managed under the 18 May 2021 order until 9 June 2021, beyond the 14-day expiry of the 18 May order.

[75] This cause of action was not advanced in Ms Stevens' written submissions.

[76] The 18 May order was revoked on 27 May 2021 and Ms Stevens was then transferred out of the SRU into houseblock 2, wing 2. She was subject to a new order, under s 60(1)(a) of the Act, and transferred back to the SRU on 8 June 2021.

[77] I find that there is no merit to this ground of review.

Tenth ground of review against second respondent: illegality

[78] Ms Stevens claims that she was managed continuously on directed segregation from 12 May 2021 until 1 November 2021 and that:

(a) there were no real safety concerns for her or the safety concerns were insufficiently particularised in the paperwork;

(b) the extensions referred to directed segregation and voluntary segregation which are contradictory;

(c) there were other units in which she could have been placed.

[79] From 21 June 2021 until 1 November 2021, Ms Stevens' management on directed segregation was on the recommendation of the prison director and made on the direction of the Chief Executive's delegate. The actual directions were not made by the prison director.

[80] The history of Ms Stevens' directed segregation between June and November 2021 is as follows. Ms Stevens was placed in directed segregation for medical oversight under s 60(1)(a) of the Act on 8 June 2021. This was revoked the next day. On 9 June 2021, the SRU Board interviewed Ms Stevens. She advised the SRU Board that she had safety concerns in houseblock 2 wing 2, where she was held at that time, and wanted to be managed on directed segregation. On 9 June 2021, the prison director directed that she be managed on directed segregation for up to 14 days under s 59(1)(b) on the basis of threats to her safety. The paperwork, signed by the prison director on 9 June 2021, records:

(a) The applicant had inserted nail clippers into her rectum on 8 June 2021; and

(b) She had told the SRU Board she had safety concerns and wanted to get out of her unit and be moved to the dry cell/SRU.

[81] Because the safety of prisoners is paramount, the prison director formed the view that directed segregation and placement in the SRU was necessary. That appears to be a view that Ms Stevens shared. All voluntary segregation placement options had been exhausted.

[82] On 18 June 2021, Ms Stevens met with the SRU Board and indicated that she could not return to houseblock 2 wing 2 on voluntary segregation because her safety could not be guaranteed. On 21 June 2021, the prison director recommended directed segregation be extended. On behalf of the Chief Executive, Ms Mohammed, senior adviser, directed that the segregation continue until 8 July 2021.

[83] Ms Stevens continued to indicate she could not return to houseblock 2 wing 2. The prison director formed the view ASCF no longer had safe placements for her outside of the SRU. On 8 July 2021, the prison director directed that her segregation be extended. On behalf of the Chief Executive, Ms Mohammed again directed that the segregation continue until 8 August 2021.

[84] By August 2021, Ms Stevens had requested a transfer out of ASCF. On 6 August 2021, the prison director recommended that her segregation be extended until she is transferred offsite. On behalf of the Chief Executive, Ms Mohammed directed that the segregation continue until 8 September 2021 "due to no suitable placement being available on site".

[85] On 8 September 2021, the prison director recommended that segregation be further extended. On 9 September 2021, on behalf of the Chief Executive, Ms Mohammed directed that segregation continue until 8 December 2021 – "awaiting pending transfer confirmation".

[86] Throughout this time, ASCF sought to transfer Ms Stevens to another prison to resolve the placement issue. It was able finally to secure a transfer on 1 November 2021. The evidence also establishes that the possibility of transfer was complicated because on 17 August 2021 Auckland entered COVID-19 alert level 4 lockdown. That meant that inter-prison transfers were not proceeding as per normal.

[87] On 1 November 2021, Ms Stevens was transferred to Auckland Prison and the prison director revoked the directed segregation order.

[88] I find that the tenth ground of review has no merit. There is probative evidence to support the decisions reached about safety concerns for Ms Stevens. I also reject the contention that Ms Stevens being managed under both voluntary and directed segregation is somehow contradictory and unlawful. I see no reason why prisoners cannot be subject to both voluntary and directed segregation at the same time. As Mr Smith, the acting prison director, notes in his affidavit, contemporaneous directed segregation and voluntary segregation might occur where a prisoner has requested that they be on voluntary segregation and then some other factor requires them to be managed in directed segregation away from other prisoners on voluntary segregation (such as where there is an incident with another prisoner in their wing in houseblock 1). Furthermore, a prisoner who is on both directed segregation and voluntary segregation may not have their exercise time or unlock time at the same time as other prisoners on voluntary segregation if that is a requirement of their directed segregation.

[89] The complaint about a lack of reasons for Ms Stevens not being placed in units she had already been in or why she could not be placed in houseblock 1 wings 1–3 voluntary segregation cells also lacks foundation. I am satisfied that the prison director discharged his statutory duty by noting the basis for each recommended extension in the relevant forms in such a way that it was clear that he addressed his mind to the relevant criteria.

[90] The second respondent accepts that the paperwork refers to 39 to 40 cell movements from 5 June 2020, whereas Ms Stevens' cell history records fewer. However, this was not a determinative factor and therefore does not meet the high threshold for review.

Eleventh ground of review against first respondent: natural justice (right to reasons) in regard to 8 September 2021 direction

[91] Ms Stevens contends that natural justice obliged Ms Mohammed to provide adequate reasons for her opinion that a further extensive period of s 59(1)(b) directed segregation was required – i.e. to support the prison director's recommendation on 8 September 2021 for a three-month extension.

[92] Ms Stevens says that the reasons should have addressed the nature of the safety risk, the location of the purported risk, whether the prison director had taken adequate measures to address the risk, any available alternatives, or the suitability of placement in houseblock 1 wings 1–3 (voluntary segregation cells) or houseblock 1 wing 4 or one of the "residence" units.

[93] In addressing the issue of natural justice and the duty to give reasons, the statutory context is again all important. As the Court of Appeal observed in *Graeme Martin Contracting Ltd v Disputes Tribunal*:[28]

> … what is necessary to facilitate the right to natural justice depends on the particular circumstances. The question is what is required to ensure fairness in the particular case. Context is always important, including the significance of the decision and the purpose of the statute under which the decision-making is exercised.

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[28] *Graeme Martin Contracting Ltd v Disputes Tribunal* [2018] NZCA 328 at [37] (footnotes omitted).

[94] The Chief Executive's role in the directed segregation statutory scheme is first to be informed of an initial segregation direction and then to direct it to continue along, with a residual revocation power. These are not judicial or quasi-judicial powers; they are administrative powers.

[95] The natural justice obligation on the Chief Executive can be contrasted with an obligation that rests on a court, for example, to provide fulsome reasons for a decision after a contested hearing.

[96] In *R v Secretary of State for the Home Department ex parte Doody*,[29] Lord Mustill held that the following factors are helpful in determining what fairness requires in the context of an administrative power:

(a) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

(b) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

(c) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(d) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on their own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(e) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against their

[29] *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560.

> interests, fairness will often require that they are informed of the "gist of the case" which they have to answer.

[97] As noted above, the directed segregation process is not a disciplinary process. However, I have also noted that where segregation is prolonged and gives rise to solitary confinement for extended periods, the Court will look closely for cogent evidence to support the decisions taken and scrutinise carefully the reasons provided.

[98] It is important that any reasons given tell the prisoner why they have been made subject to the direction. However, as observed by the Supreme Court in *R(Bourgass) v Secretary of State for Justice*,[30] the reasons do not need to necessarily provide the primary evidence relied upon, but instead capture the reasons why prison management consider that the statutory threshold has been met. Reasons, in this framework, allow the prisoner to engage with why they have been segregated.

[99] I accept that there was a duty here on Ms Mohammed to give reasons for the three-month extension of the directed segregation on 8 September 2021. However, Ms Stevens' submission goes too far in suggesting that prescriptive criteria was required and go beyond what the applicant needed to seek a review of the direction.

[100] The Chief Executive's decision in this context is one of the safeguards in the directed segregation scheme. It does not follow a "hearing" and is not the result of an adversarial process. It is meant to be a prompt assessment of the management decision. The prisoner is entitled to know why the directed segregation decision has not been revoked or has been directed to continue. The prisoner has the ability to seek a review of the direction. I note that Ms Stevens utilised that process by asking Ms Mohammed to review her directed segregation status in August 2021. Ms Mohammed concluded that the directed segregation should remain in place until a transfer could be completed.

[101] Ms Mohammed's comments were brief, but in my view did fairly inform Ms Stevens about the basis for the decision. I also agree with the submission for the first respondent that in agreeing with the prison director's recommendation,

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30 *R(Bourgass) v Secretary of State for Justice*, above n 8.

Ms Mohammed's reasons can be taken to incorporate the more comprehensive reasons recorded by the prison director. In my view, Ms Mohammed was entitled to rely on these reasons and the particular judgment and knowledge of the on-site staff.

[102] I find that this ground of review is not made out.

Twelfth ground of review against first respondent: unlawful abdication of statutory discretion

[103] The final pleaded ground of review seeks to challenge all of Ms Mohammed's decisions, on behalf of the Chief Executive, on directed segregation in the relevant time period. It is alleged that they all represent a failure properly to exercise the statutory discretion under ss 58 and 59.

[104] I again find that this ground of review is not made out. There is probative evidence to support the decisions of Ms Mohammed and she undertook a review process with the relevant and necessary materials. Furthermore, where she placed reliance on the information and view of ASCF staff, she was in my view entitled to do so.

[105] Ms Mohammed ultimately considered that the extensions met the necessary threshold. Her affidavit outlines her position as follows:

> … due to the applicant's high number of non-association orders, behavioural concerns, and management requirements, placing her in a suitable unit onsite at ASCF was very difficult. The COVID-19 restrictions at the time meant transferring her off-site also was very difficult. In the absence of an appropriate placement, I was of the view that protective directed segregation was the correct course of action in order to stop any harm to the applicant.

Conclusion

[106] I find that the application for judicial review should be dismissed. None of the grounds of review advanced nor any of the causes of action are made out. This is not a case where something has gone wrong of a nature and degree which requires the intervention of the Court.[31]

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[31] Joseph, above n 1010, at 920.

Result

[107] The application is dismissed.

[108] As to costs, I note that Ms Stevens is legally aided. There is no order for costs.

Andrew J