IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA701/2022
[2023] NZCA 658

BETWEEN	DAVID IKENNA OBIAGA Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	3 August 2023
Court:	Brown, Gilbert and Wylie JJ
Counsel:	G H Allan and S A Davies for Appellant A M Powell for Respondent
Judgment:	20 December 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Mr Obiaga is serving a lengthy sentence of imprisonment. Like all prisoners subject to a term of imprisonment exceeding three months, Mr Obiaga must be assigned a security classification that reflects the level of risk he poses while inside or outside the prison.[1] The security classification must be reviewed at least once every

[1] Corrections Act 2004, s 47(1).

six months or whenever there is a significant change in the prisoner's circumstances.[2] Prisoners who are dissatisfied with their security classification may apply for it to be reconsidered.[3]

[2] Security classifications are important to prisoners because they can have a marked effect on their daily lives, including the nature of the physical environment in which they are detained, their access to some rehabilitation programmes, and the type and extent of contact they may have with visitors. The security classification can affect other aspects of day-to-day life in prison including movement around the prison, requirements to be accompanied by Corrections officers, employment within the prison, how food is received and access to computers. Incarceration at lower security classifications has greater resemblance to life in the community and there is less intervention by Corrections officers. Access to group-based programmes and release to work opportunities can only be achieved in lower security environments. However, lower security comes with greater internal and external risk, including because the buildings are less secure and prisoner to staff ratios are much higher.

[3] Mr Anthony O'Neill, the principal custodial advisor in the chief custodial officer's team at the Ara Poutama Aotearoa | Department of Corrections, explains that prisoners ideally progress down through the security classifications as they serve their sentence so that when they are nearing parole eligibility or release date they are at minimum or low security.

[4] Security classifications are provided for in the Corrections Act 2004 (the Act), but the Act does not prescribe how they should be assigned or reviewed. These matters are left for regulations made under s 202(f) of the Act and any instructions or guidelines issued by the Chief Executive of the Department of Corrections to Corrections staff pursuant to s 196(1) of the Act. The principles of security classification and the factors that must be taken into account in assessing risk for the purposes of the classification are set out in pt 5 of the Corrections Regulations 2005 (the Regulations). Further details specifying how risk assessments are to be undertaken are set out in instructions issued by the Chief Executive in the Prisons

---

2 Section 47(3).
3 Section 48(2).

Operations Manual and associated guidelines (the Review policy). The security classification is driven by a points system based on set criteria, although this is subject to override where appropriate and there is also a right of review. The system is designed to achieve consistency in a widely spread decision-making process across the entire prison estate. To illustrate, over 6,000 security classification reviews are undertaken each year.

[5] Mr Obiaga contends that three of the mandatory considerations prescribed in the Regulations (reg 48(c)–(e)) do not reflect the relevant risk under s 47(1) of the Act and are therefore outside the scope of the power to make regulations conferred under the Act. He also claims that the Chief Executive's instructions and guidelines for undertaking reviews of security classifications are defective, do not reflect the relevant risk, and are therefore unlawful.

[6] Mr Obiaga applied to the High Court for judicial review, challenging the validity of the Regulations and the lawfulness of the Review policy. His claim was dismissed by Cull J.[4] The Judge concluded that reg 48(c)–(e) fall within the ambit of s 47 of the Act and were therefore within the regulation-making powers in s 202.[5] The Judge was satisfied that the Review policy was lawful and within the four corners of s 47 of the Act.[6] Mr Obiaga now appeals, advancing similar arguments.

Statutory scheme

[7] The purpose of the Corrections system set out in the Act is to improve public safety and contribute to the maintenance of a just society by various means outlined in s 5. These include ensuring that custodial sentences are administered in a safe, secure, humane and effective manner; providing for Corrections facilities to be operated in accordance with rules and regulations that are based on, amongst other matters, the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*;[7] and assisting in the rehabilitation of offenders and their reintegration into the community through the provision of programmes and other

4 *Obiaga v Department of Corrections* [2022] NZHC 3146 [High Court judgment].
5 At [94].
6 At [95].
7 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2015).

interventions so far as is reasonable and practicable in the circumstances and within the resources available.[8]

[8] The principles that guide the operation of the Corrections system are set out in s 6 of the Act. The maintenance of public safety is the paramount consideration in decisions about the management of prisoners.[9] The Corrections system must ensure the fair treatment of prisoners, including by ensuring that decisions affecting them are taken in a fair and reasonable way and by providing access to an effective complaints procedure.[10] Sentences must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, Corrections staff, and prisoners.[11] So far as is reasonable and practicable in the circumstances within the resources available, prisoners must be given access to activities that may contribute to their rehabilitation and reintegration into the community.[12] To the extent that this is consistent with the maintenance of safety and security requirements, and so far as it is reasonable and practicable and within the resources available, contact between prisoners and their families must be encouraged and supported.[13]

[9] The Chief Executive has numerous powers and functions under the Act, including responsibility for ensuring that the Corrections system operates in accordance with the purposes and principles set out in the Act, ensuring the safe custody and welfare of prisoners, and issuing instructions or guidelines under s 196 of the Act.[14]

[10] The specific provisions dealing with security classifications are found in ss 47 and 48 of the Act. Section 47(1) provides that the Chief Executive must ensure that every prisoner who is subject to a sentence of imprisonment for a term exceeding three months is assigned a security classification that reflects the level of risk posed by the prisoner while inside or outside the prison, including the risk of escape and the

---

8 Corrections Act, s 5(1).
9 Section 6(1)(a).
10 Section 6(1)(f)(ii).
11 Section 6(1)(g).
12 Section 6(1)(h).
13 Section 6(1)(i).
14 Section 8(1)(a), (b) and (j).

risk that escape would pose to the public. The security classification of each prisoner must be undertaken and reviewed in the prescribed manner.[15]

[11] Section 48 requires prisoners to be promptly informed in writing of the security classification assigned to them, any change made to this classification, and the reasons for the assignment of that classification or changed classification.[16] A prisoner who is dissatisfied with the security classification may apply to the Chief Executive for reconsideration.[17] The Chief Executive must then ensure that the security classification is reconsidered promptly in the prescribed manner.[18] The prisoner must be informed in writing of the decision.[19]

[12] The Chief Executive's power to issue instructions or guidelines to Corrections staff is set out in s 196 of the Act. The Chief Executive can issue guidelines on the exercise of powers under the Act, or any regulations made under the Act, and instructions or guidelines relating to the procedures to be followed or standards to be met in the management of prisons.[20]

[13] The relevant regulation-making power is contained in s 200 of the Act. This section relevantly provides that the Governor-General, by Order in Council, may make regulations ensuring the good management of prisons, prescribing the powers and functions of staff members, ensuring the safe custody of prisoners, providing for the management, care, treatment, well-being, and reintegration into the community of prisoners, and providing for any other matters contemplated by the Act or necessary for its administration or to give it full effect. Section 202 provides that regulations made under s 200(1)(c) to ensure the safe custody of prisoners may include provisions dealing with a range of specified matters. These include provisions regulating the security classification of prisoners.[21]

---

15 Section 47(3).
16 Section 48(1).
17 Section 48(2).
18 Section 48(2).
19 Section 48(4).
20 Section 196(1).
21 Section 202(f).

The Regulations

[14] Regulation 44(1) stipulates that a prisoner should be assigned the lowest level of security classification at which the prisoner can safely and securely be managed given the assessment of the level of risk posed by the prisoner. A prisoner must be placed and managed within a facility and regime that is consistent with his or her security classification to the extent practicable having regard to the availability of accommodation and other resources.[22]

[15] Regulation 45 sets out the matters that must be taken into account in assessing the risk posed by a prisoner for the purposes of undertaking a security classification:

> **45 Assessment of risk**
>
> Any staff member conducting an assessment under section 47(1) of the Act of the level of risk posed by a prisoner for the purposes of undertaking a security classification, must take into account—
>
> (a) the seriousness of the offence for which the prisoner is serving a sentence of imprisonment or, in the case of a prisoner serving sentences of imprisonment for 2 or more offences, the seriousness of the most serious of those offences:
>
> (b) the duration of the sentence or sentences being served by the prisoner:
>
> (c) any history of escapes or attempted escapes from custody by the prisoner:
>
> (d) any history of violent behaviour by the prisoner:
>
> (e) any history of mental ill health:
>
> (f) whether the prisoner is awaiting trial or sentencing on any further charges and, if so, the nature of those charges:
>
> (g) any additional matter specified in writing by the chief executive as a matter to be taken into account in conducting a risk assessment under section 47(1) of the Act.

[16] Regulation 47 requires a security classification to be assigned within 14 days of the date the prisoner is received into the prison. Regulation 48 prescribes the matters that must be taken into account on any review of a security classification. In addition to the matters set out in reg 45, a number of other matters must be taken

---

22 Corrections Regulations 2005, reg 44(2).

into account. As noted, Mr Obiaga's challenge to the validity of the Regulations centres on three of the listed criteria (reg 48(c)–(e)):

> **48 Assessment of risk when security classification reviewed**
>
> Any staff member conducting a review of a security classification under section 47(3) of the Act must, in conducting an assessment under section 47(1) of the Act of the level of risk posed by the prisoner for the purposes of that review, take into account the matters specified in regulation 45 and in addition—
>
> (a) the duration of the period that the prisoner has left to serve under his or her sentence:
>
> (b) the current state of the prisoner's mental health:
>
> (c) whether the prisoner has co-operated with staff members while serving his or her sentence:
>
> (d) whether the prisoner has engaged in any misconduct while serving his or her sentence or has been involved in any reported incidents:
>
> (e) whether the prisoner has—
>
> (i) displayed motivation to achieve the objectives set out in his or her management plan; and
>
> (ii) achieved those objectives:
>
> (f) any additional matter specified in writing by the chief executive as a matter to be taken into account in conducting a review of a security classification under section 47(3) of the Act.

The Review policy

[17] The Chief Executive has issued instructions to Corrections staff detailing how security classifications are to be determined. These instructions are contained in the Prison Operations Manual and associated guidelines. The manual contains a section dealing with reviews of security classifications and prescribes the form to be used when carrying out the risk assessment for male prisoners.

[18] The assessment form is in four parts. Parts A and B are respectively concerned with the assessment of internal and external risk. Part C is where points gained in the earlier sections are tallied to arrive at one of five preliminary security classifications ranging from minimum to maximum. Immediately below the indicated preliminary

classification is a section where the assessing officer can set out reasons for recommending that the preliminary classification should be overridden and replaced by some other security classification. There is then space for the assessing officer to record any additional comments. Part D makes provision for the signatures of the recommending officer and the approving officer, who must each check the form and recommend the security classification arrived at. Part E is to record the prisoner's acknowledgement of receipt of a copy of the completed form.

[19] As noted, the assessment involves a points-based system allocated against set criteria. A score of 33 points or more in pt A (internal risk) will result in a maximum security classification. An internal risk score of 19 to 32 points will result in a high security classification. The remaining classifications of low-medium, low, and minimum depend on the combined points scored for internal and external risks as assessed in pts A and B. To achieve a minimum classification requires a score of not more than 18 in pt A and not more than 11 in pt B. The classifications generated by this tallying process are preliminary and subject to override and review.

[20] Part A has five sections headed: critical security factors; risk of escape; current state of mental health; offence history; and cooperation in the unit, in workplaces and in programmes. Part B also has five sections, one of which is headed behavioural stability, compliance, and risk of contraband importation. There is some overlap between the criteria listed in the last sections of pts A and B. Because the impugned criteria are in this category of overlap, it will suffice to set out the relevant section in pt A:[23]

> **A.5 Co-operation in unit, workplace, programmes**
>
> A.5.1 Number of incidents in past six months
>
> A.5.2 Compliance with staff requests
>
> A.5.3 Positive interaction with staff and other prisoners
>
> A.5.4 Compliance with prison rules
>
> A.5.5 Motivation to achieve Offender Plan activities

[23] These criteria are replicated in pt B.4.4 to B.4.8.

[21] The sources to be consulted for each criterion are listed. For example, the sources of information for the purposes of determining the number of incident reports in the past six months (A.5.1) are listed as being the penal file, sentence plan file notes, and the incident reports logged to the Integrated Offender Management System.

[22] Prisoners are assessed against these criteria as being poor, average, or good with six points being allocated for poor, three points for average, and zero points for good. The points allocation for the first criterion — number of incidents in past six months — involves a simple tally of these incidents. It indicates "the number of incident reports in the past 6 months that show the prisoner's negative attitude towards others". Four or more incidents will attract an assessment of poor and a score of six points. Two or three incidents will attract a score of three, and one incident or none will score zero points. The scoring for the other four criteria is addressed in the guidelines and requires judgement, for example:

> **A.5.2 Compliance with staff requests**
>
> …
>
> **Description**
>
> - This section assesses how well the prisoner complies with staff requests in a range of situations in the past 6 months.
> - The scores represent:
>   - **Poor** – the prisoner almost never complies with requests or fails to comply in a timely manner.
>   - **Average** – the prisoner complies most of the time but sometimes fails to comply in a timely manner.
>   - **Good** – the prisoner complies in a timely manner to all staff requests.
>
> **A.5.3 Positive interaction with staff and other prisoners**
>
> ...
>
> **Description**
>
> - This section assesses how well the prisoner interacts with other prisoners and with staff in a range of situations in the past 6 months. Do not rely solely on the opinions of other staff in the unit – health staff, [Corrections inmate employment] staff, and programmes staff

should be consulted as appropriate to assess how the prisoner behaves in different contexts.

- The scores represent:
    - **Poor** – the prisoner interacts negatively with staff and other prisoners.
    - **Average** – the prisoner interacts positively most of the time but with occasional instances of negative interaction.
    - **Good** – 1 or less instances of negative interaction with staff or prisoners over the previous 6 months.

[23] The guidelines direct assessing officers to canvas opinions from unit officers, the unit principal Corrections officer, Corrections inmate employment instructor or other employment supervisor, and programme providers before completing pt A.5.

[24] The guidelines provide directions on the discretion to override the indicative preliminary classification. These include:

Override reasons and recommendation

- Any classification may be over-ridden to a higher or lower classification. A clear reason must be given for the override.
- A classification may not be overridden based on a factor that has already been incorporated in the assessment. For example, the offence type has already been incorporated, so overrides can not be made based on this factor.

…

Reasons and supporting documentation

- This section is primarily used to indicate if the officer believes the Security Classification is incorrect as a result of additional information not being accounted for in the assessment process.
- The officer will summarise main reason for override and state where information can be found, or provide details to support override.
- This section also contains any relevant information pertaining to individual questions as required, noted during completion of the assessment.

Are the Regulations ultra vires?

The claim

[25] Mr Obiaga sought a declaration that reg 48(c)–(e) are ultra vires the Act, claiming that:

(a) whether a prisoner has cooperated with staff members while serving his or her sentence (reg 48(c)) does not inform the risk required to be assessed under s 47 of the Act, namely the risk posed by a prisoner while inside or outside the prison, including the risk of escape and the risk that escape would pose to the public (the relevant risk);

(b) whether a prisoner has engaged in any misconduct, or been involved in any reported incidents, while serving his or her sentence (reg 48(d)) does not inform the relevant risk; and

(c) whether a prisoner has displayed motivation to achieve the objectives set out in his or her management plan and whether the prisoner has achieved those objectives (reg 48(e)) does not inform the relevant risk.

High Court judgment

[26] The Judge accepted the Crown's submission based on Mr O'Neill's evidence that a prisoner's attitude and cooperation with staff members and his or her history of incidents and misconduct are relevant to staff resourcing. Disproportionate staff attendance required for an uncooperative prisoner increases the risk of disruption within the unit or elsewhere within the prison. This in turn increases the possibility of prisoner escape.[24] The Judge was therefore satisfied that reg 48(c) is relevant to the prisoner's overall risk assessment.[25]

[27] The Judge considered that misconduct and reported incidents (reg 48(d)) also act as a gauge of a prisoner's compliance with instructions. A prisoner's amenability

---

24 High Court judgment, above n 4, at [39].
25 At [40].

to abiding by rules and following instructions is relevant to whether the prisoner can be placed in lower security prisons or allowed outside a prison on a work assignment. It is relevant to the risk to public or fellow prisoner safety, including whether the prisoner is likely to escape from either inside or outside the prison.[26]

[28] The Judge also accepted the Crown submission that a prisoner's motivation to rehabilitate (reg 48(e)) is relevant to his or her ability to participate effectively in rehabilitation programmes, including those only available in lower security environments. It reflects their attitude towards other prisoners in low security and is directly relevant to whether they pose a risk of escape and the consequent risk to the public.[27]

[29] The Judge was satisfied that the impugned regulations are within the ambit of the Act and are relevant to informing the appropriate security classification based on the risk posed by the prisoner.[28]

Submissions

[30] Mr Obiaga's overarching submission is that the Act "demands calibration in the security classification because 'getting it right' is pivotal to the Act's conception of how our corrections system should contribute to a just society". He contends that the Regulations and Review policy fail to meet that demand, including by positing risk factors that are overly broad and ambiguously expressed. Mr Obiaga does not suggest what improvements might be made. Nor does he contend that the Regulations and Review policy should be prescriptive such that individual judgement is subordinated. He simply asserts that the Regulations and Review policy are "not good enough" as presently framed because they fail to meet the substantive requirements of the Act and statutory purposes of the Corrections system — that prisoners are assigned a security classification that reflects the level of risk posed (s 47), that sentences not be administered more restrictively than is reasonably necessary (s 6(1)(g)), that prisoners are given access to rehabilitative and reintegrative programmes so far as is reasonable and practicable (s 6(1)(h)), and that contact with their families is supported (s 6(1)(i)).

---

26 At [45].
27 At [49]–[50].
28 At [51]–[52].

[31] Mr Obiaga also relies on the requirement for procedural and substantive fairness in s 6(1)(f). He argues that decision-making based on imprecise criteria or underdefined and unregulated metrics, such as incident reports and file notes, is not fair, reasonable, or transparent. This compromises a prisoner's understanding of decisions affecting them and hinders effective access to reconsideration and review processes.

[32] While he accepts that the impugned risk factors could inform the relevant risk in certain circumstances, Mr Obiaga submits that the Regulations and Review policy should explain or better encapsulate these criteria so far as is practicable for the assistance of decision-makers who must apply them. He argues that the discretion to override the preliminary security classification is not curative. He contends that reliance on the unguided assessment of individual Corrections officers as to what is and is not appropriate is "hopelessly deficient".

[33] Turning to reg 48(c) — cooperation with staff members — Mr Obiaga submits that any lack of cooperation could be petty or significant depending on the underlying demand. He argues that non-cooperation might be indicative of a need for care (such as where it arises from a transitory depressive state) rather than a more restrictive security classification. Similarly, the criteria in reg 48(d) — misconduct and involvement in reported incidents — may or may not be relevant to the security risk. For example, he refers to an incident report generated on account of his refusal of meals when he was on a hunger strike and a file note recording his disappointment on another occasion that only a crust was left for his toast. As to reg 48(e) — motivation to achieve the objectives of the management plan — Mr Obiaga says that, ideally, all prisoners will be highly motivated to engage in rehabilitation and reintegration programmes, but security classifications should not be used as tools for incentivising this. A prisoner's motivation, or lack of it, to achieve the objectives of his or her management plan may not necessarily be relevant to the internal or external risks that inform the s 47 assessment. He says this will depend on the particular aims of the plan.

Assessment

[34] The starting point is the presumption of validity of subordinate legislation.[29] The onus of establishing invalidity rests with the party making the challenge.[30] The approach on review is well-settled and can be traced at least as far back as the decision of this Court in *Carroll v Attorney-General* given in 1933:[31]

> The principles upon which the Court determines the validity of regulations made by Order in Council are well settled … The Courts … merely construe the Act under which the regulation purports to be made giving the statute … such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid.

[35] The court's task is therefore to begin by ascertaining the scope of the regulation-making power in the empowering legislation. This requires construing the words used in context and in light of the scheme and purpose of the empowering legislation. Where the enabling legislation is specific and detailed, the scope of the regulation-making power will be narrower and more constrained. Conversely, where the regulation-making power is broad and expressed at a general level of policy, it may be inferred that Parliament intended that the specifics would be supplied by regulation.[32] Once the scope of the regulation-making power has been ascertained, the meaning of the subordinate legislation must be examined. The court then determines whether the subordinate legislation comes within the scope ("the four corners") of the enabling power.[33] The court's focus on review is confined to the legal limits of the power, in particular whether the regulation was authorised by Parliament. The court is not concerned with the merits of the exercise of the power.[34]

[36] As we have seen, the Act confers broad regulation-making powers covering a range of topics, including to ensure the good management of prisons and the safe

---

29 *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA) at 243–244 quoting *McEldowney v Forde* [1971] AC 632 (HL) at 660–661 per Lord Diplock and 655 per Lord Pearce.

30 *McEldowney v Forde*, above n 29, at 661 per Lord Diplock.

31 *Carroll v Attorney-General* [1933] NZLR 1461 (CA) at 1478 per Ostler J.

32 *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 81 per McMullin J; and *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [60]–[61].

33 *Edwards v Onehunga High School Board*, above n 29, at 242 quoting *McEldowney v Forde*, above n 29, at 658 per Lord Diplock.

34 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 388 per Cooke, McMullin and Ongley JJ; and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55].

custody of prisoners. While ss 47 and 48 make provision for security classifications reflecting the level of risk posed by a prisoner while inside or outside prison, including the risk of escape and the risk that escape would pose to the public, the Act does not prescribe the classifications, nor does it specify how this broadly defined risk is to be assessed. Parliament left these matters to be dealt with in subordinate legislation. This is reinforced by the reference in s 47(3)(a) that the security classification for each prisoner must be assessed and reviewed in "the prescribed manner". There is no prescription in the Act, so this can only be a reference to regulations, instructions or guidelines issued under the Act.

[37] The regulation-making power to ensure the safe custody of prisoners expressly includes regulating the security classification of prisoners (s 202(f) of the Act).

[38] Regulation 44, which sets out the principles of security classification, echoes the policy directives in the Act. Regulation 45 sets out the matters that must be taken into account in the assessment of risk for the purposes of undertaking a security classification. This is clearly authorised by the Act and is not challenged.

[39] Regulation 48 responds to the requirement in s 47 of the Act for security classifications to be reviewed periodically and whenever there is a significant change in the prisoner's circumstances. Mr Obiaga does not dispute that the matters listed in reg 48(c)–(e) — cooperation with staff members, misconduct, involvement in reported incidents, and motivation to achieve, and achievement of, the objectives of a management plan — may logically be connected to the relevant risk, as the Judge found. The requirement in reg 48 is simply to take these matters into account. This hardly seems objectionable.

[40] The power in s 202(f) to make regulations for the security classification of prisoners plainly authorises directions on the matters to be taken into account in undertaking the risk assessment. In agreement with the Judge, we are of the view that the impugned clauses of reg 48, directing that potentially relevant matters be taken into account in undertaking the security risk assessment, are authorised by the Act. We see no error in the Judge's analysis on this point.

[41] Mr Obiaga's submission that the Regulations are "not good enough" and that the Act insists on "getting it right" seems to us to be misconceived. It is unrealistic to expect that a "right" way exists or could ever be found to assess accurately the broadly stated risk posed by each prisoner, both inside and outside the prison, across the entire prison estate. There is nothing in the Act to suggest that perfection in the assessment is expected and that anything less would be unlawful.

[42] Nor do we consider the Regulations to be inconsistent with the purposes and principles of the Act — or as Mr Obiaga says, deficiently calibrated to meet the statutory purposes of the Corrections system — such that they are invalid. The Act has a broad purpose: that the Corrections system is to improve public safety and contribute to the maintenance of a just society. The Act provides the means by which this is to be realised at s 5(1) and sets out the Corrections system's guiding principles at s 6. The Regulations need only be consistent with the object and intent of the Act;[35] there is no "right" solution. As this Court has previously stated:[36]

> [regulations] will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations. If the only suggested connection with that purpose is remote or tenuous, the Court may infer that they cannot truly have been made for that purpose.

[43] We consider the Regulations serve the purposes and principles of the Act. In particular, the Regulations ensure that prisoners are provided with information about rules that affect them and require decisions about security classifications to be taken in a fair and reasonable way in line with objective criteria that can be applied consistently by decision-makers with an appreciation of the relevant circumstances.[37] All assigned security classifications are subject to third-party confirmation and review.[38] We do not consider than any challenge can be maintained on the basis the Regulations are inconsistent with ss 5 and 6 of the Act.

---

35 *Carroll v Attorney-General*, above n 31, at 1478 per Ostler J.

36 *New Zealand Drivers' Association v New Zealand Road Carriers*, above n 34, at 388 per Cooke, McMullin and Ongley JJ.

37 Corrections Act, s 6(1)(f).

38 Corrections Regulations, reg 49(c).

[44] The court on review is not concerned with the merits of the particular regulation or how "good" it may be, only whether it was authorised. We are quite satisfied that it was.

Is the Review policy unlawful?

The claim

[45] Mr Obiaga sought a declaration that the Review policy is unlawful on the basis that:

(a) the points allocation does not allow for differentiation, according to nature and seriousness, of:

(i) incident reports;

(ii) non-compliance with requests;

(iii) non-compliance with rules;

(iv) negative interactions with staff or other prisoners; and

(v) incidents of alleged failure to display motivation to achieve management plan objectives, or a failure to achieve management plan objectives.

(b) the Review policy does not provide any guidance as to what constitutes:

(i) an incident report "that shows the prisoner's negative attitude towards others";

(ii) "positive" or "negative" interactions with other prisoners or staff;

(iii) "occasional instances" of negative interaction; and

(iv) the threshold for determining when a prisoner "almost never" complies with staff requests and when a prisoner complies "most of the time" bearing in mind the number of interactions a prisoner will have over a six-month period.

(c) the override discretion precludes such differentiation by directing that "a classification may not be overridden based on a factor that has already been incorporated in the assessment";

(d) the guidelines do not identify any basis upon which a Corrections officer might believe a security classification to be "incorrect as a result of additional information not being accounted for in the assessment process";

(e) the Review policy accordingly allows classification decisions to be based on every incident report capable of being construed as showing the prisoner's negative attitude towards others, every disclosed incident of alleged non-compliance with requests, every disclosed incident of non-compliance with rules, every disclosed incident of alleged negative interactions with staff or prisoners, every alleged failure to display motivation to achieve sentence plan objectives, and every failure to achieve sentence plan objectives;

(f) not every incident, interaction, alleged non-compliance, or failure reported, disclosed, or alleged will be reflective of the relevant risk; and

(g) because of the overlap and the absence of a requirement to differentiate, a single incident, interaction, or alleged non-compliance can be taken into account multiple times in the accumulation of points in both pt A and pt B.

High Court judgment

[46] The Judge noted that the Review policy largely reflected the factors under reg 48(c)–(e) and to that extent Mr Obiaga's complaint was a repetition of the

arguments he raised concerning the validity of those regulations. The Judge considered that a prisoner's failure to comply with instructions or staff requests and unacceptable behaviour towards staff or other prisoners was indicative of a prisoner's attitude towards authority and can be a measure of a risk of escape. The Judge accepted that not every minor infraction or incident would be relevant to the risk but taken together with other factors would provide a picture of the prisoner and how they respond to authority and other prisoners.[39]

[47] The risk under s 47(1) of the Act is wider than the risk of escape and includes the risk posed by a prisoner both inside and outside the prison. Failure by a prisoner to comply with basic staff requests can cause disproportionate constraints on staff resources and therefore has a bearing on the maintenance of security in the prison. Non-compliance also informs whether a prisoner is suited to opportunities outside prison reserved for those with lower classifications.[40]

[48] While the purpose of the guidelines is to ensure that risk assessments are performed as consistently and objectively as possible across the prison estate, this is balanced by evaluation and judgement by Corrections officers enabling the preliminary or indicative classification to be overridden.[41] The Judge considered that the discretion to override in the exercise of judgement answered Mr Obiaga's complaint that there is an absence of guidance to discriminate between incidents of negative attitude, failure to display motivation, non-compliance with prison rules, and negative interaction with staff or other prisoners.[42] The override system and availability of review provide a check on the automated response from the scores on the review forms.[43] Further guidance on what constitutes positive or negative interactions would risk over-prescription of an assessment requiring intuitive judgement. Any further restrictive or prescriptive guideline on how to judge incidents or conduct risks the assessments becoming inflexible or unfair, eliminating the discretion to reflect the individual prisoner's position.[44]

---

39 High Court judgment, above n 4, at [83].
40 At [84].
41 At [85].
42 At [87].
43 At [88].
44 At [90].

[49] The Judge was satisfied that the Review policy falls within the four corners of the Act, particularly s 47, and is therefore lawful. The Judge rejected the submission that the override option cannot cure any distorting effects of metrics taken from the Integrated Offender Management System. Nor was the Judge persuaded that this information is not relevant to the s 47(1) risk.[45]

Submissions

[50] Mr Obiaga submits that the Review policy calls for either simple addition (for example, the number of incident reports in the past six months) or, at the other extreme, highly subjective evaluations (for example, the prisoner complies most of the time but sometimes fails to comply in a timely manner). He argues that Corrections officers are not permitted to discriminate between circumstances that speak to the relevant security risk and those that do not (for example, negative attitude towards others regardless of circumstance, non-compliance with staff requests or prison rules without regard to the underlying circumstances, and failure to display motivation to achieve management plan objectives irrespective of the objectives in question). He says that despite the subjectivity involved in these assessments, the Review policy provides no guidance on what constitutes negative attitude towards others, positive or negative interactions with staff or other prisoners, and what "occasional instances", "almost never" and "most of the time" mean. Further, the Review policy provides no guidance on the distinction between events that should be recorded in incident reports rather than in file notes.

[51] Mr Obiaga repeats his submission that the Regulations and Review policy "can do better so is required (by the Act) to do better". He contends that the Judge erred by failing to sufficiently weigh the Act's "exhortations" of fairness, reasonableness, consistency, and transparency. He argues that the Judge paid insufficient regard to "the vulnerability of prisoners to inaccurate, capricious or retributive decision-making".

[52] Mr Obiaga submits that the override system does not cure these deficiencies because it is only available if there is specific, counterveiling additional information

---

[45] At [91].

not accounted for in the assessment process. In any case, he says the criteria must be transparently capable of uniform application. The right of review is not curative of a deficient system. The deficiencies inhibit review because it is difficult to challenge decisions where what has been taken into account is not transparent.

Assessment

[53] A policy must be based on factors and purposes relevant to the power.[46] A policy will be unlawful if there is no rational connection between what the Act allows and the policy, or if no reasonable decision-maker could have promulgated such a policy because it is outside the limits of reason. The test is a stringent one.[47] Where possible, a policy should be interpreted in a manner that reconciles it with the empowering provision. The presumption is that persons entrusted with the power have sought to act within the scope of that power.[48]

[54] Mr Obiaga's submission is that the Review policy can be better, and the Act therefore requires it to be better. We do not consider the Review policy can be struck down as being unlawful merely by showing that improvements could be made. Rather, the question is whether no reasonable decision-maker could have promulgated the Review policy in its present form. We accordingly reject Mr Obiaga's primary submission.

[55] It is not suggested that the Review policy is based on factors that are not contemplated by the Act or the Regulations. We have already found that these factors are relevant to the specified risk and within the scope of the Act. The Review policy cannot be said to be unlawful on that account.

[56] We disagree that the Review policy is deficient, let alone unlawful, merely because it does not attempt to prescribe or confine the risk assessment to a greater degree, for example by defining the meaning of the expressions "almost never" and "most of the time" or what may constitute a positive or negative interaction with staff

---

46 *H (SC 104/2020) v Minister of Immigration* [2021] NZSC 192 at [58] per Winkelmann CJ dissenting quoting *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [119].

47 At [58] per Winkelmann CJ dissenting.

48 At [44] per Winkelmann CJ dissenting.

or other prisoners in any given circumstance. It seems to us that it was entirely reasonable to leave these matters for judgement by Corrections officers who have knowledge of an individual prisoner's current circumstances and are best placed to undertake the assessment. We are far from persuaded that the Review policy is one that no reasonable decision-maker could have promulgated without providing greater specificity in these respects.

[57] The Review policy seeks to achieve consistency in what is necessarily a widely spread decision-making process across a large and diverse prison estate. The numerical tally produced by the points scoring system serves the objectives of consistency, fairness and transparency but is also capable of generating inappropriate preliminary classifications in individual cases. However, this problem is addressed in several ways. First, assessing officers are directed, before undertaking the assessment, to review relevant information. With respect to pt A.5, the assessing officers are directed to review source records and canvas opinions from other personnel likely to have personal knowledge of the prisoner's present circumstances and risk. Secondly, there is room for some judgement to be exercised in populating the form in respect of the impugned factors. Thirdly, the Review policy contemplates that if the preliminary security classification generated by the points score process is incorrect, the assessing officer will recommend a different classification where there is good reason to do so. Fourthly, the ultimate security classification must be recommended by the assessing officer and approved by the approving officer. Finally, the prisoner has a right of review.

[58] We turn to Mr Obiaga's submission that the override is not curative because of the direction in the guidelines that a classification may not be overridden based on a factor that has already been incorporated in the assessment. The example given in the guidelines is the offence type. That factor having already been incorporated, no override can be made based on it. Mr Obiaga's complaint is that this prohibition on override applies equally to the factors in A.5 of the form quoted at [20] above. He says that instances of non-compliance with prison rules and staff requests will therefore inevitably attract points regardless of circumstance. We disagree.

[59] The Review policy must be interpreted so far as possible in a manner consistent with the purposes and policy of the Act, in particular, to achieve the allocation of an appropriate security classification that reflects the relevant risk. If, for example, the assessment generates an incorrect preliminary security classification because of points allocated for two or three instances of non-compliance with staff requests, we see no reason why this could not be corrected through the mechanism of override if there is additional information, not accounted for in the assessment process, that the non-compliance was not relevant to the risk set out in s 47(1) of the Act. An example might be where the non-compliance was the result of a temporary depressive episode of short duration that occurred five months earlier following the death of a close family member.

[60] Quite apart from the opportunity for override in appropriate circumstances, prisoners also have a right to have their security classification reconsidered by the Chief Executive. The classification must also be reviewed periodically every six months or whenever there is a significant change in circumstances.

[61] In conclusion, we agree with the Judge that the Regulations are valid, and the Review policy is lawful.

[62] Mr Obiaga is legally aided. There is no issue as to costs.

Result

[63] The appeal is dismissed.

[64] There is no order as to costs.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent