Neutral Citation Number: [2015] EWHC 606 (Admin)

Case No: 4077/2014

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2015

Before :

LORD JUSTICE ELIAS
MR JUSTICE SIMON

- -

Between :

R (Khatib)	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

Raj Desai (instructed by **Birnberg Pierce**) for the **Claimant**
Ben Lask (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 19 February 2015

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Approved Judgment

Lord Justice Elias :

1. This is an application for judicial review brought by a prisoner with respect to his high escape risk classification.

2. The claimant is a prisoner at HMP Full Sutton. He was convicted of conspiracy to murder in 2009 and was sentenced to life imprisonment with a minimum tariff of 18 years. The offence was committed between January and June 2006. It was a conspiracy to blow up a number of aircraft between Britain and the United States. Had it been successful - and it had reached an advanced stage in its development when it was discovered - it would have inevitably led to an enormous loss of innocent lives. The conspirators were a group of Al Qaeda inspired extremists who were reacting to what they perceived to be the criminal activities of the Western powers in Iraq and Afghanistan. The trial judge described the conspiracy as "the most grave and wicked… ever proven within this jurisdiction." The applicant's particular role was to carry out research into the ways of creating detonators and bombs. He was at the time 19 years old and was described by the judge as immature.

Security Classification.

3. All adult male prisoners are subject to security assessment. There are four security categories, the most secure of which is category A. This is defined in PSI 40/2011 as follows:

> "Prisoners whose escape would be highly dangerous to the public or the police or the security of the state and for whom the aim must be to make escape impossible."

4. The focus here, therefore, is on the consequences of an escape: the potential danger to the public, police or state security from the risk of further offending if the defendant were to escape.

5. Given the nature of the defendant's offence, it is hardly surprising that he was placed in category A and he remains in that category notwithstanding frequent reviews. Prisoners so categorised are subject to strict surveillance with telephone numbers screened, calls routinely monitored, visits vetted by police, and regular searches.

Escape risk classification.

6. All category A prisoners are subject to a separate assessment which seeks to identify the risk that they may escape. Unlike the security classification, this is not concerned with the consequences if they do escape; it focuses on the risk that they might do so.

7. There are three categories of escape risk which are defined as follows:

> "*Standard Escape Risk*: A prisoner who would be highly dangerous if at large.
> No specific information or intelligence to suggest that there is a threat of escape.
>
> *High Escape Risk:* As Standard Escape Risk, however, one or more of a number of factors are present which suggest that the prisoner may pose a raised escape risk. The factors include:
>
> Access to finances, resources and/or associates that could assist an escape attempt
> Position in an organised crime group
> Nature of current/previous offending
> Links to terrorist network
> Previous escape(s) from custody
> At least one of the above factors plus predictable escorts to be undertaken (e.g. court production, hospital treatment)
> Length of time to serve (where any of the other factors above are also present)
>
> *Exceptional Escape Risk*: As High Escape Risk, however, credible information or intelligence received either internally or from external agencies would suggest that an escape attempt is being planned and the threat is such that the individual requires conditions of heightened security in order to mitigate this risk."

8. The definition of high escape risk identifies certain factors from which a high risk can be inferred, but they are not exhaustive. It is a relatively low threshold. It is sufficient for a prisoner to be placed in the higher risk category that he may pose a risk of escape; a cautious, risk averse, approach is adopted.

9. The higher the category in which a prisoner is placed, the more detailed and intrusive the measures to prevent escape will be. Those on high escape risk will be subject to more frequent cell searches and cell moves than would otherwise be the case, and domestic visits will be held in the presence of a member of staff. As the Divisional Court noted in *Abdullah v Secretary of State* [2011] EWHC 3212 (Admin) para.8, the impact of high risk classification is a matter of real significance affecting the daily life of the prisoner. Moreover it will in practice be likely to affect the chance of the prisoner being considered for parole: see *Ali v Director of High Security Prisons* [2009] EWHC 1732 (Admin); [2010] 2 All E R 82, paras 9-10.

10. The applicant has throughout his incarceration been categorised as a high escape risk. Like the security classification, this is subject to regular reviews (now usually annual). It is his current high risk classification which he now challenges by way of judicial review.

11. Initially the focus of challenge was on a decision dated 30 May 2014. However, following a letter before action dated 8 August 2014 there was a reconsideration and that led to a further decision dated 11 August 2014 which confirmed the earlier categorisation of high risk escape. The claimant submits that the first determination was flawed and the errors were not remedied by the later 11 August decision. He challenges that high risk classification on three grounds. First, he says that there was a material misdirection in law, the defendant impermissibly conflating the test for determining security classification with that required to determine escape risk classification. This ground is now directed only at the 11 August decision. Second, it is submitted that there was a failure to consider all relevant factors and a reliance on various matters which, had they been properly investigated, would have been shown to be false. Third, there is a complaint that the reasons given for the decision were inadequate and failed to provide a sufficiently cogent explanation of the reasoning process lying behind the decision.

The procedures.

12. The rules for determining escape risk classification are set out in the Prison Service Instruction 08/2013. I draw attention to certain material provisions.

13. Rule 2.8 provides that once a prisoner has been placed in the high or exceptional risk category, in order for it to be downgraded, the DCC High Security "must be satisfied that information suggesting an enhanced escape potential is "no longer valid." Any doubts must therefore be resolved against the prisoner. This reinforces the cautious approach to risk classification.

14. The assessment procedure is essentially that a case worker will produce a brief which will be submitted for consideration by the final decision maker. Rules 3.13 to 3.16 spell out the way in which the information should be gathered:

> 3.13 The caseworker will gather and ensure that all relevant information is summarised in the submission to be put to the DDC [Deputy Director of Custody for High Security] (or delegated authority).
>
> 3.14 In some reviews the caseworker will consider that information from police sources is required. In such instances a request for information will be made using the form at annex C.
>
> 3.15 The caseworker will then prepare a submission to be put to the DDC for consideration and decision. When reports are received the caseworker will asses the content as to what information is relevant to the prisoners escape risk. Any information that is not relevant will not be included in the submission.
>
> 3.16 A copy of the submission intended to be put before the DDC (or

> delegated authority) must be disclosed to the prisoner at least six weeks prior to the review to allow representations to be submitted.

15. Any representations are then added to the submission and sent to the CART [Category A review team] which will make a recommendation. That in turn is forwarded to the Head of High Security Prison group who will either make the final decision or in some cases refer the papers on to the DDC High Security to make the final decision after also making a recommendation. That is what happened here.

16. A further rule relevant to this case is rule 3.28 which is as follows:

> "The category A team will consider and respond to representations against a decision to keep a prisoner high or exceptional escape risk. The DDC High Security (or delegated authority) may retake the decision where s/he considers the representations highlight information not previously considered that could materially affect the decision."

17. This rule is not well drafted. It suggests that it is the DDC (or his delegate) who must consider whether the fresh representations could materially affect the original decision, and then only go on to retake the decision if they could materially affect it. In effect, however, the DDC would then be retaking the decision, albeit on the grounds that the new information did not justify a detailed reconsideration. The rule seems intended to mean that the Category A team should respond to the representations and effectively act as a filter, sending the case on to the DDC only if it considers that the new information could materially affect the decision. That is how the rule was interpreted and applied in this case, and it has not been suggested that the process itself was in breach of the rule. The Category A team did not consider that the new representations highlighted fresh information which could materially affect the original decision, and accordingly the DDC was not requested to retake it.

The procedures in practice

18. The defendant relies upon a witness statement from Mr Stuart Freed. He is currently the operational manager in charge of the Category A team within the high security prisons. This consists of six full-time posts. He explained how the relevant rules and procedures are applied in practice.

19. Escape risk classification reviews are dealt with by a single case worker within the operational team. The submission he or she produces will include uncontroversial information concerning the nature of the offence and sentence, previous convictions and escape risk history; and also potentially more controversial information relating to the prisoner's custodial history. This will consist of summaries of information concerning the prisoner's behaviour in prison.

20. There are three sources of information to assist the caseworker. First, there are intelligence reports from individual prison officers which are put on an electronic database known as the Mercury database. Second, there is a separate database, the

national offender management information system (NOMIS), which provides details of an offender's personal history including, for example, prisoner movement both within the prison and between prisons, information about breaches of prison discipline, and activities undertaken within the prison. Third, the Category A team maintains a manual file for each category A prisoner which keeps a record of reports, submissions and decisions relating both to security categorisation and escape risk clarification.

21. Mr Freed said that particular emphasis would be placed on the Mercury database because it is most likely to flag up concerns relating to escape risk. The intelligence reports (IRs) contained therein are graded according to what is known as the "5 times 5" coding system. Under this system, each IR is assigned three scores reflecting (i) the reliability of its source; (ii) the likelihood that it is true; and (iii) the extent to which it can be disseminated. The scores are assigned in accordance with the following criteria:

> "a. The source of the IR is graded A-E, where A is "always reliable"; B is "mostly reliable"; C is "sometime reliable"; D is "unreliable"; and E is "untested source".
>
> b. The truth of the IR is graded 1-5, where 1 is "true with no reservations"; 2 is "known to be true to source"; 3 is "not known to be true to source, but corroborated"; 4 is "cannot be judged"; and 5 is "suspected to be false / misleading / malicious.
>
> c. The extent to which the IR can be disseminated is graded 1-5, where 1 is "may be disseminated to other UK, EEA and EU law enforcement and prosecuting agencies; 2 is "may be disseminated to UK non prosecuting parties"; 3 is "may be disseminated to non EEA law enforcement agencies"; 4 is "no dissemination permitted outside the Prison Service; 5 is "no further dissemination is permitted".

The scores are identified on the Mercury database and they are now disclosed in the submissions sent to the DDC, but that was not the position with respect to the reports which led to the decisions under challenge in this action.

22. The material passed to the DDC (or other decision maker) in the briefing includes the original submission together with a summary of the representations received in response to it, and the two recommendations. The DDC reviews the case together with an advisory panel which will typically include police advisers, a psychologist and the operational manager in charge of the Category A team (in this case Mr Freed).

The procedures in this case.

23. The high risk review submission relating to this claimant was prepared in January 2014. Two material sections of the report read as follows:

Escape risk history
Mr Khatib was made high risk because of the severity of the offences, which if successful, could have resulted in a huge loss of life.

Custodial History
June 2010 – Information received stated that Mr Khatib may be trying to condition staff into not following correct procedures.
Information received stated that Mr Khatib remained in contact with a high profile radical Islamist cleric prior to this individual being extradited to the United States. Mr Khatib was said to hold this individual in high regard.

March 2011 – Information stated that Mr Khatib made comments to a member of staff that he did not 'think they were funded enough' and that he could pay them to get him 'stuff', it was reported however that this statement was made in a joking manner.
July 2011 – Information was received which suggests that Mr Khatib entered the cell of another prisoner briefly whilst the occupant was being assaulted by other prisoners, further information received suggested that Mr Khatib took some part in this assault.
Information was received that Mr Khatib had complimented a member of staff on how they looked. While seemingly innocent there were concerns that Mr Khatib may be attempting to condition staff.
October 2011 – Information received stated that Mr Khatib had taken some interest in a member of staff's ID Card. While seemingly innocent there were concerns that Mr Khatib may be attempting to condition staff.

January 2012 – Information received suggested that Mr Khatib, amongst others, complained about one of the prison Imams and said that they would not attend Friday prayers until the Imam stepped down.

January 2013 – Information received states that Mr Khatib is in communication with a number of groups and individuals within the community who offer support and aid to a number of Muslim prisoners within the estate. Mr Khatib is also reported to communicate and associate with other TACT prisoners both within his current establishment and elsewhere.
July 2013 – No further information.
January 2014 – No further information.

24. I observe that the paragraph headed "escape risk history" is wholly misleading. It suggests that it was the danger to the public demonstrated by the nature of the offence which justified the imposition of the high escape risk category. If that had been the justification it would have been unlawful since that factor is relevant to security categorisation but not escape risk classification. Nothing directly turns on that statement since it is only purporting to say why the claimant was originally assessed as high risk, although Mr Desai, counsel for the claimant, submits that it

lends support to his submission that there was confusion about the test applied when determining the escape risk in this case.

25. Mr Freed reported that the officer responsible for producing this report has said that of the intelligence reports summarised, one was category C (i.e. from a source sometimes reliable) whilst the others were more reliable being category B or above. These assessments were not communicated to the Director, however.

26. The claimant produced his own response to these reports in an articulate three page handwritten document. First, he criticised - in my view justifiably - the observations in the section headed "escape risk history" on the grounds that this confused security risk and escape risk. He then commented on the particular matters raised in the submissions. It is not necessary to deal with each matter; suffice it to say that he took issue with much, but not all, of the intelligence relied upon. He said, for example, that he did not take part in the attack on another prisoner and that there would have been CCTV cameras which, if examined, would prove his innocence. He categorically denied saying he would not attend Friday prayers until the Imam stepped down; and although he did not deny outside communication with a radical Islamic cleric, he did not accept that the nature of the communications was pertinent to any escape risk. He also admitted to being in contact with other Terrorist Act (TACT) prisoners but said that such contact was inevitable in prison and he had only written to one prisoner elsewhere in that category. Likewise he accepted that there were certain "moral support" Muslim organisations with which he was in contact, but he denied that that these were illegal or inappropriate and he objected to any suggestion that they provided him with 'aid' of any kind, whether financial or otherwise.

27. The recommendation of Mr Freed was that it remained appropriate to keep the claimant in the high escape risk category. He summarised his reasons as follows:

> It is clear that this prisoner has a long term to serve before he reaches his minimum tariff. As his sentence is life imprisonment there are no guarantees that he will be released at his minimum tariff and, in the absence of any evidence of a reduction in risk of re-offending, Mr Khatib is likely to remain in custody beyond this term. In terms of the representations relating to Judge King, this was part of a judicial review that preceded the issue of PSI 08/2013. Mr Khatib's representations do not take into account the criteria for high escape risk as set out in this PSI. Mr Khatib meets the threshold for high risk due to:
> Nature of current / previous offending.
> Links to terrorist network.
> Length of time to serve.
>
> The representations that intelligence reports are subjective is difficult to disagree with as the reports relate to interactions between staff and prisoners or are in reference to overheard /monitored conversations.

> What is clear is that staff report that Mr Khatib has attempted to condition them, to bypass security measures and was part of a group that attempted to discredit an Imam.
>
> Given the above and the lack of evidence of a reduction risk brought about by a positive self change process it is recommended that high escape risk remains appropriate."

28. The Head of HSG agreed, observing that the risk remained high "due to the nature of his offending, his links to terrorist networks and the duration of his sentence".

The first decision dated 30 May 2014.

29. The decision letter identified the nature of the information considered. It is conceded that it was in error because it represented that police sources had been taken into consideration whereas in fact no police intelligence had been sought. Indeed, it is one of the criticisms of the decision that no such evidence was obtained. After setting out the criteria for the high escape risk classification, the decision letter continued:

> "Two of the six factors were considered to be relevant in your case along with the seventh factor:
> 1. Nature of current/previous offending.
> 2. Links to terrorist networks.
> 3. Length of time left to serve.
>
> It is considered evident from your offence whereby you intended to kill members of the general public by acting as a suicide bomber, that you present a high level of risk.
>
> The DDC noted information in your High Risk review from which it could be inferred that you continue to adhere to your interpretation of the Islamic faith and was content that it was reasonable to conclude that this risk remains.
>
> Additionally having examined your High Escape Risk review document the DDC considers it reasonable to infer from the nature of your offence that you have links to a terrorist network.
>
> As the circumstances described above satisfy the provisions stipulated in PSI 08/2013 and given a lack of evidence that you have demonstrated a reduction of your risk via a process of positive self-change [27], it was the DDC's decision that you should remain classified as High Escape Risk at this time."

30. In my judgment this explains the basic reasoning behind the Director's decision (although whether it is enough as a matter of law is one of the issues in this application). The terrorist links and the ideological commitment demonstrated by the original offence establish a risk of escape and a willingness to take advantage of escape opportunity; and there is a lack of evidence to justify the conclusion that the claimant has taken steps to sever those links or has otherwise changed his attitudes and weakened his ideological commitment.

Letter before action of 8 August.

31. This determination led to a letter before action in which the solicitors acting for the claimant sent in very detailed submissions including additional material about the claimant. It was submitted that relevant information which ought to have been provided to the Director in the submission was not given to him, including up to date prison information about the claimant's behaviour, police and security assessments, and information about the reliability of the intelligence reports. The claimant says that had these matters been considered, it would have been plain that the applicant had made considerable efforts positively to change his beliefs and attitudes.

32. Particular emphasis was placed on the fact that the claimant had successfully completed courses of various kinds whilst in prison. These included: educational programmes including three Islamic courses; the Sycamore Restorative Justice Programme, which addresses general issues relating to the impact of offending on victims; the Thinking Skills Programme, an accredited cognitive skills programme; a Motivation and Engagement intervention specifically designed for prisoners convicted of extremist offending; and, perhaps most relevantly, the claimant had voluntarily undertaken the ERG 22+ risk assessment which is a set of structured guidelines for assessing the risk of extremist offenders. This assessment was carried out in September 2012 by a psychologist, Ms Fiona Mulloy. She produced a report in March 2013 in which she recognised that the claimant had made real progress, commenting that "he no longer believes that people should be killed for the "greater good", nor believes that violence is a "means to an end."" However, she remained concerned about certain matters. For example, she noted that the claimant had not engaged in risk reduction work relating to his specific offence; and she noted also that he sought to place some distance between his offending and the present day, observing that "whilst this is a natural and understandable coping mechanism, it may act as a barrier to Mr Khatib being more open to fully exploring his vulnerability factors and therefore safeguarding against them." These concerns were also identified in a later report in April 2014.

33. The claimant also relied on the observations of an imam who commented that the claimant had matured significantly and was a very different person from the one who had first come to prison.

34. It was submitted that these positive reports were particularly important given that the critical issue was whether the attitudes and beliefs of the claimant had changed.

35. The claimant's solicitors also submitted that the decision should not have been taken without first obtaining a police security report. The letter then set out in greater detail than the applicant's own original submissions why he took issue with

the intelligence relied upon. It was asserted that a proper investigation of the intelligence material would support the claimant's answers to the criticisms made of him.

36. This letter led to a reconsideration of the original decision in accordance with rule 3.28. This requires the Category A team to act as a filter, only allowing the case to go back to the Director if the new information "could materially alter his decision. " The Category A team did not accept that the fresh material identified could cause the Director to downgrade the risk and therefore the matter was not referred back to him. Unlike the original decision, however, there was a recognition that some encouraging steps had been taken towards meeting the concerns about his escape risk, but not enough. The critical part of the letter is as follows:

> "The category A Team noted your office had now submitted post decision representations in relation to your client's high risk review expressing concerns that reasonable enquiries were not made to ascertain and consider all relevant material. The Category A Team noted that your office had sent documents and certificates outlining the sustained efforts made by your client to reduce his risk, and the submissions drew attention the courses completed to reduce his risk.
>
> However, the Category A Team can confirm that your client's security category was reviewed on 6 August 2014 in which he was represented by Tuckers solicitors, which had also submitted representations detailing the efforts made by your client to reduce his risk. In addition, it is also noted that correspondence had been received from Tuckers solicitors in relation to his high risk review and the intention to submit representations.
>
> His decision letter dated 6 August 2014 noted that the LAP had highlighted concerns that your client had been subject to a number of security intelligence reports including inappropriate remarks and attitudes relating to his offending. The decision recognised that it was encouraging that your client had engaged in the sentence planning process and a number of faith based and risk relevant intervention work, but had yet to engage in the breadth and intensity of work specifically targeted to his risk related extremist offending. The decision concluded that your client made some progress in reflecting on his beliefs and attitudes and the next stage was to explore and address the factors most directly related and strongly linked with the index offence. It was concluded that your client had not at this time made the level of personal change that was indicative of a significant reduction in risk related to his serious terrorist offending."

37. The reference to the letter of 6 August is to a separate security decision which confirmed that the security classification should remain category A. It included the following observation:

> "The Category A Team noted that you had started on the process of personal change but you had not at this time made the level of change that was indicative of a significant reduction in risk in related to your

> serious terrorist offending and you had had yet to undertake any in depth offence specific intervention work.
> Having regard to the serious nature of the present offence which evidenced a propensity to commit serious terrorist offences and the lack of any cogent evidence at present, through offence related work or otherwise that the risk of you re-offending in a similar way if unlawfully at large had significantly diminished, the Category A Team concluded that you must still be regarded as potentially highly dangerous to the public, police and the security of the state."

The grounds of appeal.

38. The grounds now advanced largely reflect the submissions made by the claimant's lawyers which led to the rule 3.28 reconsideration.

Applying the wrong test.

39. First, it is submitted that the 11 August decision demonstrates a clear confusion between the security test and the high escape risk test. The letter refers to an "intrinsic link" between the two. Mr Desai concedes that there will inevitably be an overlap in the factors connected with a particular offence which go to risk of escape and those which go to the consequences of an escape. That is made plain in the *Abdullah* decision. As the court pointed out in that case (paras. 41-42), the fact that the crime involves like minded terrorists who are part of, or supporters of, an international community like Al Qaeda may readily justify the inference that the defendant has access to associates who may assist in seeking to bring about his escape and have the resources to do so; and where the offence demonstrates a strong ideological commitment, it may further be inferred, absent any change in beliefs, that the prisoner will be only too willing to take advantage of an escape opportunity should it arise.

40. Nonetheless, Mr Desai says that it is an error to describe the link as "intrinsic" because it suggests that the tests are very closely interlinked whereas they are focusing on different risks. Furthermore, by relying on the outcome and reasoning of the security classification decision of 6 August, the inference that the category A team applied the wrong test is reinforced.

41. I understand why there is some dissatisfaction with the way in which the 11 August decision was framed. Read on its own it might well be thought to have confused the two tests. It uses the word "risk" without clearly indicating whether it meant the risk of serious future offending - the test for the security category – or the risk of escape.

42. However, there are two reasons why I would reject this ground. First, and fundamentally, the decision of 11 August does not change the original determination. It was not a fresh reconsideration by the Director; rather it was a rule 3.28 determination by the Category A group concluding that such a reconsideration was not warranted. Strictly, therefore, the decision which actually fixed the escape risk classification is the 30 May decision and it is not now suggested that the

confusion between security and risk classifications is demonstrated in that letter. I do not think that it is legitimate to cast doubt on the reasoning expressed in that earlier letter by relying on a subsequent decision which expressly does not seek to change it. Accordingly, I do not accept that any error in the 11 August letter would invalidate the 30 May decision which actually confirmed the relevant classification. At best it would only invalidate the 11 August rule 3.28 determination itself.

43. Second, it is accepted that the decision letter should be read fairly and as a whole: *Abdullah* para.46. In my view that principle requires, in the context of these decisions, that the 11 August letter should be read in the light of the 30 May determination with which it is linked. When read in that context, I do not think that this ground can be sustained. In my view the 11 August decision is reasonably capable of being read consistently with the right test being applied. I do not think it would be right to assume that a fundamental misunderstanding of the requisite test was introduced between the first and second decisions.

44. Furthermore, I do not accept that the reference back to the 6 August decision in the 11 August letter demonstrates the confusion relied upon; indeed, if anything it suggests to the contrary. Relevant factors potentially capable of establishing the risk of escape are the continuation of terrorist links and the propensity of the prisoner to take advantage of an escape opportunity should it present itself. If there is insufficient evidence to show that the prisoner no longer remains ideologically committed to the cause, so that the position is left in doubt, it is legitimate to infer a continuing escape risk - or, to use the language of rule 2.8, that the enhanced escape potential remains valid. It is true that such continuing ideological commitment to terrorist activity will also enhance the risk that he will commit further offences if he does escape, but that is not its only significance. The reference to the 6 August decision was a shorthand way of identifying these features which were as material to the risk assessment as to the security classification. Although the 11 August letter might have made this point more clearly than it did, in my view that is the thrust of the decision when read in context and it does not display an error of law.

45. I would add, however, that I do not find it helpful to have, as one of the factors which may justify a high escape risk, the nature of the current /previous offending. Plainly that offending may be relevant to escape risk in the ways indicated. However to identify the factor in that way simply conceals why that offending may be relevant to the escape risk. It may be because it shows links to terrorist networks, or it may show access to resources and associates who may assist in an escape attempt. But both these factors are already specially identified as potentially relevant matters and it is not helpful, and would in my view be illegitimate, to use what is essentially the same factor twice. If the nature of the offending reveals some other factor relevant to the risk of escape, such as propensity to escape if the opportunity arises, that factor may well justify or help to justify a high escape risk assessment, but it should then be specifically identified and not subsumed under the generic heading of the nature of the offending. When so expressed it understandably raises the concern that the risk of escape has been confused with the risk of further dangerous offending if there is an escape. I think it would be desirable to remove this heading altogether from the list of factors justifying a high risk status whilst indicating that it will often be legitimate to infer from the nature of the offending the presence of factors which enhance that risk.

Failure to have regard to all material considerations and make reasonable inquires.

46. There are a number of matters which it is alleged should have been put before the DDC because they were potentially material to the escape risk assessment. In addition, the claimant submits that inaccurate material was presented to the Director in the form of intelligence reports which were in fact false and which, with a modicum of proper investigation, could have been corrected and fairly presented. These submissions raise the question how far the courts can legitimately review the decision of the Category A team as to what material should be drawn to the Director's attention; and to what extent the courts can legitimately require further investigation of disputed material before it is submitted to the Director.

47. The starting point for this analysis is rule 3.13 which requires the submission to the Director to include "all relevant information." Rule 3.15 emphasises the corollary, namely that the submission should not include irrelevant information.

48. We were taken to a number of authorities bearing upon the appropriate principles to be applied in a case of this nature. I would summarise them as follows:

49. First, in a case like this where the decision-maker relies upon a briefing prepared by others, the decision maker need not be told everything which has some potential relevance, however marginal; it is enough that he be given "the salient facts which give shape and substance to the matter, the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered": per Brennan J in the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. (1986) 162 CLR 24,30-3 cited with approval by Sedley and Keene LJJ in *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, paras. 60-64. The latter was a case where a minister was briefed by his civil servants. The purpose of the briefing is to enable the decision maker to make an informed judgment.

50. Second – and this seems to me to be a corollary of the first principle - a decision will be invalidated for failing to take into account a relevant consideration only if it is one which the decision maker was obliged to consider (and therefore which had to be drawn to his attention in any briefing). This is supported by the following observation of Lord Scarman giving judgment in *Findlay v Secretary of State for the Home Department* [1984] 3 All E R 801, 826-827 relying on certain observations of Cooke J giving judgment in a New Zealand case:

> [Counsel] prayed in aid some observations of Cooke J. in the New Zealand case of CREEDNZ Inc. v. Governor General [1981] 1 N.Z.L.R. 172 .
>
> The facts of that case bear no resemblance to this case. But the judge did consider the question of the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of certain matters. The judge said, at p. 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."
>
> These words certainly do not support Mr. Sedley's submission. But, and it is this upon which Mr. Sedley has to found his argument, the judge in a later passage at p. 183, line 33, did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act."
>
> These two passages are, in my view, a correct statement of principle."

51. Third, unless the relevant rules indicate to the contrary, it is for the decision maker to decide, subject to Wednesbury principles, what information is relevant and what is not. This point was emphasised by Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 27, a case where the issue was whether someone being housed by a local authority in accordance with its statutory duty should be entitled to view the property before being required to accept or reject it. The Court of Appeal held that it was legitimate to have a rule denying the applicant this opportunity. Laws LJ said this, immediately after referring to the *Findlay* case set out above (para.35):

> In my judgment the CREEDNZ Inc case (via the decision in In re *Findlay*) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to Wednesbury review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such. This view is I think supported by the judgment of Schiemann J in *R v Nottingham City Council, Ex p Costello (1989) 21 HLR 301* , to which Mr Luba referred us. That case concerned the degree of inquiry which an authority was obliged to undertake into issues of priority need and intentional homelessness. Schiemann J said, at p 309:

> "In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient."
>
> This approach is lent authoritative support by the decision of this court in *R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani (1990) 22 HLR 406* , which was concerned with the authority's duty of inquiry in a homelessness case. Neill LJ said, at p 415:
>
> > "The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the inquiries made."

52. Fourth, as that passage from the judgment of Laws LJ makes clear, it is for the decision maker, again subject to Wednesbury criteria, to decide how extensive any inquiry into disputed facts should be.

53. Fifth, in applying these principles the decision maker or those briefing him, when determining what is potentially relevant, has to have regard to the nature of the decision in issue; and where it adversely impinges on the rights and liberties of individuals he must have regard to the need to ensure that matters potentially favouring the individual are fairly summarised to the decision maker or considered by him, as the case may be. As the Divisional Court held in *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) para.73, in a case which concerned the decision by the Secretary of State to refuse a terrorist prisoner parole, contrary to the recommendation of the parole board:

> "…fairness required that his officials put the issues to him in a balanced way so he could arrive at a decision that had a rational basis…..He could not rely, if he was to follow what a fair procedure dictated, upon a document which set out only the case for rejection of the panel's decision."

54. There are three matters in particular which the claimant says ought to have been included in the submission provided for the DDC but were in fact excluded. First, there was the evidence of the constructive way in which the claimant had spent his time in prison. These included the educational and other courses which he had completed. In particular, reliance is placed upon the positive reports from the psychologist and the Imam to the effect that the claimant was maturing and had taken some positive steps to distance himself from his former unsparing commitment to the terrorist cause. Mr Desai submits that it was particularly important to draw this to the Director's attention given that in a case like this, where the nature of the escape risk is to be inferred from the nature of the offending, it is only if the prisoner can demonstrate positive evidence of a change in his ideological

stance, his attitudes and beliefs, that he can hope to have a determination in his favour. Here there was no attempt to bring before the DDC the positive reports which were capable of giving a different slant on the current attitudes of the claimant.

55. The second omission was the failure to inform the DDC of the "5 times 5" reliability assessment of the intelligence reports which would have enabled him better to evaluate the weight to be given to the prison intelligence. The third was the failure to obtain a police security report which, it was suggested, may have cast light on the extent, if at all, to which the claimant's former terrorist links were still in place.

56. I have no doubt that the information relating to the work the claimant had done in prison, and the reports in his favour, were relevant matters which should have been summarised in the submissions to the DDC. This was not information which, in his discretion, the author of the report could properly omit to mention. It was not good enough for the original submission to focus only on the features from intelligence reports which cast doubt on whether the claimant had changed his attitudes; that reflects the error identified in the *Hindawi* case. Where the burden is on the prisoner to show a change of heart, it is particularly important that there should be a fair representation of the features of the case which point in his favour. That is what fairness requires, and what a properly informed DDC should be told. It is not for the author of the report to take the view that these matters are unlikely ultimately to be persuasive. That is to usurp the function of the decision maker. Moreover, if there is a gradual change in attitudes, it will necessarily take place over a period. It is important that any such change is reflected in the reports, even if at any one stage the change is not sufficiently substantial to overcome the concern that terrorist links and/or ideological commitment remain.

57. The way in which the two decisions of 30 May and 11 August are framed points up the potential impact of this material. In the former the decision stated that there was a "lack of evidence that you have demonstrated a reduction of your risk via a process of positive self-change". By contrast, the later letter, by reference to the security decision of 6 August, was much more nuanced and recognised that improvements had been made:

> "…. your client made some progress in reflecting on his beliefs and attitudes and the next stage was to explore and address the factors most directly related and strongly linked with the index offence. It was concluded that your client had not at this time made the level of personal change that was indicative of a significant reduction in risk related to his serious terrorist offending."

58. It seems to me that the latter is a much more balanced assessment. The claimant may still be unhappy with the outcome, but there has at least been a proper recognition of certain factors in his favour which demonstrate a shift in attitude in a positive direction and give him some hope that his current high escape risk classification is not set in stone.

59. I recognise that the claimant had the opportunity to make representations about the original submission. But in my judgment that is no answer to the contention that the submission was unfair. First, the prisoner might not have seen all the material which is available to the category A team. Second, it is the duty of the category A team to ensure that a fair and balanced report is placed before the DDC; that obligation is not in my view discharged by assuming that the prisoner - no doubt often unrepresented at this stage - will provide any corrective which may be required.

60. Had there been no consideration at all of this material, the 30 May decision would in my view have been so flawed as to justify quashing the original decision. But in fact all this material was later drawn to the attention of the Category A team in the very detailed submissions from the claimant's solicitors. The 11 August decision, made pursuant to rule 3.28, said that the representations had been taken into account, and there is no reason to doubt that they had been. Indeed, in my view the terms of the 11 August letter show that they had and recognised that they demonstrated some change in attitude. For reasons I set out below, I consider that the Category A team was entitled to conclude that the additional information would not materially have affected the decision to confirm the high risk classification. Accordingly, I would not on this ground quash that determination.

61. The second major area where it is alleged that the author of the report failed in his duty was the omission to obtain any police report. It is suggested that this might have revealed, for example, that any terrorist links of the kind relied upon here had over time been severed. This, submits the claimant, is a particularly important obligation in a case such as this where the inference of escape risk is inferred from the circumstances of the original offending which may have occurrred many years before, as indeed in this case.

62. I do not accept this submission. Rule 3.14 provides that it is for the author of the submission to determine whether or not to obtain such a report. Mr Freed said in his witness statement that there was rarely any specific evidence about a prisoner's terrorist links once he had been convicted; and in any event there was evidence of continuing links with persons of a similar ideological persuasion from the intelligence reports. I accept that these were cogent reasons why it was not thought appropriate to obtain a report. No doubt there may be circumstances where such evidence should be obtained. Perhaps, for example, the links of the prisoner were with a particular criminal gang which no longer operates and whose leaders are themselves in prison. But in a case where the prison intelligence suggests certain on-going links with like minded ideologically committed individuals, it cannot be an error of law to assume that the potential risk of support remains without first seeing if there is any relevant police information. Even if, as experience suggests would have been the case, any police intelligence had been negative, it would not have undermined the prison intelligence which was the primary basis for confirming the high risk assessment.

63. The third area of complaint is that the DDC was not given the 5 times 5 coding system which would have enabled him to make a proper assessment of the weight to be given to the intelligence information. It is certainly desirable that this information should be provided, and apparently it now is as a matter of course. But I do not accept that this omission is a material error. First, as Mr Freed has made clear, in fact the matters were reliable and so the additional material would not have

cast any real doubt upon it. Second, as I indicate below, there was much in the material provided which was not in substance disputed and which of itself raised sufficient concerns to justify maintaining the high risk classification.

64. The fourth area raised queries not so much about what had not been disclosed but about whether the intelligence information had been adequately and fairly communicated to the DDC. The concern is in particular that the impression given from this material was that the claimant was still voluntarily communicating with those connected with terrorist offences, whereas it is submitted that a fair analysis of the detail of the communications would have shown that the intelligence was unfair and exaggerated. It is alleged that contrary to the information provided, the contact with TACT prisoners was innocent, incidental and minimal; that communications from the Muslim community group Sanabil were no more than unsolicited news letters of an anodyne nature; and that there had been no refusal to attend Friday prayers unless the Imam was removed. The submission had suggested that the mere fact of these contacts justified the assumption that the claimant had still not severed links with his past whereas that was not a proper or fair inference when the nature and extent of these contacts was fully considered.

65. Furthermore, the assertion that he had been involved in an attack on another prisoner was also false and that would have been obvious with a relatively minor investigation of the prison material. He was not, for example, punished for any involvement in the attack.

66. The force of these submissions is to some extent undermined by the fact that the claimant was able to, and did, respond to each of these intelligence reports. The DDC knew what the claimant was saying by way of response to these reports. Moreover, as Mr Lask, counsel for the respondent, points out, the claimant did not deny that he did communicate with someone who was in fact a radical Islamist cleric, Abu Hamza, and he did not deny that he held him in high regard. This was important irrespective of the details of the communication. Similarly prison intelligence was that the community group with whom he was in contact sent correspondence and finances to TACT prisoners and their close associates only. He had not sought to distance himself from this organisation; and by his own admission he had contact in prison with other TACT prisoners. The respondent submits that this was sufficient information to justify the conclusion that the claimant had not yet adequately demonstrated the necessary shift from the ideological attitudes which had infused and caused his offending.

67. I see some force in the claimant's submission that more might have been done to inquire further into these intelligence reports, but in the end I would reject it. The position adopted by the author of the report or the DDC on receipt of it, was not so unreasonable as to constitute an error of law. It cannot be necessary for the decision maker to make specific findings with respect to each and every disputed intelligence report; that would be an onerous and often unnecessary exercise turning every incident into a state trial. It would I believe have been useful for the author of the submission to have indicated briefly whether there might be some merit in the prisoner's response, or part of it, even if no formal resolution of any dispute was made. But I do not think that the failure to do that is an error of law sufficient to invalidate the decision. That is not to say that further inquiries into disputed intelligence material is never required. I would accept that there may be

circumstances where the evidence showing a change of attitude is so strong and the opposing factors revealed from prison intelligence are so limited and controversial that it would be unfair not to investigate them carefully before reaching a final decision on escape risk adverse to the prisoner. But here there was enough material of an undisputed nature to justify the inference that not enough had yet been done to remove concerns about the prisoner's attitudes and commitments.

68. In that context it is pertinent to note that the psychologist, on whose assessment the claimant relies, accepted in May 2013 that the claimant had written a letter to a governor of another prison, admittedly in wholly appropriate terms, concerning the treatment of another radical prisoner holding extremist views. She opined that ongoing links with such high profile peers could act as a destabiliser. In addition, as I have pointed out, she had other concerns about whether there had yet been a strong enough change in attitude and beliefs. So even this report was far from unequivocally positive.

Inadequate reasons.

69. It is well established that the extent to which a decision maker must give reasons will depend upon the nature of the decision. As Lord Brown put it in *South Bucks District Council v Porter (no. 2)* [2004] UKHL 33/ [2004] 1 WLR 1953, "the degree of particularity required [depends] entirely on the nature of the issues falling for decision. " He added that the reasons must enable the reader to understand why the matter was decided as it was.

70. In my judgment the letter of 30 May indicated in essence why the DDC had confirmed the high risk category: see paragraph 30 above. It was arguably unjust to the applicant in that it did not give credit for such personal change as had been made; but the reasoning was clear and that failing was corrected in the 11 August letter. The claimant may consider that the inference that he remained a high escape risk was not justified from the evidence, or at least would not have been justified had that evidence been fairly assessed. But he cannot, it seems to me, fairly say that he does not know why his high escape risk status is being maintained.

71. It is true that the decision did not state precisely which pieces of intelligence the DDC considered to be of particular importance; nor did it indicate the extent – if at all – to which the representations of the claimant had in the eyes of the DDC diluted the force of that intelligence. The claimant submits that this was failing to provide reasons for the principal controversial issues in dispute, which Lord Brown had indicated should be provided, at least in a planning context. I do not agree. The principal issues here were whether the claimant had, and may continue to have, terrorist links and/or an ideological commitment to the terrorist cause. There was a perfectly adequate explanation of the reasoning with respect to these matters. Since in the circumstances I do not consider that it was necessary for the DDC to make findings on the disputed intelligence material, it was not necessary to say anything more about it. Again, it may have been helpful if the DDC had said that he did not need to resolve these matters, if that was indeed his view, but the failure to do that does not in my judgment mean that the reasoning is inadequate.

Conclusion.

72. In my view there was a failure fairly to present the material to the DDC in the original submission. That in my view tainted the decision of 30 May. Thereafter the 11 August decision was not a full reconsideration; rather it was a decision taken in accordance with rule 3.28 that a full reconsideration was not appropriate because the new material could not have affected the original decision. I take this to mean that it could not have made a difference to the original decision, possibly causing the DDC to change his mind and reduce the high escape risk classification.

73. I have no doubt that this was a correct conclusion. As I have said, even having regard to the positive elements of the claimant's case such as the psychology report, the material fell well short of demonstrating the change in attitude necessary to justify the conclusion that the risk of escape had been effectively eliminated. It would be a pointless exercise to remit the matter for a fresh consideration, particularly given that the 11 August decision has recognised that there has been some positive movement in the claimant's attitudes.

74. At the same time I do not think it would be appropriate simply to dismiss the application for judicial review entirely. There was substantial merit in the contention that the original submission was inadequate and failed to provide the DDC with a fair assessment of the relevant material. The fact that the relevant material which was omitted from the submission would not have been determinative is in my view irrelevant. That may be a justification for concluding that the Category A team were entitled to exercise the power under rule 3.28 not to remit the matter to the DDC for the decision to be retaken. But the result is that in fact there never was a proper analysis by the DDC reaching a conclusion on the basis of a proper and fair brief.

75. For this reason in my view it would be appropriate to declare that the original submission presented to the DDC, and on which his 30 May decision was based was defective and failed fairly to reflect the relevant material. But I would not quash the decision. I appreciate that this is an unusual outcome, and the court will only in the clearest of cases find that a decision which is defective because a relevant matter has not been properly considered should nonetheless be allowed to stand. This in my view is such an exceptional case, not least because there has been a reconsideration of sorts pursuant to the rule 3.28 procedure, albeit not leading to the decision being retaken by the original decision maker.

76. I would therefore uphold the judicial review to the limited extent of granting a declaration in these terms:

> "The submission sent to the DDC and which formed the basis of the 30 May decision did not include all relevant information as required by rule 3.13 of PSI 08/2013 and it failed fairly to identify material supporting the claimant's case."

77. To that limited extent, I would uphold this judicial review application.

Simon J:

78. I agree. What in my judgment was required was a fair presentation of facts which the decision-maker might regard as relevant. It is not an onerous obligation nor such as to require elaboration. However, I agree that the appropriate relief should be that which is proposed by Elias LJ for the reasons he has given.