NEUTRAL CITATION NUMBER: [2019] EWHC 2862 (Admin)

IN THE LEEDS ADMINISTRATIVE COURT

Case No: CO/5225/2018

Courtroom No. 17

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

3.15pm – 4.37pm
Friday, 20th September 2019

Before:
HIS HONOUR JUDGE KRAMER SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N:

THE QUEEN ON THE APPLICATION OF ROYAL

and

SECRETARY OF STATE FOR JUSTICE

MISS WALKER appeared on behalf of the Claimant
MISS WARD appeared on behalf of the Defendant

JUDGMENT
(Approved)

HHJ KRAMER:

1. The claimant is a prisoner currently serving a life sentence at Wakefield Prison. He challenges the decision, taken on behalf of the defendant, by the Deputy Director of Custody High Security, not to downgrade his security category from A to B and to refuse his request to hold an oral hearing before making that decision.
2. Permission to proceed with this claim was given by His Honour Judge Saffman, on 2 April 2019. The claimant is represented by Miss Walker and the defendant Miss Ward, both of counsel. I have to say that I am indebted to both of them for their helpful exposition on the law and their succinct submissions.
3. The background is that on 26 July 1996, the claimant was convicted, on his pleas of guilty, to various counts, including three counts of rape, for which he received a life sentence with a minimum tariff of 10 years and several other offences of burglary and indecent assault for which he was sentenced, in each case, to six years concurrent. The sexual offences included breaking into the homes of sleeping women, who were attacked, and also attacking women whom he had followed in the street. The minimum tariff period expired on or before 25 July 2007.
4. The claimant has been designated a Category A prisoner throughout his sentence. Categorisation is reviewed periodically, generally on an annual basis. The last review of which I am aware, was completed on 21 August 2018. It is in relation to that the review that the challenge is made.

Dealing with the law as to security categorisation

5. Security categorisation is part of the respondent's management function in relation to prisoners. The instructions and guidelines for the procedure of review are set out in Prison Service Instruction (PSI) 08/2013. The relevant parts of the instruction are as follows:

> '2.1. A Category A prisoner is a prisoner 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 an escape impossible.
>
> 2.3. The Deputy Director of Custody (DDC), High Security, is responsible for the categorisation of allocation of Category A prisoners. The DCC High Security may delegate decisions as deemed appropriate in accordance with the provision of this instruction.
>
> 2.4
>
> • **Confirmed Category A**: these are prisoners held in a high security prison that have been deemed to be Category A at first formal review (usually following conviction and sentencing).
>
> 4.1 Each prisoner confirmed as Category A, at a first formal review, will normally have their security category reviewed two years later, and thereafter annually on the basis of progress reports from the prison. These annual reviews entail consideration by a local advisory panel (LAP) within the establishment, which submits a recommendation about security category to the Category A Team. If the LAP recommends continuation of Category A, and this is agreed by the Category A Team, then the annual review may be completed by the Category A Team without referral to the DDC High Security (unless the DDC has not reviewed the case for 5 years, in which case it will be automatically referred). The DDC High Security (or

delegated authority) will remain solely responsible for approving the downgrading of a confirmed Category A prisoner, following consideration at the Deputy Director's panel'.

This is important:

'4.2 Before approving a confirmed Category A prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of re-offending, if unlawfully at large, has significantly reduced, such as evidence that shows the prisoner has significantly changed their attitudes towards their offending or has developed skills to help prevent similar offending.

4.14 Prison staff must prepare the reports for the prisoner's annual review at the relevant time. A copy of the annual review report forms is enclosed at Annex B (an annex to the Rules).

4.15 The completed reports must be disclosed to the prisoner at least four weeks prior to the prison's LAP to allow representations to be submitted. Taking both the reports and any representations into account, the LAP must in turn make a recommendation to the Category A Team on the prisoner's continued suitability for Category A.

4.20 The review of a prisoner's category A status is an open one and the prisoner must be able to understand why he/she has been placed in a particular category. The reports must be disclosed to allow the prisoner to submit informed representations to the prison's LAP. The prisoner must be allowed four weeks to submit representations, although an extension may be granted at the prison's discretion if requested.

4.22 The LAP must consider the prisoner's reports and any representations after the period of disclosure.

4.23 It is unnecessary for individual report-writers to attend. It is also unnecessary for prisoners or their representatives to attend, as they have the appropriate opportunity to submit written representations to the LAP.

4.24 The LAP must recommend whether the prisoner should remain Category A status and record this recommendation on section 6 of the reports using the guidance provided.

4.26 On receipt from the prison, the Category A Team will consider the prisoner's reports, any representations submitted by the prisoner to the LAP, and the LAP's recommendation, and either complete the review or forward the case to the DDC High Security. It will also take into account or forward to the DDC High Security any representations received following the prison LAP's consideration.

4.27 In cases where the Category A Team supports a recommendation from the LAP that the prisoner should remain Category A it will normally complete

the review without reference to the DDC High Security and within four weeks of receipt of the reports send the prisoner a notification of the decision confirming that the prisoner should remain Category A.

4.29 The Category A Team may alternatively refer a case to the DDC High Security and the next available monthly Category A panel if:

- the LAP or Category A Team recommends the prisoner should be downgraded;
- the DDC High Security has made a special request at the previous review that the case should be referred to the DDC High Security;
- the DDC High Security has not reviewed the prisoner's case for five years'.

6. Thus far, what I have read, is a paper procedure. However, there is provision for the prisoner to have an oral hearing. This is dealt with under 4.6. This provides:

'4.6 The DDC High Security may grant an oral hearing of a Category A/Restricted Status prisoner's annual review. This will allow the prisoner or the prisoner's representatives to submit their representations verbally'.

It goes on:

'In the light of the clarification by the Supreme Court in *Osborn, Booth, Reilly* of the principles applicable to determining whether an oral hearing should be held in the Parole Board context, the Courts have consistently recognised that the Category A Review Team (CART) context is significantly different to the Parole Board context. In practical terms, those differences have led to the position in which oral hearings in the CART context have only very rarely been held. The differences remain; and continue to be important. However, this policy recognises that the *Osborn* principles are likely to be relevant in many cases in the CART context. The result will be that there will be more decisions to hold oral hearings than has been the position in the past. In these circumstances, this policy is intended to give guidance to those who have to take oral hearing decisions in the CART context. Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing. The process is of course not a mathematical one; but the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed. Three overarching points are to be made at the outset:

- **First**, each case must be considered on its own particular facts – all of which should be weighed in making the oral hearing decision.

- **Secondly**, it is important that the oral hearing decision is approached in a balanced and appropriate way. The Supreme Court emphasised in *Osborn* that decision makers must approach, and be seen to approach, the decision with an open mind; must be alive to the potential, real advantage of a hearing both in aiding decision making and in recognition of the importance of the issues to the prisoner; should be aware that costs are not a conclusive argument against the

holding of oral hearings; and should not make the grant of an oral hearing dependent on the prospects of success of a downgrade in categorisation.

- **Thirdly**, the oral hearing decision is not necessarily an all or nothing decision. In particular, there is scope for a flexible approach as to the issues on which an oral hearing might be appropriate'.

7. It then goes on to identify, at 4.7, factors which would tend to favour an oral hearing being appropriate. One of the challenges to the decision is that 4.7 has not been properly applied. The factors identified are:

'a. Where important facts are in dispute. Facts are likely to be important if they go directly to the issue of risk. Even if important, it will be necessary to consider whether the dispute would be more appropriately resolved at a hearing. For example, where a significant explanation or mitigation is advanced which depends upon the credibility of the prisoner, it may assist to have a hearing at which the prisoner (and/or others) can give his (or their) version of events.

b. Where there is a significant dispute on the expert materials. These will need to be considered with care in order to ascertain whether there is a real and live dispute on particular points of real importance to the decision. If so, a hearing might well be of assistance to deal with them. Examples of situations in which this factor will be squarely in play are where the LAP, in combination with an independent psychologist, takes the view that downgrade is justified; or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds. More broadly, where the Parole Board, particularly following an oral hearing of its own, has expressed strongly-worded and positive views about a prisoner's risk levels, it may be appropriate to explore at a hearing what impact that should or might have on categorisation.

It is emphasised again that oral hearings are not all or nothing – it may be appropriate to have a short hearing targeted at the really significant points in issue.

c. Where the lengths of time involved in a case are significant and/or the prisoner is post-tariff. It does not follow that just because a prisoner has been Category A for a significant time or is post-tariff that an oral hearing would be appropriate. However, the longer the period as Category A, the more carefully the case will need to be looked at to see if the categorisation continues to remain justified. It may also be that much more difficult to make a judgement about the extent to which they have developed over the period since their conviction based on an examination of the papers alone.

The same applies where the prisoner is post-tariff, with the result that continued detention is justified on grounds of risk; and all the more so if he has spent a long time in prison post-tariff. There may be real advantage in such cases in seeing the prisoner face-to-face.

Where there is an impasse which has existed for some time, for whatever reason, it may be helpful to have a hearing in order to explore the case and seek to understand the reasons for, and the potential solutions to, the impasse.

d. Where the prisoner has never had an oral hearing before; or has not had one for a prolonged period'.

That is the Prison Service Instruction under which the prison was operating in the case of Mr Royal.

8. The reference in the instruction to *Osborn* is to the case of *Booth & Osborn v The Parole Board* [2014] 3WLR 1020. As the name of the case suggests, that was a case concerning the procedures of the Parole Board. The Supreme Court held, in that case, that in order to comply with common law standards of procedural fairness, and to act compatibly with Article 5(4) of the European Convention on Human Rights, the Board was required to hold an oral hearing before determining an application for release, transfer to open conditions, or whenever fairness to the prisoner required it in the light of the facts of the case and the importance of the issues at stake. The court set out a non-exhaustive list of circumstances in which an oral hearing would be necessary, many of which are reflected in paragraph 4.7 of the PSI.

9. In the case *Hassett & Anor (on the Application of) v Secretary of State for Justice* [2017] 1WLR 4750, the Court of Appeal considered two cases in which prisoners sought judicial review of decisions to maintain their Category A status without affording them an oral hearing. As part of their argument, they attacked the lawfulness of paragraph 4.7 on the grounds that it did not reflect the Supreme Court's guidance in *Osborn*. The Court of Appeal rejected that argument holding that *Osborn's* case was fashioned in a manner specific to the context in which the Parole Board operated whereas CART/Director operated in a different context (see *Hassett* paragraph 56).

10. The differences in the context of which the Parole Board operates and in which the Prison Service operates when looking at categorisation were set out at paragraph 51 of the Judgment. Where, in giving a judgment of the court, Lord Justice Sales, as he then was, said:

'51. Although the CART/Director and the Parole Board all make decisions which have significant effects upon prisoners and their prospects for release, there are material distinctions between the CART/Director and the Parole Board in relation to each aspect of the inquiring regarding the requirements of fairness identified by Lord Bridge:

i). As noted above, the Parole Board has been established as a judicial body independent of the Secretary of State and the prisons management organisation. The requirements of fairness to be observed by an independent judicial body adjudicating on aspects of the right to liberty are high, having regard to the need to promote confidence in the independence and impartiality of the judicial adjudicative process. On the other hand, the CART/Director are officials of the Secretary of State carrying out management functions in relation to prisons, whose main task is the administrative one of ensuring that prisons operate effectively as places of detention for the

purposes of punishment and protection of the public. In addition to bringing to bear their operational expertise in running the security categorisation system, they will have other management functions which mean that in striking a fair balance between the public interest and the individual interests of prisoners, it is reasonable to limit to some degree how elaborate the procedures need to be as a matter of fairness for their decision-making. Moreover, in relation to their decision-making, which is part of an overall system operated by the Secretary of State and is not separate from that system, it is appropriate to take account of the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering processes within the system as a whole. So, for example, in the present cases it is a relevant factor that both Mr Hassett and Mr Price have had extensive discussions with and opportunities to impress a range of officials of the Secretary of State, including significant contact with prison psychology service teams. The decision-making by the CART/Director is the internal management end-point of an elaborate internal process of gathering information about and interviewing a prisoner, whereas the Parole Board has to make its own decision independent of the prison management system.

ii) The kind of decision to be made by the Parole Board is different from the kind of decision to be made by the CART/Director: (a) the question which the Parole Board seeks to answer is whether a prisoner can safely be released at an appropriate point in his sentence, in circumstances where there are possibilities for his management in the community to contain and safeguard against the risk he might otherwise pose; this is a highly fact-sensitive question with a number of dimensions, which contrasts with the far starker question which the CART/Director seek to answer, namely what is the risk to the public interest if the prisoner escapes and is at large in society without any prospect of management in the community? (b) the Parole Board is directly engaged with adjudicating on rights in respect of liberty and the question whether the prisoner should now be released, whereas the CART/Director have to focus directly on the question of what security measures should be put in place in relation to the prisoner in the course of managing him while his sentence continues, and the impact on his eventual prospects for release is an indirect side-product of their determination on that issue (see *McAvoy* [1998] 1WLR 790, 799C); and, related to these points, (c) the decisions made by the Parole Board are judicial determinations of rights, whereas those made by the CART/Director are administrative decisions with a particular focus on ensuring the administration of prisons is carried out properly and effectively in the public interest.

iii) Reflecting and giving further emphasis to the points made above, the statutory framework for decision-making by the Parole Board is very different from that for decision-making by the CART/Director. The

> Parole Board is a body set up under statute as an independent judicial body with power to make binding determinations on whether a prisoner is entitled to be released. Moreover, the need for the Parole Board to be established and to function as an independent judicial body is underpinned by the requirements of Article 5(4) of the European Convention on Human Rights and fundamental freedoms as noted in *Osborn*: 'The courts have … been able to take account of [obligations under the Convention] in the development of the common law…Human rights continue to be protected by our domestic law, interpreted and developed in accordance with [the Human Rights Act 1998] when appropriate'). By contrast, the role of the CART/Director in relation to prisoner security classification is laid out by the Secretary of State in Prison Service Instructions and is an aspect of the prison management regime. Article 5(4) does not apply in relation to their decision-making'.

11. The differences of context led the court to say that it rejected the submission that 4.7 was unlawful. After the decision in *Osborn's* case, and before it, there remained material differences between the decision making context of the Parole Board and for the CART/Director. Those differences mean that the procedural requirements are different in the two cases. It also has the effect, as is apparent from paragraph 56 of the judgment, that:

> 'The guidance given by the Supreme Court in Osborn was clearly fashioned in a manner specific to the Parole Board context and factors given particular weight in that context either do not apply at all or with the same force in the context of security categorisation decisions by the CART/Director, because of the differences in context which I have highlighted above. In my view, the guidance given by this court in *Mackay and Downs* regarding when an oral hearing is required before the CART/Director continues to hold good. The cases in which an oral hearing is required will be comparatively rare'.

12. The test that I have to apply, in dealing with the challenge to the decision not to hold a hearing and not to re-categorise are different. It is common ground that the challenge to the refusal of re-categorisation is to be judged by the ordinary Wednesbury principles of irrationality. Where the issue, however, is as to whether there should have been a hearing I have to judge the objective reasonableness of that refusal and ask myself was it objectively fair? That is apparent from paragraphs 65 to 67 of *Osborn*, which is the test which applies where the complaint concerns procedural fairness and it is a test of universal application, not simply applying to the Parole Board. In deciding what is fair, I have to have regard to what is said in *Hassett* as to the context in which the CART/Director decision is taken. That is apparent from paragraphs 60 to 62 of *Hassett*, to which I have been referred to which I refer to now, where it was said, as regards *Osborn*:

> '60. Lord Reed was considering the standards to be expected of the Parole Board as an independent judicial body. Therefore he did not address other reasons why, in striking a fair balance in terms of procedural standards between the public interest and individual interests in the context of decision-making by the CART/Director, it is legitimate to bear in mind that the Director and other officials engaged in the process are not judges required to dedicate their full time and attention to categorisation decision-making, but have wider management responsibilities in running prisons. Lord Reed observes that the Parole Board should guard against any temptation to refuse oral

hearings as a means of saving time, trouble, and expense. However, whilst it is no doubt the case that the CART/Director could not lawfully refuse an oral hearing on these grounds if fairness required one, it is a relevant consideration in assessing whether it does that the courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate diversion of excessive resources to the categorisation review function, away from other management functions'.

Sales LJ then goes on:

> '61. Some of the factors highlighted by Lord Reed will have some application in the context of decision-making by the CART/Director, but will usually have considerably less force in that context. However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/Director, if only in comparatively rare cases. In particular, if in asking the question whether upon escape the prisoner would represent a risk to the public the CART/Director, having read all the reports, were left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact upon him of a decision to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing'.

13. Turning then to the impugned decision and what led to that. A dossier was compiled for the classification review prepared by on or before 14 January 2018 and this is what it contained:
    a. Category A report from a wing officer which, under the heading, concerning behaviours, stated that Mr Royal's behaviour was generally good, but there had been two negative reports in the last year when he had displayed inappropriate concerning behaviour towards a female member of staff. He had signed a compact but did not seem to understand the gravity of the situation. He was not currently involved with the assessment intervention centre apart from being assessed as suitable for the Healthy Sex Programme (HSP). There was a concern that he had not engaged fully because that was a requirement of his sentence plan; that is information from his prison wing.
    b. An assessment of his current risk, dated 6 October 2017, by a trainee forensic psychologist, Helen Lister who in the report stated that she had been in the prison service for many years. That was compiled under the supervision of Lisa Hewitt a senior forensic psychologist. Ms Lister said that there had been no further treatment gains made by Mr Royal during the reporting period. She said he would benefit from developing more insight and understanding into the risk factors which can contribute towards his offending behaviour. Her recommendation was that Mr Royal had yet to demonstrate the personal changes necessary to indicate a reduction in the risk of his offending. The assessment, she said, was to be read in conjunction with the sentence planning and review report she had prepared, which was dated 10 May 2017; that too was in the dossier. In that she said that she had reviewed the documents within Mr Royal's psychology file, she listed a large number of reports, and she looked at the previous parole decisions, she had also interviewed Mr Royal.

When she referred to the previous parole hearing, she recorded there had been hope that Mr Royal would move to another establishment to undergo the Healthy Sex Programme assessment. She said he was assessed in 2016 by Lisa Hewitt but was found not to be ready to engage in that programme. Her assessment was that his progress in understanding his sexual interests was limited, he did not appear to have a good insight into the future high risk situations he may face, and he could not identify robust risk management strategies in order to be able to deal effectively with these. She said it was a concern in relation to understanding his motivation behind sexual offending. He had completed two high intensity programmes and was not able to express a clearer understanding, in interview, of the risk factors underpinning it. She had significant concerns with him not having insight into potential risks, risky thoughts, and situations. She felt he should undertake further assessment for the Healthy Sex Programme and should he gain any further insight into his offending in the future. She recommended that Mr Royal should be referred to a Psychologically Informed Planned Environment (PIPE), and I shall refer to it hereafter as PIPE unit, which he could access while remaining a Category A prisoner. Depending upon his progress in this unit, and the insight into offending behaviour he could gain, he could then be transferred to a suitable therapeutic community which would entail re-categorisation, preparatory work for the Healthy Sex Programme should also be undertaken.

c. A risk assessment from the Offender Management Unit, dated 12 February 2018. The risk of serious harm summary recorded the risk to the public as high if he were in the community. It gave further detail as to an incident with a healthcare assistant, on 17 January 2018, in which he had been placed on a behaviour compact. It was reported that he had been assessed for the HSP and highlighted for a KAIZEN course but declined to take part in the latter and he rarely spoke to his Case Management Team. The report also highlighted increased risk of offending associated with instability and his accommodation, finance relationship, lifestyle, drug and alcohol misuse were he to find himself in the community.
d. There was a risk assessment from the security department. This also referred to him displaying inappropriate behaviour at the primary care hatch on 18 January 2018.
e. The a current assessment of risk from activities dated 30 November 2017 which seemed to show that he had not been found to have any findings of the taking of drugs.
f. The previous Category A Team review dated 9 March 2016. This recorded the proposal in 2016 to participate in the Healthy Sex Programme but observed that Mr Royal had yet to take part in necessary work on his outstanding offence and related issues and this needed to be completed before further progress could be determined. In considering that evidence, a significant reduction in the risk of similar offending if unlawfully at large was still not shown and it concluded that it was therefore satisfied that the downgrading could not be justified and that he had to stay at Category A.
g. The claimant's most recent Sentence Planning Review Board report dated 27 March 2017 prepared at Wakefield. It recorded the risk of serious harm to the public and the community was high. The review of progress showed that his engagement with members of his Case Management Team, including an offender management was partially achieved. The assessment to take part in the sexual offenders treatment programme showed that it had not been achieved and he was to be assessed for, and to complete, the programme if deemed suitable. This however had been removed as

a target as he was found not to be suitable.

The review recommended that he needed to engage with an ongoing assessment for HSP in order for an appropriate decision to be made regarding treatment pathways. It said, 'A move out of the high security estate, subject to his security category being downgraded, would benefit Mr Royal greatly and help to continue his positive moves in his sentence for the possible move to HMP Hull PIPE unit being a target to continue his progressive move'. The report ends, 'Mr Royal has evinced a reduction in the identified risk pertaining to his conviction, although all identified risks will need to be worked on and Mr Royal is currently fully engaging with our assessment intervention centre at HMP Wakefield'. However, the report also says, under transfer recommendations, 'Mr Royal is appropriately allocated at HMP Wakefield in order to complete all identified coursework to help show progression in his sentence by reducing his identified risks'. Additionally, under re-categorisation recommendation, it says, 'Mr Royal's category is to remain Category A'. Under 'Re-categorisation B/C no/yes', it says, 'No'. Underneath that, 'Mr Royal's category is to remain Category A at this time and any reduction in category will need the authority of and approval of Category A Section in London'.

h. the Local Advisory Panel's minutes and recommendations. The Panel noted that Mr Royal had received two negative reports (IEPs) about his behaviour in the last year relating to separate incidents where he displayed inappropriate behaviour towards female members of staff. It was reported that Mr Royal was encouraged to continue being open with members of his Case Management Team and further work was required to explore and develop skills to manage the identified risks which underpinned his offending behaviour. He had not demonstrated the level of personal change sufficient to indicate a reduction in this level of risk. The recommendation was that he remain at Category A.

14. The dossier was provided to the claimant's solicitors who submitted representations in a letter dated 26 July 2018. The letter pointed to the courses Mr Royal had undertaken and asserted that this was evidence of a reduced risk of harm. It claimed that the referral to PIPE was not a risk reduction programme and was an unachievable target because the centre for him to engage with PIPE was HMP Hull which they claimed was a Category C establishment, in fact it is Category B. It contested the assessment in Ms Lister's report on the basis that the recommendation to transfer to a PIPE unit with a view to transferring to a therapeutic community and preparatory work for HSP would only be of benefit to Mr Royal because she said that it would be of benefit to him, and this was a not core risk reduction strategy.

15. As regards the reported IEP warning, in respect of displaying inappropriate behaviour towards staff, it was said that he denied these allegations in full and there was no adjudication which had followed. The letter asked that if the Category A Review Team is of the opinion that it cannot remove Mr Royal from Category A status, an oral hearing should be directed to allow for a fair and proper review. The letter did not invite the Review Team to consider any other reports, psychological or otherwise.

16. The decision, which is at the heart of this case, is dated 1 August 2018; it is the five year review, hence it was referred to the DCC. I have been taken to various parts of it, so I had better read them. Under present circumstances, it says, 'He is compliant on the wing, is polite and will speak to staff when spoken to, but is generally quiet and keeps himself to himself'. It goes on:

"Security reported He had demonstrated inappropriate behaviour at a care hatch, January

2018. His last adjudication was 2015. During the offences he forced all the victims to either give or receive oral sex and used violence in the offences including threatening two of the victims with an object they believed to be a knife. He currently denies sexual interest in violence. However, he has admitted previously that he experienced sexual fantasies about rape. He has completed core sexual offender treatment programme March 1998 and extended SATP April 2004 and enhanced thinking skills, ETS, April 2006. He had been found unsuitable for RESOLVE in March 2017. He was transferred to a unit to deal with personality disorder (DSPD) at Whitemore, in 2006 and review confirmed he would likely meet with DSPD entry criteria. At the time of the review he stated that he would only move to DSPD unit if he underwent an independent assessment and therefore he was not offered a place.

> He was originally transferred to Wakefield, in January 2016, to undertake assessment for the HSP as this was the recommendation on completion of the extended SATP. He has been assessed by the AIC for the HSP over the last two years. He does meet the criteria, but is not ready to engage at the moment. He needs to be willing to talk about his offending, preparatory work needs to be undertaken prior to the HSP, but he has not done this as yet. There are concerns about ongoing risk, paralleling behaviour regarding female members of staff and issues regarding his fantasies. Short-term sentence planning targets include assessment for KAIZEN to address identified risk. Long-term target is to work towards reducing areas of risk pertaining to his convictions, associated risks linked to his offending and evidence of personality change. This may include work to address sexual/violent offending by an appropriate programme or treatment pathway'.

17. It then refers to the representations submitted by his solicitors under letter of 26 July 2018.

> "They state that if he was not to be downgraded, he should be directed to an oral hearing for a fair and proper review. They submitted that he had reduced his risk based on the work he had undertaken should be removed from Category A. They stated that PIPE consolidation and KAIZEN is untested as risk reduction programmes and he could be managed in Category B conditions. To remain Category A would be irrational without a sentence impasse and a lack of progression and will raise ECR Article 5 issues'.

18. It then refers to the local advisor panel recommendation:

> 'He is encouraged to continue to be open with members of the Case Management Team and to maintain his motivation and continue making progress and exploring the identified areas of need. Further work is required in exploring the relevant skills to manage the identified areas of need. Further work is also required in exploring the relevant skills to manage and identify the risk factors which underpin his offending behaviour. He has not yet demonstrated the level of personal change sufficiently to indicate a reduction in his level of risk. NAP recommends Category A'.

19. We then get to reasons for the decision.

> 'The Executive Director for long-term high security prisons has reviewed Mr Royal's security category and decided that he should remain Category A. In considering Mr Royal's security the Director took into account the serious nature

of the present offences which involve the rape and serious sexual assault on a series of women who he attacked in the early hours of the morning, both in the street and in their homes. The Director noted that Mr Royal had been in custody a long time and was now also many years past his tariff. The Director also noted that Mr Royal's general behaviour has been acceptable for some time and he previously made some progress to interventions. The Director did not, however, consider that Mr Royal had achieved significant risk reduction through this work and has since declined to engage with crucial further interventions. There was also some recent possible offence paralleling behaviour. The Director noted that no significant risk reduction could therefore be confidently identified. The Director suggested that manageability in Category B provided no convincing evidence of a significant reduction in Mr Royal's risk, if unlawfully at large, also there were no grounds for the case to be reviewed further through an oral hearing in accordance with the criteria in PSI 08/2013. Having regard to the serious nature of the present offences which evidenced the propensity for extreme violence and the lack of any evidence at present through offence related work or otherwise, that the risk of Mr Royal re-offending in a similar way, if unlawfully at large, was significantly diminished, the Director concluded that Mr Royal must still be regarded as potentially highly dangerous, particularly to women. On the information available the Director concluded that there were at present no grounds on which a downgrading of a security category could be justified and that he should remain in Category A'.

20. Ground one concerns the failure to hold an oral hearing. Miss Walker took me to paragraph 82 of *Osborn* where the court said that a hearing can be necessary for someone to put their case effectively. That, of course, was said in the context of a parole hearing. However, she says that this is a similar case and that to put his case effectively, Mr Royal needed an oral hearing. As regards the Director's letter, she says that it gives the impression that the Director seems to have proceeded upon the basis that Mr Royal was recalcitrant and did not want to be on courses. This is incorrect. Further, where he has said there is no significant risk reduction, that is too sweeping a comment. On the evidence there was some indication of a reduction in risk.

21. She then looked at the paragraph 4.7 factors and she said that they were all present here. First, he has never had a hearing, secondly, he is 13 years over tariff, he has had no therapeutic courses since 2007. One of Ms Lister's report she had referred to the position as regards treatment as being at an impasse. She said the Parole Board had said that Mr Royal was being held back by his Category A status, although she accepts that the Parole Board decision was not before the Deputy Director in this case when he made his decision. However, she says it could have been brought to his attention had there been a hearing.

22. There is the content of the sentence planning document which suggested that a move out of the high security estate would benefit Mr Royal and help him continue positive moves in his sentence. She made a broader point that Ms Lister's report spoke of some increased insight and suggested some reduction of risk. The counterpoint to that, however, is that she also referred to a lack of insight giving rise to insufficient reduction of risk to remain in Category A. Miss Walker says that this is one of those rare cases where there should be an oral hearing. She would not need to establish that the outcome for the hearing would have been different but that fairness dictated the opportunity for an oral hearing as here there was a prospect that something might come out of it and that would be sufficient. As to what could come out of it, if there had been a discussion, she says that the Director's view as to

Mr Royal's unwillingness to undertake courses, could have been dispelled, and Mr Royal would have had the opportunity of telling the Director about his attitude was to undertaking courses involving risk reduction.

23. Secondly, she said there was disputed expert evidence because if you look at Ms Lister's report she does refer to there being two reports in 2006 and 2008 from a Dr Somek and a report, in 2015, from Professor Crichton; these were prepared on the claimant's behalf for Parole Board hearings. Dr Somek had given evidence that the DSPD course was not suitable and that would therefore justify Mr Royal's opposition to attending the course without having been independently assessed and would dispel the suggestion that he was uncooperative in relation to undertaking therapeutic work. As regards Professor Crichton, he had said that therapeutic work could be undertaken in Category B conditions. Further, she said that the offender manager in the report of 27 March 2017, had referred to Mr Royal moving out of High Security being to his benefit and it would be a positive move for him to do his PIPE in Hull, which she correctly says is a Category B prison.

24. Thirdly, there could have been discussion as to the way forward. The HSP, which had been put forward as a sentence objective at one stage, could not proceed because of the practical problem that he was not suitable to undertake the course. Had there been an oral hearing, there was a better chance for Mr Royal to ascertain what was expected of him. She did not place much reliance on what was said by the solicitor that he had disputed the account of the incident referred to by the Director in the report, I think advisably so, and I will explain why when I come to deal with this. Had there been a meeting she says there could have been an opportunity to make specific reference to what the Parole Board had said in its decision.

25. The Parole Board had noted that the removal of the attendance at the DSPD had been a sentencing target which had been jeopardising his re-categorisation. Now that it had been removed as a target on the grounds that it was an unsuitable course, that should strengthen his re-categorisation application. They said that Mr Royal had said that he wanted to do offender focus work and to do the HSP followed by PIPE. As a result of this discussion before the Parole Board an impasse had been broken around his future motivation to undertake work and engage in offence focus work about which the Parole Board had said he had previously wavered. She said that emphasis should be placed on the fact that he was 13 years post-tariff and there had been no previous hearings and as a result his situation, as regards his risk, required very careful scrutiny. The passage in the decision, which said that there are no grounds to review an oral hearing, is factually incorrect. There were grounds, under 4.7, as she identified, such as 13 years over tariff, and length of time in custody and not having had a previous hearing, but the question for the Director was how would they be balanced in order to decide what was procedurally fair.

26. As regards ground two, she says that the dismissal of evidence as to the reduction of risk was too sweeping. The Director said no significant risk reduction could be identified. Miss Walker said there was some, if you look at the Lister report. She said there was some insight apparent. However, she argues that ground two is bound to ground one. If there should have been an oral hearing, then the decision will need to be quashed and needs to be taken again, hence the main challenge relates to refusal to offer a hearing.

27. Miss Ward started by making a general point that the documents received by the Director did not include the reports of Dr Somek or Professor Crichton and the Director was not asked to look at them when considering the case by the claimant's solicitor. Furthermore, the Director did not have the Parole Board decision and again was not asked to consider this aspect of its decision. The solicitors did make reference to Ms Lister's report but their criticisms of it were extremely limited. She says that the only basis upon which one could

conclude that there was a lack of procedural fairness in refusing a hearing, or indeed that the decision to refuse to recategorize was irrational, can only be based upon what materials before the Director. I cannot look outside the materials which were looked at in making the decision and I agree with her about that. There was clearly limited reference in Ms Lister's report to the reports of Dr Somek, Professor Crichton and the Parole Board, and that is something that the Director would need to take into account, but there was no need to consider passages in any of those documents to which no reference had been made.

28. Miss Ward says that even if all the 4.7 factors are present, it is not inevitable that there must to be a hearing. She says that you can be long over tariff and nevertheless there does not need to be a hearing; indeed, 4.7 says so. Similarly, that applies to the fact that you have never had a hearing, it does not mean that there should be one, it all depends on the facts.

29. Miss Ward points to the last assessment for re-categorisation. That said that Mr Royal had previously not taken part in interventional work but he had now expressed an interest in undertaking the HSP. It would be necessary for him to do so to look at his offending and offence related issues before any further progress could be determined. At that stage, there was no sign of the risk reduction justifying re-categorisation from Category A. Miss Ward said that nothing had changed since that letter of 9 March 2016, following what Ms Lister, the trainee psychologist said in her first report. There was no further treatment since the last categorisation. She also said that there were outstanding areas of treatment. The Director was faced with the stark fact that there had been no reduction in risk since the last time this matter had been considered and furthermore, there was outstanding treatment to be undertaken. The psychologist who had seen Mr Royal regarded the risk factors as such that she could not recommend that he had demonstrated the personal change necessary to indicate a reduction in his risk of re-offending at this time.

30. The defendant argues that this is not a case of an impasse. In 2015, the position had been that the claimant had deferred being assessed for an HSP as he was awaiting his parole decision. He delayed an assessment and in that respect the decision letter from the Director is not inaccurate because he did put off having certain therapies. However, after the parole hearing and the move to Wakefield, he was to be assessed for HSP. He was then found to be unsuitable for the programme, so Ms Lister looked at the other options and came up with one, namely going on the PIPE with a view, in due course, of moving to a therapeutic community. Miss Ward says that this is not a case of an impasse, that is to say where it had been found there was no way forward, because one had been found and what was said about the impasse was specific to the availability of HSP to the claimant.

31. The defendant argues that there is no dispute between experts to resolve in this case. What was said in 2016 and 2015 was, in any event, not before the Director who could not, therefore, be alert to any expert dispute and the claimant's solicitors certainly did not say there was one. The sentence planner said that it would be better for him to be re-categorised for his sake but still recommended that he remain in the Category A institution. There was no dispute as to the risk posed by the claimant.

32. As to the reference in the decision to there being no grounds for an oral hearing, it should not be read as meaning that none of the 4.7 grounds exist or have been taken into consideration. Ms Ward says they clearly were taken into consideration: (a) because the Director specifically refers to 4.7 in saying there were no grounds; and (b) because he makes specific reference to two of them, namely the length of custody and Mr Royal being way past his tariff.

33. As regards the incident at the hatch, she said that if this was a case in which it was said there was a reduced risk but that reliance was placed upon Mr Royal's behaviour towards female staff on a particular occasion to counter the suggestion, that would be a case where

there would need to be a determination of fact as to whether that occurred, if he was denying it, or certainly there could be one. That is not, however, the case here because there was no evidence of reduction of risk. Further, the Director could legitimately look at what was to be gained by such an enquiry. . The health worker said that it had happened, three officers had said that they had spoken Mr Royal about it and they claimed he had said he did not see what was wrong with it, so he was not denying it, and he had been put on a compact for that very event. There was therefore a sufficiency of evidence that there did not need to be a hearing to determine precisely what had happened on that occasion and particularly so in a context where it did not go to the issue as to whether there was a reduction in risk in the absence of evidence that there had been.

34. As regards ground two, she said that there is nothing irrational. All the evidence pointed one way, there was no reduction of risk.

Conclusion

35. Dealing firstly with ground one, which I agree is the main issue here. The starting point is to look at the decision which the Director had to take and that is to be found in 4.2 of PSI 08/2013. The Director had to decide whether there was convincing evidence that the prisoner's risk of re-offending, if unlawfully at large, had significantly reduced? That is the question to ask, was there convincing evidence of that?

36. To decide that issue, the major evidence gathering as to risk was to be found in the reports of the psychologist. Others had their input, but the psychologist had looked at the history, looked at the reports, the therapies undertaken, the parole decision, and, most importantly, interviewed the claimant. There, the claimant had an opportunity to put his views to the psychologist as to what had happened to him in the past and what should happen to the future and to what risk he posed. Furthermore, there was of course another opportunity to do so in the form of the solicitors' representations. In those representations, the solicitors can pick on anything in the information that they think is relevant or ask for additional information to be considered.

37. Faced with the evidence gathered in the dossier and the solicitors' representations, the Director needs to decide if the requirements of fairness necessitate a hearing. That is done in the context of the question which is to be asked, namely is there convincing evidence that the risk of re-offending, if unlawfully at large, is significantly reduced? It must be remembered that if he was unlawfully at large he would be in a position where he was out in the public with no controls over him whatsoever.

38. When one looks at the report, Ms Lister gives a history as to which the claimant's solicitors did not dispute, explaining that the claimant had not undertaken courses in the past, the HSP, for his own reasons but he was now motivated to do so and had been, certainly, since 2015/6. However, at this time, he was not suitable for the course and the reason she gave was that he had given inconsistent accounts of his motivation. Sometimes he had said that he was driven by sexual fantasy and, according to Ms Lister, and again this was not disputed by the claimant's solicitors, the course is suitable for that particular stimulus. However, currently he was not saying that and sometimes he said that he was driven by senses of anger. As a result, she said, of his not stating that sexual fantasy was not his offending driver, the course was not suitable to deal with his needs. Her reference to an impasse was not that no treatment was available, and he could not move forward, but was specific as to why the HSP was not suitable. Up to then, it had been expected that the HSP was to be the next step to reduce risk. As a result of what she referred to as the impasse, alternatives had to be looked at. She found an alternative which was the PIPE plus preparatory work for HSP. Following the PIPE it was to be hoped that a move to a therapeutic community would be suitable. There clearly was no impasse, there was simply

an inability to follow the HSP.

39. As regards risk, Ms Lister was clear. The risks remained and they were associated with a lack of insight into motive, thus an ability to resist improper motive. It is correct that at paragraph 16 of the sentence planning review, paragraph 43 in the bundle, she said 'Mr Royal has demonstrated he has started to develop some insight into his offending behaviour and that he felt that he had changed since exploring his offending.' She summarised the question of evidence of risk reduction by saying, 'That he had made developments in exploring and developing skills to manage some of the risk areas which had been identified as contributing towards his index offences. He would benefit from continued reflection and revisiting some of the work he has completed to make sure his learning is consolidated'. She then went on, 'There are concerns that Mr Royal has not yet identified links between the areas of his offending and that he still seems to find it difficult to articulate the risk factors which underpin the index offences'.

40. That was set against a background, this is in the sentence planning review report, that when you look at what she said in the current assessment of risk, she said:

> 'Mr Royal has engaged in a number of treatment programmes to explore his index offences, most notably the core extended sex offender treatment programmes. However, his current levels of insight into his risk and how he will manage this in the future, do not seem consistent with him undertaking two high intensity programmes. In addition to this, Mr Royal has provided differing accounts of the role sexual fantasy played in the index offences. It is therefore difficult to accurately assess his progress in developing healthy fantasies and his skills at being able to manage any offence related fantasies he may experience in the future. In my assessment, Mr Royal would need to gain further insight and understanding into the factors which contribute to his offending behaviour in order to develop robust risk management skills for the future'.

It is on that basis that she recommended that he had not demonstrated the personal change necessary to indicate a reduction in risk.

41. The only criticism of Ms Lister made by the claimant's solicitors, which would have been apparent to the Director, was that a referral to PIPE was not a risk reduction strategy but was for the benefit of Mr Royal. I have to say it seems to me that was a complete *non sequitur* as the benefit was to assist him to avoid re-offending. Obviously, it is for his benefit, but it is also a risk reduction strategy. It was also said that he could not do the PIPE as he would have to go to Hull which as a Category C institution; in fact it is a Category B. However, he could do the PIPE at Category A, so that was just factually incorrect.

42. There is nothing in the claimant's solicitors' remarks concerning Ms Lister which would require her to attend an oral hearing to be questioned or for there to be some apparent further explanation as to why her report, and its conclusions, should somehow not be seen as conclusive on the issue of risk reduction. The report is not equivocal and there is no absence of logic in the report between evidence gathering and conclusions to put the Director on notice and that Ms Lister would need to explain, in an oral hearing, her findings or recommendations or that comment from Mr Royal, or his solicitors, on the report would somehow assist in potentially reducing the perceived risk identified by Ms Lister. That is all the more so when the claimant's solicitors did not identify such risk reduction when they had the opportunity to do so.

43. As regard the question was there an expert dispute, I asked Miss Walker, 'Who was the dispute with?' She directed me to the sentence planning report and what was said concerning benefit to the claimant by being moved out of the high security estate.

However, the sentence planning report does not say that the risk has been reduced to the date of the report being completed. The report says that he is to stay in Wakefield and is to remain in Category A. Additionally, both reports say that he is a high risk if out in the community. I cannot see that that gives rise to a dispute between whoever produced the sentence planner. The sentence planner was looking at further progress by reference to ongoing assessment for HSP. By the time that Ms Lister was producing her report, it was found that it was not suitable for the HSP. There clearly was no dispute between them about anything which would require resolution by an oral hearing.

44. As regards the incident at the hatch, and whether there needs to be an oral hearing to deal with that, I agree it was right for Miss Walker not to place much reliance on this aspect of the case. Without convincing evidence that there was not a reduction in risk, what happened at the hatch was neither here nor there. I there had been some evidence, and what was said to have occurred at the hatch was treated as significantly undermining such evidence, I look at the information before the Director. There were three officers saying that they had discussed the matter with Mr Royal who said he did not realise he significance of his behaviour, and there was the healthcare worker and her account. The evidence would have been, because it is recorded within documents that the Director saw, that Mr Royal had attended at the health hatch with a letter and a bag with some chocolate in it and tried to give this to the healthcare worker. She did not take the letter and asked if it would get her into trouble, and so she did not take it. He had given an explanation for trying to give her a bag containing a bar of chocolate which was that it was to show her that he loved her.

45. Given that the evidence was from these sources it would have been quite justifiable for the Director to say there is limited scope for Mr Royal to deny that this had taken place. Indeed, in the face of the health worker's evidence and three members of staff having spoken to him about it, it probably would not have been of great assistance to Mr Royal to embark upon requiring a factual finding as to whether it had happened in the face of his denial that he had done any such thing.

46. Looked at it in the round, as far as the Director is concerned, there was the previous Category A assessment in 2016; that said work needed to be done to reduce risk. There had been no work done and the psychologist said that there was no gain since the last report, that there was still a risk, and there had not been a sufficient reduction in the risk to justify a move from Category A; that is to say the psychologist said there was not a reduction in his risk of re-offending at this time and he was still categorised as a high risk to the public if he was in the community.

47. Set against that background, do the objective requirement of fairness dictate that a hearing take place? I cannot see how, looking at the factors in 4.7, it could be said that a hearing had a realistic prospect of altering the answers to the question as to whether there was sufficient diminution of risk or indeed what course should be taken in the sense of what are the treatments that should be considered in order to reduce such risk. Looked at objectively the Director did not acted unfairly in refusing a hearing.

48. What about the argument as to the way the decision was phrased, that is to say the Director did not take into account relevant considerations in reaching that conclusion? The decisions of the Director are administrative decisions and, albeit they are important in the effect upon Mr Royal, they are not expected to be phrased as if they were a judgment. What the Director was saying is that there was no basis for holding a hearing when the factors in 4.7 were considered; as I say, he makes specific reference to 4.7 of the PSI. When he was saying that there were no grounds for a hearing, he was saying the same thing. The Director was clearly alive to there being grounds as reference was made to the lengthy in custody and the time post-tariff.

49. I have to say that if the tests were one of simple compassion, I can see that someone who has been in prison as long as the claimant should have a hearing. He may be in a state in which he does not know what to say anymore. If he says his offending was motivated by anger he can go on the RESOLVE course and if he says it was not anger, he can't. If he says sexual fantasy is the motivation he can go on HSP, but not if he changes his mind about that. I can see that someone in that position, as a matter of compassion, would wish to see the human face of the person who is making these important decisions in their lives, otherwise he may feel that these decisions are de-personalised and he is no longer regarded as an individual. It is often the experience of the courts that someone, even with a hopeless case, is more easily able to come to terms with their situation if they have had their say. However, the test here is not whether I consider that the decision was a compassionate one, it is whether it was procedurally fair. On my view, I cannot say that it was not procedurally fair.

50. Turning then to ground two, I agree with Miss Ward, the evidence is all one way. The sentencing planning document is not inconsistent with the decision made for the reasons I have already given. The medical reports which is said should have led to a different conclusion were not before the decision maker, they were not referred to in the solicitor's letter as being important, there is reference to them in the Ms Lister's report but they were of historic interest and did not conflict with what she was saying at the time of the reporting. Accordingly, the irrationality challenge cannot be made out.

51. The challenge to the decision of the Director must be refused.

End of Judgment

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This transcript has been approved by the judge.