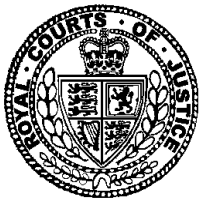

Neutral Citation Number: [2019] EWHC 3214 (Admin)

Case No: CO/1558/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2019

Before :

HEATHER WILLIAMS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

R (on the application of MARK HARRISON)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Jude Bunting (instructed by **Bhatia Best**) for the **Claimant**
David Manknell (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 5 November 2019

- -

Approved Judgment

Heather Williams QC:

Introduction

1. The Claimant, Mark Harrison, is a serving prisoner at HMP Full Sutton. In these proceedings he challenges the decision made on 11 December 2018 by the Deputy Director of Custody High Security ("the Director") not to hold an oral hearing when deciding whether to downgrade his prison security classification from Category A. The Claimant was informed by letter dated 14 January 2019 that the Director had decided to maintain his Category A status.

2. Permission to apply for judicial review was granted on 21 June 2019 on consideration of the papers by David Pittaway QC, sitting as a Deputy High Court Judge. It is accepted that this decision resolved a time limits issue raised by the Defendant in the Claimant's favour.

3. The Grounds accompanying the Claim Form contended: (1) the decision to maintain the Claimant's Category A status was unlawful as the Director had applied the wrong test ("Ground 1"); (2) common law procedural fairness required the provision of an oral hearing ("Ground 2"); and (3) in declining to hold an oral hearing, the Director had failed to follow the Defendant's published policy in Prison Service Instruction 08/2013 ("Ground 3"). At the outset of the hearing, Mr Bunting indicated that Ground 1 was no longer pursued. Accordingly, the parties' submissions focused on the absence of an oral hearing.

The facts

The offences

4. On 21 December 1999 the Claimant was sentenced to life imprisonment with a tariff of 10 years for offences of rape and wounding with intent ("the main offences"). The circumstances involved extreme violence and degradation of the victim, who was grabbed during the early hours of 5 December 1998 when making her way home. The Judge who passed sentence described the rape as being "*most horrendous*", "*brutal*" and "*appalling*". The Claimant was also convicted of affray in relation to a 1997 pub fight, for which he received a 12 months concurrent sentence. He was on bail in relation to this earlier offence at the time of the main offences. Eighteen months earlier he had been released from a 14 year sentence imposed in 1988 for offences that involved attacking two women in their home using a screwdriver and craft knife. The Claimant has earlier convictions for offences of assault occasioning actual bodily harm, robbery, burglary and theft, amongst others.

The Claimant in custody

5. The Claimant was aged 34 at the time of the main offences and is now 54 years old. His tariff expired on 21 December 2009. He has spent nearly ten years in prison post-tariff. He has been classified as a Category A prisoner throughout his sentence. When decisions to maintain his Category A status have been made he has not had an oral hearing.

6. It is accepted that the Claimant has behaved well in custody. He is an 'enhanced' level prisoner (the highest level) on the incentives and earned privileges scheme. He has been employed in the DHL workshop for many years. He has no recent behavioural warnings or disciplinary findings. He has no substance misuse problems.

7. The Claimant has consistently denied that he committed the main offences. Those assessing his risk (and the Court) must proceed on the basis that he is guilty, as convicted. I return to the significance of his denial of guilt for those assessing his risk below.

8. The Claimant has undertaken the offending behaviour courses offered to him, including the Enhanced Thinking Skills ("ETS") programme in 2004; the A to Z programme in 2009; the Thinking Skills Programme in 2012 and RESOLVE, a group based programme aimed at reducing violent re-offending, in 2017.

Earlier assessments

9. Between 2009 and 2013 the Claimant was assessed by a number of experts instructed by his solicitors. In a report dated 18 September 2009, Barry Conlin, a forensic psychologist, opined that: (1) his risk of recidivism had probably decreased since imprisonment, but remained significant; (2) he was a low risk of sexual recidivism and a medium risk of violent recidivism; and (3) he did not need maximum security conditions or Category A status. In a report dated 17 July 2012, forensic psychologist, Louise Coughlin, concluded that: (1) he had some understanding of his areas of risk and his emotional management had improved; (2) if he remained in prison his risk of violence was low; (3) he posed a moderate risk of sexual violence; and (4) he did not present a high risk of either violence or sexual violence and he should be considered for re-categorisation to Category B. On 13 August 2013, Lisa Davies, a chartered and registered psychologist, concluded that: (1) he posed a moderate risk of future violence if released into the community; (2) he was a low risk of violence in prison; (3) he did not present as a high risk for violence or sexual violence; and (4) his risk could be effectively managed in Category B conditions.

10. In November 2013 the Defendant's Category A Team decided to retain the Claimant in Category A conditions. The Claimant brought a judicial review challenging this decision (CO/897/2014). His claim was stayed pending the outcome of an appeal to the Supreme Court in *R (Mackay) v Secretary of State for Justice* from the Court of Appeal's judgment at [2011] EWCA Civ 522. In the event, the Defendant resolved matters by introducing a new policy, Prison Service Instruction 08/2013 ("PSI 08/2013"). In October 2014 the decision that the Claimant should remain in Category A, was reviewed and maintained. The Claimant was refused permission to amend his Grounds to add a judicial review challenge to this determination on the basis that it was a fresh decision. By this point, more than three months had passed since the October 2014 decision and no new application for judicial review was made.

11. In the meantime, in January 2014, the Claimant's case was considered by the Parole Board. The decision made by the single member panel on the papers, included the following observation: "*the panel member shared your legal representations [sic] concerns that you remain a Category A prisoner despite your positive prison behaviour and time spent in custody and considered that the next panel would benefit*

from some clarification from the prison for the reasons for this should you not have been re-categorised by then".

12. An oral hearing before the Parole Board in November 2016 was adjourned for completion of a psychological assessment and provision of proposals to identify a treatment pathway to address the Claimant's use of violence. This led to the recommendation that he undertake RESOLVE, which he completed in June 2017 demonstrating a high level of motivation.

13. In January 2018 the Claimant's Category A security classification was reviewed and maintained. The Claimant places particular emphasis upon two developments since that decision was made. The first is the assessments undertaken by Rachael Sales, trainee psychologist at HMP Full Sutton (under the supervision of Catherine Wordie, registered psychologist). The second is the recommendation for his downgrading made by the Local Advisory Panel ("LAP") in October 2019.

The Programme Needs Assessment

14. In February 2018 Ms Sales completed a Programme Needs Assessment ("PNA") to "*identify areas of treatment need, to assist with the identification of future intervention pathways for Mr Harrison and to fulfil directions issued by the Parole Board*". She assessed the extent to which he had progressed in relation to specified risk factors. In so doing, Ms Sales referred to earlier risk assessments, the Claimant's participation in RESOLVE and her interview with him on 5 February 2018. She determined that the Claimant did not need to undergo Kaizen, a programme for high and very high risk sex offenders. She concluded he was evidencing 'new me' skills in all domains of the success wheel (a tool used in the PNA). She observed that "*whilst the maintaining of his innocence made the assessment of attitudes which support sexual offending difficult, the fact that he only has one conviction relating to sexual offending meant that items linked to 'sexual interests' were not considered relevant to Mr Harrison's offending*".

Ms Sales' August 2018 assessments

15. In August 2018 Ms Sales prepared her report for the forthcoming Category A review, *Psychological Contribution to the Category A Review* ("the Category A Review report"). She explained that her assessment should be read in conjunction with her psychological assessment for the Parole Board and her earlier PNA. She indicted the purpose of the report was to consider, in accordance with PSI 08/2013, whether "*there is convincing evidence the prisoner's risk of re-offending if unlawfully at large has significantly reduced*". She said that in accordance with the PSI, she would not be making specific recommendations regarding re-categorisation (para 2.1). Ms Sales summarised her fuller assessment for the Parole Board (paras 4.1 – 4.2). This included that the Historical, Clinical, Risk Management-20 (HCR-20) assessment indicated the Claimant presented a low risk of violence if he remained in closed conditions, whereas if he were to be progressed to open conditions or released within the following 12 months, his risk of future violence would increase to 'moderate'. Further, the Risk for Sexual Violence Protocol (RSVP) assessment indicated that his risk of sexual violence was low in closed conditions, but if he were to be progressed to open conditions or released, his risk of sexual violence would increase to a 'moderate' level.

16. Under the heading "*Outstanding treatment need*", Ms Sales noted the Claimant had been assessed as not suitable for Kaizen on the basis of need. She said that he was not considered to require the Healthy Sex Programme ("HSP") as there was no evidence indicating he had offence related sexual interests or high levels of sexual preoccupation. She said that taking into account the intervention work he had completed to date and the recent assessments she considered "*Mr Harrison to have no current areas of outstanding treatment need. Whilst Mr Harrison maintains his innocence with regards to his index offence, he does take responsibility for his previous convictions. In addition, it should be noted that Mr Harrison has completed all of the required intervention work on the basis of his assessed risk and need, regardless of his stance regarding his index offence. Therefore, if Mr Harrison was to change his stance he would not currently become suitable for any further intervention work*" (para 4.5). Ms Sales' conclusion was: "*he is considered to have no outstanding areas of treatment need. In my view there is convincing evidence that Mr Harrison's risk of reoffending if unlawfully at large has been significantly reduced*" (para 5.2).

17. It is only necessary to refer to a few passages in Ms Sales' *Psychological Risk Assessment Report* for the Parole Board ("the Parole Board report"), also completed in August 2018. She said that before completing her report, she had consulted with professionals involved in the Claimant's case including his Offender Supervisor and members of his residential wing staff and that she had interviewed Mr Harrison on 13 August 2018 (para 1.6). She said that in her opinion he had no outstanding areas of clinical need as evidenced through the application of a number of dynamic assessments and that he had "*completed all the required intervention work on the basis of his assessed risk, regardless of his stance. On this basis I would support Mr Harrison being progressed to open conditions*" (para 2.5). When discussing the RSVP assessment, Ms Sales said: "*Mr Harrison's stance makes it difficult to assess the extent to which he holds attitudes which would drive further offending or the extent to which he has insight into such potential attitudes (and therefore able to moderate / address these). Conversely, Mr Harrison has shown motivation to engage with processes which are linked to the managing of his future risk of sexual violence*…" (para 5.6).

18. At para 6.7 Ms Sales expanded upon her assessment that the Claimant had no current areas of outstanding treatment need. She said she did not consider one to one work to be required or suitable as he was unwilling or unable to discuss the circumstances of the index offence and moving an individual out of denial was not an appropriate treatment goal. She said the Claimant had already demonstrated insight, as evidenced through the outcomes of the recent PNA assessment and his ongoing positive custodial behaviour. She continued: "*I am also aware that there has been a suggestion Mr Harrison be assessed for a progression PIPE* [Psychological Informed Planned Environment] *unit, in my view he is currently evidencing sufficient insight and application of the intervention work completed to date to indicate a progression PIPE would be of limited, if any, current benefit"*.

Ms Graham's entries in the Dossier

19. The Dossier prepared for the Category A review, included entries completed by Ms Graham, the Claimant's Offender Supervisor. In an entry dated 21 June 2019 she noted that a Parole Board hearing had been deferred in order for a psychologist to make recommendations as to his progression. She continued: "*As Mr Harrison has*

not yet reduced his risk through offending behaviour work, this should first be the focus. Any future Parole hearings will identify any areas of resettlement should Mr Harrison be downgraded/released". Ms Graham subsequently participated in the psychologist's assessment (paragraph 17 above). Mr Manknell accepts that Ms Graham did not express a specific view as to whether or not the Claimant's Category A status should be downgraded.

20. A further entry by Ms Graham made on 21 June 2018 set out the short-term and long-term objectives from the Claimant's sentence plan formulated on 13 July 2017. As the LAP noted, the short term objectives had all been met. The long term objectives were: "*PIPE or should he be re-categorised to CAT B then a Therapeutic Community should also be considered*". Ms Graham noted this had not been achieved.

21. Written representations supporting his downgrading to Category B were submitted on behalf of the Claimant in late September 2019.

The LAP's recommendation

22. Those attending the LAP from HMP Full Sutton were the Head of Security and Intelligence; the Head of Residence 1; the Head of Operations 2; the Head of Psychology and Interventions; and the Head of Corruption Prevention and CT. The LAP's recommendation, dated 18 October 2018, was that the Claimant be downgraded to Category B. The Panel indicated it "*agreed that Mr Harrison has now provided ongoing evidence of skill application and noted that psychological assessment has since taken place and that significant progress is reported. The Panel decided that sufficient evidence now existed to suggest a significant reduction of risk and that further progress would be most likely within a TC* [therapeutic community] *environment*". The LAP had earlier referred to the PNA and commented: "*The panel was mindful that whilst denial in itself should not prevent progression, it is possible that relevant risk factors related to the index offence remain unidentified and therefore possibly unaddressed"*.

23. The LAP identified a number of factors supporting its recommendation that the Claimant's security classification be downgraded. These included: he had successfully completed intervention work relating to his past use of violence and had shown consistent insight; his custodial behaviour had been positive; he was not assessed as needing either Kaizen or Horizon (the latter because he had already completed ETS and RESOLVE); and Ms Sales' assessment. In conclusion, the Panel stated "*it agreed that there was no further intervention work that needs to be completed. Should Mr Harrison accept responsibility for the index offence, then this would provide an opportunity to provide further insight into his sexual offending which could be facilitated within a lower category environment…The panel agreed that he could be safely managed within a lower category establishment when he could continue to make positive progress with his sentence and engage with a therapeutic environment*".

The Director's decision

24. The Director's decision to maintain the Claimant's Category A status was set out in a letter dated 14 January 2019. His reasons were as follows:

"The Director carefully considered the wealth of information in this case, including his recent reports and previously submitted assessments in the representations. He recognised the prisoner has completed a long settled period in custody and achieved some progress addressing his risk. He accepted the current assessments suggest the prisoner poses a moderate risk and there are no specific courses identified in high security. He nonetheless remained concerned about the extreme nature of the prisoner's offending, which to a great extent remains unaddressed due to the prisoner's denial of guilt. He noted also the prisoner's past offending, which also involved violence against females. ("The Director's first paragraph.")

Taking into account the serious and escalating nature of this offending he considered the prisoner's assessed moderate risk would still make him highly dangerous if unlawfully at large. He noted the prisoner still needs to complete substantial work on his offending (as shown by the recommendation for a therapeutic community) which is not compatible with an assessment of significant progress and risk reduction at this time. ("The Director's second paragraph".)

The Director carefully considered the reasoning of the LAP for downgrading. He considered however the available assessments show key issues have still not been fully explored and addressed (as also confirmed by the LAP), and therefore he considered Mr Harrison has not achieved significant risk reduction despite his good conduct and engagement. He did not accept that Mr Harrison's downgrading could in the meantime be approved solely to allow him to address these issues further in a TC, and he should be urged. to provide greater disclosure to enable outstanding issues to be addressed more thoroughly in his present environment. ("The Director's third paragraph".)

The Director noted most of the representations (i.e. past psychology reports) have previously been considered and rejected as evidence of significant risk reduction. He recognised the request for an oral hearing (previously unsuccessfully claimed by Mr Harrison through the courts) has now been added to by the LAP recommendation. He recognised also the length of time Mr Harrison has been in custody and his good behaviour. As stated above however he considered the reports show significant offence related issues have yet to be addressed. While he noted different views on suitability for downgrading he did not consider there was a significant dispute on the principal issue that Mr Harrison needs to further address important risk factors. He considered also an oral hearing was not needed to fully understand the strengths of the

> *Mr Harrison's progress or the reasoning in the available assessments." ("The Director's fourth paragraph".)*

25. After receiving this decision, the Claimant's solicitors sought a review, repeating their request for an oral hearing. Their representations were rejected in a response dated 30 January 2019, which said that the Director's decision was rational and there was no need for an oral hearing. The letter rejected the proposition that there was an impasse if Mr Harrison remained in Category A saying: "*the means are available to him to discuss his offending and undergo further assessment and thereby show evidence of offence related insight and progress warranting consideration for downgrading"*.

The Legal Framework

26. Pursuant to s.12 of the Prison Act 1952, a prisoner may be lawfully confined to such prison as the Defendant directs. Under s.47 of the Prison Act 1952, the Defendant may make rules for the classification of prisoners. These rules are set out in the Prison Rules 1999 (SI 1999/728). Rule 7 of the Prison Rules 1999 states:

> *"Prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment…"*

27. There are four classifications, or security categories, for adult male prisoners. The highest security category is Category A. This category is defined in PSI 08/2013, para 2.1 as "*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*". Para 2.1 of PSI 40/2011 defines Category B as "*prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult*" and Category D as "*prisoners who present a low risk; can reasonably be trusted in open conditions and for whom open conditions are appropriate*".

Category A reviews

28. PSI 08/2013 gives guidance on when and how a prisoner can be downgraded from Category A conditions. The Director is responsible for the categorisation and allocation of Category A prisoners, though some decision-making may be delegated (para 2.3). After the initial review, a prisoner's Category A status is reviewed annually on the basis of progress reports from the prison. The LAP submits a recommendation to the Category A Review Team ("CART"). Where the LAP recommends downgrading, the case is referred to the Director, rather than CART, to conduct the review (para 4.1).

29. PSI 08/2013, para 4.2 sets out the test to be applied:

> *"Before approving a confirmed Category A / Restricted Status 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."*

30. In *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750 at para 2, Sales LJ (as he then was) summarised the consequences of being classified as a Category A prisoner as follows:

> "*Where a prisoner is placed in Category A, that will affect the conditions of detention to which he is subject, as the Secretary of State has to take special care to prevent his escape. It is also likely to affect his prospects of being granted parole, as it would only be in a very rare case that the Parole Board would order release of a prisoner from Category A detention without his suitability for release first being tested in more open conditions as a Category B, C or D prisoner: R v Secretary of State for the Home Department ex parte Duggan [1994] 3 All ER 277, 280, 288; R (Williams) v Secretary of State for the Home Department [2002] 1 WLR 2264, paras 23 – 24. This is an approach of the Parole Board as a matter of practice, rather than the consequences of any rule of law. None the less, it is clear that a decision regarding a prisoner's categorisation has significant implications both for the public interest and for the individual interests of the prisoner himself."*

Agreed principles

31. The following propositions of law were common ground between the parties:

    i) (As regards Ground 2), it is for the Court to determine whether procedural fairness required the Director to agree to an oral hearing in this instance: *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522, para 28; and *R (Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422, para 44;

    ii) The contents of PSI 08/2013 paras 4.6 and 4.7 (below) addressing when there should be an oral hearing for a Category A classification review reflect the common law requirements of procedural fairness;

    iii) (As regards Ground 3), it would be a public law error for the Director not to follow the Defendant's published policy in PSI 08/2013 as to when to hold oral hearings: *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin), para 42.

PSI 08/2013 paras 4.6 and 4.7

32. Para 4.6 of PSI 08/2013 provides that the Director may grant an oral hearing of a Category A prisoner's annual review and this will allow the prisoner or his representatives to submit their representations verbally. The text makes reference to the Supreme Court's decision in *R (Osborn and Booth) v Parole Board* [2014] AC 1115 as to when the Parole Board should hold oral hearings, but notes the Courts have recognised that the present context is different. "*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". The document indicates that it is intended to give guidance to those who take oral hearings decisions in the CART context "*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*".

33. Para 4.6 then identifies three "*overarching points*". The first is that "*each case must be considered on its own particular facts – all of which should be weighed in making*" the decision. The second point is that an oral hearing decision must be approached in a "*balanced and appropriate way*" and with an open mind, the decision maker must be alive to the potential, real advantage of a hearing and "*should not make the grant of an oral hearing dependent on the prospects of success of a downgrade in categorisation*". The third point is that an oral hearing is not necessarily "*all or nothing*" and there is scope for a flexible approach as to the issues on which an oral hearing might be appropriate.

34. Para 4.7 identifies factors that would tend in favour of an oral hearing being appropriate. As relevant (and with emphasis added), it states:

a. "*Where important facts are in dispute. Facts are likely to be important if they go directly to the issue of risk …*

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.*

…

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.*"

Case law regarding PSI 08/2013 and common law fairness

35. The text of PSI 08/2013 was considered by the Court of Appeal in *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750. The Court rejected the prisoners' submissions: (i) that the Supreme Court's guidance in *R (Osborn and Booth) v Parole Board* [2014] AC 1115, as to when the Parole Board should hold oral hearings, now governed the determination of when oral hearings should be held for Category A reviews; and (ii) that part of the guidance in para 4.7 of PSI 08/2013 was unlawful in light of *Osborn*. In the course of addressing these issues, Sales LJ (with whom Moylan LJ and Black LJ (as she then was) agreed) considered the extent to which the two kinds of hearings differed. Points of distinction which he highlighted between Parole Board hearings and Category A reviews, included that: (i) the Parole Board is an independent judicial body, whereas CART / the Director are officials of the Secretary of State, with operational expertise in running the security categorisation system, carrying out management functions in relation to prisons; (ii) the Parole Board considers when a prisoner can safely be released at an appropriate point in his sentence in light of the support and supervision he will then receive, by contrast a Category A review involves assessing the risk to the public if the prisoner escapes and is at large in the community without any management; and (iii) the statutory framework for the decision making is different and the requirements of article 5.4 of the European Convention on Human Rights underpinned only the Parole Board's decision making.

36. Having identified these differences, Sales LJ concluded at para 56:

> *"The guidance given by the Supreme Court in Osborn's case 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 different context which I have highlighted above. In my view the guidance given by this court in Mackay's and Down's cases 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."*

37. I consider the two earlier Court of Appeal decisions referred to by Sales LJ at paragraphs 40 - 44 below. As regards the significance of the guidance given in *Osborn*, Sales LJ said that "*it cannot be taken to apply directly in the context of security categorisation decisions made by the CART/director*" (para 59). He continued at para 61:

> "*Some of the factors highlighted by Lord Reed JSC will have some application in the context of decision-making by the CART/directors, 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."*

38. Mr Bunting accepts that the conclusions expressed by Sales LJ as to the extent to which the *Osborn* guidance applies to Category A classification reviews were part of the ratio of the case and are binding upon me. He indicates that he would wish to argue at an appellate level that this part of the case was wrongly decided. He also correctly points out that Sales LJ's indication that oral hearings for Category A reviews will be "*rare*" is not in itself a test to be applied; nonetheless it does indicate the anticipated consequence of a correct application of the PSI 08/2013 guidance.

39. Mr Bunting relies upon aspects of Lord Reed JSC's guidance in *Osborn.* At the outset of his judgment (para 2), Lord Reed summarised a non-exhaustive list of circumstances in which the Parole Board would be required by common law standards of fairness to hold an oral hearing. His examples included the following:

> "*(b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board…of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or whether a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or whether the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories;*
>
> *(c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their cases effectively or to test the views of those who have dealt with him."*

40. The Court of Appeal's decision in *R(Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 preceded the issue of PSI 08/2013, but as I have already indicated, the guidance that was given was approved by Sales LJ in *Hassett*. One of the issues addressed in Gross LJ's judgment in *Mackay* was the impasse that can arise when a

prisoner continues to deny he committed the offences of which he has been convicted. He said this at para 27:

> "*On the one hand he may need to complete various courses to satisfy CART that the risk to the public has been significantly reduced were he to be unlawfully at large; on the other hand, he may be ineligible or unsuitable for participation in such courses whilst he continues to deny guilt. While, plainly, denial of guilt cannot of itself preclude re-categorisation, a matter which would compound injustice in the case of anyone wrongly convicted of (necessarily in this context) grave offending, denial of guilt will very likely be relevant as undermining any acceptance of responsibility for the harm done…Still further and realistically, there will be "very, very, many more occasions" where prisoners deny guilt for offences which they have in fact committed": see Elias J (as he then was) in R (Roberts) v Secretary of State for the Home Department [2004] EWHC 679 (Admin) at [42], in the course of a most valuable discussion of this particular concern, at [39] – [42]. As it seems to me, it is necessary to be alert to the possibility of injustice occasioned by an impasse of this nature; but it must be accepted that on occasions such impasses will, unavoidably, occur – given the important public interest in risk reduction before an offender is released on a controlled basis into the community or a re-categorisation decision is taken increasing the risk of escape."*

41. Gross LJ noted a particular form of impasse that could arise when a prisoner needed access to opportunities to demonstrate he could be trusted in a lower category (as otherwise he would have an almost impossible task of persuading the Parole Board that he should be released), but keeping him as a Category A prisoner meant he could not access such opportunities and CART were unwilling to downgrade his security without prior evidence of significant risk reduction (para 28 (iii)). Mr Bunting submits that this is the kind of impasse that has arisen in the present case. Gross LJ went on to sound a note of caution, that although the existence of an impasse may increase the likelihood of an oral hearing being required, "*it should not be thought that the mere existence of an impasse…means that an oral hearing will be warranted. Moreover, for my part, the Court should not be too ready to conclude that there is an impasse*…".

42. More generally, Gross LJ confirmed at para 28, that there was no requirement for exceptional circumstances to be demonstrated, for procedural fairness to require an oral hearing, but "*oral hearings will be few and far between*". He noted that advantages of an oral hearing would include improved decision making and the resolution of disputed issues, but that considerations of costs and efficiency could tell against such a hearing. Gross LJ gave examples of earlier instances where on the particular facts, procedural fairness had required an oral hearing: *R (Williams) v Secretary of State for the Home Department* [2002] 1 WLR 2264, where the Parole Board had made a clear recommendation in favour of the post-tariff discretionary lifer prisoner, but CART had decided to maintain his security classification; and *R (H) v*

Secretary of State for Justice [2008] EWHC 290 (Admin), where there was an inconsistency between the LAP, who had recommended downgrading the prisoner's categorisation and CART who decided in favour of maintaining it.

43. In terms of additional guidance from the judgment of Aikens LJ in *R (Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422, I need only cite his observation from para 45, said in the context of a dispute between the two psychologists involved, which had already been extensively ventilated in correspondence:

> "*Ultimately, CART had to exercise a judgment on whether an oral hearing would assist in resolving these issues and assist in better decision making. I cannot say that CART was wrong to decide against an oral hearing on these points where the views had been so well rehearsed, were so well known already and had not changed."*

44. Mr Manknell relies on the above passage as emphasising that the apparent utility, or lack of utility, in holding an oral hearing is a legitimate and indeed important consideration. The value, or otherwise of an oral hearing was also emphasised by Sales LJ in *Hassett*. He said at para 69:

> "*I would add that even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/directors to hold a hearing to allow them to ventilate their views orally. This might be so because, for example, there may be no real prospect that this would resolve the issue between them with sufficient certainty to affect the answer to be given by the CART/director to the relevant question and fairness does not require that the CART/director should hold an oral hearing on the basis of a speculative possibility that that might happen…"*

45. Mr Bunting places particular reliance on the approach of Karen Steyn QC sitting as a Deputy High Court Judge (as she then was) in *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin). This was a case in which the LAP had recommended the prisoner's downgrading from Category A and the expert evidence was supportive of that approach. The Director's decision to maintain the prisoner's Category A security classification without first holding an oral hearing was challenged on the basis that common law procedural fairness and PSI 08/2013 required an oral hearing in the circumstances. At paras 59 and 60 she said:

> "*It may be said that there is no significant difference of view between the experts, The LAP recommended that Mr Rose should be downgraded and their recommendation was consistent with the thrust of the reports from both the prison psychologist and the independent psychologist, as well as the Offender Supervisor. However, in my judgment, the fact that it is not only the LAP in combination with an independent psychologist recommending downgrading, but this is also consistent with the prison psychologist's report, cannot assist*

> *the Secretary of State. It renders Mr Rose's case for an oral hearing all the stronger.*
>
> *As Lord Bingham observed in R (West) v Parole Board [2005] 1 WLR 350 at [35], it "may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker". In circumstances where the LAP concluded Mr Rose had demonstrated a significant reduction in risk and recommended down-grading him to Category B and the evidence could fairly be said to be consistent with and supportive of the LAP's recommendation, the opportunity that an oral hearing allows to discover and address the points that were troubling the decision-maker was particularly vital."*

46. In *Rose*, the Deputy High Court Judge went on to conclude that the Director did not properly or fairly apply PSI 08/2013. She noted that all but one of the factors identified as important indicators in para 4.7 of the policy were squarely in play in that case and that absent downgrading there was an impasse, "*This does not mean that it was not open to the Director to make a rational finding that Mr Rose should remain in Category A. But it does mean that he could not lawfully do so without giving Mr Rose an opportunity to address the points that were troubling him at an oral hearing*" (para 62).

Discussion and conclusions

Ground 1

47. As I indicated in my introduction, the Claimant did not pursue the contention that the Director misdirected himself when applying the test set out in para 4.2 of PSI 08/2013, namely whether there was "*convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced*". Mr Manknell invited me to endorse the correctness of that course in my judgment, given the prospect of future challenges raising a similar point. Although the issue was ventilated in the parties' Skeleton Arguments, I did not hear oral argument on Ground 1. In the circumstances, I consider that it is only appropriate for me to make the two limited comments that I do at paragraphs 49 – 50 below (which must, of course, be seen in this context).

48. In summary, the Claimant submitted that "*significantly*" in para 4.2 of PSI 08/2013 entailed the application of an objective test as to whether the prisoner's risk had been sufficiently reduced. Mr Bunting proposed that the objective test should be based on the dictionary definition of "significant", namely "*noteworthy, of considerable amount…or importance*"; or the causation approach to "significant", meaning "*more than minimal or negligible*" (for example, *R v Zaman* [2018] 1 Cr App R (S) at para 24 (iv)). Mr Manknell, on the other hand, submitted that the question of whether a reduction in risk was "significant" was a matter of judgment for the CART / the Director's evaluation and that attempting to put a gloss on the test was undesirable.

49. I consider it appropriate to record that Mr Bunting indicated Ground 1 was not pursued as a result of his consideration of appellate authorities highlighted in Mr

Manknell's Skeleton Argument. These were cases where the appellate courts have held in other contexts, that the assessment of whether there was "significant harm" (*In re B (A Child)* [2013] UKSC 331, [2013] 1 WLR 1911; Lord Wilson JSC at para 26); or a "significant risk of absconding" *(R (Omar) v Secretary of State for the Home Department* [2019] EWCA Civ 207; [2019] 1 WLR 3981; Davis LJ at paras 44 – 45); or a "significant risk to members of the public of serious harm" (*R v Pedley* [2009] EWCA Crim 840; [2009] 1 WLR 2517; at paras 16 - 18), was a matter of judgment for the decision maker.

50. Secondly, it appears to me that whether a prisoner's risk has reduced "significantly" or not, for the purposes of para 4.2 of PSI 08/2013, must be viewed in the context of the definition of a Category A prisoner in para 2.1. If a prisoner's risk has reduced to some degree, but he remains a prisoner "*whose escape would be highly dangerous to the public or the police or the security of the State*", it is difficult to understand how the reduction could be considered sufficiently significant. In this regard, I note that in *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750, after setting out the para 4.2 PSI 08/2013 test, Sales LJ observed: "*This paragraph has to be read subject to the definition of a Category A prisoner set out in paragraph 2.1 of PSI 08/2013…Downgrading from Category A pursuant to paragraph 4.2 will only be appropriate if the significant reduction in risk takes the prisoner outside that definition*".

Grounds 2 and 3

51. Given the parties' agreement that paras 4.6 and 4.7 of PSI 08/2013 reflect the common law requirements of procedural fairness, it is convenient to consider Ground 3 first.

The parties' submissions

52. The Claimant submits that the majority of factors listed in para 4.7 of PSI 08/2013 were present in this instance, save for factor (a), it being accepted that there were no important disputed facts going to the issue of risk. Mr Bunting contends that the combined force of the features pointing towards an oral hearing meant that the Director had no basis for declining to hold one and that in refusing to do so, he failed to follow the published policy. He seeks to draw an analogy with *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin) (see paragraphs 45 – 46 above), in terms of there being a significant dispute on the expert materials and an impasse.

53. The Defendant does not accept that those factors were in play in this case. Mr Manknell submits that *Rose* involved a materially different situation, as it was there accepted that if the prisoner was not downgraded, he was at an impasse and could not progress. More broadly, he emphasises the policy provides that the Director "*may*" hold a hearing when an identified factor is present.

Post-tariff, length of time as a Category A prisoner and no earlier oral hearing

54. The Defendant accepts that other than the presence of an impasse, the factors identified in sub-paragraphs (c) and (d) of para 4.7 of PSI 08/2013 are present. The Claimant has been a Category A prisoner for almost 20 years. He is nearly ten years

post-tariff and he has not had an oral hearing at any of his previous Category A classification reviews.

55. Mr Manknell submits, and I agree, that in and of themselves these factors are unlikely to give rise to a requirement to hold an oral hearing, as it would not necessarily follow from them being present, that there was an issue of substance that would benefit from consideration at such a hearing. In a similar vein, in *R (Morgan) v Secretary of State for Justice* [2016] EWHC 106 (Admin) at para 47, William Davis J. characterised these factors as "*the more nebulous potential justifications for an oral hearing*". Mr Manknell rightly accepts that when these factors are present, the question of whether to hold an oral hearing requires particularly careful consideration. I would add that if there is also a more specific reason for a hearing (an important dispute of fact / a significant dispute between the experts and/or an impasse), then the extent to which these factors are present will provide important context within which to evaluate the potential value of an oral hearing.

A significant dispute on the expert materials

56. As the wording of para 4.7 of PSI 08/2013 makes clear, this feature will only be in play if there is "*a real and live dispute on particular points of real importance*". In this instance, the central issue on which there is said to be a dispute was the extent to which the Claimant had achieved a reduction in the risk of him re-offending if he was at large; that was undoubtedly a matter of real importance.

57. Mr Manknell rightly accepts that the dispute in question may be between the various experts; or may be between the experts and the LAP (on the one hand) and the Director (on the other). This is apparent from the text of para 4.7 itself, where potential disagreement with the LAP is one of the examples given and it is confirmed by the reasoning at paras 59 – 60 in *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin) (cited at paragraph 45 above), with which I respectfully agree.

58. Mr Bunting submitted that the Director's reasoning showed he disagreed with the assessments of the psychologists and the LAP, even if he did not characterise his position in these terms. Furthermore, in so far as the Director did not perceive himself as disagreeing with their views, he must have misunderstood them and failed to appreciate the substantial difference that existed between those assessments and his conclusions. Mr Bunting highlighted various passages in the Director's reasoning (paragraph 24 above) in support of this contention, in particular:

    i) That the prisoner's offending "t*o a great extent remains unaddressed due to his denial of guilt*", in the Director's first paragraph;

    ii) He "*noted the prisoner still needs to complete substantial work on his offending (as shown by the recommendation for a therapeutic community)*", in the Director's second paragraph;

    iii) He considered "*the available assessments show key issues have still not been fully explored and addressed (as also confirmed by the LAP)*", in the Director's third paragraph;

iv) He "*did not accept that Mr Harrison's downgrading could in the meantime be approved solely to allow him to address these issues further in a TC*", also in the Director's third paragraph;

v) "*Whilst he noted different views on the suitability for downgrading…*", in the Director's fourth paragraph; and

vi) "*He did not consider there was a significant dispute on the principal issue that Mr Harrison needs to further address important risk factors*", also in the Director's fourth paragraph.

59. The Director identified these features as indicating the Claimant's level of risk was such that he should remain in Category A. In this regard, the thrust of the Director's analysis and conclusions ran contrary to the views expressed by Ms Sales (the prison psychologist) and by the LAP. As appears from my earlier summary (paragraphs 16 – 18 and 22 - 23 above), they concluded: that the Claimant had no outstanding areas of treatment need; that he had undertaken all recommended intervention work in Category A; that it would remain the position that there was no outstanding treatment work for him to undergo in Category A even if he admitted his guilt of the main offences and were that to occur, offending behaviour work could be facilitated in a lower security category; that his risk had substantially reduced; and that further progress would most likely be made in a TC environment (which is not available to a Category A prisoner). It is also apparent from the same passages, that in arriving at these conclusions, both Ms Sales and the LAP had specifically considered the impact of the Claimant's failure to admit his guilt on the level of his risk and on their ability to assess it.

60. In addition, the Director's reasoning appears to indicate material misunderstandings of the assessments that were before him. The LAP did not positively recommend the Claimant needed to be based in a TC because of his re-offending risk; in the context of opining that his risk had significantly reduced, the LAP observed that "*further progress would be most likely within a TC environment"* (paragraph 22 above). Nor did the LAP recommend downgrading to Category B *solely* to allow him to address his re-offending risk via a TC. In addition, there were no "*different views on the suitability for downgrading*" expressed in the materials before the Director. As I have already summarised, Ms Sales considered the test at para 4.2 of PSI 08/2013 to be met, as did the LAP who recommended downgrading. Ms Graham, the Offender Supervisor, had not expressed a view on downgrading and in so far as a lack of enthusiasm for that course could be perceived in her June 2018 entries in the Dossier, they were made prior to her discussions with Ms Sales and prior to Ms Sales' August 2018 assessments (paragraph 19 above). After initially suggesting that the Director's reference to there being different views on downgrading must have been a reference to Ms Graham; Mr Manknell proposed that the Director was in fact referring to his own differing view. However, this seems unlikely given he said that he "*noted*" the different views on suitability for downgrading.

61. Mr Manknell submitted that the outstanding work the Director had in mind for the Claimant to undertake in Category A and which he must have interpreted Ms Sales and/or the LAP as contemplating, was being housed in a PIPE unit, which remained an objective in his sentencing plan. However, Ms Sales had specifically commented that she saw little or no benefit in the Claimant going into a PIPE unit (paragraph 18

above) and the LAP's recommendation indicates that it took a similar view. Accordingly, if and in so far as this was the Director's view, it was a further respect in which he disagreed with the conclusions of the prison psychologist and the LAP and/or materially misunderstood their views.

62. The question for me is not whether the decision that the Claimant was to remain a Category A prisoner was a rational conclusion. It has not been suggested that this outcome was not open to the Director or that he was unable to reach conclusions that disagreed with the assessments before him. Ultimately, the decision whether to re-categorise the Claimant was one for the Director to make and, as his reasoning shows, there were features he regarded as troubling; in particular that given the extreme nature of the main offences, the Claimant could be highly dangerous if at large, even if there was only a moderate risk of violent or sexually violent reoffending (see the Director's second paragraph). The questions for me relate to whether an oral hearing should have taken place before a decision was arrived at. Given the substantial divergence between his view and those of the prison psychologist and the LAP (who were familiar with the Claimant at HMP Full Sutton) and given the Director's apparent misunderstanding of aspects of their assessments, I consider that there were strong reasons falling within para 4.7(b) of PSI 08/2013 for holding an oral hearing in this instance. As the (then) Deputy High Court Judge observed in *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin) at para 60, an oral hearing would have afforded a significant opportunity for the Claimant to discover and address the points that were troubling the Director, in a context where the materials he and his legal representatives had seen when preparing written submissions were pointing in favour of a downgrading. An oral hearing would also have enabled the Director to explore the concerns that he had with both the Claimant and with Ms Sales.

63. At the end of the Director's fourth paragraph he said that: "*he considered an oral hearing was not needed to fully understand the strength of...Mr Harrison's progress or the reasoning in the available assessments*". However, his own decision indicates to the contrary.

64. I mention for completeness, that I do not consider the Parole Board's observation in 2014 (paragraph 11 above) adds any real weight to the position. There were subsequent Parole Board decisions which I have not seen; and it was an observation made by a single member panel after considering the case on the papers, rather than at a hearing.

<u>An Impasse</u>

65. In addition, the Claimant submits that his continued classification as a Category A prisoner gave rise to an impasse, in that he had completed all intervention work available to him whilst in Category A, so that whilst he remained in this security classification he was without additional opportunities to demonstrate his reduced risk, yet without such demonstrated risk reduction he would not be downgraded. This was said to be an impasse which engaged sub-paragraph (c) of para 4.7 of PSI 08/2013 namely one "*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*".

66. The Defendant submits that there was no impasse as it was open to the Claimant to admit his guilt and/or go to a PIPE unit (albeit the Director did not make explicit reference to PIPE in his reasoning).

67. I have already noted that Ms Sales considered there was no further intervention work available to the Claimant whilst he remained classified as Category A, even if he did admit his guilt; and that she did not consider a PIPE would be beneficial for him in terms of managing his risk. Mr Manknell accepts that there was no relevant course or placement other than PIPE available to the Claimant in Category A.

68. Mr Bunting submits with some force, that without a positive recommendation from the prison psychologist at HMP Sutton that he should be so placed, it is unlikely that the Claimant would be assigned to one of the limited places in a PIPE unit. Furthermore, in the unlikely event that he was placed in a PIPE unit, on Ms Sales' assessment, the Claimant would not be able to show a further significant risk reduction of the kind contemplated by the Director, as this was not considered to be something he was likely to benefit from in terms of risk reduction. Denial of guilt cannot in itself preclude re-categorisation (paragraph 40 above). For these reasons, I accept that the present situation is akin to the kind of impasse contemplated by Gross LJ at para 28(iii) in *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 (paragraph 41 above).

69. The impasse is also highlighted by the reasoning in the Director's second paragraph: "*He noted the prisoner still needs to complete substantial work on his offending (as shown by the recommendation for a therapeutic community) which is not compatible with an assessment of significant progress and risk reduction at this time.*" In other words, the need to complete further risk reduction work necessary to secure a downgrading from Category A, was shown by a recommendation that the Claimant complete a programme only available to him if he was transferred to Category B.

70. This is not a situation where a stalemate has arisen because the prisoner has refused to undertake offending work because he will not admit his guilt, as was the case, for example in *R (Bourke) v Secretary of State for Justice* [2012] EWHC 4041 (Admin); and *R (Steele) v Secretary of State for Justice* [2018] EWHC 1072 (Admin). The Claimant has undertaken all the intervention work that has been recommended and made available to him.

71. In the circumstances, a genuine impasse existed and was liable to continue for the foreseeable future without resolution, if the Claimant's security classification was simply maintained, without addressing this aspect. This is not to doubt that denial of guilt is relevant to risk assessment, as discussed in *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 (paragraph 40 above), but, as PSI 08/2013 recognises in para 4.7(c), there are impasse situations where there is a real value in having an oral hearing at which potential solutions can be explored. For the reasons identified above, this was such a situation, especially when allied with the substantial difference in views on key issues concerning risk reduction, which I have already identified and discussed.

Conclusions on Grounds 2 and 3

72. I accept Mr Manknell's submission that the assessment of whether an oral hearing is appropriate is not determined by a mathematical exercise of simply totalling up of the number of factors mentioned in para 4.7 of PSI 08/2013 that are in play. However, as para 4.6 recognises: "*the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed*". Moreover, it will be pertinent to consider the strength of each of the factors that are in play. In this instance, for reasons I have already identified, there were compelling reasons for an oral hearing in light of the significant differences of views between the Director (on the one hand) and the prison psychologist and the LAP (on the other) regarding the central issue of risk reduction; and the impasse that resulted from the continuation of the Claimant's Category A status. These considerations were supported by the factors I have discussed at paragraph 55 above. However, when declining to hold an oral hearing, the Director did not identify these considerations, all of which arose from a proper application of PSI 08/2013 and instead he wrongly concluded that "*an oral hearing was not needed to fully understand the strengths of Mr Harrison's progress or the reasoning in the available assessments*". In so concluding, the Director did not properly or fairly apply PSI 08/2013.

73. I have kept in mind the Court of Appeal's guidance in *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750. Nonetheless, this was a case where the combination of factors pointed very strongly in favour of an oral hearing before the Director made his decision. Furthermore, the circumstances were not dissimilar to those contemplated by Sales LJ at para 61 of his judgment (paragraph 37 above); as the Director was not persuaded by the assessments of the prison psychologist or the recommendation of the LAP, this ought to have been a situation where, "*having read all the reports…* [he was]*…left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference*".

74. For all these reasons I conclude that Ground 3 is made out and that the Director failed to follow the Defendant's published policy in declining to hold an oral hearing.

75. I also conclude that Ground 2 is made out, because common law fairness required there to be an oral hearing, for the same reasons that I have identified and discussed when considering the applicability of the PSI 08/2013 factors.

76. Accordingly, the Director's decision not to hold an oral hearing was unlawful and this application for judicial review is allowed.

77. Since circulating this judgment in draft, the parties have agreed a draft Order, which I approve.