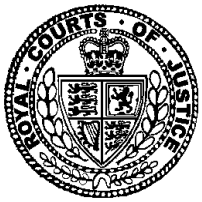

Neutral Citation Number: [2022] EWHC 2577 (Admin)

Case No: CO/1428/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2022

Before :

CLIVE SHELDON KC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :
THE KING
on the application of

ANTHONY CLARKE **Claimant**

– and –

THE SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

PHILIP RULE (instructed by **Coninghams Solicitors**) for the **Claimant**
WILLIAM IRWIN (instructed by **GLD**) for the **Defendant**

Hearing date: 27 July 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives.
The date and time for hand-down is deemed to be at 10:00 am on 13/10/2022

CLIVE SHELDON KC (Sitting as a Deputy Judge of the High Court) :

1. This is an application for judicial review brought by Anthony Clarke, a prisoner who is currently serving a prison sentence in a Category A (high security) prison. On 19th January 2021, a decision was taken on behalf of the Secretary of State for Justice to maintain the Claimant's Category A status. This decision was upheld on review on 25th March 2021. The Claimant challenges the process that led to these two decisions. In essence, he contends that (i) the process did not comply with the Secretary of State's published policy: PSI 08/2013; and (ii) there was a failure to comply with common law requirements of procedural fairness, in particular with respect to the refusal to convene an oral hearing.

Factual Background

2. In 2008, the Claimant was convicted of the murder of a former girlfriend and sentenced to a mandatory life sentence with a tariff of 25 years. The victim had been stabbed and set on fire. At the time of the index offence, the Claimant was 26 years old. The materials that I have seen describe the circumstances of the offence as follows:

> "Anthony Clarke had been in a relationship with the victim for approximately one year but the relationship had ended several months prior to the offence. There were concerns regarding domestic violence in the relationship as the victim had made 5 allegations to the Police in the 3 weeks leading up to her death. She was due to make a statement to the Police in the 3 weeks leading up to her death. She was due to make a statement to the Police on the day of her murder. According to the Crown, it appears that she had looked to take advantage of this situation by threatening Anthony Clarke that she would sign the statement unless he paid her £1000. . . .
>
> The victim arranged to meet Anthony Clarke at 4.30pm on the day of the murder. He arrived along with a co-defendant (1) who together bundled her into a car and drove her to a garage owned by Anthony Clarke's uncle (co-defendant 2). She was transferred into a white van owned by the uncle and held in there for several hours. She was eventually driven to a secure country lane by Anthony Clarke who had earlier obtained a can of petrol. She was stabbed and set on fire."

This was not the Claimant's first offence. He had previously been convicted for the offence of handling stolen goods.

3. During the course of his time in prison, the Claimant has completed a number of programmes including RESOLVE (a rehabilitation programme that aims to help users to develop skills of self-control), the Thinking Skills Programme and a number of victim awareness courses.

4. As a Category A prisoner, the Claimant's categorisation is reviewed on an annual basis. The process entails consideration by a local advisory panel (LAP) within the

establishment where the prisoner is confined. The LAP submits a recommendation about a prisoner's security category to the Category A Team ("the CART"). The Deputy Director of Custody (DDC) High Security (or delegated authority) is solely responsible for approving the downgrading of a Category A prisoner.

5. In July 2019, the LAP recommended that the Claimant be downgraded to Category B. This recommendation was not accepted by the Director of Long Term and High Security Prisons. The Director concluded that "there needs to be a clear treatment pathway" for the Claimant, that Psychology needed to know more about the Claimant's risks, and a PCL-R (a Psychopathy Checklist assessment) was required to explore fully the Claimant's risk factors so as to ensure the suitability of future treatment options.

(a) The 2020/21 annual review: the reports

6. For the following year's annual review, the Claimant was provided with the dossier of materials on 20th May 2020. The dossier contained a number of positive observations about the Claimant and his behaviour. It also referenced some remaining concerns about the Claimant's risk, and the further work that needed to be carried out to reduce his risk.

7. In the dossier, there was a report from Mr. Cook, the Claimant's keyworker at HMP Wakefield where he had been confined since March 2018. Mr. Cook explained that during the reporting period there had been no adjudications or warnings against the Claimant and there were no concerning behaviours to report. Mr. Cook explained that there were a number of positive reports about the Claimant, including an incident where he had assisted in calming an incident between two prisoners. This was stated to show the Claimant's "exceptional attitude towards the rehabilitative community on A wing and his personal contribution." Mention was also made of the Claimant's graduation from the Open University, where he had obtained a degree in Business. Mr. Cook observed that the Claimant "regularly implements skills learned from RESOLVE and shows this on a daily basis. [He] speaks with staff if there are issues or threats against him rather than letting situations progress and potentially worsen." Reference was also made to the Claimant keeping very strong family ties, having regular contact with his children and a supportive partner.

8. The dossier also included a report from Ms. Barton, a Probation Officer. Ms. Barton reported that the Claimant continued to be diligent in his employment as a wing cleaner and noted that no concerns about the Claimant's day-to-day behaviour were recorded. However, Ms. Barton's report contained a concern that the Claimant may have engaged in "manipulative behaviour" by inviting the Prison Offender Manager, the Claimant's key worker and an independent psychologist to a meeting between the Claimant and Assessment and Intervention Staff. Ms. Barton also noted that the Claimant had not completed any offending behaviour work that addressed the domestic abuse element to his index offence. She regarded this as "core reduction work". She concluded that:

> "whilst Mr Clarke's completion of RESOLVE/TSP alongside no concerns being raised about his day to day behaviour on the wing and him gaining various qualifications are all extremely positive, in my assessment they are not enough to warrant a reduction in the risk to medium.

> In my assessment, work on his behaviour towards women in relationships is a priority and given the nature/seriousness of the offences and the risk Mr Clarke presents he should remain within the Long Term High Security Estate ... whilst the core risk reduction work is completed. . . . The main risk factors relate to his behaviour in relationships and the extreme violence he has used towards an ex-partner"

9. A Psychology report from Ms. McCraw (dated 15th May 2020) was also included in the dossier. Ms. McCraw had met with the Claimant as part of her assessment. I shall set out some of the details from Ms. McCraw's assessment, as these were referred to by the parties, and (when compared with the views expressed by a private psychologist engaged by the Claimant) will help to illustrate some of the issues that were in dispute between the parties.

10. Ms. McCraw reported that the Claimant had initially denied responsibility for the index offence; in 2015 he began to accept responsibility for his part in the offence, although his account of the offence differed from that contained in the official documentation. Ms. McCraw reported that the Claimant had expressed concern about moving to another Category A establishment due to what he said were issues with another resident at HMP Long Lartin, where the Claimant stated he had been threatened or extorted for finances. The Claimant was also reported to have said that the threat of violence had followed him to another Category A establishment, HMP Whitemoor, there was an altercation with another resident for a particular reason disclosed to the prison service. It was stated that this incident was documented as the Claimant not being subject to adjudication on the grounds of "provocation". (During the course of the hearing, counsel for the Claimant, Mr. Rule submitted that this must have meant "self-defence"). As a result of these concerns, the Claimant intimated that he would not be able to move to another Category A establishment to complete offending behaviour programmes if they were recommended.

11. Ms. McCraw explained that a Programme Needs Assessment had been produced in January 2020. This concluded that further investigation was required into the Claimant's insight into his risk and future risk management plans. Ms. McCraw reported that she had carried out the HCR-20 version 3 (Historical, Clinical and Risk management) violence risk assessment. This is a structured risk assessment, pursuant to which risk is evaluated in a variety of domains. Ms. McCraw identified that the Claimant had a history of problems with violence, as reflected in the index offence; and a history of problems with antisocial behaviour, which included involvement with antisocial peers at the time of and preceding the index offence. In Ms. McCraw's opinion, "the presence of co-defendants suggest there was some level of group affiliation in the commission of the offence." Ms. McCraw noted that the circumstances surrounding the index offence suggest the possible presence of difficulties in the intimate relationship with the victim prior to her death, although she noted that the Claimant had denied that he had been verbally or physically aggressive towards her.

12. With respect to the domain of "History of Problems with Personality Disorder", Ms. McCraw noted that a formal assessment of personality disorder had been carried out in 2018 by another psychologist (Dr. Gregory), and this indicated "the presence of

problematic personality traits, specifically callous disregard for others, manipulation, entitlement and antisocial beliefs". She explained that "these traits did not cluster to reach the level of a formal diagnosis for personality disorder." Ms. McCraw stated that an assessment in Psychopathy (the PCL-R) was not necessary, but shared the view of Dr. Gregory that "the presence of these traits within the context of the index offence, which have also been observed to some extent in his behaviour in custody, suggests these traits are worthy of consideration in the development of a risk management plan." Ms. McCraw explained that:

> "Dr Gregory makes reference to Mr Clarke's capacity for impression management in her assessment, an opinion with which I am inclined to agree. It is my view Mr Clarke presents as an educated man who considers himself to be highly skilled and capable in several aspects of his life. This is evidenced in the composition of his Relapse Prevention Plan document (2017) which outlines all of his achievements in custody, something he was keen to reiterate and expand upon during interview. Mr Clarke's language and presentation are suggestive of an individual with a high level of self-esteem and confidence in his abilities, with a willingness to question and/or contest, albeit through formal and appropriate measures, professionals who may question the sincerity or validity of his presentation. I am of the view this assessment is supported by evidence pertaining to Mr Clarke's approach to questioning information documented within his recent PNA [Programme Needs Assessment], his approach to contacting the Senior Psychologist involved in the PNA assessment to discuss the outcome of the assessment and, his attempts to elicit a recommendation from the author of this assessment on completion of interviews.
>
> It is my opinion Mr Clarke's attempts to circumvent formal measures to communicate with professionals, with the implied intention of securing a positive appraisal of his behaviour, is worthy of consideration. I suggest this could be viewed as offence paralleling behaviour to some degree. In the circumstances of the index offence where Mr Clarke was eager to quash the threat of information becoming known to authorities that could have been damaging to his character and position. In the current context, I suggest Mr Clarke may be keen to ensure assessments of his thinking and behaviour are consistent with that of a recommendation for a downgrade, thus enabling him to progress with his sentence as he hopes. Whilst it is noted that Mr Clarke is not engaging in acts of violence to secure his position, he has been persistent in his attempts to challenge and seek modification of appraisals of his behaviour, for example in the form of the PNA and this assessment, that could hinder the advancement of his preferred sentence progression. I consider this evidence to support the presence and relevance of this item."

13. With respect to the domain of "History of Problems with Violent Attitudes", Ms. McCraw noted that the Claimant had recognised, through his association with perpetrators of violence, that he had begun to hold beliefs that violence was permissible and appropriate "in the context of preservation of his status, material and financial gain." Ms. McCraw stated that in her opinion, the Claimant's association with antisocial peers could be considered as evidence of this item. Although the Claimant denied direct involvement in the antisocial or violent activities of his peers, he had lauded the benefits of their lifestyle. During interview, she noted that the Claimant had acknowledged that he had engaged in behaviour that could be viewed as disrespectful towards others, exemplified by the manner in which he engaged in sexual contact with females, including the victim: the victim and other women had been shared between the Claimant and his co-defendants for sexual purposes. In addition, Ms. McCraw noted that the Claimant had had the status of an HRE [High Risk of Escape] prisoner due to concerns about his possible association with criminal gangs. Although Ms. McCraw could not expand on the nature of the concerns, the length of time that the Claimant was the subject of these measures (approximately five years) was suggestive of substantial concerns by the authorities to support their assessment of risk. Ms. McCraw expressly noted, however, that the Claimant consistently denied association with organised crime at any stage in his sentence.

14. With respect to Clinical items, and the domain of "Recent Problems with Insight", Ms. McCraw expressed the view that the Claimant had developed insight into his behaviour through participation in therapeutic programmes. However, she was of the opinion that the Claimant's capacity for impression management could not be overlooked. She stated that:

> "This view does not imply Mr Clarke is disingenuous in his acknowledgment of the factors that influenced his use of violence, rather I suggest a level of caution may be applicable in this case, with consideration of Mr Clarke's motivation to acknowledge risk and his culpability for his behaviour, i.e., to achieve a downgrade"

15. In dealing with the domain of "Recent problems with instability", Ms. McCraw expressed the opinion that evidence presented in the assessment was suggestive of the Claimant experiencing a level of cognitive instability, specifically a tendency to attribute responsibility and/or blame to others. This was evidenced in his discussion of the index offence, where although the Claimant accepted responsibility for setting the victim on fire, he also presented the view that he was a passive agent in the offence "acting under the instruction of others through fear of reprisal, denying that he was the central perpetrator". Ms. McCraw noted that this was inconsistent with the official account of the index offence. Ms. McCraw noted that there were similar patterns of thinking evidenced in the Claimant's appraisal of difficulties he had encountered in custody: the Claimant had, for instance, presented the threat of violence from others as a barrier to moving to another Category A establishment to access therapeutic programmes, even though there was evidence to suggest that he had been capable of managing threats to his safety in custody and she therefore questioned "the veracity" of the Claimant's argument for not wanting to move to another high security establishment.

16. As for the domain of "Recent Problems with Treatment or Supervision", Ms. McCraw stated that there was no evidence to indicate that the Claimant had displayed a poor attitude to compliance or responsiveness to supervision in the recent past. However, the issue of impression management was said to be relevant.

> "Concerns have been expressed regarding the nature of Mr Clarke's interaction with professionals, querying whether this is genuine or self-serving in nature. . . . [T]here is evidence to indicate Mr Clarke struggles to accept appraisals of his behaviour that are inconsistent with his view of himself, i.e. suitable for a downgrade. . . [D]uring the current assessment Mr Clarke queried the evidence used to rate the presence of personality traits in Dr Gregory's report and the reasoning for an assessment of psychopathy. Mr Clarke was not observed to be disrespectful in his disagreement, nor did he attempt to discredit report writers. It is my view the persistent nature of Mr Clarke's disagreement, specifically his desire to have information reflect an evaluation of his behaviour consistent with his own view, raises questions about authentic compliance in this case."

17. In considering "Risk management items", Ms. McCraw stated that the Claimant had expressed a desire to downgrade this categorisation so that he could access therapeutic interventions within a Category B establishment, including the option of a Therapeutic Community at HMP Dovegate. Ms. McCraw noted that the intensity of a Therapeutic Community "is commensurate to Mr Clarke's risk and could allow for the targeting of critical risk factors, such as his association with antisocial peers and self-perception". Ms. McCraw pointed out that this therapeutic pathway was not facilitated at the Claimant's current establishment.

18. With respect to the domain of "Assessment of treatment gain during the reporting period", Ms. McCraw repeated the position that professionals had expressed concerns regarding the Claimant's approach to managing his response to recommendations that are contrary to his perception of risk and need. She acknowledged that the Claimant had not challenged professionals using "aggressive and/or violent behaviour", but stated that he had contested their views through the use of formal applications and meetings with professionals, citing the view of other professionals and staff members to support his position as/when possible." This behaviour had been perceived as "entitled", although Ms. McCraw noted that the Claimant contested this assessment. Ms. McCraw stated that she considered the Claimant's tendency to contest and/or challenge professionals on their assessments as "a potential form of offence-paralleling behaviour, based on the level of persistence and intent which accompanies this behaviour". She was of the view that the Claimant "struggles to accept an appraisal of his behaviour that is inconsistent with his own, which could impact on his ability to comply with future treatment recommendations. I suggest this currently may operate as barrier to progression".

19. In her description of "Case formulation", Ms. McCraw discussed the "Predisposing factors" for the index offence. In doing so, she stated her view that the Claimant's life choices in late adolescence and early adulthood were "potentially driven by how he wanted other[s] to perceive him rather than a sense of clarity about his own wants and goals for life". Ms. McCraw considered these behaviours to be an early manifestation

of Mr Clarke's tendency for impression management, albeit in a positive manner at this stage in life." Ms. McCraw then discussed the Claimant's earlier offences for handling stolen goods, and his statement that he did not think he would get caught when he purchased a stolen computer from his uncle. Ms. McCraw stated that:

> "this could be perceived as a level of conceit rather than naivety on Mr Clarke's part, potentially linked with his desire to succeed in life and a perception he is able to circumvent certain societal rules and regulations if this enables him to advance with his objective. In such circumstances, when driven by a desire to succeed and present himself as capable and successful to others, engaging in impression management, I suggest Mr Clarke's capacity for irresponsibility and reckless decision making is heightened."

20. In assessing the "Precipitating factors" for the index offence, Ms. McCraw described what she regarded as "callous" behaviour and "potentially the emergence of a personality trait which had previously not been a prevalent feature of Mr Clarke's behaviour prior to his association with antisocial peers." The Claimant's indignation towards the victim, along with "the emergence of traits of conceit, impression management callousness and attitudes condoning the use of violence to preserve status and material gain" were all functional in his decision to participate in the index offence.

21. Ms. McCraw summarised her assessment as being that although the Claimant had consistently applied his learning from therapeutic programmes since his last review, there remained aspects of his offence that:

> "may warrant further exploration, for example the strength and nature of his association with antisocial peers, specifically the effect these relationships had on his thinking, attitudes and behaviour. I suggest the work he has completed to date in therapeutic programmes may not have adequately addressed this salient factor in his index offence, therefore I am of the view further therapeutic intervention may be of benefit to Mr Clarke's risk management."

22. Ms. McCraw concluded that the Claimant posed a "moderate/elevated risk of violence at the present time" and that he required some specialist management strategies to address his risk of violence. She did not consider that he posed "an imminent risk of violence". The Claimant's behaviour – the presence of insight into his behaviour and evidence of application strategies to manage his risk of violence – would indicate that he could be considered for downgrade. Nevertheless, Ms. McCraw stated that:

> "it is my view there remain aspects of Mr Clarke's thinking and behaviour both in the index offence and during his time in custody which could benefit from further exploration. Of particular concern is Mr Clarke's association with antisocial peers and the impact of these relationships on his thinking and behaviour in the index offence, including the two years prior to

> the event. On this basis, ***I do not consider Mr Clarke to be suitable for a downgrade and recommend he remain a Category A prisoner*** at this stage of sentence".
>
> (emphasis in original).

23. As for treatment pathways for the Claimant, Ms. McCraw did not consider that the "Kaizen" programme was appropriate. ("Kaizen" is a programme for high or very high risk adult men who have been convicted of a sexual, Intimate Partner or general violent offence. It supports the development of optimism, and skills to strengthen pro-social identity). Rather, she suggested that the Claimant should be considered for an assessment to determine his suitability for the "*Identity Matters*" programme. That programme targeted several factors which she had identified in her assessment of the Claimant: group association, status and material gain obtained through association with such a group, and depersonalisation of others through association with a group. Ms. McCraw reasoned that the Claimant's propensity for violence had significantly increased through his association with antisocial peers.

24. Ms. McCraw accepted that the treatment pathway of a Therapeutic Community would allow the Claimant to explore the areas that she had outlined. However, she considered that the group element of that format was a potential barrier to treatment, and in her opinion, the "Identity Matters" programme was a more appropriate programme for the Claimant. Ms. McCraw reasoned that that programme was delivered on an individual basis, and thereby reduced the possibility of influences from peers that would be found in a therapeutic environment. Ms. McCraw stated that she considered the Claimant's "proclivity for impression management, specifically difficulties presenting himself in a vulnerable or negative way to others, to be more likely in a group setting than on an individual basis". The Identity Matters programme was stated to be available in three other Category A establishments.

25. At the end of her report, Ms. McCraw described her exchange with the Claimant when they discussed the outcome of her assessment. She explained that the Claimant had queried the view that he engages in impression management. He had said that his decision to question information was not based on a desire to manipulate or change a professional's view, but was based on his view that decisions should not be based on inaccurate or incorrect information; that it was justifiable to question information that he felt was untrue or not factually grounded. The Claimant also disputed attempting to circumvent procedures, and denied any association with organised criminal activity since his arrest for the index offence. The Claimant reported that he would be willing to engage in the recommendation for "Identity Matters", but reiterated the threat posed to him if he was to move to one of the Category A prisons where that programme was facilitated. He enquired whether it would be possible to complete the programme in segregation at HMP Frankland, a Category A establishment.

26. The dossier also included an addendum report to that of Ms. Barton, produced by Tina Terrington, another Probation Officer. Ms. Terrington stated that "the conclusion remains that re-categorisation is not recommended until core risk reduction work is completed."

(b) The Claimant's representations

27. On 10th August 2020, the Claimant's solicitors made representations to the LAP. They submitted that the Claimant's risk had reduced sufficiently to warrant a downgrade to Category B. It was pointed out that professionals had determined that a PCL-R was unnecessary. Doubts were expressed about Ms. McCraw's report, and in particular her concerns about the Claimant's tendency to "impression management" and circumvention of normal channels in a "potentially offence-paralleling way". It was submitted that this was at odds with the experience of staff who had worked with the Claimant over many years and that he had used formal complaint channels.

28. In the representations, the Claimant's solicitors requested that the LAP recommendation be provided to the Claimant immediately, so as to enable him to make representations before a final decision was made. This was stated to be the Claimant's "entitlement under PSI 08/2013".

29. The Claimant's solicitors also provided two reports from Dr. Pratt, an experienced independent Consultant Clinical and Forensic psychologist, dated 14th May 2020 and 3rd August 2020 (the latter report responded to the report from Ms. McCraw). The Claimant's solicitors invited the LAP to prefer the analysis of Dr. Pratt to that of Ms. McCraw. They argued that Ms. McCraw's recommendation was based upon a concern about the Claimant's previous anti-social associations, however, she had failed to acknowledge that there was no evidence of those associations during the Claimant's time in custody. As for Ms. McCraw's recommendation that the Claimant undertake the "Identity Matters" programme on the basis that this was not done in a group, the Claimant's solicitors submitted that this overlooked the fact that the Claimant had previously completed the RESOLVE programme which was a group activity. Furthermore, it was submitted that Ms. McCraw had failed to make clear how completion of the "Identity Matters" programme related to the reduction of risk and a future pathway towards risk reduction.

30. Dr. Pratt advised in his first report (dated 14th May 2020), that the PCL-R should not be used. He also concurred with the previous year's recommendation by the LAP that the Claimant's risk of serious harm, if unlawfully at large in the community, had reduced for him to be appropriately managed in Category B. Dr. Pratt did not recommend that the Claimant complete the Kaizen programme before he could properly be downgraded. Rather, he supported a Therapeutic Community for the Claimant.

31. In his second report (dated 3rd August 2020), Dr. Pratt addressed the risk assessments that had been carried out by Dr. Gregory in 2018 and by Ms. McCraw in 2020. Dr. Pratt disagreed with Ms. McCraw's assessment that there was the presence of a Personality Disorder. He also rejected the suggestion that by making detailed representations, or completing numerous request complaint forms, the Claimant was evidencing a "personality pathology, or even a potential form of offence paralleling behaviour". For Dr. Pratt, the use by the Claimant of the request complaint procedure, which was without menace or threat, was simply an example of the Claimant "wanting to thoroughly engage with professional processes, which will have a major impact on his future." Dr. Pratt pointed out that at no stage had the Claimant attempted to discredit report writers, and his complaints were not considered vexatious.

32. With respect to "Violent attitudes", Dr. Pratt regarded its presence as "Partial", whereas Ms. McCraw had assessed this as a "Yes". Dr. Pratt said there seemed to be no evidence of violent attitudes and beliefs intensifying within the custodial environment, or being present recently. With respect to clinical factors, Dr. Pratt stated that the consistency of the Claimant's "pro-social behaviour and evidently good relationships, at least with uniformed staff, is a strong indication, in its own right, that he is not consciously trying to manipulate or manage the impression that everybody has of him, but is simply reacting instinctively and naturally." With respect to "Risk management factors", Dr. Pratt stated that it was evident that the Claimant was fearful for his life should he be transferred to HMP Long Lartin or Whitemoor.

33. Dr. Pratt concluded that "there is little or no indication, it seems for some time, of offence paralleling behaviour, e.g. via the use of violence or advocating violent solutions to others, and his reliable pro-social persona is, in my opinion, to his credit." Dr. Pratt did not consider that the "Identity Matters" programme was necessary before the Claimant could be formally re-categorised. Dr. Pratt considered that a Therapeutic Community should be the next stage. This might explore the thinking styles behind the callous murder and destruction of somebody with whom the Claimant had been in an intimate relationship, the issue which was "perhaps an outstanding area of concern" and would "almost certainly not be covered by Identity Matters." Dr. Pratt confirmed that the Claimant should be downgraded to Category B.

34. The Claimant's solicitors asked the LAP to give a view as to whether it could be beneficial for the Director to hold an oral hearing, so as to resolve any doubts as to the Claimant's progress and to professional disagreements as to the outstanding levels of risk.

(c) The LAP recommendation

35. On 14th January 2021, the LAP issued a letter setting out its recommendation, and provided the minutes of their discussion. It was noted that the Claimant needed to address the domestic abuse elements of his offending. It was also stated that the Claimant presents very well, but requires some specialist strategies for violence management. It was recommended that he undertake the 1:1 programme "Identity Matters". It was noted that the Claimant was keen to preserve his lifestyle from before prison, and he chooses to overlook or minimise any use of violence and can be evasive when answering direct questions. The Claimant's educational achievements were acknowledged, and his positive relationship with his keyworker and positive references to his work and contributions on the wing were noted. Similarly, his regular contact with family and friends.

36. The minutes contain reference to "Security Information", where it was stated that the Claimant was moved from A to B wing "due to allegations of bullying in October." This allegation had not been disclosed to the Claimant as part of the dossier.

37. The LAP minutes also record that there had been an adjudication which was dismissed in April 2020 regarding a possible physical altercation between the Claimant and another prisoner. It was stated that:

> "In the last year he has displayed offence paralleling behaviour with violence and bullying, and while he gives a consistent

> impression of having changed there are some concerns that he very much manages the image that he presents. This requires further assessment."

38. The LAP's recommendation was for the Claimant to remain at Category A. It was recommended that for a reduction in risk to be evidenced, the Claimant should complete the "Identity Matters" programme and continue to engage with the case management team.

(d) The CART's decision

39. The LAP recommendation was provided to the Claimant on 18th January 2021. On 19th January 2021, the CART completed its review. The CART decided that the Claimant should remain at Category A (Standard Escape Risk). The decision letter contained the following:

> "The Category A Team considered your offending showed you would pose a high level of risk if unlawfully at large, and that before your downgrading could be justified there must be clear and convincing evidence of a significant reduction in risk."
>
> Your recent reviews have shown your good behaviour and engagement in education. You completed the Resolve programme in 2016 followed by a period of consolidation. However the extent of your treatment gain and full acceptance of responsibility for your offending remained unresolved after this work. Both further assessments and possible further treatment was therefore recommended. This included assessment of your personality traits and the part these played in your offending. No significant risk reduction has therefore been shown.
>
> The Category A Team recognised your overall behaviour has been satisfactory since your last review. There is some alleged negative information, including possible bullying, but you have received no recent adjudications and continue to make good use of the regime. It considered however your general regime adherence is insufficient to show a significant reduction in your risk if unlawfully at large. It still needed convincing evidence of your progress addressing and amending the risk factors shown by your serious offending.
>
> The Category A Team noted you have engaged with psychological services since your last review. The resulting assessment confirms you accept involvement in the present offence, with some provisos. You have in recent years willingly engaged in identified intervention work and made good use of your time through education. The assessment nonetheless concludes there are key issues influencing your present offence and subsequent behaviour in custody requiring further exploration. The assessment shows your personality traits are an

> important factor in your offending and behaviour, suggesting both impression management and that your progress through interventions may be unreliable as an indicator of significant change. The assessment concludes you should remain in Category A at this time on the basis of these issues and should take part in the IM ["Identity Matters"] programme.
>
> The Category A Team supported the view of the LAP that these outstanding matters need to be further explored and resolved before significant progress can be properly established. It considered that convincing evidence of a significant reduction in your risk of similar reoffending if unlawfully at large is still not shown. It is therefore satisfied you must stay in Category A at this time.
>
> The Category A Team carefully noted your representations, but considered these also provide no convincing evidence you have achieved a significant reduction in your risk of similar reoffending if unlawfully at large. It noted these rely to a great extent on the submitted private psychology reports, which take a different view on your level of progress and treatment needs. It notes these reports however also conclude you need to complete further substantial treatment to address the core risk factors influencing your present offence, albeit through a different route. These reports recommend your downgrading on the basis of your suggested manageability in Category B, which is not the correct test for downgrading from Category A. It did not believe these reports show the prison and LAP conclusions on your progress and unsuitability for downgrading to be irrational".

(e) The Claimant's further representations

40. On 24th March 2021, the Claimant's solicitors submitted post-decision representations along with a further report from Dr. Pratt. The Claimant's solicitors requested that the Director convene an oral hearing, on the basis that fairness demanded an oral hearing given the complexities of the case, the disputed expert evidence and the current impasse.

41. The Claimant's solicitors contended that there were a number of allegations of unfairness as to the process: (i) that the Claimant was given no opportunity to make representations on the LAP's recommendation; (ii) the LAP recommendation contained a number of inaccuracies or was based on material not disclosed to the Claimant: there was no evidential basis for the assertion that he had displayed "offence paralleling behaviour"; to the Claimant's knowledge he had not been accused of bullying, an assertion which was inconsistent with Mr. Cook's report who confirmed that there had been no adjudications, negative behaviours or concerns; concerns as to impression management were not reflected in the reports of those who work with the Claimant, and references to evasiveness were not sourced or substantiated; the LAP was wrong to say that a PCL-R had been carried out, that the Claimant had been assessed as unsuitable for interventions regarding domestic violence; and there was no engagement with Dr. Pratt's suggestion that the "Identity Matters" programme was a disputed pathway; and

(iii) the CART decision was flawed: weight was put on the unsubstantiated allegations of bullying, no account was taken of Dr. Pratt's views as to the suitability of the "Identity Matters" programme; and Dr. Pratt had applied the correct test for a downgrade.

42. In addition, it was submitted that there was a clear and important dispute of fact as to the Claimant's behaviour, and this could be assessed first-hand through the Claimant's presentation at an oral hearing. It was submitted that there was a very significant dispute on the expert materials (on whether the downgrading test had been met; as well as the suitability of the "Identity Matters" programme for the Claimant as a means to demonstrate necessary risk reduction and an appropriate pathway; and the assertions as to image management). It was argued that the practicalities of the "Identity Matters" programme could be canvassed at the hearing, as could the experts' views on any allegation of offence paralleling behaviour. It was contended that there was an impasse of some years' standing: only the "Identity Matters" programme was being proposed, and not only might this programme be unsuitable for the Claimant, the Claimant may have to wait many years before a place is available. On the other hand, it was noted that Dr. Pratt had identified the Therapeutic Community as a pathway, but it was noted that this was not achievable without a downgrade.

43. The further report from Dr. Pratt submitted with the solicitor's representations was dated 17th March 2021. In his report, Dr. Pratt concluded that he could not recommend that the Claimant be required to complete the "Identity Matters" programme before the CART could conclude that there was cogent evidence of risk reduction. Dr. Pratt stated that there was little indication that the Claimant's risk of violence was imminent. The Claimant had completed the RESOLVE programme which had enabled him to review his index offence, and this process should continue in a Therapeutic Community. Dr. Pratt said that he maintained the view that the risk, if the Claimant was unlawfully at large, did not merit Category A status.

(f) The CART's further decision

44. On 25th March 2021, the CART responded to these further representations. The CART stated that its previous decision was "rational" on the basis of the available information, and that appropriate responses had been provided to the representations.

45. The CART continued as follows:

> "there is no basis to your claim it acted unfairly or unlawfully in completing Mr Clarke's review on 19 January. It is satisfied it completed this review precisely in accordance with PSI 08/2013. There is no requirement for the [CART] to await further representations on the LAP recommendation before completing a review. It notes you disagree with the decision and with information in Mr Clarke's review. It considers you have however provided no coherent evidence that information having a material bearing on the decision was insufficiently disclosed, misrepresented or overlooked.
>
> The [CART] considered there are also no grounds for an oral hearing in relation to Mr Clarke's recent review, in accordance with the criteria in PSI 08/2013. It is satisfied that your

> disagreement with prison reports, LAP recommendation or [CART] decision does not represent a significant dispute warranting an oral hearing. The decision provided clear and detailed reasons why the recommendations in the private psychology reports do not provide coherent evidence of significant risk reduction, in accordance with PSI 08/2013. These recommendations do not therefore represent a significant dispute warranting an oral hearing. It notes Mr Clarke has been in custody some years and has never had an oral hearing, but considers these facts alone provide insufficient grounds for an oral hearing without other supporting reasons. It considers there is no evidence Mr Clarke is in an impasse and that he has the means to show risk reduction enabling his consideration for downgrading at this time. It notes also Mr Clarke is over 10 years from tariff expiry, therefore no credible claim can be made [that] his Category A status is preventing his consideration for liberty. It considers there are no other issues relevant to his review and risk assessment that can be resolved only through an oral hearing."

46. Judicial review proceedings were issued on 19th April 2021. Permission was granted on 15th September 2021. Since that date, a further annual review has been held, and a further decision has been made that the Claimant should remain at Category A. Permission to amend the pleadings to challenge that decision was refused by Dan Squires QC, sitting as a deputy judge of the High Court on 13th May 2022. The parties are agreed that the more recent re-categorisation decision is not relevant to the issues of substance that I have to decide, although the Defendant suggests that it may be relevant to any relief if the judicial review claim succeeds.

The Legal Framework

47. Section 12 of the Prison Act 1952 confers a power on the Secretary of State to allocate prisoners to confinement in a particular prison. Section 47 of that Act empowers the Secretary of State to make rules for the classification of persons required to be detained in prison.

48. Rule 7(1) of the Prison Rules 1999 (SI 1999/728) deals with the classification of prisoners. It provides that:

> "prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and 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 as provided by rule 3".

49. The main policy guidance relating to the classification of Category A prisoners is PSI 08/2013: *The Review of Security Category – Category A/Restricted Status Prisoners*.

50. The policy guidance explains that Category A prisoners are those "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" (paragraph 2.1). Within Category A there is a sub-classification of escape risk: exceptional/high/standard. The Claimant's escape risk is classified as 'standard'.

51. Category B prisoners are defined as those "whose assessed risks require that they are held in the closed estate and who need security measures additional to those in a standard closed prison": see HMPPS Security Categorisation Framework, 20th February 2020, paragraph 3.6. This Framework also provides at paragraph 1.2 that:

> "Security Categorisation is a risk management process, the purpose of which is to ensure that those sentenced to custody are assigned the lowest security category appropriate to managing their risk . . ."

52. Paragraph 4.2 of PSI 08/2013 provides that:

> "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."

(my emphasis).

53. Paragraphs 4.6-4.7 contain details about the oral hearing process:

> 4.6 The DDC High Security (or delegated authority) 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. 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 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.

4.7 With those three introductory points, the following are factors that would tend in favour of an oral hearing being appropriate:

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.
>
> (emphasis in the original).

54. At paragraph 4.20, it is provided that:

> *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. Records must be kept when the prisoner is given his / her reports and when he /she is informed of the date of the LAP*.

(original emphasis).

55. At paragraph 4.25, under the heading "Local Advisory Panel (LAP) Consideration", it is stated that:

> *The reports, representations and the LAP's recommendation must then be sent to the Category A Team as soon as possible for the final decision to be made.* At this point the prison will forward the LAP report to the prisoner. The Category A Team review will be completed within 4 weeks of receipt of the LAP report.

(original emphasis).

56. At paragraph 4.26 under the heading "Initial Category A Team Consideration", it is stated that:

> "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 (or delegated authority) for the final decision (see below). It will also take into account or forward to the DDC High Security (or delegated authority) any representations received following the prison LAP's consideration".

57. The "Post-Decision Process" is described at paragraph 4.36:

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

58. There have been several cases both at first instance and in the Court of Appeal which have addressed questions of re-categorisation and, in particular, when an oral hearing should be held. I was taken to many of the relevant authorities during the course of the hearing. I shall not refer to each of those authorities in this judgment as it was made clear to me, and I readily accept, that each case turns on its own facts. It is important, however, to refer to the leading authority in this area: the decision of the Court of Appeal in *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750. That case considered the extent to which the principles of procedural fairness as applied by the Supreme Court in *R* (*Osborn) v Parole Board* [2014] AC 1115 to decisions of the Parole Board applied to categorisation reviews, and also addressed the lawfulness of the guidance in paragraph 4.7(b) of PSI 08/2013 (the same provision that applies to the present case).

59. In *Hassett*, Sales LJ (as he then was) referred at paragraph 50 to the well-known proposition that "What the requirements of fairness demand . . . depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates" (citing *Lloyd v McMahon* [1987] AC 625, and *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531).

60. At sub-paragraph 50(i), Sales LJ (with whom the rest of the Court agreed) acknowledged some key differences between the CART (or the Director) and the Parole Board: the Parole Board was a judicial body independent of the Secretary of State and the prison management organisation, adjudicating on the right to liberty; the CART/Director, on the other hand, were officials:

> "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."

61. At sub-paragraph 50(ii), Sales LJ. compared the kinds of decision that the Parole Board and the CART/Director were required to make. The CART/Director has to make a stark question "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?". 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". Sales LJ. observed that the decisions 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".

62. Against that background, as well as the fact that "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", Sales LJ held that the demands of procedural fairness were very different for the two regimes, and there could be not be a direct read across from the principles applicable to the Parole Board as enunciated by Lord Reed in *Osborn*. At paragraph 60, Sales LJ explained that 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 [in *Osborn*] 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."

63. At [61], Sales LJ continued:

> Some of the factors highlighted by Lord Reed [in *Osborn*] 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.

64. At [66], Sales LJ held that paragraph 4.7(b) of PSI 08/2013 gave lawful general guidance regarding procedural requirements:

> "[It was] unnecessary to consider whether the guidance in PSI 08/2013 is precisely aligned with common law fairness standards. Some differences in expression are to be expected as between internal administrative guidelines and a judgment of a court of law".

65. At [69], dealing with the specific facts of Mr. Hassett's case, Sales LJ observed that

> "even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/Director 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: see Downs at [45]".

Grounds of Challenge

66. The Claim Form stated that the decision being challenged was the "Decision to retain the Claimant's Category A status". The date of the decision was stated to be that made on 19th January 2021. During the course of the hearing, it appeared to me that the Claimant was also seeking to challenge the decision letter dated 25th March 2021 which dealt primarily with the failure to hold an oral hearing. Counsel for the Claimant, Mr. Rule,

indicated that the Claimant was seeking to challenge that decision. In the circumstances, and to ensure that the Court could focus on the real decisions under challenge, the Claimant applied to amend the pleadings to challenge the 25th March 2021 decision as well. This was not opposed by Mr. Irwin, Counsel for the Defendant, and I granted permission to amend so as to allow justice to be done in this case.

67. In the Statement of Facts and Grounds, there was a challenge to the failure to hold an oral hearing, and to the decision to maintain Category A status itself. During the course of the hearing, Mr. Rule explained that the challenge was actually to the former – the failure to hold an oral hearing. There was no free-standing challenge to the decision to maintain Category A status itself; the concerns about the decision fed into the question as to whether it was lawful not to have held an oral hearing.

68. The arguments which I need to consider, therefore, are as follows:

(i) was there a failure to consider and properly apply the published policy PSI 08/2013 in not granting the Claimant an oral hearing;

(ii) was the failure to grant the Claimant an oral hearing in breach of the common law duties of fairness, taking into account (among other things) the Defendant's reliance in his decision-making upon undisclosed or incorrect information, and the Defendant's failure to approach all of the evidence in a fair way.

The parties' submissions

69. Mr. Rule, acting on behalf of the Claimant, made the following submissions.

70. First, Mr. Rule submitted that the Defendant had failed to apply his published policy properly because the Claimant was deprived of the opportunity to make representations between the LAP and the CART decisions. This was alleged to be a mandatory requirement and not just a mere recommendation. Furthermore, there were a number of factors – as reflected in the published policy – which favoured an oral hearing.

71. In his skeleton argument, and elaborated upon during the course of the hearing before me, Mr. Rule had identified the following important factual disputes which could be evaluated at an oral hearing and determined fairly:

a. Whether there is impression management or genuine evidence of attitudes and insight demonstrated;

b. The actual attitudes and insights of the Claimant which could be explored and tested face-to-face and through questioning. This goes to the fact of the level of risk reduction achieved;

c. Whether there were concerning behaviours in the Claimant's daily conduct on the wing or not – including ascertaining whether there is any truth to any bullying allegation – which is contradicted by the preponderance of information;

d. Whether the interactions with assessors or report writers were inappropriate or understandable;

e. Whether the Claimant was being unfairly criticised for wanting his expert to have contact with another expert (which is entirely common);

f. Whether the Claimant was motivated to engage with any treatment pathway identified, whether any concern raised by him was unjustified;

g. Whether the Claimant would be placed at unacceptable risk of attack by other prisoners if moved to the general population of one of the other Category A prisons where courses are provided;

72. Mr. Rule also submitted that there were real and live disputes between the experts, including:

i) What is the level of risk reduction that has been achieved and demonstrated;

ii) Whether there is offence paralleling behaviour;

iii) Whether the opinion that there may be impression management, or that there is not, is correct;

iv) Whether the Identity Maters programme was suitable for the Claimant or note;

73. There were also questions as to whether the CART had correctly appreciated what the experts had stated and recommended.

74. It was also relevant that the Claimant had not had an oral hearing in respect of his security categorisation previously, even though he had been in custody for 13 years.

75. Further, there was an impasse in resolving the pathway for the Claimant to engage with: the Therapeutic Community or the Identity Matters programme.

76. Second, Mr. Rule submitted that there had been a failure by the Defendant to act in accordance with common law duties of procedural fairness. The same factual points as were relevant to the published policy applied here, alongside the fact that the case concerned a matter of real significance to the Claimant who has been maintained at Category A status for 13 years, despite engagement with offence-based programmes and even the positive recommendation from a LAP in the past and from an independent expert supporting a downgrade. Mr. Rule submitted that it was fair for the Claimant to have the benefit of an oral process to enable an accurate factual basis for the security category decision-making to be based on a risk assessment of appropriate rigour with a fair opportunity to present the case for re-categorisation. An oral hearing would assist the quality of the decision-making, and reflect the Claimant's legitimate interest in being able to participate in a decision with important implications for him.

77. Looking at the matter in the round, Mr. Rule submitted that the question was whether the Claimant had had a fair opportunity to make his case, especially where the Claimant had not had an opportunity to see the LAP recommendation and report before it was considered by the CART.

78. Mr. Irwin, acting on behalf of the Defendant, argued that these submissions should be rejected.

79. First, with respect to the failure to apply the published policy, Mr. Irwin emphasised that the starting point for considering the matter was the test to be applied by the CART/Director in making a downgrading decision: there has to be "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" (see paragraph 4.2 of PSI 08/2013).

80. Mr. Irwin contended that the policy did not oblige the Defendant to afford the Claimant the opportunity to make representations between the LAP report and the CART decision. Paragraph 4.26 of PSI 08/2013 was not a mandatory requirement, indicated by the fact that the relevant wording relied upon by the Claimant was not in italics: the policy distinguishes between mandatory matters which are in italics and non-mandatory actions. What paragraph 4.26 provides for is that *if* a prisoner has made representations after the LAP recommendation they should be considered by the CART, not that there is an implied right to make representations on the LAP's recommendations.

81. As for where the published policy called for an oral hearing, Mr. Irwin addressed the specific points raised by Mr. Rule. With respect to the alleged disputes of fact, Mr. Irwin argued that some of these were actually questions of clinical judgment, and others were either not clearly relevant or were not reasonably to be expected to be resolved at an oral hearing. With respect to disputes of opinion between the experts, Mr. Irwin submitted that there were no differences between the experts that were likely to be resolved by an oral hearing: the differences of opinion were differences of professional judgment in the context of a structured assessment of risk; and there was no real prospect in any event that an oral hearing would lead to CART/the Director concluding that the test in paragraph 4.2 of the PSI was met. With respect to the latter point, Mr. Irwin submitted that the differences between the experts were clear from their reports, it was very unlikely that a hearing with the experts would satisfy the CART/Director that there was convincing evidence of a reduction of risk. Indeed, Mr. Irwin submitted that Dr. Pratt's opinion does not directly address the paragraph 4.2 test.

82. Further, Mr. Irwin submitted that there was no impasse in this case. The kinds of cases in which the Courts had found an impasse to exist were those where the offenders were significantly over their tariffs, and remained in custody as Category A prisoners solely on the grounds of their risk; the impasse arose due to a maintenance of innocence; and there was no further risk reduction work that could be undertaken to demonstrate the necessary reduction in risk. In addition, Mr. Irwin argued that the fact there had not been a previous hearing was not a factor which could potentially attract great weight.

83. Second, with respect to Mr. Rule's argument on common law procedural fairness, Mr. Irwin contended that the paramount question was whether the Claimant had had a fair opportunity to put his case. This involved consideration of the Claimant's involvement in the evidence-gathering process as a whole, as well as the opportunity to make representations. Mr. Irwin submitted that the Claimant had had the chance to speak to disciplinary and probation staff who were involved in his care and in the preparation of the dossier for the categorisation review. The Claimant had also had the chance to speak to and engage with Ms. McCraw. The Claimant had submitted reports from Dr. Pratt, and his solicitors had made written representations on his behalf. The Claimant also submitted his own supplementary submissions before the decision was taken. The Claimant, through his solicitors, had also made post-decision submissions. In the

circumstances, it was submitted by Mr. Irwin that the Claimant had had more than adequate opportunity to put his case, and did in fact do so, and so common law fairness did not require an oral hearing to be convened.

Discussion

(i) Failure to apply published policy

84. In my judgment, the Defendant did not fail to apply his published policy either with respect to the making of representations between the LAP and CART decisions or with respect to the failure to afford the Claimant an oral hearing. I agree with Mr. Irwin's submissions on behalf of the Defendant.

85. Shortly put, the published policy (PS/081/2013) does not oblige the Defendant to allow the prisoner to make representations on the LAP recommendation before the CART decision is taken.

86. First, this is not expressly mandated by the policy itself. The policy states that "All Mandatory Actions throughout this instruction are in italics and must be strictly adhered to". An example of this is at paragraph 4.25 which sets out in italics, and therefore makes mandatory, that "*The reports, representations and the LAP's recommendation must then be sent to the Category A Team as soon as possible for the final decision to be made."* The paragraph that the Claimant relies upon – 4.26 – is not in italics and is not regarded by the text itself as mandatory.

87. Second, the language of paragraph 4.26 is actually permissive. The paragraph states that the Category A team "will also take into account or forward to the DDHC High Security (or delegated authority) any representations received following the prison LAP's consideration." In other words, paragraph 4.26 means that if and insofar as there are representations which are received following the LAP consideration, these should be taken into account or forwarded before the final decision is taken. It does not imply that there must be an opportunity to make representations with respect to the LAP's recommendation. That makes sense, as it is ordinarily envisaged that prisoner representations will be made before, and so as to influence, the LAP's recommendation, as reflected in paragraph 4.20 (which states in italics: "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").

88. Third, as a matter of principle it will not be in all cases that procedural fairness requires a prisoner to comment on the LAP's recommendations before they are considered by the CART, given that the prisoner will have had the opportunity to feed their representations to the LAP.

89. I also consider that the Defendant did not fail to apply his published policy in deciding not to hold an oral hearing. The decision of the CART on 19th January 2021 does not explain why an oral hearing was not held. The reasoning for this was explained, however, in the subsequent decision letter sent out on 25th March 2021, and this reasoning is in my judgment consistent with the published policy at paragraphs 4.6-7.

90. The letter sent out by the CART on 25th March 2021 stated in two places that there was not "a significant dispute warranting an oral hearing". Firstly, with respect to the

Claimant's "disagreement with prison reports, LAP recommendation or [CART] decision"; and secondly, with respect to the recommendations made in the private psychology reports.

91. With respect to the first of these matters, the fact that a prisoner disagrees with reports, or recommendations, is not something which by itself tends to favour an oral hearing under the terms of the policy. Disputes as to significant facts could tend to favour an oral hearing, but there were no factual disputes of that kind in the instant case which needed to be resolved. Indeed, the CART alluded to this in their letter of 25th March 2021 where they explained that there was "no coherent evidence that information having a material bearing on the decision was insufficiently disclosed, misrepresented or overlooked". This was, in my judgment, the CART's response to the Claimant's allegation that the LAP had got it wrong factually when it had referred to "bullying" and "violence". The CART was saying that there was no such factual dispute. Indeed, on reading the CART's earlier decision of 19th January 2021, it is clear that they did not agree with the LAP's position on "bullying" and "violence", or at the very least this had no influence on their decision.

92. In their earlier decision, the CART had stated that "There is some alleged negative information, including possible bullying, but you have received no recent adjudications and continue to make good use of the regime". It is clear, therefore, that the CART did not regard what the LAP had said about the allegations of bullying or violence as amounting to fact. Furthermore, the allegation of bullying was put into proper perspective by the CART. The decision letter stated that "The Category A Team recognised that your overall behaviour has been satisfactory since your last review".

93. I do not consider that the other matters that Mr. Rule described (see paragraph 71 above) gave rise to important disputes of facts that needed to be resolved by the CART. Most of the matters that Mr. Rule refers to were really matters of clinical judgment about which experts could disagree; others were not sufficiently important to the real issue that the CART had to decide: whether there was "convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced": see paragraph 4.1 of PSI 08/2013.

94. As for the second of these matters – the recommendations of the private psychologist - the CART explained that the decision of 19th January 2021 had "provided clear and detailed reasons why the recommendations in the private psychology reports do not provide coherent evidence of significant risk reduction, in accordance with PSI 08/2013". In other words, the CART were saying that nothing would be gained by an oral hearing. In the CART's view, the private psychologist (Dr. Pratt) had not provided "convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced" (paragraph 4.1 of PSI 08/2013), the key question that CART had to consider when deciding on re-categorisation. As a result, it was not necessary to hear further from him, or to ventilate the issues further, at an oral hearing.

95. It seems to me that this approach did not depart from the approach set out at paragraph 4.7 of the policy PSI 08/2013. The mere fact that there is a difference of view between experts is not sufficient to require there to be an oral hearing, and paragraph 4.7 does not say otherwise. It is necessary to consider whether an oral hearing would assist to deal with a "real and live dispute on particular points of real importance to the decision".

96. Indeed, as Sales LJ explained in *Hassett*, even if there was "a significant difference of view between experts", it was not always necessary for an oral hearing to be held to allow the private psychologist to ventilate his views orally, if there was no "real prospect that this would resolve the issue . . . with sufficient certainty to affect the answer to be given . . . to the relevant question."

97. In the instant case, I consider that there was a reasonable basis for the CART to conclude that it was not necessary to hear further from Dr. Pratt, or to ventilate the issues further, so as to resolve the key question of the Claimant's risk.

98. Ms. McCraw had expressed the view that the Claimant's risk did not justify downgrading, and this was based on her own assessment of the Claimant, as well as the earlier work that had been conducted by Dr. Gregory. Ms. McCraw's conclusion was also supported by the Probation Officer Ms. Barton. Accordingly, there was plenty of evidence against Dr. Pratt's position.

99. Furthermore, as set out in the CART's decision letter of 19th January 2021, although Dr. Pratt had taken a different view on the Claimant's level of progress and treatment needs, his reports had also concluded that the Claimant needed "to complete further substantial treatment to address the core risk factors influencing your present offence, albeit through a different route". Accordingly, even on Dr. Pratt's own evidence, there was much more work that needed to be done by the Claimant to reduce his risk.

100. So, even though there were clearly differences between the experts about a number of matters (see paragraph 72 above), on the key question of the Claimant's risk it was open to the CART, in accordance with the policy, to conclude that an oral hearing was not required to resolve this.

101. The decision letter of 25th March 2021 also addressed other points set out in paragraph 4.7 of PSI 08/2013: it was said that the fact that the Claimant had been in custody for some years and had never had an oral hearing did not justify one now, and there was no evidence that he was at an "impasse". It was considered by the CART that the Claimant had the means to show risk reduction. Further, the Claimant was more than 10 years from tariff expiry, and so remaining in Category A at this point in time would not prevent his consideration for liberty at the appropriate moment. These factors were all consistent with the published policy.

102. I also consider that the CART were right to conclude that an oral hearing was not called for under the policy on account of an alleged impasse or merely because of the length of time that the Claimant had served in Category A. There was no impasse, as there was available to the Claimant means to demonstrate risk reduction. Furthermore, the Claimant was some considerable time away from tariff expiry. His consideration for liberty was not precluded by his Category A status.

(ii) Common law fairness

103. Whether or not common law fairness called for an oral hearing is a matter for the Court to decide. In my judgment, the procedures adopted in this matter did not deprive the Claimant of procedural fairness. I agree with Mr. Irwin's submissions for the Defendant on this point.

104. Looking at the matter in the round, and bearing in mind that the present decision is more administrative or managerial in nature than judicial or quasi-judicial, it is clear to me that the Claimant knew what the case was that he had to meet and had ample opportunity to make representations such that an oral hearing was not required.

105. The Claimant was provided with the key materials that were used by the CART in making the recategorisation decision, and had ample opportunity to make representations on those materials and generally to state why he should have been downgraded to Category B. The Claimant did not need an oral hearing to advance his case.

106. Furthermore, given the Claimant's extensive involvement in contributing to the assessments and making his own representations, an oral hearing was not required for him to participate in a decision which had important implications for him. The Claimant was able to speak to the staff who prepared the dossier for the categorisation review, and had the opportunity to meet with and engage with Ms. McCraw as part of her psychology assessment and was able to feedback to her his views on her assessment. The Claimant was provided with a copy of Ms. McCraw's assessment as well as the various officer reports. The Claimant, and his legal team, were able to comment on these reports, and the Claimant was able to provide a private psychology assessment from Dr. Pratt. Although the Claimant did not have sight of the LAP recommendation before the initial decision was taken by the CART, he did have an opportunity to comment on it afterwards and seek to influence the CART to reconsider its earlier decision.

107. The fact that the Claimant did not have sight of the LAP recommendation before the initial decision was taken by the CART had the potential for being procedurally unfair. However, as a general matter, the Claimant did have an opportunity to comment on the LAP's recommendation and seek to influence the CART to reconsider its earlier decision. More specifically, the Claimant was able to address the reference by the LAP to "allegations of bullying in October", and the LAP's statement that "In the last year [the Claimant] has displayed offence paralleling behaviour with violence and bullying." These matters had not been drawn to the Claimant's attention before the CART decision was made, and the presence of these references gave rise to a potential unfairness which may have called for an oral hearing if they were to be relied upon by the CART. However, it seems clear that the CART did not rely on these matters as being factually correct and so an oral hearing was not necessary to resolve any dispute over these matters. Indeed, the allegation of bullying was put into proper perspective by the CART. The decision letter stated that "The Category A Team recognised that your overall behaviour has been satisfactory since your last review".

108. In the letter of 25th March 2021, the CART alludes to the Claimant's representations about the allegations of bullying and displaying of violence where they state that the Claimant had provided "no coherent evidence that information having a material bearing on the decision was insufficiently disclosed, misrepresented or overlooked." Procedural fairness did not demand, therefore, an oral hearing to correct an error made by the LAP.

109. I also consider that there were no other factors that called for an oral hearing as a matter of procedural fairness. In particular, the fact there were a number of differences between the experts did not require an oral hearing. I have set out in some detail above the various quotes from Ms. McCraw's report and those from Dr. Pratt. I consider that these were essentially matters of clinical or professional judgment: in particular, whether or not the Claimant's conduct amounted to impression management or offence paralleling

behaviour, and what programmes for risk reduction were suitable and/or most appropriate for the Claimant (Identity Matters vs. Therapeutic Community). These were matters upon which expert opinions could vary, and it was open to the CART to reach their own view as to which set of opinions to prefer simply from reading the reports. An oral hearing would not necessarily have illuminated the issues more clearly for the CART; nor would it have been likely that either of the experts would have changed their position as a result of an oral hearing.

Conclusion

110. For these reasons, therefore, the application for judicial review is dismissed.
