Neutral Citation Number: [2023] EWHC 1281 (Admin)

Case No: **CO/2225/2022**

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2023

Before :

Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between :

R (on the application of Robert Cusworth)	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

MR MICHAEL BIMMLER (instructed by **Bhatia Best, Solicitors**) for the **Claimant**
MR TOM TABORI (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 4 May 2023

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Friday 26 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DEXTER DIAS KC

Dexter Dias KC :

(sitting as a Deputy High Court Judge)

1. This is the judgment of the court in an application for judicial review.

2. It is divided into eleven sections, as set down in the table below, to assist parties and members of the public follow the court's line of reasoning.

B123 (electronic bundle page); SB 456 (supplementary bundle page); SFG (Summary of Facts and Grounds); CS/DS (claimant/defendant skeleton).

§I. THE MURDER OF SALLY GARWOOD

3. The claimant Robert Cusworth was sentenced on 29 January 2010 to life imprisonment with a minimum term of 19 years and 6 months to serve in prison before being eligible for parole. He has been in HMP Whitemoor as a Category A prisoner and challenges the decision of the defendant in this case, the Secretary of State for Justice (delegated to his Directorate of Security), not to grant him an oral hearing in the annual review of his security categorisation. This case raises important questions about how officials charged to administer the High Security Estate of the Prison Service, where some of the highest risk and most dangerous offenders are located, exercise their powers in the public interest to keep the public safe.

4. The parties are represented by counsel. The claimant by Mr Bimmler; the defendant by Mr Tabori. The court is grateful to them both for their focused submissions. But why is the claimant in prison at all?

5. On the afternoon of Friday 10 July 2009, Robert Cusworth became frustrated with a number of aspects of his life. He began drinking in Aylesbury and went to a Tesco's store in a nearby retail park, where he purchased a knife for £2. He then set about looking for someone to attack in the Quarrendon area, a tranquil green space north of Aylesbury. There was no one about. However, his frustration and rage did not abate.

6. The next day, he returned to the seclusion of Quarrendon. He spotted a lone jogger. However, before he could begin his assault, a group of people came into view and that unnerved him. The jogger continued jogging. Robert Cusworth then saw a young woman out walking her dog. This was Sally Garwood, a complete stranger to him. Mrs Garwood smiled as she passed him and said hello. Shortly afterwards, he approached her and grabbed her throat. He also grabbed her by the hair when she tried to protect herself and the two of them fell into a stream. Robert Cusworth stabbed Sally Garwood 26 times in the neck. She died from his knife attack.

7. At Reading Crown Court in 2010, the claimant received a 20-year minimum tariff, less the time he had spent on remand. His sentence tariff expires on 29 July 2029. He wishes to move to a prison of lower security classification than the current Category A placement, and claims that he should have had an oral hearing to argue it. 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" (PSI 08/2013, para 2.1)

§II. IMPUGNED DECISION

8. On 16 February 2022, the Executive Director of the HMP Prison and Probation Service Directorate of Security ("the Director") reviewed the claimant's security categorisation following an annual review, a procedure in the Prison

Service to ensure people are detained in the appropriate security settings. His review was required because on 20 January 2022, the Local Area Panel ("LAP"), consisting of a deputy governor (acting as chair), the head of Offender Management and "intel" analyst, amongst others, had recommended a categorisation downgrade. This was supported by the internal psychologist, Ms Evans. The Prison Offender Manager ("POM") Ms Looseley, however, opposed downgrading. A positive recommendation having been made, the Director was tasked with making the decision. He decided against a downgrade to Category B. This decision was communicated in a decision letter dated 16 March 2022. But the decision under challenge is not his risk assessment, rather his decision that he was able to make the categorisation decision on the papers. The papers before him consisted of a dossier of reports and information ("the dossier"). He decided the case on the dossier instead of convening what is called an "oral hearing". This is the **"impugned decision"** that is the subject-matter of this claim. As made clear in the claimant's skeleton (CS §2):

> "The Claimant's challenge is not one to the merits of the decision that he remain a Category A prisoner as such, but concerns the process by which it was reached."

9. At the time of the impugned decision, the claimant was located at HMP Whitemoor and classified as a Category A prisoner. After an initial period, people who receive a life sentence with a minimum tariff generally have their security categorisation reviewed on an annual basis. The review is by a local panel at the prison the individual is held at. If this panel recommends downgrading the categorisation, then the matter is reviewed centrally by the Directorate of Security, centrally based in Petty France, London. Here the LAP recommended downgrading Robert Cusworth's classification and thus the Director reviewed the matter. His decision (B132), having examined the dossier of documents and reports, stated:

> "The Director considered Mr Cusworth's offending showed he would pose a high level of risk if unlawfully at large, and that before his downgrading could be justified there must be clear and convincing evidence of a significant reduction in this risk.
>
> The Director recognised Mr Cusworth has engaged in therapy for some time and there is evidence of a degree of progress in terms of his understanding of his risk factors and greater stability in his behaviour. He considered the current evidence however shows there are a number of key offence-related issues that are incompletely addressed or need further development. He considered this evidence shows the level of Mr Cusworth's progress and his capacity to manage his risk outside his current security remain to a great extent unknown. He considered first Mr Cusworth's agreed transfer to Broadmoor Hospital (a high security psychiatric unit) is not compatible with an assessment that he has at this time achieved significant progress and risk reduction. He noted the recommendation for further work on relapse prevention on triggers to rumination, a key offence-related issue. He considered also the conclusion that Mr Cusworth is now more likely to harm himself is not a wholly

reliable indicator that he has yet significantly reduced his capacity for violence to others. He noted also there is no unanimous view from staff that Mr Cusworth has achieved significant progress.

The Director considered there are in the meantime no grounds for an oral hearing in relation to this review in accordance with the criteria in PSI 08/2013. He considered there are no significant facts in dispute and that the available information and reasoning for downgrading are readily understandable. As stated above the recommendations for Mr Cusworth's progression are based on recent and unconvincing evidence of progress. He did not accept simply disagreeing with the LAP, reports or representations on the basis of such recommendations represents a significant dispute justifying an oral hearing. He recognised Mr Cusworth has been in prison some years and has never had an oral hearing. He considered these factors alone could not however justify an oral hearing without other supporting grounds. He noted Mr Cusworth has some years to go to tariff completion. He considered Mr Cusworth also remains free to engage in identified pathways effectively in the meantime to enable closer assessment of significant progress and is not in an impasse.

The Director considered evidence of a significant reduction in Mr Cusworth's risk of similar reoffending if unlawfully at large is not yet shown. He is therefore satisfied Mr Cusworth's downgrading cannot be justified and he must stay in Category A at this time."

§III. GROUNDS

10. This decision is challenged on two grounds, both intimately connected to the procedural fairness of the case.

Ground 1: Failure to comply with published policy

Ground 2: Common law unfairness

11. **Ground 1** states that the defendant's own policy was breached. The policy is PSI 08/2013 "T*he Review of Security Category – Category A/Restricted Status Prisoners".* The claimant states that several of its specified factors pointing strongly towards the need to hold an oral hearing feature in his case and were not or not taken sufficiently into account by the Director in refusing to convene an oral hearing. There was a dispute on the expert materials (Factor b.); the claimant had served a significant period of time in prison, approximately 12 years of his sentence (Factor c.); he had not previously had an oral hearing (Factor d.).

12. **Ground 2** asserts that beside the breach of the defendant's policy, there is procedural unfairness at common law. The court can and should take into account factors beyond those enunciated in the policy and here decide that the decision process as a whole was procedurally unfair. Given that both the LAP and psychologist recommended downgrading, it was "particularly vital" (*R (on the application of Rose) v Secretary of State Justice* [2017] EWHC 1826

(Admin) at [45]) for there to be an oral hearing so the points troubling the Director could be addressed by the experts.

§IV. PROCEDURAL HISTORY

13. On 23 May 2022, the claimant's legal representatives served a Letter before Action on the defendant in accordance with the Pre-Action Protocol for Judicial Review. It was submitted that the decision to refuse a downgrade to Category B without offering an oral hearing failed to comply with the defendant's policy. By his Category A Team, the defendant replied by letter of 1 June 2022, not resiling from the substance of the downgrading decision, nor the decision to refuse an oral hearing.

14. The claim form applying for judicial review of the Director's decision not to convene an oral hearing was issued on 21 June 2022. The first judge of the High Court to consider the application refused permission on the papers. There was an oral renewal hearing on 15 December 2022 at which Mr David Lock KC, sitting as a Deputy High Court Judge, granted permission and the matter was set down finally for a substantive hearing on 4 May 2023. This is the judgment of that hearing.

§V. LEGAL AND POLICY FRAMEWORK

15. The legal principles governing this application are broadly uncontroversial between parties. The key dispute that remains is about the meaning of one part of one subparagraph of the relevant policy. I will deal with that in due course. The governing legal and regulatory framework has two elements (1) common law principles derived from decided authority; (2) the applicable Prison Service Instruction ("PSI") – here PSI 08/2013.

16. Section 47 of the Prison Act 1952 provides that rules may be made for the classification of persons required to be detained in prison. Rule 7 of the Prison Rules 1999 (S.I. 1999/728), entitled "Classification of Prisoners" authorises the classification process. The prime relevant policy shaping the defendant's classification decision is found in the revised Prison Service Instruction 08/2013 ("PSI 08/2013", most recently revised on 10 June 2016).

17. The law can be reduced to a number of uncontroversial propositions. This forensic exercise has been undertaken by Fordham J, whose scholarship I gratefully adopt: *R (Steele) v Secretary of State for Justice* [2021] EWHC 1768 (Admin) [1], [3]-[5]; *R (Wilson) v Secretary of State for Justic*e [2022] EWHC 170 (Admin) at [2].

    (1) The test for Downgrading is whether the Director has "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 Prison Service

Instruction 08/2013 at §4.2. This Downgrading test reflects that need for "cogent evidence in the diminution of risk" which has been endorsed by the Courts as "plainly a proper requirement": see *R (Hassett) v Secretary of State for Justice* [2017] EWCA Civ 331 [2017] 1 WLR 475 at §70.

(2) The PSI records (§2.1) that a Category A prisoner is "a prisoner whose escape would be highly dangerous for the public, or the police or the security of the State, and for whom the aim must be to make escape impossible". The focus (§2.2) is on "the prisoner's dangerousness if he did escape, not how likely he is to escape". The PSI goes on to describe the review procedures applicable, inter alia, in the context of Category A review.

(3) Oral hearings are addressed in the PSI at §§4.6 and 4.7. The PSI has been revised and updated, including in the years subsequent to the October 2013 decision of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61. At §4.6, the PSI discusses the extent to which there are parallels and differences between Category A review decisions and Parole Board decisions, as does *Hassett* at §51. At §4.6 the PSI says "this policy recognises that the *Osborn* principles are likely to be relevant in many cases in the [Category A review] context", referring to the PSI as "guidance [which] involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing".

(4) At §4.6 the PSI identifies three "overarching points". (i) The first, in essence, is that each case must be considered on its own particular facts. (ii) The second, in essence, is that the decision as to whether to hold an oral hearing must be approached "in a balanced and appropriate way", which includes (quoting *Osborn*) the decision-makers being "alive to the potential, real advantage of a hearing both in aiding decision making and in recognition of the issues to the prisoner" and not making "the grant of an oral hearing dependent on the prospects of success of a downgrade in categorisation". (iii) The third, in essence, is that there is scope for flexibility and tailoring: the decision is "not necessarily all or nothing". I set out §4.7 of the PSI shortly.

(5) *Hassett* at §56 endorsed the guidance in *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 and *R (Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422. Within this line of authority are to be found the following points. (1) The common law principles identified in the parole context in *Osborn* do not apply with the same force to Category A review decisions (*Hassett* §§59-61). (2) The general guidance in the PSI is lawful and not apt to mislead a decision-maker as to the applicable legal standards, a point decided in the specific context of a challenge to factor (b) (*Hassett* §66). (3) A Category A review decision "has a direct impact on the liberty of the subject and calls for a high degree of procedural fairness" (*Mackay* §25). (4) It is "for the Court to decide what fairness requires, so that

the issue on judicial review is whether the refusal of an oral hearing was wrong; not whether it was unreasonable or irrational" (*Mackay* §28). The decision-maker may need to "exercise a judgment on whether an oral hearing would assist in resolving … issues and assist in better decision making" and the question for the Court is whether the CAT "was wrong to decide against an oral hearing" (*Downs* §45). (5) Where a prisoner denies the offending of which they were convicted, which may in consequence mean ineligibility or unsuitability for participation in courses relevant to satisfy the decision-maker that the risk to the public has been significantly reduced, the decision-maker's "starting point can only be the correctness of the jury's verdict" and the denial "may … in many cases severely limit … the practical opportunity of demonstrating that the risk has diminished" (*Mackay* §27).

(6) Although it has been said that "oral hearings will be few and far between" (*Mackay* §28) and "comparatively rare" (*Hassett* §61), that is prediction rather than principle: there is "no requirement that exceptional circumstances should be demonstrated" (*Mackay* §28).

(7) The fact that there is a "difference of professional opinion" between two experts (eg. two psychologists), the fact that the decision-maker has "two clear, opposed views to consider", and the fact that the decision-maker's "task was to decide which view it accepted" does not – in and of itself – make an oral hearing necessary (*Downs* §§44-45, 50; *Hassett* §69).

18. The PSI policy has previously been challenged and stands with full effect: *R (Hassett) v Secretary of State for the Home Department* [2017] EWCA Civ 331 at [66]. Moreover, while the PSI is directly relevant, it is unnecessary to cite it in full. Para. 4.7, insofar as it is material, states:

> 4. 7 … 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 [Local Area Panel], 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.
>
> 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 provided)

§VI. CONTEXT OF ANALYSIS

19. I structure my analysis by examining in turn each of the para. 4.7 factors submitted on by counsel (b., c., d.), and then the common law. I weave in the arguments of parties. There is no pleaded dispute of fact (Factor a.), nor any "impasse" to progression (part of Factor c.). However, it is essential to see such argument about the remaining factors in proper context. There are in fact two vital contexts, it seems to me (1) the existential purpose of the policy and its goals in the public interest; (2) the applicable downgrading test. The policy in respect of oral hearings cannot be adequately understood, let alone interpreted, without knowing those two matters.

20. The PSI begins with an Executive Summary. This states, critically:

> "Desired outcomes
> 1.2 Escapes of highly dangerous prisoners are prevented, ensuring public protection.
>
> 1.3 Category A (including Provisional) / Restricted Status prisoners' categories are reviewed appropriately and on time and appropriate security measures are applied lawfully, safely, fairly, proportionately and decently."

21. Thus the policy requirement is for "appropriate" and timely review of categorisation. For example, if the LAP recommends continuing of Category A status, the matter can be concluded without referral to the Director (para. 4.1). If, however, there is no downgrading recommendation by the LAP for five years, then the matter is automatically referred up for review. Thus the PSI provides a carefully calibrated series of checks and balances that are built into the system. The requirement (necessity) for an oral hearing must be seen in the context of this carefully crafted structure.

22. The further vital context is the decategorisation test. It is set out at para. 4.2:

> *"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."*

23. The test is italicised in the original policy to emphasise its undoubted central importance. The Director must consider whether there is "convincing evidence" that the risk to the public if the individual is unlawfully at large has "significantly reduced". That can be either through change of attitude or developing coping or relapse skills. But note that those later points are examples that feed into the prime question of risk or, more accurately, its reduction. This is an important point, and one that I must return to. It is vital not to proliferate issues unnecessarily, but to remain clear about factors that feed into the prime issues.

GROUND 1

(BREACH OF PUBLISHED POLICY)

§VII. FACTOR B.

24. Factor b. has been the major focus of the forensic disputation in court. This issue was characterised by Mr Bimmler as the "nub of the case". He is correct.

The argument about this topic has been extensive, and it is necessary to reduce the argumentation into distinct strands and systematically analyse them. There are three principal disputes:

Dispute 1: rival recommendations

Dispute 2: self-harm and autism

Dispute 3: relapse prevention plan

Dispute 1: rival recommendations

25. The underpinning to this dispute, the claimant submits, is the legal effect of a number of first instance authorities, cited in some detail on behalf of the claimant to the court. They are:

R (Rose) v Secretary of State for Justice [2017] EWHC 1826 (Admin)

R (Hopkins) v Secretary of State for Justice [2019] EWHC 2151 (Admin)

R (Harrison) v Secretary of State for Justice [2019] EWHC 3214 (Admin)

R (Smith) v Secretary of State for Justice [2020] EWHC 2712 (Admin)

26. The claimant relies upon them as a "consistent line of authorities" speaking to the interpretation of Factor b.'s "significant dispute on expert materials". Mr Bimmler submits that taken together they make plain that where there is an expert recommendation or are such recommendations that the Director disagrees with, that is sufficient to qualify as both a "significant dispute" and one that is "on" the expert materials.

27. In answer, the defendant intrepidly submits that in some of these first instance cases this court has taken a "wrong turn". It cannot be right that the fact that when a Director does not agree with a recommendation by an expert that itself constitutes a "dispute on expert materials". It is, Mr Tabori submits, a dispute "with" the expert materials, if that. This is a vital dispute of principle, and I must make clear my approach to all this. For the sake of intelligibility, I organise it into eight points.

28. **First**, a policy such as the PSI is not a statute. It seems to me that the precise words should not be construed as if given statutory force and effect. As the Supreme Court recently confirmed in two decisions, policies are not the law; they exist to guide and shape the exercise of (often wide) discretionary power by the executive (*R (A) v Secretary of State for the Home Department* [2021] UKSC 37 ("*A v SSHD*"); *R (BF (Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38 ("*BF*"), both co-authored by Lord Sales and Lord Burnett). The purpose of policies is as follows:

> "They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to

> promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court." *(A v SSHD* at [39])

29. The standard for reviewing a policy must not be unduly demanding – policies "are different from law. They do not create legal rights as such" (ibid. at [3]). Thus the policy in question in this case was issued by the Secretary of State as an "instruction", by definition, which:

> "sets out guidelines for the procedures for reviews of Category A / Restricted Status prisoners' security category, and for deciding and reviewing the appropriate escape risk classification of Category A prisoners." (para. 1.1)

30. Thus I cannot think it appropriate to construe each phrase or word as if it had legal or statutory meaning. It has not been drafted and issued as such. Should there be such an intensively demanding approach to the court's scrutiny of policy, as the Supreme Court observed (*A v SSHD* at [40]):

> "there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the basis that they were not sufficiently detailed or comprehensive. This would be contrary to the public interest, since policies often serve useful functions in promoting good administration."

Thus a balance must be struck between clarity and fairness and not inappropriately investing policy pronouncements with misplaced legal status.

31. **Second**, such a policy should be read as a whole, fairly, reasonably and objectively (*A v SSHD* at [34]). That is why the context of the purpose of the policy is important.

32. **Third**, one must think of the role and function of the Director. She or (here) he is a decision-maker. If a judge in a trial hears from expert witnesses and does not accept their conclusion (recommendation), that judicial decision-maker is not "in dispute" with the experts. The judge simply does not accept their recommendation. That rejection may be right or wrong. Thus, I am not persuaded that if a Director does not accept a recommendation from a psychologist or the LAP (or both), that necessarily constitutes a dispute "on" the expert materials. It was put shortly and accurately by the Director:

> "He did not accept simply disagreeing with the LAP, [psychological] reports or [legal] representations on the basis of such recommendations represents a significant dispute justifying an oral hearing" (B132/Reasons §3).

33. **Fourth**, much argumentation was directed at the meaning of the "example" embedded within subpara. b. It reads:

> "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."

34. It is contended by the defendant that this example is "an error". It is, Mr Tabori submits, a "red herring that is at risk of being perennially engaged". The vice of this example, counsel continues, is that as soon as the LAP and psychologist recommend security downgrading, there must "automatically" be an oral hearing. Mr Tabori then proceeds to invite the court to ignore it or construe the policy without this erroneous example. As for the claimant, he relies on this example in support of the necessity of an oral hearing; he submits the words are plain.

35. I have considered all this carefully. The fact is that this was the policy in existence at the time of the Director's decision. There is a high public law duty on a public authority such as the defendant to act in accordance with relevant published policy, unless there is good reason to depart from it (*In re Findlay* [1985] 1 AC 318 at 338; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [35]). Consequently, I find great force in Mr Bimmler's submission that it would be in violation of the claimant's legitimate expectation to hold that this policy element that the Secretary of State had not disowned at the time of the decision should be discarded now. This is published policy. There has been no retraction or removal. It is, of course, open to the Secretary of State to change it. That is a matter for him. But what is a matter for this court is whether it is fair to the claimant and legally legitimate to permit the defendant to disown part of his own policy without notice to anyone. I judge that it is not. As the Supreme Court said in *A v SSHD* at [3]:

> "the courts will give effect to the legitimate expectation unless the authority can show that departure from its policy is justified as a proportionate way of promoting some countervailing public interest."

36. It strikes me as entirely contrary to principles of legitimate expectation to capriciously ignore the terms of the policy. I will not permit it. The "example" remaining relevant, I must next consider what "squarely in play" actually means.

37. The mere voicing of the phrase underscores that this is not a statute or anything remotely akin to it, but plain policy guidance. I take from this example that where the LAP and psychologist both recommend downgrade, this presses with some force the need for the Director to consider an oral hearing. But the phrase cannot mean that the double recommendation determines the question of oral hearing. If that were the case, it would say so. It does not. Instead, I read the phrase as indicating that such twin recommendation for downgrading is a significant factor for the decision-maker to weigh in the oral hearing decision.

38. That said, I agree with Mr Tabori that the way in which this part of the policy is drafted is unhelpful. What the policy should be is a matter of political

judgement by the Secretary of State. The court does not intrude upon that. But the way in which is presently formulated in this respect has not helped. It has been generative of unnecessary legal argument that can and should be avoided. What would be most useful to decision-makers, whether the Director initially, or the court should the case come before it by way of judicial review on a "correctness test" evaluation, is an (inevitably non-exhaustive) list of factors that decision-makers should have regard to in assessing whether an oral hearing is necessitated. I emphasise that this is a matter for the Secretary of State. What he chooses to do or not do is entirely for him. I have been invited to put the policy on the right track by excising the "offending" example. I decline to do that. But it is completely within scope for the court to point out that the present drafting is not conducive to clear evaluation. If the political judgement is that where the LAP and the psychologist both recommend recategorisation, then the decision-maker should carefully consider an oral hearing if she or he disagrees, then it would be helpful to say that. But presently it is buried in a paragraph dealing with "expert dispute", which is producing unnecessary argument because it is not the experts who are in dispute but the decision-maker who is not receptive to the expert recommendation(s) – an entirely different matter. I leave the matter there and refuse to be tempted across any boundary of our constitutional arrangements, persuasive though Mr Tabori was.

39. **Fifth**, I consider the status of the decided cases. They are of an equivalent tier to this court and do not bind. However, while they are capable of being persuasive, the question is persuasive about what? I asked Mr Bimmler in terms whether he derived any proposition of law from these authorities. He did not. He was right: it is impossible to extract any such reliable legal precept. Thus, one is left with the facts. He relies upon, for example, what was said in *Rose*:

> "6. It may be said that there is no significant difference of view between the experts. The LAP has recommended that Mr Rose should be downgraded, and their recommendation is 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 judgement, 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.
>
> 7. 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."

40. However, *Rose* was a case where there was unanimity between experts in the downgrading recommendation. Here there is not. The offender manager firmly disagrees on the question of risk. In *Smith*, the court stated at [24(4)]:

> *"That guidance suggests factors of importance which may tend towards CART/the Director deciding to have an oral hearing*
>
> b. Where the LAP, in combination with an independent psychologist, conclude that downgrade is justified but the Director/CART disagree. That is especially so where there is no psychological evidence to the contrary effect."

41. Here the POM does provide evidence "to the contrary effect". Although not a trained psychologist, the POM in question is a very experienced professional with many years of experience in the risk assessment of dangerous offenders.

42. It is submitted that the situation in *Smith* (LAP and psychologist recommendation and offender compliance) is "on all fours" with the claimant's case (SFG [42]). However, once a fuller examination of the case of *Smith* is undertaken, points of obvious and striking factual difference are plain. In *Smith*, there was unanimity of expert recommendation and there had been three previous reports with precisely the same downgrading conclusion.

43. Thus, the facts of these cases are materially different from the claimant's. What assistance do their facts provide this court? I find very little. I so informed counsel during the course of argument so they could address the point directly. The difficulty if this court is to rely on observations in another first instance case about its facts (it being correctly accepted by the claimant that there is no principle of law), then *all* the material facts must necessarily be considered to see whether there is sufficient equivalence to carry any weight, and how much. I regard this as an unnecessary and disproportionate exercise. It also offends against fundamental principle. In the absence of a clear proposition of law (put algebraically) that **LAP + psychologist = oral hearing**, each of the decisions relied upon amounts to little more than a factual precedent. The Supreme Court made its position on this "concept" plain. In *HA (Iraq) v SSHD* [2022] 1 WLR 3784, Lord Hamblen stated at [96]:

> "There is no such thing as a "factual precedent" … findings made by a tribunal in one case have no authoritative status in a different case… the tribunal has to make its own evaluation of the particular facts before it, it is often difficult to be sure that the facts of two cases are in truth substantially similar."

44. It follows that the term "factual precedent" is in its most essential respects here oxymoronic. I therefore derive little assistance from the citation of a series of first instance factual precedents, despite the unarguable eminence of the jurists who delivered the judgments, which I doubt not.

45. **Sixth**, drawing all this together, I judge that the proper approach to interpreting this subparagraph of the policy is:

> (1) To carefully examine if there is any "significant" relevant dispute between experts – relevant meaning relevant to their reasoning on and/or analysis of risk;
>
> (2) Examine with equal care whether there is any material dispute in recommendation;
>
> (3) If either (1) and/or (2), then weigh whether any oral hearing *would help resolve the dispute, that is add value and accuracy to the substantive downgrading decision.*

46. If the reasoning and analysis of the conflicting experts is clear, and if the conclusions (and thus the basis for them) are clear, I fail to see what value is added by holding an oral hearing in most circumstances. Therefore, the court must constantly go back to the nature and quality of the reports. Are they sufficiently clear for an informed judgment to be made by the decision-maker about risk on the papers? If, therefore, experts fundamentally disagree about downgrading, but the decision-maker is perfectly able to evaluate the reports and choose between the competing recommendations, then (subject always to a perception of justice/common law fairness point), I cannot see how the necessity test for an oral hearing is met. The point of an oral hearing is not the mere ventilation of a dispute for the sake of it, but to explore and/or resolve them. The policy says in terms at subpara. b. that where there are "significant" disputes "a hearing might well be of assistance *to deal with them*" (emphasis provided). An oral hearing is not a mere talking shop. Its function is to assist the decision-maker make a more accurate decision in fairness to the incarcerated person, in the better protection of the public. If the nature of the dispute means the basis of the recommendation is unclear, that may be a strong reason for an oral hearing. If, however, both the rival reasoning and recommendations are perfectly clear on the papers, I fail to see what is added by convening an oral hearing for the experts to repeat what is already evident and plain.

47. Thus, the question really is whether the crucial reports contain ambiguity, confusion, lack of clarity, internal contradiction or inconsistency, flaws or gaps in reasoning, or other impediments to their intelligibility that may be explored or resolved in an oral hearing. If so, an oral hearing may be necessary. If the experts are implacably opposed and their reasoning in opposite directions is perfectly clear, then there is likely to be little advantage to the decision-maker to have them "fight it out" verbally in front of him. In such a case, the decision-maker will have well understood the rival arguments. Having the experts repeat what is clear in their reports will add nothing of value.

48. **Seventh**, While I reject the submission that if the Director does not agree with an expert or indeed experts then that in itself is a "significant dispute" (the defendant is correct about that), I do find that there is a significant dispute between experts for the purposes of subpara. b. between on the one hand the psychologist and the LAP (that included the same psychologist Ms Evans), and the POM Ms Looseley on the other. The defendant is incorrect in his submission about that. Therefore, I do find that Factor b. is engaged and I must consider the nature of the expert dispute and ask myself whether an oral hearing would have added anything "to deal with it".

49. **Eighth**, I turn to the nature of the expert dispute and ask whether it is sufficiently clear on the papers to enable a reliable decision to be made by the Director or whether there was any other reason requiring an oral hearing "to deal with it". To do this, one must review the reports themselves. I set them out in turn and in the order they are presented in the dossier.

50. ***Psychologist***. First, at Section 5, is the "Current assessment of risk from the Psychology Department", Ms Evans's report. It is dated 26 November 2021. Ms Evans is undoubtedly suitably qualified (see her "credentials" as footnote at the end of the report (B103)). The report runs to 10 pages accompanied by two appendices. It is subdivided as follows:

- Background information relating to assessment and treatment through Offending Behaviour Programmes;
- Previous recommendations from LAP/CART;
- Assessment of risk during reporting period (i.e. HCR-20, SARN);
- Assessment of treatment gain during the reporting period;
- Case formulation;
- Summary;
- Recommendation for progression;
- Appendix: VRS scoring;
- Appendix: SAPROF scoring (September 2021).

51. It should be noted that both the "scoring grids" in the appendices contain evaluation of the itemised criteria. Ms Evans has taken considerable trouble in producing this assessment, for which she should be commended. She has considered the case carefully and explains her reasoning with clarity. For example, while she recognises that there are remaining "risk-related factors", she states that "predominantly" the claimant has directed them inwardly "seeking to hurt himself rather than others" (§5.6.1). She notes that the claimant presents with a sense of "hopelessness" that show "parallels" to the time that he murdered a member of the public, but opines once more that he has directed his behaviour "internally rather than to externalise" (§6.6.2 (sic) – should be §5.6.2). She continues that "risk relapse plans" could be developed in a less secure environment since evidence of harm to others has been "minimal" over the last year (§5.6.3). She ends by supporting security downgrade since "my view is that ongoing needs are not core to risk" and that future placement affords the claimant the opportunity to "generalise gains in a less secure environment and one that has more specialised guidance and support related to his ASD" (§5.7.1).

52. I have read the whole report. There was no need to reread it. It is admirably clear and coherently argued.

53. ***POM***. Second, at Section 6 of the dossier, is the report of the POM and runs to six pages. The report is authored by Suzanne Looseley, a probation officer and prison offender manager (see SB4). There is an assessment of static and dynamic risk, including tables of ratings ("risk scores"), identified risk areas from the OASys tool, sentence planning recommendations, attitude and concerning behaviours, including that the claimant has been on an open ACCT

monitoring plan since February 2022. ACCT is a well-known acronym in the Prison Service for Assessment, Care in Custody and Teamwork, a monitoring plan for those at risk of self-harm and suicide. The claimant was placed on ACCT because he cut his left arm and lost a "significant amount" of blood. The report is balanced, detailing his "positive behaviours" and recommendations for future progression. It is a respectful report, calling the applicant "Mr Cusworth", and gives full credit where the claimant had made progress. For example, it notes that:

> *"Mr Cusworth is able to demonstrate that he has made significant progress in demonstrating the factors that underlie his behaviour, his triggers, the origin of his triggers and the strategies he has to manage his emotional state."* (§6.1/B109)

The report notes that:

> *"Mr Cusworth is aware that he has further work to complete during his sentence. Following discussion between him and his clinicians; Mr Cusworth is keen to move to Broadmoor Secure Hospital."* (§6.6/B111)

The question of future progression is put in this way (p.6/B111):

> *"It is my opinion that Mr Cusworth should remain a Category A prisoner until there is evidence to demonstrate a significant reduction in his risks."*

54. The risk to the public in the community is assessed at "High" (§6.1/B106). Ms Looseley is very experienced and has the clear professional background to make such judgements. She has been a probation officer since 1996 and has worked with high-risk offenders both in prison and the community. She has worked professionally in the High Security (prison) Estate. She worked previously at HMP Whitemoor between 2004-08 and spent half her time working on the Dangerous and Severe Personality Disorder Unit. She completed her training for the OASys risk assessment system and the Active Risk Management (ARMS) and Risk Matrix 2000 (RM2000) risk evaluation tools. With such experience and expertise in risk assessment, it is not surprising that Ms Looseley sets out her risk assessment of the claimant clearly and with sufficient detail for a reader to evaluate it. Nothing in the report needs further elaboration, each requisite section being completed with updated and person-specific rather than generic detail. It was open to the Director to accept or reject her recommendation. I was able to understand and make a judgment about the merits of her report without difficulty.

55. ***LAP***. Third, and finally, the dossier sets out at Section 9 the LAP minutes and recommendations (B110-13). This, the LAP "report", is dated 20 January 2022 and signed by the LAP Chair, who was also Deputy Governor at HMP Whitemoor. It is four pages long.

56. It summarises the previous review (decategorisation refusal), minutes of the LAP discussion, including programmes/interventions and protective factors,

Wing/security information, and the concluding recommendation – downgrade to Category B. It deals in fine detail with the claimant, calling him "Rob", detailing the Panel's regret that "unfortunately" his transfer to HMP Wakefield's specialist Mulberry Unit for people with ASD was unsuccessful as "Rob" felt it "did not meet his needs" (p.4/B115). I can see nothing in the LAP report that requires further elaboration at an oral hearing. It is a clear and well-structured assessment.

Assessment of Dispute 1

57. The claimant submits that the markedly differing recommendations of the experts required an oral hearing. I have read the reports carefully. It is absolutely clear to me what the rival arguments are and I have set out some of their chief features above. Like the Director, I have no difficulty in evaluating the competing analyses. It is perfectly possible to make a clear and accurate judgment about which recommendation to prefer for the purposes of the applicable para. 4.2 prevention of risk/harm test. The fact that experts disagree does not in the circumstances of this case call out for an oral hearing. If there were features of the rival recommendations that needed greater exploration or clarification, that would be a different matter. There are not. I find nothing in the rival recommendations on the facts of this case that call for an oral hearing. The Director was perfectly able to judge the competing contentions himself – as can the court on exactly the same materials.

Dispute 2: self-harm and autism

58. The claimant identifies a dispute about the assessments of Ms Evans and the POM about self-harm and autism and risk. The starting-point is how this issue was dealt with by the Director in the "Reasons for the decision". At B132 it is stated that the Director:

> "considered also the conclusion that Mr Cusworth is now more likely to harm himself is not a wholly reliable indication that he has yet significantly reduced his capacity for violence."

59. Mr Bimmler states that Ms Evans disputes this in her report at various points, including:

> "5.6.1: It is clear however that predominantly Mr Cusworth has directed these inwardly seeking to hurt himself rather than others.
>
> 5.6.2: There is a degree of blame directed at others in terms of his belief that the environment he lives in requires others to be more accommodating (excessive base noise attributed to hifi systems), although he is aware this may never be at a level he can tolerate hence his helplessness. This does not directly indicate enhanced risk to others."

60. Mr Bimmler contrasted this with what the POM said, not in her report, but at the LAP meeting. At B113 it is noted that the POM's view was that:

> "Mr Cusworth's autism increases his risks which they believe were proven by him not being able to cope outside of the therapeutic environment of the Mulberry Unit."

61. In response to this, Ms Evans said that the claimant's autism diagnosis was a vulnerability that will need ongoing management going forward and not something that will "go away". This sits well with the fact that the Director did not say that the recent self-directed harm was of no relevance to risk-reduction, but that it was not a "wholly reliable indicator" of significant reduction of risk of harm to others. The totality of the material makes it plain that this is a valid point, and not one needing an oral hearing for development. For example, Ms Evans cites the assessment of Dr Victoria Vallentine, a clinical psychologist "experienced in autism" (5.5.6/B100). Dr Vallentine's opinion is that the claimant's ASD will, as Ms Evans puts it, "impact on several important factors related to his risk". His cognitive difficulties, Dr Vallentine considers, can lead to "reactions or conclusions that are extreme" (ibid., B101) and

> > "All [becoming fixated, rumination] are evident within his act of violence. Thus, autism is a vulnerability or predisposing factor … (emphasis provided)
> >
> > … ruminatory actions can fuel negative reactions and precipitate Mr Cusworth acting out in violent ways." (ibid.)

62. The issue is set out with clarity and detail in Ms Evans's report, relying as she does on Dr Vallentine and yet a further assessment in October 2020 by Elizabeth Smeath. Mr Bimmler relies on Ms Evans's account at §5.6.1 that the claimant's difficulty in coping "*does not directly indicate enhanced risk to others".* He argues that any risk has been internalised as self-directed self-harm. However, even on Ms Evans's analysis, the possibility remains open of an indirect risk, which is consistent with the assessment of Dr Vallentine. Ms Evans speaks at various points about his autism making interpersonal relationships difficult. This is important since putting the extracts above relied upon by the claimant in their fuller context reveals that "rejection and isolation … coupled with ruminatory actions can fuel negative reactions and precipitate Mr Cusworth in acting out in violent ways" (§5.5.7). Should he escape from prison, there must be the clear risk of his experiencing isolation and intense stress. It is plainly not the autism itself that is the risk, but one consequence of it which impacts his ability to cope with periods of high stress and feeling powerless to regulate his environment. For example, he could not tolerate the noise levels in Mulberry Unit and chose to leave a placement designed to address his additional needs. This shows that not being able to control his environment still has a significant impact on him. The link to risk-creation is that it was dissatisfaction with noise levels that were not being addressed that led him to dangerously cut his arm (Looseley, §6.4). This lack-of-control mechanism, with an external focus, contributed to the murder, Ms Evans noting that the feeling of hopelessness and powerlessness led to his "desire to take control leading to an extreme act resulting in the victim being cut 26 times prior to her death" (§5.5.8). So here are two instances – one internally directed, one externally – where loss of control led to the use of a weapon or sharp implement to cut the body. Clear to the Director on the papers, then, is the interplay between his disorder and

difficulties in coping and the risk of violent or extreme reactions. While the risk of violence may have been reduced, Ms Evans judges that it remains "moderate" or "medium" and that is why Ms Evans recognises in her Summary that "There are some risk related factors that remain" (§5.6.1) and his present presentation and hopelessness has "parallels" with the index offence (ibid.). Further, one must look at the evidence before the Director in the round. In the LAP minutes (B113), it is documented that:

> "The LAP discussed that earlier in the reporting period, Mr Cusworth made a serious attempt at committing suicide as he had stopped taking his medication which led to him becoming psychotic."

63. Ms Evans puts it that his decision to withdraw from medication led to a "significant relapse" (§5.4.6) and a psychotic episode. She adds that his "autistic traits" can lead to him "having limited perspective taking" (ibid.) which again is connected to reactions that are "extreme" (§5.5.6). This remains "an ongoing treatment need" (§5.4.6). It is essential to go back to the existential reasons for this policy. It is fundamentally to protect the public from risk of harm (PSI, para. 1.1). Further, the context is risk that arises should the individual be unlawfully at large having escaped from a lower security prison. Should that happen with this claimant, there is at the very least a clear risk that as an escapee he would not be or not be regularly taking his medication – he did not do so at times even in the highly controlled environment of the prison. There is again the risk of his becoming psychotic without medication, especially since his psychotic episodes are "frequently triggered by excessive stress and poor sleep" (Evans, §5.4.5). On escape, there must be at the very least a real risk of this. The Director must then examine what the risk to the public might be. The originating index offence cannot be overlooked and a measure of realism must be injected. Robert Cusworth stabbed a member of the public, a young woman walking her dog in the park, 26 times in the neck.

64. It seems to me that the submissions made on behalf of the claimant suffer from a degree of artificiality. One must look at the claimant's autism and inability to cope together with how it has manifested in prison environments as self-harm, but also consider that when he did not cope and stopped taking his medication, he became psychotic. Should he become psychotic again if an escapee from prison (and the mechanism via lack of medication, stress and isolation is clearly set out in the papers), it is fanciful to suggest that he would not pose any risk to the public – all this is clear in the dossier. It should be noted that Ms Evans says at §5.6.1 that "predominantly" he has directed his behaviours "inwardly seeking to hurt himself". While, in fairness to the claimant one must note that there has been "no actual aggression towards others", there have been "implied threats" to other people (§5.3.4). Further, new behavioural traits have emerged such as an "over controller mode to avoid his vulnerabilities" (partly expressed as being "overly demanding to get his needs met" (§5.5.3) and this is now "an area of further need" (§5.4.5).

65. Thus there is a difference of opinion between the POM and psychologist that is evident on the face of the papers clearly before the Director. The Director was able to reach his own judgement about this topic. It has been entirely possible for the court to evaluate all this and reach a conclusion by reviewing precisely

the same papers. I cannot see that there is any need on this point for an oral hearing. I cannot see what it would add of value. What cannot be overlooked is the next sentence in the Director's decision at paragraph 2 of the "Reasons":

> "He also noted there is no unanimous view from staff that Mr Cusworth has achieved significant progress."

66. That is objectively true. The differences between the POM and the psychologist and LAP are clear. The Director's task was to assess them and make a decision about which analysis and conclusion he preferred. There is nothing in the self-harm and autism question that calls out for an oral hearing. Mr Bimmler argues that the case is "complex" because of the claimant's neurodivergent traits. But the question is not about the complexities of finding effective treatments for his neurodivergence, but about risk should he escape. If he did escape and while not coping did not take his medication (even assuming he had any) and became psychotic, the risk to the public is obvious. The fallacy in the claimant's approach to this question is that the submissions have not considered the real question: not ambient risk posed by the claimant in a vacuum, but risk to the public directly from a further psychotic episode, indirectly contributed to by his neurodivergence, should the claimant be "unlawfully at large" (para. 4.2). It does not need an oral hearing to spell it out. It is unmistakable and obvious.

67. I should add that I reject the submissions that the court should consider the hearsay in the solicitor's representations at §13. It is impossible to gauge how reliable a reflection of the POM's views they are. I find it preferable to evaluate what the POM actually said in her report. Equally, I do not find the post-decision evidence from Ms Evans to be helpful in an assessment of the decision based on the material before the Director. This was not material before the impugned decision-maker. It does not materially add to the need for an oral hearing, as judged at the time of the impugned decision.

Assessment of Dispute 2

68. I reject the submission that the difference of opinion between experts about self-harm and autism, which largely (not exclusively) consists of a difference of emphasis and presentation, increase the need for an oral hearing. Mr Bimmler dealt with autism and self-harm together in submissions, and was right to do so. Autism itself does not create a risk to the public. It is clear from the papers that the issue is how autism can make it more difficult for the claimant to cope with stresses and external factors, and then how that inability to cope is connected to violent behaviour, that is the route to risk. It is clear that the Director well understood that the "predominantly" self-directed harm when the claimant could not cope with aspects of the highly artificial environment of the prison is not a reliable indicator of poor coping during an escape. All this is clear. It does not need an oral hearing to explore it. Whether the risk assessment of the Director is wrong is a matter of substantive challenge, not this procedural one.

Dispute 3: relapse prevention plan

69. The claimant submits that a dispute about the relapse prevention plan also increases the need for an oral hearing. Mr Bimmler cites a sentence from paragraph 2 of the decision reasons:

> "He [the Director] noted the recommendation for further work on relapse prevention on triggers to rumination, a key offence-related issue."

70. Mr Bimmler contrasts this with what Ms Evans states at §5.1.2 (B94), that outstanding relapse prevention strategies "are not core to his ongoing risk". But the claimant's submissions must be read in conjunction with what Ms Evans said at §5.6.3 (B102), that these strategies – which are not complete – are designed to prevent the claimant's "mental health deterioration" and, critically, "these also need to be developed *with his harm to others*" (emphasis provided). I take "with" to mean "in respect of" harm to others. Therefore, even looking at the extracts relied upon by the claimant, it is evident that there are outstanding relapse prevention (that is part of risk prevention) strategies that address "harm to others" – not the claimant, but other people. Again, the proper context: specifically upon escape of risk to the public. Ms Evans herself notes that the claimant's own explanation of the "main factors" at the time he murdered Mrs Garwood included "poor coping, poor decision-making" (§5.6.2). Thus in the passage of the decision cited above and subject to criticism, the Director was able on the papers to accurately identify both the fact that there is outstanding work on relapse prevention and that the ability or inability of the claimant to cope is related to triggers to offending. Indeed, as noted previously, Ms Evans notes the "parallels" in the claimant's present "hopelessness" that mirror his state of hopelessness when he murdered Sally Garwood.

71. In a vital passage at §5.5.9, not referred to by the claimant, Ms Evans states that "many" of the factors that led to the murder have been "weakened". It is telling that she does not say eliminated. But she proceeds to emphasise that "remaining concerns" are around "protecting him against mental health relapses". At §5.4.6, Ms Evans when discussing the claimant's levels of insight speaks of "his **mental health disorder** and link to violence" (emphasis in original). As already explained, it is such relapses that increase his risk of violent behaviour. Therefore, the work that remains to be done is not unconnected to the risk of violence, as the claimant's case appears to be, and while it may not be "core to risk", it is nonetheless materially connected to the risk of violent behaviour. It is unrealistic to suggest otherwise. This with great vividness demonstrates the perils of isolating and extracting sentences from Ms Evans's report (or indeed any others) and then artificially building a case around them. The psychologist's report, and the dossier before the Director, must be read as a whole. When this is done, a crystalline risk-picture emerges. Ms Evans states in terms at §5.3.5, for example:

> "The main factors with remaining treatment needs <u>linked to Mr Cusworth's ongoing risk of violence</u> are as follows:
>
> • Poor emotional control
>
> • Weapon use

• Mental disorder

• Stability of relationships

• Community support" (emphasis provided)

72. Within treatment he has been "overwhelmed with emotion and been unable to manage his ruminations" (§5.4.4). Although he had not used weapons against others, he had recently used a blade taken from a pencil sharpener to harm himself (§5.4.5). This is no doubt why "weapon use" remains on list of treatment needs to be addressed. Ms Evans states that the relapse prevention strategies that remain outstanding are designed to "manage the pressures of stress and negative mood which contributed to the index offence" (§5.4.7). Thus, Ms Evans's conclusion is that this outstanding work is connected to mechanism that led to the murder. This is clear from the papers. She states that his self-harm acts were "serious attempts on his life" and his thinking processes resulting in them "has a parallel with the index [murder] offence" (ibid.).

73. It is true that Ms Evans suggests that these coping strategies could be developed in a less secure environment because "actual harm to others has been minimal over the last year" (§5.6.3). But that is not the test. They might very well be better developed in a different setting. Nevertheless, the question for the Director on the substantive decision is whether there has been sufficient risk reduction should there be an escape. The outstanding treatment is, even on Ms Evans's analysis, linked to "ongoing risk of violence", with a continuing risk of physical violence if "in the community" being "moderate". It was, she judges, "high" previously, so there has been a reduction. Nevertheless, she states that the relapse prevention plans are needed to prevent him "directing his despair at best inwardly, at worst outwardly" (5.7.2). Outwardly, must include the public on escape. It is clear that Ms Evans has not discounted the risk of poor coping leading to the claimant taking out his inner turmoil on other people. She has made all this perfectly clear on the papers. There is then a legitimate and delegated judgement to be made by the Director about whether that is an acceptable level of risk should he escape from a lower security facility.

Assessment of Dispute 3

74. The pertinent question for this judicial review claim, given this matter has been ventilated in the papers in such detail, is whether anything about this topic increases the need for an oral hearing. In my judgment, it does not. Once more, proper analysis of the materials before the Director plainly indicates that the issue was squarely before him and he was able to evaluate it – precisely as the court can do without difficulty.

75. I conclude that the question of relapse prevention adds nothing to the need for an oral hearing.

§VIII. FACTORS C. AND D.

76. **Factor c. (length of time in custody).** The claimant at point of decision had been in custody for 12 years of a sentence of 19 years and 6 months. The claimant relies on the length of time combined with the complexity of his "psychological presentation" (CS §27). I have dealt with the psychological complexity point already. The fact is that the claimant was pre-tariff and had completed just over 60 per cent of the minimum term imposed for Mrs Garwood's murder. I do not accept the defendant's submission that the proper approach for Factor c. is that length of time needs to be "supported" by something else. That is because as years pass, and especially towards tariff or beyond, that accumulated weight of time may itself call for an oral hearing. But in this case, it is clear that such a stage has not been reached. This adds nothing of substance to the oral hearing question.

77. **Factor d. (no previous oral hearing)**. The claimant has not previously had an oral hearing. I find that this factor does not in the circumstances of this case add or add materially to the need for an oral hearing.

§IX. CONCLUSION GROUND 1

78. For the sake of clarity and logical analysis, I have examined the factors separately, since they were addressed in this way by counsel. But I emphasise that I also put all the factors together and examine the question of an oral hearing in a global and holistic way (*Seton* at [49]). I look at all the arguments made on Factors b., c. and d. together. I find that they do not cumulatively necessitate on oral hearing. There was a dispute between experts. I find that factor b. is engaged. But the nature of the dispute was absolutely clear on the papers. It did not require an oral hearing. It was a question of the Director making a judgement – that is his role as decision-maker. He put it succinctly (B132/Reasons §3):

> "there are no significant facts in dispute and that the available information and reasoning or downgrading is readily understandable."

79. I agree. The court is able to make its own evaluation in just the same way on the papers. The other disputes relied upon by the claimant are perfectly clear and do not require an oral hearing to evaluate. In any event, they feed into the prime recommendations, and thus the central dispute on risk. The length of time incarcerated and lack of previous oral hearing do not call out for an oral hearing. When they are added to the central risk dispute between experts, they do not result in a need to convene such a hearing. The critical factors and rival arguments that are constituent parts of the downgrading decision are all plain and clear on the face of the papers. After that, it is a question of evaluation. The Director is perfectly entitled to reach a view contrary to the LAP and psychologist, who in any event contributed to the LAP decision and attended the meeting, without the necessity of an oral hearing. All of this is clear and consistent with substantive and procedural policy.

80. Ultimately, the para. 4.7 factors are simply indications that "tend" towards, but do not prescribe, an oral hearing, as the express words of the paragraph make clear. Viewed globally, I reject Ground 1 of this claim.

§X. GROUND 2

(COMMON LAW UNFAIRNESS)

Preliminary point

81. There was contention between parties about whether it was open to the claimant to argue the question of a possible transfer to Broadmoor Hospital, a specialist psychiatric hospital in Crowthorne, Berkshire, as part of Ground 2, common law unfairness. It is true, as Mr Bimmler ultimately conceded, that "Broadmoor" was not pleaded as such. But I judge that the issues are of such importance to Mr Cusworth, and indeed the public interest, that the claimant should not be estopped from arguing the point as if the statements of case were some kind of Victorian pleading. Our notion of procedural fairness has moved on significantly since then.

82. On common law unfairness, the claimant makes four points. First, that this was a complex case, and in particular in respect of the claimant's "psychological presentation" and neurodiversity, a point not mentioned in the PSI. Second, that the point reached in the claimant's progress was a significant "watershed" in his treatment history. Third, the impact of the factual error made by the Director about Broadmoor. Fourth, an overall breach of common law procedural fairness. I examine each in turn and then together.

(i) Complexity

83. The complexity is said to derive from, as counsel put it, "neurodivergence and ASD". But the fact that someone who has murdered a member of the public presents with Autistic Spectrum Disorder is not itself a justification for an oral hearing. The question is whether the risk-significance of his ASD needs exploration and spelling out beyond what is evident on the papers. Mr Bimmler submits that "after this length of time it is not possible to assess this on the papers". But it must be remembered that before the Director was information that the claimant was accepted into the specialist Mulberry Service at HMP Wakefield that supports people with ASD. However, he did not find it helpful overall and he "withdrew from this service" as he "found the supportive environment counter-productive" (Evans, §5.1.5) and "it didn't work well" (LAP, B112). He found it difficult to tolerate the noise levels in the unit. The complexity of the claimant's overall presentation is evident in the dossier, which also sets out the positive aspects of the claimant's conduct in prison, such as that the keyworker noting that he is "polite" and has gained enhanced status (Dossier, §4). All this is there on the papers.

84. The submission made on behalf of the claimant fails to distinguish between the inherent nature of the claimant's neurodivergence and the extent to which, if any, his disorder affects risk and how this would necessitate an oral hearing. The decategorisation process is not a seminar about mental health. It is about safe assessment of risk. On the papers before the Director the mechanism of possible significance of ASD is absolutely clear: ASD – difficulties with coping – medication compliance – risk of psychotic episodes - risk-laden behaviours – possible risk to the public. There is nothing in this that calls for an oral hearing.

(ii) "Watershed moment"

85. In July 2014 the claimant began treatment at HMP Whitemoor's "Fens Service". This is a prison wing for Offenders on the Personality Disorder Pathway ("OPDP"). This ended in July 2021. He then was transferred to HMP Wakefield's Mulberry Unit for offenders with ASD, but withdrew and returned to Whitemoor in September 2021. It is submitted orally that the completion of this body of treatment was a significant "watershed" moment since the claimant had "completed a long treatment programme to address his core risk" (see similar submission at CS, §28). But this treatment programme and its effect on very specific aspects of his presentation and functioning is spelled out at various points in the papers. For example, the Director "recognised that Mr Cusworth has engaged in therapy for some time and there is evidence of a degree of progress in terms of his understanding of risk factors and greater stability in his behaviour" (B132/Reasons). Ms Evans addresses the treatment programme in detail at various points, including at §5.1.2:

> "He was able to address risk, trauma, and related well-being concerns … Mr Cusworth was able to complete all aspects of his outstanding treatment needs mainly through individual therapy, although has some limited relapse prevention strategies to develop."

86. At §5.1.3, Ms Evans details the 10 modules the claimant has completed of the programme, ranging from three months to six years in duration. He has "undertaken seven years of therapy with the OPDP Fens Service" (§5.3.1) and "Mr Cusworth has made progress in risk reduction related to violent risk." (§5.3.3). This was clear and spelled out. The diagnostic tools used were set down in the report: Violence Risk Scale, Wong & Gordon, 2000.

87. The claimant submits that an oral hearing was required "at this juncture … in line with the policy". However, no specific reference was provided to which part of the policy justified this submission, particularly when the nature of the risk reduction and the scoring of it has been documented in such detail. Indeed, such a matter does not readily fall within the four subparagraphs of para. 4.7. Out of fairness to the claimant and the court's duty to further the overriding objective (CPR 1.1), despite the defendant's objection, I gave permission during the hearing for the matter to be evaluated as a common law breach. But I fail to see how the completion of this OPDP-focused body of work necessitates an oral hearing if the impact of the work and the benefits that the claimant has taken from it are clear on the papers. They are. If the point is that such a watershed calls for "a hearing with all the professionals involved" (oral submission), I cannot see that it is justified at common law. It would add nothing to the decision-making. This is not a question of cost – "costs should not be a conclusive argument"

(PSI para. 4.6). It is what value would be added to the process. I detect nothing of substance.

(iii) Broadmoor Hospital

88. There is post-decision evidence from Ms Evans about the question of a possible transfer to Broadmoor Hospital (SFG §16). Claimant counsel was asked in terms if the Evans later evidence was relied upon, given that it was not before the Director. Counsel, quite properly, stated that he would "not take the court to the post-decision evidence". This is not a *Wednesbury* challenge to the Director's decision. Therefore, the correct question is whether the differing statements about the status of the Broadmoor transfer application pointed to the need for an oral hearing. In the decision the Director states:

> "Mr Cusworth's agreed transfer to Broadmoor Hospital (a high security psychiatric unit) is not compatible with an assessment that he has at this time achieved significant progress and risk reduction." (B132)

89. This factual misconception is likely to have come from the POM's report, where she states at §6.7 (B111) that he had been "accepted to be transferred". As was stated in written submissions, the transfer was "neither accepted nor agreed by Broadmoor Hospital". What is the significance of all this?

90. The fact is that Mr Cusworth himself wished to be transferred to Broadmoor. As the POM states at §6.6, "following discussions between him and his clinicians, Mr Cusworth is keen to move to Broadmoor Secure Hospital", something not apparently disputed by the claimant. If this were indeed a substantive challenge, the argument would be that the decision had taken a factor wrongly into account. But this is exclusively a procedural challenge. Broadmoor was but one of "a number of key offence-related issues", as the decision says (B132/Reasons, §2). I find that the difference between being accepted and having applied to be accepted is not of sufficient materiality to point to an oral hearing, especially given that the claimant wished to be transferred. Further, given that Broadmoor was but one out of several factors, the reason for the transfer is not something of such significance that adds anything important to oral hearing need. If the factual mistake of the Director were of such importance, that would be a basis to challenge the substantive decision. That is not a matter before this court in a procedural challenge.

(iv) Overall procedural fairness

91. Although counsel for the claimant did not develop this point in oral submissions, I take into account the request by the claimant's former solicitors that he should give evidence at an oral hearing (Representations, 16 December 2021; §44/B124). I cannot think that the claimant giving oral testimony at a hearing before the Director would add anything of significance. The essence of the case is a question of risk evaluation by those who have familiarity with the case and/or expertise. Hearing from the claimant himself in the artificial environment of a convened oral hearing would add nothing of substance and in itself carries the risk of presenting an unfair picture of the claimant given the

stress and daunting nature of the hearing. It is clear that the claimant finds it difficult to cope with stress.

92. The claimant further submits that he "did not have a fair opportunity to present his case and to enable the views of the experts to be fully explored and tested" (CS, §31). I have dealt with the fact that I do not judge that there was a necessity for their oral testimony. Beyond that, it is vital to note that the representations made on the claimant's behalf by his solicitors were very detailed. They run to 7 pages and 44 paragraphs. It does Mr Prabatani of former instructing solicitors Carringtons credit that he took the time to provide the Director with such full submissions. His submissions address both the application for security downgrade and for an oral hearing. The document sets out in a structured and persuasive way evidence and arguments about the background, the applicant, the keyworker report, the offender management report, Ms Evans's psychological report and the grounds of the application. The submissions cite with further developed argument *Osborn v Parole Board* [2014] 1 AC 1115 in the Supreme Court and PSI 08/2013.

93. I do not see how these points could have been materially supplemented during an oral hearing. Thus, I find no procedural unfairness in not affording an opportunity for oral submissions made, whether by his legal representative or the claimant himself. Thus, both from a substantive perspective (developing submissions and testing evidence) and also from a procedural point of view – the "look of the thing" – I cannot see how the process adopted by the Director was either procedurally unfair or could reasonably be viewed as being procedurally unfair.

Conclusion Ground 2

94. I emphasise that I accept the claimant's submission that it is not necessary to show "exceptionality" for an oral hearing at common law. Nonetheless, I cannot see how, even with the factors relied upon viewed globally, Ground 2 adds anything of substance or persuasive merit to the argument. As put in his skeleton, the claimant says that the decision was unfair at common law "for the reasons set out with reference to the PSI" (CS, §30). This reinforces the point that Ground 2 adds little. It also fails.

§XI. DISPOSAL

95. The unmistakable impression given by this claim is that the true discontent is with the Director's substantive decision. But that is not challenged here. It is not being argued before me that the Director is wrong in the decision to refuse recategorisation of the claimant. That would require a rationality challenge, a forensic slope the claimant is not endeavouring to climb in this hearing. Instead, the procedure is attacked. I find that the criticism made is misplaced and unjustified, selectively focusing on snippets of the evidence and failing to engage adequately with the clear picture that emerges from the totality of materials before the decision-maker. The approach runs contrary to the fair and reasonable standards approach to review of policy-grounded decisions that

informs the ethos of the Supreme Court in *A v SSHD* and *BF*. Looking at that global picture objectively, as the court must, without construing words in the policy as if they had been granted statutory force, which they have not, I find no difficulty in analysing the evidence before the Director and reach precisely the same conclusion as the Director that an oral hearing was not required.

96. The Director's decision about oral hearing cannot be divorced from the underlying offence, the murder of Sally Garwood in Quarrendon in 2009. It is plain that the Director took into account the risk factors that contributed to Mrs Garwood's murder, the mechanisms leading to Robert Cusworth's psychotic episodes and the extent to which they persist. Further, the delegated decision-maker was comfortably able to do so because the relevant factors are all set out in clear and unambiguous detail in the dossier. This document, when properly and fairly examined, provides a powerful evidential and principled basis to refuse to move Robert Cusworth to a less secure prison, and strongly points to the fact that he should remain in a Category A institution, where his escape will be impossible - a decision in any event not challenged here. The procedural challenge mounted in its stead is misconceived.

97. Ground 1 is rejected; Ground 2 adds very little and is rejected. The claim fails and must be dismissed.

98. That is my judgment.