Neutral Citation Number: [2021] EWHC 1898 (Admin)

Case No: CO/1777/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

- -

Between :

REGINA
(on the application of SIMON SMART) **Claimant**

- and -

THE SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Mr Jude Bunting (instructed by **ITN Solicitors**) for the **Claimant**
Mr Robert Cohen (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17/06/2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MRS JUSTICE THORNTON DBE

The Hon. Mrs Justice Thornton:

Introduction

1. This case concerns procedural fairness in the context of a review by the Secretary of State's Category A Review Team ('CART') when deciding to maintain the Claimant's classification in prison as a Category A prisoner.
2. The Claimant was convicted of murder in March 2012 and is serving a life sentence with a 30-year tariff. He will not be considered for release until April 2042.
3. The claim is brought on three grounds:

   Ground 1A – The Defendant applied the wrong test in deciding not to hold an oral hearing. It treated its conclusion on the substantive question of whether there had been a substantial reduction in the Claimant's risk of reoffending, if unlawfully at large, as conclusive of whether fairness required an oral hearing.

   Ground 1B – Common law procedural fairness required an oral hearing.

   Ground 2 – The Defendant failed to apply the policy Prison Service Instruction (PSI 08/2013) which was intended to widen the circumstances in which there will be oral hearings of Category A reviews.

Legal framework

4. A prisoner may lawfully be confined to such prison as the Secretary of State directs (s.12 of the Prison Act 1952). The Secretary of State has the power to make rules for the classification of prisoners (s.47 of the Prison Act 1952), and has done so in the Prison Rules (SI 1999/728).
5. Rule 7 of the Prison Rules provides, subject to exceptions which are not applicable to this case:

   > *"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."*

6. Adult male prisoners are classified by reference to four security categories (A to D). A Category A prisoner is one "*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, §2.1). Immediately below Category A is Category B, which is for prisoners "*for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult*".
7. A decision regarding a prisoner's categorisation has significant implications both for the public interest and for the individual interests of the prisoner himself. A prisoner in Category A endures a more restrictive regime and higher conditions of security than those in other categories. Movement within prison and communications with the outside world are closely monitored; strip searches are routine; visiting is likely to be more difficult for reasons of geography in that there are comparatively few high security prisons; education and employment opportunities are limited. And as, by definition, a Category A prisoner is regarded as highly dangerous if at large he cannot properly be

regarded by the Parole Board as suitable for release on licence (R v Secretary of State ex p Duggan [1994] 3 All ER 277, Rose LJ).

8. The CART is an internal body, part of the Prison Service, administering the prisons and organising their security. It is composed of persons with relevant expertise and experience in making judgments about prisoner categorisation, as an aspect of prisoner management within the prison estate which is its responsibility. The CART addresses the question of the risk posed by a prisoner in the context of his escaping from prison and being at large, on the run and not subject to any measures of management and support in the community (R (Hassett) v Secretary of State for Justice [2017] 1 WLR 4750).
9. The Category A review process is explained and guidance regarding it is given in PSI 08/2013. It was further explained by the Court in Hassett [at 13-16]. The CART typically takes its decisions by reference to a dossier of materials compiled by staff within the prison where the prisoner is held, including the prison's psychology services team. The reports are compiled following interviews with the prisoner. The reports attach any pre-sentence and post-sentence reports on the prisoner. The reports in the dossier deal with the prisoner's offending history; his behaviour in prison and level of compliance with his sentence plan; offence-related work in terms of programmes attended and progress in those programmes; his health, insofar as it might be relevant to risk categorisation; and security information. Other relevant material will be included in the dossier.
10. The dossier is provided to the prisoner so that he and his advisers have an opportunity to make representations in writing about its contents. The prisoner may submit material of his own, such as reports from an independent psychologist as occurred in this case.
11. The dossier and any materials submitted by the prisoner are then sent to the Local Advisory Panel ("LAP"), which is composed of representatives of the probation service, the prison psychology service, security specialists and the prison governor. The LAP makes a reasoned recommendation.
12. The package of materials is then sent to the CART. The CART usually completes the review itself if the LAP has not recommended downgrading the prisoner from Category A and the CART considers that there is no reason to downgrade him.
13. The CART has a discretion in relation to the procedure it adopts for categorisation reviews and must act fairly, having regard to the context in which such reviews are undertaken.

The test for downgrading a Category A prisoner

14. Paragraph 4.2 of PSI 08/2013 states:

> *"Before approving a confirmed Category A / Restricted Status prisoner's downgrading the [Director] (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."* (underlining is the Court's emphasis).

15. In Hassett, Sales LJ said this paragraph had to be read subject to the definition of a Category A prisoner set out in § 2.1 of PSI 08/2013, which governs the whole of PSI 08/2013. Downgrading from Category A pursuant to § 4.2 will only be appropriate if the significant reduction in risk takes the prisoner outside that definition.

Oral hearings

16. Paragraphs 4.6 and 4.7 of PSI 08/2013 deal with the topic of oral hearings in the Category A review process. Relevant extracts state:

> *"4.6 The [Director] (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 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 a 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...

(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…

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."

The Facts

17. The Claimant was convicted of murder in 2012 and sentenced to life imprisonment. His minimum term is due to expire on 23 April 2042. The Claimant continues to maintain his innocence. His co-defendant's case is pending before the Court of Appeal (Criminal Division). The Claimant intends to seek consideration of his case by the Criminal Cases Review Commission.
18. The circumstances surrounding the index offence were that a 44-year-old male was shot dead outside the Belgrave Public House, Liverpool. Emergency services attended the scene, but the victim died instantly from the injury sustained. Mobile phone records indicated that the Claimant made a sequence of mobile phone calls on the offence date. Those phone calls appeared to show a pattern of communication between mobile numbers which seemingly lured the victim to the murder site where he was shot dead. The sentencing judge observed that the Claimant was *"central to the planning and execution of the murder"* and that *"he developed a relationship with the victim as a result of which [he was] able to lure him to the place where he was to be killed"*.
19. Since his sentence, the Claimant has been detained in Category A conditions. On 2 November 2013, he completed the Thinking Skills Programme designed to help users understand their reasons for offending including developing emotional self-management problem solving and special interaction skills.
20. On 8 January 2019, the Defendant decided to retain the Claimant as a Category A prisoner. The Local Advisory Panel review suggested that RESOLVE was the best way forward for the Claimant.
21. In 2019, the Claimant completed RESOLVE, a rehabilitation programme that aims to help users develop skills of self-control so they can be better prepared to deal with the conflicts that leads to aggressive behaviour. The post-programme report found that the Claimant had *"developed insight and awareness into his offending and the risks that have influenced his use of violence and aggression."*
22. On 30 September 2019, a prison psychologist completed an assessment report on the Claimant ('the prison psychology report'). The psychologist did not make a recommendation for downgrading. The summary and recommendations concluded as follows:

Summary and recommendation for progression

> *"In the reporting period Mr Smart has…completed RESOLVE and is reported to have acknowledged the pro criminal attitudes and beliefs which have factored into his use of violence and aggression. Mr Smart was also felt to have developed insight into how difficult emotions linked with violence and aggression.*
>
> *In my opinion on the basis of the information available to me at this time, I would consider Mr Smart to be at least a moderate risk of violence in both high security and lower security establishments.*
>
> *In my view Mr Smart clearly has the ability to maintain stability in his behaviour and avoid resorting to the use of violence and aggression. He has completed both TSP and RESOLVE, and Mr Smart's custodial behaviour within the previous reporting period is indicative of him having improved problem solving and perspective taking skills. However, the extent to which he holds attitudes which support the use of violence and aggression, and*

> *his level of insight into his index offence remains difficult to accurately assess. It is therefore also difficult to accurately assess the extent to which Mr Smart has significantly reduced his risk.*
>
> *Whilst I appreciate it is not ideal, I would suggest that when Mr Smart's appeal/CCRC processes have concluded, if he is still in custody, Mr Smart reflects upon his account of his actions, and takes the opportunity to evidence his insight into the circumstances which lead to him being convicted of murder. Such discussions would allow for a more accurate assessment of Mr Smart's risk of future offending in a manner similar to his index offence, and the impact of intervention work completed to date."*

23. Having reviewed the Claimant's dossier his representatives requested the review was deferred to January 2020 to enable the Claimant to submit an independent psychology report.
24. On 8 December 2019, a chartered and registered psychologist (Dr Johnson), completed an assessment of the Claimant ('the Claimant's psychology report'). The executive summary concluded as follows:

> *"To make a recommendation for downgrade there must be evidence of significant risk reduction such as evidence of change in attitudes towards offending or the development of skills to help prevent similar offending. For the most part, Mr Smart has demonstrated compliant and positive custodial behaviour, and this suggests that his risk is well managed within a closed prison environment. Mr Smart has been responsive to treatment, and I consider that he has made positive progress in terms of insight and the development of some risk management strategies. I consider that the conditions for downgrade to category B as being met due to significant risk reduction since offending and completion of interventions. Furthermore, there is no evidence to suggest that Mr Smart's risk would increase within a Category B prison where the structure and routine that he is used to would be maintained to what I consider an acceptable degree. If he were to transfer to a Category B prison, suitable professional support would be in place. In addition, based upon my independent assessment risk, there is no evidence to suggest that Mr Smart would present a risk of escape or present with any control issues."*

25. On 20 December 2019, the Claimant's solicitors submitted the Claimant's psychology report and detailed representations to the Local Advisory Panel. The representations set out the legal framework including the relevant test for downgrading; the guidance on oral hearings and on denial of index offence. The submissions then considered the Claimant's completion of RESOLVE before turning to the expert reports and requesting an oral hearing:

> *"Psychology Reports*

It is submitted that Dr Johnson's view should be preferred to that of the prison psychologist: Mr Smart has evidenced significant risk reduction. Dr Johnson's view is consistent with that of the (different) prison psychologist who assessed Mr Smart in 2017 and also considered that he should be downgraded to Category B prior to completion of RESOLVE. The fact that Mr Smart is an appellant does not prevent him from demonstrating significant risk reduction, nor of being categorised as a lower security category. Furthermore, Dr Johnson's view is supported by that of Mr Smart's Offender Supervisor who is very experienced with working with Category A offenders and is an expert in risk assessment.

Oral Hearing

It is submitted that fairness requires an oral hearing to consider Mr Smart's downgrade. Reliance is placed on the following:

1. There is a significant dispute on the expert materials. The prison psychologist has made a different assessment of Mr Smart's risk to the independent psychologist. On the central question, there is disagreement about whether Mr Smart meets the test for downgrade to Category B.

2. If accepted, the prison psychologist's position - that a recommendation for downgrade cannot be made until after Mr Smart has concluded his appeal - would represent a significant impasse (i.e. Mr Smart would not be able to progress until after the conclusion of his appeal). Fairness requires that this is considered at an oral hearing.

3. Mr Smart has been a Category A prisoner for almost eight years and has not had an oral hearing. He has developed significant skills and maturity in that period, which could be demonstrated at an oral hearing.

4. He has shown such exemplary custodial behaviour and has had previous recommendations for downgrade. Therefore, it is important that Mr Smart is given the opportunity to participate in the review and engage with the CAT/Director in understanding the basis for his continued status as a Category A prisoner.

Conclusion

It is submitted that Mr Smart's risk is such that he can properly be managed in Category B conditions, as he was whilst on remand. In light of his consistent and ongoing high standard of behaviour and his engagement with prison staff, Mr Smart has demonstrated a positive attitude to his offending and developed skills to prevent similar offending and his downgrade is supported by his Offender Supervisor and the independent psychologist."

26. The Local Advisory Panel sat at HMP Fall Sutton on 16 January 2020. It did not recommend that the Claimant be downgraded:

> "*It is recommended that Mr Simon Smart remains as Category A. During the reporting period Simon has continued with positive behavior engaging appropriately with staff and his peer group. He enjoys enhanced privileges within the IEP policy and continues to be employed as a wing cleaner. During the reporting period he has engaged with Learning Together studying alongside visiting students from Leeds Beckett University.*
>
> *Risks associated with his index offence have been identified as including poor problem solving, and impulsivity, with no manifestation of these factors within custody. It should be noted that Mr Smart's stance in relation to his index offence makes it difficult to make an accurate assessment of relevant psychological risk factors. It is reported that Simon's positive behaviours and lack of risk factors may be attributable to skills learned through intervention.*
>
> *The CAT in 2019 indicated that progress was needed to evaluate any details on his level of insight and progress in relation to reduction in risk and that this information would be assessed more effectively at this review where comment could be made on the opportunity to implement and consolidate skills learned. The local panel considered these requirements against a difficulty to accurately assess insight into offending behaviour due to Simon's current stance and an appeal being progressed through the CCRC. Simon has chosen not to discuss circumstances relating to his index offence and engaged with interventions based on previous offending. This makes it difficult to fully assess outstanding risk factors and insight into his offending.*
>
> *Should there be a change in stance then further assessments will be facilitated which would identify the most appropriate treatment pathway, however should this change not be forthcoming, there will be a further period of consolidation which can be considered at the next review.* (underlining is the Court's emphasis).
>
> *On that basis, and whilst denial should not be a barrier to downgrade the local advisory panel could not evidence a significant reduction in risk of reoffending should Simon be unlawfully at large and therefore agreed that he should remain Category A."*

27. On 30 January 2020, the Claimant's solicitors requested an oral hearing of the review. They also provided further representations.
28. On 14 February 2020, the CART decided to retain the Claimant as a Category A prisoner and refused to hold an oral hearing. Relevant extracts from the decision are as follows:

"The Category A Team noted that you have had a settled year by not receiving any negative entries, IEP warnings, positive MDTs or any proven adjudications. It is reported that you are enhanced IEP prisoner, you are employed as wing cleaner and you complete all your duties to a high standard. The Category A Team noted that you fully engage in your sentence planning process, you have completed Resolve and participated in the Leeds Beckett Psychology Course, where you received a certificate at the graduation ceremony in June 2019.

The Category A Team noted you completed Resolve and TSP which was for your previous offences not your index offence. Upon completing Resolve, a risk assessment was carried out however, it was difficult for psychology to assess your level of insight to the index offence as you chose not to discuss your index offence due to your ongoing appeal. Should there be a change in your stance then further assessments will be carried out to identify the most appropriate treatment pathway.

The Category A Team noted that ITN Solicitors submitted representation on your behalf and an independent psychology report was submitted by Dr Darren Johnson, Chartered and Registered Forensic Psychologist.

The Category A Team noted that representation requested your review to be deferred to January 2020 and after reviewing your dossier you wished to submit an independent psychology report, both have been conducted. Representation submit that there is a profession dispute between the prison psychology report and the independent psychology report. They further submit that it is only fair your case is review through an oral hearing and that you can be managed in Category B conditions.

Dr Darren Johnson submits you present a moderate risk within custody, you demonstrate compliant and positive custodial behaviour and the conditions for you to be downgraded have been met. Dr Darren Johnson also submits that there is no evidence to suggest that your risk would increase within Category B conditions and based upon Dr Darren Johnson's independent assessment, there is no evidence to suggest that you would present a risk of escape or control issues.

The Category A Team noted your good behaviour and that you have completed both TSP and Resolve. However, as you did not discuss your index offence, there is no evidence of a risk reduction. Whilst there is a dispute between the prison psychology report and the independent psychology report, this is not enough to hold an oral hearing as you have not achieved a significant reduction in your risk of similarly reoffending if unlawfully at large. Although representation submit you can

> *manage within Category B conditions that is not the criteria to warrant a downgrade. In accordance with PSI 08/2013, there must be evidence of a significant reduction in your risk of reoffending to warrant a downgrade.*
>
> *The Category A Team considered at present there is no convincing evidence you have achieved a significant reduction in your risk of similar reoffending if unlawfully at large. It is therefore satisfied that Category A status remains appropriate at this time."*

29. In November 2020, after proceedings had been issued, the Defendant produced a witness statement from a member of the Category A team closely involved with the decision under scrutiny. The Claimant invited the Court to place no weight on a witness statement which it was said amounted to an attempt to explain away and correct defects in the decision's reasoning. The Court was directed to the decision of the Divisional Court in R(Kind) v SSHD [2012] EWHC 710 (Admin) in which the Court said that the effect of late provided reasons must be treated with caution owing to the obvious risk of the truth becoming 'refracted' [72]. In the event, I have not found it necessary to consider the witness statement in order to evaluate the decision.

Submission of the parties

30. The Claimant submits that the Defendant treated its conclusion on the question of whether there had been a substantial reduction in the Claimant's risk as conclusive of whether fairness required an oral hearing:

> *"Whilst there is a dispute between prison psychology report and the independent psychology report this is not enough to hold an oral hearing as you have not achieved a significant reduction in your risk of similarly reoffending if unlawfully at large."*

31. This was obviously the wrong test (Ground1A). Common law procedural fairness required an oral hearing because the central dispute in the case relates to an assessment of the extent to which the Claimant has demonstrated a reduction in risk in circumstances where he continues to deny his guilt of the index offence. This makes assessment of risk difficult and requires an assessment of an inherently subjective question and depends upon the presentation of the Claimant in oral evidence. There was a clear dispute on the expert evidence which necessitated an oral hearing. The CART team misunderstood Dr Johnson's evidence as solely about whether the Claimant could be managed within Category B conditions when it was also based on his assessment of the Claimant's risk reduction. An impasse has developed and the Claimant has been in category A conditions for a significant period without an oral hearing before (Ground 1B). The Defendant failed to apply its own policy (PSI 08/2013) given that the overwhelming majority of factors that tend in favour of an oral hearing were present (Ground 2).
32. The Defendant submitted that oral hearings are few and far between. The Claimant's effort to place his case in the small category of cases when an oral hearing is required fails. The correct test was applied to consideration of whether an oral hearing was

required. The Claimant focuses on a single sentence in the decision to the exclusion of all other matters which could have been better drafted but does not demonstrate unlawfulness. It is entirely appropriate for the Defendant to consider the extent to which a hearing will change the outcome (R(Bamber) v Secretary of State for Justice (Ground 1A). Fairness did not require a hearing in any event. There was no meaningful dispute on the expert material. Dr Johnson had answered a different and less material question of whether the Claimant could be managed in category B conditions. The Defendant was entitled to consider that a report directed to a different issue did not truly present a dispute significant enough to warrant a hearing. This is not an impasse case (Ground 1B). The Defendant correctly applied the terms of the relevant policy (Ground 2).

Discussion

Ground 1A: Application of the wrong test to decide there should not be an oral hearing

33. The Claimant relies on the following sentence from the decision to advance his case that the Defendant applied the wrong test in deciding that an oral hearing was not necessary:

> *"Whilst there is a dispute between prison psychology report and the independent psychology report this is not enough to hold an oral hearing as you have not achieved a significant reduction in your risk of similarly reoffending."*

34. Read in isolation, I agree with the Claimant's submission that the latter part of the sentence suggests the CART treated its decision on the substantive issue before it (whether there was convincing evidence that the Claimant's risk of reoffending, if unlawfully at large, had significantly reduced so as to satisfy the test for downgrading in § 4.2 PSI) as conclusive of the procedural question in relation to an oral hearing. If so then, in the Claimant's words, this would be to 'put the cart before the horse'.
35. It was common ground that the sentence was clumsily worded. The Defendant readily acknowledged that the letter could have been better drafted. The Court was told that the decision was drafted by a member of the CART team who is not a lawyer.
36. However, the question for the Court is whether the drafting indicates unlawfulness in terms of a failure to apply the correct policy test for an oral hearing. In my judgment, when the letter is read, in context and as a whole, it is apparent that the CART applied the correct test.
37. The context is relevant. The CART is an internal part of the Prison Service. It is a body composed of persons with relevant expertise and experience in making judgments about prisoners' categorisation (R(Hassett) v Justice Secretary [2017] 1WLR 4750 at [3]). It would be surprising if it had misunderstood or misapplied the PSI, particularly in circumstances where the Court was told that there have been other recent cases contesting CART decisions not to hold oral hearings.
38. Turning then to the decision letter as a whole: the decision starts by setting out the factors taken into account in the decision making (§2), before summarising the index offence and previous convictions (§3 and 4). The Claimant's behaviour and achievements during the assessment period are considered including the completion of RESOLVE (§5). The view of the prison psychology report as to the difficulty in

assessing risk given the Claimant's decision not to discuss the index offence is set out at §6. At §8 the decision letter notes the request for oral hearing. It refers to "*representation submit that there is a profession dispute between the prison psychology report and the independent psychology report. They further submit that it is only fair your case is review through an oral hearing and that you can be managed in category B conditions."* The Claimant's psychology report is summarised at §9. The next paragraph (§10) is set out in full as follows:

> "*The Category A Team noted your good behaviour and that you have completed both TSP and Resolve. However, as you did not discuss your index offence, there is no evidence of a risk reduction. Whilst there is a dispute between the prison psychology report and the independent psychology report, this is not enough to hold an oral hearing as you have not achieved a significant reduction in your risk of similarly reoffending if unlawfully at large. Although representation submit you can manage within Category B conditions that is not the criteria to warrant a downgrade. In accordance with PSI 08/2013, there must be evidence of a significant reduction in your risk of reoffending to warrant a downgrade."*

39. The first sentence in the quote set out above reaches the view that there is no evidence of a risk reduction. The second sentence acknowledges a dispute between psychologists which can only be read, in my judgment, as a clear reference to the criteria in PSI which favour an oral hearing (*"a significant dispute on the expert materials"*). Read fairly, the third and fourth sentences are an exploration of the significance of the expert dispute in accordance with the policy criteria which states that *"the existence of any dispute must 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."* This is evident from the summary of the content of the Claimant's psychology report in the preceding paragraph and the view expressed that the Claimant's report has addressed the wrong criteria (*Although representation submit you can manage within Category B conditions, that is not the criteria to warrant a downgrade…)*
40. In this context, the second part of the third sentence which the Claimant focuses on (*not enough to hold an oral hearing as you have not achieved a significant reduction in your risk of similarly reoffending, if at large)* is to be read fairly as the panel's judgment, albeit clumsily expressed, that the disagreement between the psychologists is not significant in key aspects and an oral hearing would not assist its decision making. It was entitled to come to the view that an oral hearing would not be of assistance:

> *"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 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".* (R(Hassett)) at [69]

41. Accordingly, when read fairly, it is apparent from the decision letter that the CART had the right tests in mind and applied them. Ground 1A fails.
42. Before turning to consider procedural fairness at common law (Ground 1B), I consider Ground 2, failure to follow policy.

Ground 2: Failure to follow policy

43. It is well established, and was common ground, that a decision-maker must follow his own policy unless he has a good reason not to do so. This public law principle is grounded in fairness and, more broadly, the requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.
44. The Claimant submits that the PSI 08/2013 was intended to widen the circumstances in which there would be hearings of Category A reviews. The overwhelming majority of factors listed in the PSI as tending in favour of an oral hearing being appropriate were present in this case. In particular, there was a significant dispute on the expert materials; the lengths of time involved in this case are significant; an impasse has developed, and the Claimant has never previously had an oral hearing. The Defendant submits that it correctly applied the terms of the relevant policy.
45. The factors in play in this case which are said by the PSI to *"tend in favour of an oral hearing being appropriate"* include:
    a) A significant dispute on the expert materials.
    b) Where the lengths of time involved in a case are significant.
    c) Where there is an impasse.
    d) Whether the prisoner has never had an oral heating before.

Significant dispute between the experts

46. It was common ground that there was a dispute between the experts. This was acknowledged in the CART decision letter. The question is whether the dispute is *significant*. This '*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'* (PSI 08/2013 at [4.7(b)). The Claimant relied on the wording in the PSI to suggest that there need only be a dispute with the Prison psychology report on tenable grounds. However, the PSI lists this as *"an example of when the factor will be squarely in play"*, which is not to say the requirement for the dispute to be significant is dispensed with. In any event, having considered the two reports carefully, I am of the view that the differences that exist between the experts, are not *"on particular points of real importance to the decision"*, which was whether there was convincing evidence that the prisoner's risk of reoffending if unlawfully at large has significantly reduced (PSI 08/2013 [4.2]).
47. Both experts acknowledge the Claimant's participation in the RESOLVE programme and the positive feedback as to his participation:

> *"Mr Smart was also felt to have developed insight into how difficult emotions are linked with violence and aggression."* (Prison report at 5.4)
>
> *"…He has been responsive to treatment and retained a good understanding from the treatment he has completed"* (Claimant report at 7.2)

48. Both consider that the Claimant is at moderate risk of violence in a Category A prison setting, whilst the Prison report considers this to also be the case in a lower security prison:

> *"In my opinion on the basis of the information available to me at this time I would consider Mr Smart to be at least a moderate risk of violence in both high security and lower security establishments."* (Prison report at 5.3)
>
> *"...at the present time within a structured environment of a category A prison he presents with a moderate level or risk of violent offending."* (Claimant report at 6.2)

49. Both agree that the Claimant has made progress in behaviour/insight:

> *"In my view Mr Smart clearly has the ability to maintain stability in his behaviour and avoid resorting to the use of violence and aggression. He has completed both TSP and RESOLVE, and Mr Smart's custodial behaviour within the previous reporting period is indicative of him having improved problem solving and perspective taking skills."* (Prison report at 5.6)
>
> *"I have formed the view that Mr Smart has developed improved insight into his violent related risk, and he is aware that his risk management will be long term."* (Claimant report 7.2)
>
> *"Through Mr Smart's improved custodial behaviour, he has demonstrated his consolidation of learning from treatment and he has been applying his risk management skills thus demonstrating his ability to manage his risk within his current custodial environment."* (Claimant report 7.3)

50. Both accept, albeit to varying degrees, that it is difficult to fully assess the Claimant's insight and attitude towards his offending and level of risk because the Claimant did not wish to discuss his index offence and maintains his innocence:

> *"However, the extent to which he holds attitudes which support the use of violence and aggression, and his level of insight into his index offence remains difficult to accurately assess. It is therefore also difficult to accurately assess the extent to which Mr Smart has significantly reduced his risk."* (Prison report at 5.5)
>
> *"Although denial alone is not established as causing increased risk of future offending, denial and minimization are relevant to risk formulation because this impacts greatly on treatment approaches and thus risk management."* (Claimant report 4.3.5)
>
> *"In part I concur that due to the paucity of formal evidence… has restricted a comprehensive formulation of risk…"* (Claimant report 7.1)

51. Where the psychologists materially differ is in the conclusions they draw from their analysis. The Prison report concludes that it is difficult to evaluate the Claimant's reduction in risk and proposes that *"the Claimant reflects and takes the opportunity to evidence his insight into the circumstances which lead to him being convicted of murder to allow for a more accurate assessment of his risk of future offending and the impact of intervention work completed to date"* [5.6]. In contrast, the Claimant's psychology report concludes that his positive progress makes him suitable for a transfer to a Category B prison. It is correct to say that the author of the report makes explicit reference in this context to *'significant risk reduction since offending and completion of interventions'* (paragraph c of the Executive Summary). However, the relevant paragraph does not reach an express conclusion that there is convincing evidence that the Claimant's risk of reoffending, if unlawfully at large, has significantly reduced, which is the test for downgrading ([4.2] PSI 08/2013). Of itself, I accept the Claimant's submission that this may be to take an overly forensic view of the report. However, read fairly, when applying the risk management factors in HCR-20, the author has focussed on how they would apply to the Claimant in closed prison conditions (see, in particular, §§ 4.3.12 to 4.3.17 and 8.3 of his report). There is no conclusion elsewhere in the report that there is convincing evidence that the Claimant's risk of reoffending, if unlawfully at large, has significantly reduced. If anything, in places, the body of the report expresses concerns in this regard:

> *"4.3.6 Mr Smart's disclosures regarding his past violent offending do suggest he is minimizing his behaviour and thus risk.*"
>
> *"4.3.14 Mr Smart has demonstrated an increased ability to manage his behaviour whilst in a structured environment (custody), albeit there remains a need for him to strengthen his risk management skills and apply them more effectively within more challenging situations, therefore reducing the likelihood of him presenting aggressive or belligerent behaviours."*
>
> *"6.2 at the present time within a structured environment of a category A prison he presents with a moderate level of risk of violent offending. However, if circumstances change notably if Mr Smart experiences an increase in stress his risk would be elevated."*
>
> *"7.3 Through Mr Smart's improved custodial behaviour he has demonstrated his consolidation of learning from treatment and he has been applying his risk management skills, thus demonstration his ability to manage his risk within his current custodial environment. With this said there remains a salient concern over Mr Smarts application of skills to situation that he finds more challenging or when in the community. I hold the view that his not due to lack of insight to due to him finding difficulties in applying his skills to situation that trigger his developer beliefs and schemas. This predisposes Mr Smart to employ ineffective and problematic coping strategies. To support Mr Smarts future risk management, it is imperative that he strengthens his understanding by working with professional to reflect and*

> *formulate challenges experiences that he encounter to support him in understanding the presence of his beliefs schemas and thus risk. There is also a need for Mr Smart to strengthen his risk management strategies."*

52. It follows that I do not accept the Claimant's submissions that the CART misunderstood the Claimant's report or that report addresses the question of the Claimant developing insights and progress separately from the assessment that the Claimant can be managed in a category B setting. Read fairly and as a whole, the report acknowledges the Claimant's progress and developing insight, in the context of a conclusion that his risk can be well managed within a closed prison environment. This is not however the relevant test for the CART.

Where there is an impasse which has existed for some time

53. The Claimant submits that an impasse has been reached. He has completed all the available offending behaviour coursework. There is nothing further he can do to advance his case in circumstances where he continues to maintain his innocence. The Defendant is treating his denial of guilt as decisive of the Category A decision.
54. The Defendant denies that an impasse has been reached. Denial of guilt is not by itself enough to show an impasse. There are still avenues open to the Claimant to demonstrate the necessary reduction in risk. The recommendation from the Local Advisory Panel refers to 'a period of consolidation which can be considered at the next review'.
55. It is plainly the case, as Sales LJ observed in ***Hassett and Price*** at [70], that:

> *"Where a prisoner refuses to accept responsibility for an offence of which he has been found guilty … that is likely to have an effect on the relevant risk assessment made in relation to him for the purposes of a Category A review decision, as explained by Elias J in R (Roberts) v Secretary of State for the Home Department [2004] EWHC 679 (Admin) at [36]-[42]."*

56. However, in the present case the Local Advisory Panel has recognized the potential impasse and suggested a route forward:

> *"Should there be a change in stance then further assessments will be facilitated which would identify the most appropriate treatment pathway, however should this change not be forthcoming, there will be a further period of consolidation which can be considered at the next review'.* (underlining is Court's emphasis)

57. The Claimant submits that this point was not made in the CART decision letter. Nonetheless, it indicates a route forward for the Claimant which does not require him to change his stance on the index offence. In this respect, it may be said to be consistent with the view of his own expert that:

> *"I have formed the view that Mr Smart has developed improved insight into his violent related risk, and he is aware that his risk management will be long-term."* [7.2] (underlining is the Court's emphasis).

58. It is also the case that the Claimant only completed RESOLVE during the course of the assessment year so any impasse, if it exists, cannot be said to have *"existed for some time"*. (the wording of the PSI criteria).

Length of time in custody/prisoner has never had an oral hearing before

59. For the reasons set out above, there was no unlawfulness in the way in which the policy was followed in relation to the expert material or existence of an impasse. The Claimant did not submit that length of time in custody and the lack of an oral hearing previously would, of themselves, give rise to a requirement for an oral hearing. This is reflected in the authorities. Of themselves, they are unlikely to give rise to a requirement to hold an oral hearing as it would not necessarily follow from them being present that there was an issue of substance that would benefit from consideration at such a hearing (R (Harrison) v Secretary of State for Justice [2019] EWHC 3214 Admin at [55]). These factors have been characterised as "the more nebulous potential justifications for an oral hearing" (R (Morgan) v Secretary of State for Justice [2016] EWHC 106 (Admin) at para 47, William Davis J).
60. Accordingly, in my judgment, there was no unlawfulness in the Defendant's application of policy. Ground 2 fails.

Ground 1B: Common law procedural fairness

61. The principles to be applied in relation to the common law duty of procedural fairness were not in dispute. The duty may require the decision maker to hold an oral hearing. Such a hearing is not required in every case and what fairness requires in a particular case is fact specific. It is for the court to decide what fairness requires and the issue on judicial review is whether the refusal of an oral hearing was wrong, not whether it was unreasonable or irrational (DM v Secretary of State [2011] EWCA Civ 522)
62. The fairness of the decision not to hold an oral hearing must be viewed in the context of the guidance given in Hassett and Price:

> *"51 (i)…The CART/Director are officials of the Secretary of State carrying out management functions in relation to prisons, whose main task is the administrative one of ensuring that prisons operate effectively as places of detention for the purposes of punishment and protection of the public.* ***In addition to bringing to bear their operational expertise in running the security categorisation system, they will have other management functions which mean that in striking a fair balance between the public interest and the individual interests of prisoners, it is reasonable to limit to some degree how elaborate the procedures need to be as a matter of fairness for their decision-making. Moreover, in relation to their decision-making, which is part of an overall system operated by the Secretary of State and is not separate from that system, it is appropriate to take account of the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering processes within the system as a whole."***
>
> *"60…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."*
>
> *"61 Some of the factors highlighted by Lord Reed JSC 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."*
>
> ***"69…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 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…*** *"*

63. There was some debate between the parties as to the extent to which the factors set down in the PSI reflect the requirements for common law fairness. For the Claimant it was said that the policy was intended to reflect the requirements of common law fairness. For the Defendant, it was suggested that the PSI went further than required by common law procedural fairness in proposing consideration be given to the time spent in custody and the absence of an oral hearing. Given I have found that the Defendant followed its policy, I am not sure much turns on the difference in the present context.
64. In any event I am not persuaded that fairness required the Claimant to be afforded an oral hearing to present his case.
65. On a careful review of the expert evidence, I do not consider there was a material dispute between the psychologist on the question to be answered by the Panel which was whether the Claimant would present a risk to the public if he escaped from prison. Nor am I persuaded of an impasse.
66. Further, as per the guidance in Hassett, I have considered the extent to which the Claimant had a fair opportunity to present his case at other stages of the information gathering process. I am satisfied that he had a fair opportunity to do so. His representatives were provided with the dossier of information compiled for the decision making. Having seen it they requested deferral of the review to enable submission of an independent psychology report. This took place. The Claimants' representatives submitted detailed representations setting out the legal framework; the policy in relation to oral hearings; relevant guidance on denial of an index offence; the Claimant's recent reviews; his offending behaviour work, including RESOLVE; his prison discipline. The Claimant's psychology report was summarised and an oral hearing requested. The

representations concluded by submitting that the Claimant can be properly managed in Category B conditions. Further representations were then provided on 30 January 2020.

67. It is not apparent to me what could have been said at an oral hearing that was not said on paper. It was suggested that the Claimant could have given evidence about his level of insight in circumstances where his denial of guilt made it difficult to assess risk reduction. However, given the extent of the expert agreement on pertinent matters, I do not see how this could have meaningfully assisted the decision-making process.

Conclusion

68. The claim for judicial review is dismissed.