Neutral Citation Number: [2019] EWHC 2151 (Admin)

Case No: CO/5186/2018

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

The Combined Court Centre, Oxford Row, Leeds

Date: 12 August 2019

Before:

HIS HONOUR JUDGE GOSNELL
Sitting as a Deputy Judge of the High Court

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Between:

REGINA (on the application of EDWIN HOPKINS)	**Claimant**
- and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

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- -

Mr Jude Bunting (instructed by SL5 Legal) for the Claimant
Mr Robert Cohen (instructed by Government Legal Department) for the Defendant

Hearing dates: 19th July 2019
Draft Judgment supplied on 25th July 2019

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JUDGMENT

His Honour Judge Gosnell:

1. Introduction

On 30th January 1997 the Claimant was sentenced to life imprisonment with a minimum term of eighteen years subsequently reduced to sixteen years and 290 days (having taken into account the period spent in custody on remand) following his conviction for murder. He was 19 years old when he committed the unpleasant murder of a 15-year-old girl. She suffered severe stab wounds and her body was mutilated with sexual overtones. The Claimant has always denied responsibility for this offence, but he was convicted and there are no outstanding appeals. His minimum term expired on 16th November 2013.

2. On 12th February 2018 a panel of the Parole Board considered the Claimant's case at an oral hearing at HMP Full Sutton. In a written decision the panel members did not recommend the release of the Claimant but did recommend a transfer to open conditions. The Defendant did not act upon this recommendation but did agree to bring forward the Claimant's categorisation review. The Defendant obtained a dossier of further reports and the Local Category A Panel at HM Full Sutton met to consider the Claimant's case. It did not recommend any change in the Claimant's category which remained at category A as it had throughout his sentence. On 21st September 2018 the Defendant's Category A Team made a decision in which they refused to hold an oral hearing and decided to retain the Claimant's category A status. It is this decision which is challenged by the Claimant in these proceedings, in particular the decision to refuse to hold an oral hearing. Permission was granted by His Honour Judge Saffman sitting as a Deputy High Court Judge on 13th March 2019.

3. The Legal Framework

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 he has done so in the Prison Rules (SI 1999/728).

4. 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."*

5. 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*" (Prison Service Instruction ["PSI"] 08/2013, §2.1). This definition is subject to a proviso in §2.2, which may apply where the aim of making escape impossible can be achieved, in view of the circumstances of a particular prisoner, in

lower conditions of security. But it has not been suggested the proviso is relevant in this case.

6. 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. PSI 08/2013, entitled *The Review of Security Category – Category A/Restricted Status Prisoners*, was revised and re-issued on 10th June 2016. At §4.1 it provides for annual reviews of a confirmed Category A prisoner's security category, on the basis of progress reports from the prison. These reviews include consideration by a local advisory panel within the prison, which should submit a recommendation to the Category A Review Team ("CART"). If the local advisory panel recommends downgrading, the decision on the annual review will be taken by the Director rather than the Category A Review Team.

8. At §4.2 the policy provides that before approving the downgrading of a confirmed Category A prisoner's security category, the Director

> *"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."*

9. PSI 08/2013 gives guidance, at §§4.6-4.7, on the question whether an oral hearing should be held in respect of the annual review of a Category A prisoner's security categorisation, in these terms:

> *"4.6 The DDC High Security (or delegated authority) may grant an oral hearing of a Category A / Restricted Status prisoner's annual review. This will allow the prisoner or the prisoner's representatives to submit their representations verbally. In the light of the clarification by the Supreme Court in Osborn, Booth, Reilly of the principles applicable to determining whether an oral hearing should be held in the Parole Board context. The Courts have consistently recognised that the CART context is significantly different to the Parole Board context. In practical terms, those differences have led to the position in which oral hearings in the CART context have only very rarely been held. The differences remain; and continue to be important. However, this policy recognises that the Osborn principles are likely to be relevant in many cases in the CART context. The result will be that there will be more decisions to hold oral hearings than has been the position in the past. In these circumstances, this policy is intended to give guidance to those who have to take oral hearing decisions in the CART context. Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing. The process is of course not a mathematical one; but the more of such factors that are present*

in any case, the more likely it is that an oral hearing will be needed. Three overarching points are to be made at the outset:

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

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

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

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

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

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

(c) 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.

(d) 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.

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

(f) 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.

(g) Where the prisoner has never had an oral hearing before; or has not had one for a prolonged period."

10. **The Law**

A relevant issue in this case is that the decision was preceded by a decision of the Parole Board which recommended recategorisation. How should CART treat a previous recommendation of the Parole Board? This issue was explored in ***R (Williams) v Secretary of State for the Home Department*** [2002] EWCA Civ 498 when Lord Justice Judge (as he then was) said:

"The views of the DLP (Discretionary Lifer Panel of the Parole Board) on categorisation, however strongly expressed, are not and cannot be determinative of the categorisation decision. On this aspect of their decision, as Harrison J concluded, the review team was right.

This does not produce the lamentable consequence that the recommendations of the DLP are irrelevant to the categorisation decision, or indeed the decision-making process. It was rightly accepted that these must always be considered by the review team. Our attention was focused on the adequacy, or otherwise, of the process adopted in this case."

11. In that case the Court of Appeal supported the right of the prisoner to an oral hearing where there had previously been a positive recommendation by the Parole Board for the following reasons:

> *"In rejecting the application for an oral hearing, the review team misdirected itself by elevating the theory of the DLP'S statutory jurisdiction disproportionately above the practical realities, and over emphasising the differences between its own functions and those of the DLP, without sufficiently recognising the link between them. The likely recommendation of the review team was foreshadowed by the 'gist' document. Once notice of the DLP's decision had been received, the review team should have recognised an obvious prospect of a major inconsistency between their respective conclusions. An oral hearing would have enabled the reasons for the contradictory views to be examined on behalf of the appellant and for the contents of any adverse reports to be directly addressed. In the final analysis the review team would, of course, have reached its own decision, but an oral hearing, and proper disclosure, would have ensured that the decision was the result of a better informed process, and the conclusions, and the reasons for them, would then have been received with correspondingly greater confidence."*

Counsel for the Defendant has correctly pointed out that in this case there had also been a failure to disclose various reports on which the decision was based to the prisoner in advance of the hearing (which was usual then) which added to the unfairness of the decision and may well have influenced the court's view.

12. The same issue arose again many years later in *Mackay v Secretary of State for Justice [2011]* EWCA Civ 522. There had been a somewhat lukewarm recommendation for a move to Category B status by the Parole Board who recorded "that it may be a constructive move". The first instance Judge felt that was sufficient to justify an oral hearing before CART. The Court of Appeal disagreed as expressed by Lord Justice Gross as follows:

> *"28. Fourthly, the common law duty of procedural fairness will sometimes require CART to convene an oral hearing when considering whether or not to downgrade a Category A prisoner. As Bean J rightly observed (at [27] of the Judgment), 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. Whether an oral hearing is required in an individual case will be fact specific. Given the rationale of procedural fairness, there is no requirement that exceptional circumstances should be demonstrated – there will be occasions when procedural fairness will require an oral hearing regardless of the absence of exceptional circumstances. But oral hearings are plainly not required in all cases; indeed, oral hearings will be few and far between. Advantages may be improved decision-making, bringing CART into contact with those who have direct dealings*

> *with the offender and the offender himself; an oral hearing may also assist in the resolution of disputed issues. Conversely, considerations of cost and efficiency may well tell against an oral hearing. There can be no single or even general rule, save, perhaps, for the recognition that oral hearings will be rare"*

13 In the event Mr Mackay's application failed on the merits for reasons explained below:

> *"34. It is here that, very respectfully and with some regret, I find myself parting company with Bean J. To my mind, the sense of the Parole Board's decision, taken as a whole, was clear: there had been no significant reduction in the risk attaching to the Respondent. At the most, there was a tentative rider as to the benefits of downgrading the Respondent's security categorisation. I am unable to accept that this isolated rider provides any or sufficient foundation for concluding that this case should be one of those few in which an oral hearing is required. Unlike Williams (supra), there was no clear recommendation in the Respondent's favour from the Parole Board; nor was there any disclosure issue – all the relevant reports were available to the Respondent in the present case. Further and by contrast with H (supra), there was no disagreement between the (local) Advisory Panel and CART; in this case, the Advisory Panel's conclusion (set out above) was unequivocal and adverse to the Respondent"*

In the current application, like Mr Williams there is a clear recommendation in the prisoner's favour by the Parole Board but, like Mr Mackay, the Local Advisory Panel came to a conclusion adverse to the Claimant.

14 There is however further support for the Claimant in this Judgment in the following passage:

> *"37 (ii) Granted that there is no "exceptionality" test, these submissions, if anything, prove too much; if alone they justified an order for an oral hearing, such hearings would be the rule rather than a rarity. What is lacking here, which these undisputed facts cannot supply, is a proper foundation for an oral hearing; consider, by way of contrast, the position which would have arisen had the Parole Board concluded that there had been a significant reduction in risk."*

The Claimant would say in this case that the Parole Board did conclude that there had been a significant reduction in risk.

15. The standard of procedural fairness required to be observed by the Defendant's Category A Review Team (CART) when deciding on whether to maintain a prisoner's category A status was re-visited again by the Court of Appeal in *R (Hassett and*

another) v The Secretary of State for Justice [2017] EWCA Civ 331 when Lord Justice Sales gave the leading judgment:

> *"4. The status and role of the CART and the Director and his panel are to be contrasted with those of the Parole Board. The Parole Board is an independent judicial body which makes judgments about the suitability of prisoners for release on licence or parole, among other things. It too is concerned with questions of risk to the public, but in the different context of asking whether release of a prisoner on licence would pose an unacceptable risk of harm, having regard to a range of management measures which may be put in place to support the prisoner and manage that risk if he is released. The difference in the function of the CART and the Director and his panel, on the one hand, and the Parole Board, on the other, in assessing risk was emphasised by this court in R (Williams) v Secretary of State for the Home Department at [22] and [27]."*

16. One of the issues which the court had to address in that case was the implications of the judgment of the Supreme Court in *R (Osborn) v Parole Board* [2014] AC 1115. It was contended on behalf of the Appellants that Supreme Court guidance concerning the need for the Parole Board to convene an oral hearing in more cases should apply to decisions by CART. Lord Justice Sales disagreed with this submission:

> *"56. The guidance given by the Supreme Court in Osborn was clearly fashioned in a manner specific to the Parole Board context and factors given particular weight in that context either do not apply at all or with the same force in the context of security categorisation decisions by the CART/Director, because of the differences in context which I have highlighted above. In my view, the guidance given by this court in Mackay and Downs regarding when an oral hearing is required before the CART/Director continues to hold good. The cases in which an oral hearing is required will be comparatively rare."*

17. Lord Justice Sales did however concede that there would be cases where in a categorisation review CART may consider an oral hearing is fairly required:

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

18. This case involves a prisoner who maintains his innocence even after conviction. Those types of case create particular problems where the prisoner is attempting to demonstrate a reduction in risk as was identified by Mr Justice Elias (as he then was) in *R (Roberts) v Secretary of State for Justice* [2004] EWHC 679:

> *"39. There is a very real difficulty facing the review team in cases of this nature. The guilt of the prisoner must be assumed. That is what the review team properly did here. The review team must then assess the nature of the risk in the event of an escape. Where the index offences are so grave, as they will inevitably be in category A cases, the review team can justifiably require cogent evidence that that risk has diminished.*
>
> *40. That evidence will, in the normal way, be most cogently demonstrated by the prisoner participating in courses and programmes which are directed to the specific offences, so that there can be some self-awareness into the gravity and consequences of his conduct. However, it is a condition of a number of these courses that the prisoner must admit his guilt. That is so, I am informed, for the Sex Offences Treatment course, the CALM course (controlling anger and learning to manage), and the CSCP course (cognitive self change programme). By not participating in such courses or programmes the prisoner inevitably makes the task of the review team more difficult, and in some cases practically impossible.*
>
> *41.It must be recognised that this compounds the injustice for anyone who has suffered the grave misfortune to be wrongly committed of such terrible crimes, and there will inevitably be such people. It puts pressure on the innocent to admit guilt in order to facilitate release, or, alternatively, to serve a longer sentence than they would have had to do had they committed the crime and felt properly able to admit guilt. But that seems to me to be inevitable, the system cannot operate unless the verdict of the jury is respected.*
>
> *42. Moreover, on very, very, many more occasions defendants deny guilt for offences which they have in fact committed, for a whole variety of reasons. Given that the danger must be presumed from the nature of the index offence, it is plainly a proper requirement that there should be cogent evidence in the diminution of risk if the safety of the public is to be secured. No doubt to those in denial the recitation by a review team that being in denial does not of itself preclude re-categorisation may appear to have something like a mantra-like quality. There is no doubt that if they disqualify themselves from the courses which address their specific offending, it will be considerably more difficult than to be able to satisfy the review team that re-categorisation is justified. This is not, however, a punishment meted out to them because they have not admitted the offences, but it is because by being in denial they limit - and in many cases*

> *severely limit - the practical opportunity of demonstrating that the risk has diminished. Indeed, their denial demonstrates that they have not accepted that the risk was ever present. In the circumstances, therefore, I do not consider that the review team can be criticised on this ground."*

19. I was also referred by both parties to two first instance decisions: *R (Rose) v Secretary of State for Justice [2017]* EWHC 1826 and *R (Steele) v Secretary of State for Justice* [2018] EWHC 1072. Whilst it was interesting comparing the facts of both cases and the reasons why the former Claimant succeeded and the latter failed, they are essentially examples of the appropriate principles being put into practice in the factual context of the two individual cases.

20. **The decision of the Parole Board**

On 12th February 2018 a panel of the Parole Board considered the Claimant's case at an oral hearing at HMP Full Sutton. They considered a victim's personal statement from the victim's brother and explored the Claimant's case through oral examination of a forensic psychologist (Ms Cathy Wordie), the Offender Supervisor (Mr Broderick Taylor), the Offender Manager and the Claimant himself. All of the witnesses agreed that the Claimant had completed all the necessary core risk reduction work in order to progress and supported the Claimant's progression to open conditions. The forensic psychologist and Offender Supervisor went further and agreed that the Claimant's risk could be managed in the community.

21. The decision letter confirmed that the Claimant's behaviour in prison had generally been excellent and that he is an enhanced level prisoner on the Defendant's incentives and earned privileges scheme. He had undertaken several risk reduction courses and although the courses were not directly targeted at the risk of sexual violence some of the areas covered had links directed at that risk. It was recorded and agreed by the three professional witnesses that the Claimant had completed all necessary core risk reduction work. His risk of general violence, his static risk of sexual reconviction, his risk of future sexual violence, his risk of reconviction and general offending and risk of violent offending were all assessed as "low". The Parole Board *"shared the surprise of the professional witnesses that, despite your lengthy excellent prison behaviour and attitude, satisfactory completion of courses, and positive reports, you remain a category A prisoner"*. The Parole Board considered that the Claimant had reduced his risk sufficiently to be managed in open conditions (effectively category D) having satisfied the statutory criteria and there was no suggested risk of absconding.

22. The Defendant did not accept the recommendation of the Parole Board. He remained concerned that the Claimant continued to deny his guilt and accordingly had done no offending behaviour work in relation to the sexual element of the offence committed which meant the risk of violent sexual offending had not been fully explored. The Defendant did however agree to bring forward the categorisation review.

23. **The expert evidence available for the categorisation review**

A report had been prepared by Ms Becky Triffitt a trainee psychologist supervised by Catherine Wordie a forensic psychologist in June 2017 to assist both the Parole Board and the categorisation review. The purpose of the report was said to be *"to consider*

whether there is convincing evidence the prisoner's risk of re-offending if unlawfully at large has significantly reduced". She found that the Claimant was at low risk of general violence and a low risk of sexual violence; his risk was not imminent; and he had shown good insight into his attitudes, thinking and his behaviour linked to his use of violence. Overall, " *there has been a significant reduction in risk in Mr Hopkins case"*. This report was available to the Parole Board before they reached their decision and Cathy Wordie was present at the oral hearing to speak to the report if required. She confirmed that the Claimant's static risk assessment was too low to qualify for the Horizon course and that even if the Claimant admitted his guilt at this late stage it would not affect his risk or access any different treatment. Having heard the Claimant give evidence to the Parole Board she remained of the opinion that he should be moved to open conditions but went a little further to say that it would not be a mistake to release him. I deduce from this that the Claimant's evidence to the Parole Board must have impressed Ms Wordie.

24. A further report was commissioned by the CART and was prepared by Ms Sarah Gibson, a trainee psychologist and supervised by Hayley Sharp a forensic psychologist both employed by the Defendant. Ms Gibson recorded that the Claimant felt despondent about his prospects of persuading the CART to downgrade him as he done all he could do. Ms Gibson confirmed that the Horizon programme was unsuitable for him due to *"insufficient levels of risk and need"*. She found that the Claimant's risk of sexual re-offending was low, he had completed all the programmes available to him to a satisfactory standard, and there was evidence that the Claimant was applying the skills he had developed on previous interventions. Ms Gibson was aware that the Claimant continued to deny his guilt but in her professional opinion research suggests that denial is not associated with an increased risk of sexual recidivism. She felt there was no evidence from the reporting period to suggest that the low risk assessments previously referred to were inaccurate. She recommended that the Claimant be downgraded saying "*Mr Hopkins is considered to have significantly reduced his risk and would benefit from a progressive move*".

25. Other information available to the CART review team was a positive report from his offender supervisor who confirmed his custodial behaviour was positive, settled and polite. Similar positive reports came from wing staff. A sentence review meeting note indicated the Claimant was at a low risk of reoffending on all assessments and was not an imminent risk of harm. His sentence planning consisted of maintaining the status quo until he was recategorised to either category B or C then he could progress further. His Offender Supervisor had recommended that the Claimant be re-categorised to category B or C.

26. It is perhaps surprising, in the face of this local support and the expert evidence that on 16th August 2018 the Local Advisory Panel at HMP Full Sutton did not recommend the Claimant's downgrading. The principal reason appears to be that:

> *" the panel conclude that Mr Hopkins has yet to provide any insight into the violent sexualised offending present within the index offence , and therefore it is difficult to fully establish the level of risk and treatment needed. On that basis, there is still no evidence that Mr Hopkins has significantly reduced his risk of reoffending if unlawfully at large and should therefore remain Cat A"*

When recording the best way forward one of the recommendations was:

> *"provide an account of his offending which is in line with published court documentation"*

Other recommendations involved: maintaining a positive working relationship with his Offender Supervisor (who had recommended his downgrading); continue dialogue with psychology and interventions team to identify the most appropriate treatment pathway (there was no further work required according to them) and maintain positive custodial behaviour. I can personally understand why the Claimant may have been disappointed in this decision, but it is only fair that I record it as it was available to the CART team.

27. **The decision under challenge**

The decision letter dated 21st September 2018 correctly records the Claimant's offending history and his exemplary behaviour whilst a prisoner. It says however that satisfactory behaviour whilst in custody should not by itself determine the level of risk. The Claimant's denial of the offence for which he was imprisoned was recorded but the decision makers rightly pointed out that they have to proceed on the basis that he was rightly convicted. It acknowledged that the Claimant had completed the following courses:

- Enhanced Thinking Skills
- Drug and Alcohol Awareness
- Anger Management
- Victim Awareness
- Victim Empathy
- Alternative to violence
- Controlling Anger and Learning to Manage it
- Resolve

28. The decision makers recognised that both his static risk and dynamic risk of sexual violence were assessed as low although he was said to pose a high risk of harm to the public and children. They also understood that he was unable to carry out the Horizon Programme because there were insufficient levels of risk and need. The ratio of their decision seems however to be adequately summarised in the last three paragraphs of the decision letter:

> *" The Category A team considered all available information. It acknowledged your positive custodial behaviour and engagement in some offence-related intervention to date. However it is satisfied that you have yet to provide significant evidence that you have fully explored and addressed the serious risk areas and the motivations for committing your present*

violent offending, which also indicates a sexual element. It noted information suggests that you have not been fully open about the full extent of your offending and which in turn makes it difficult to accurately assess any change in your level of risk in relation to the present offence.

The Category A Team did not accept that your downgrading could be approved solely to assist your progression. It is satisfied that a significant reduction in risk must precede downgrading and is satisfied that you should show you have achieved a significant reduction in risk of similar offending if unlawfully at large. It considers there are no important factors in dispute going directly to the issues of risk in your case to convene an oral hearing in your case, as your reports are entirely suitable for risk assessment purposes and the submission of representations. It considers that all the information is readily understandable and does not require oral hearing to resolve its conclusions. It is satisfied that the means are available to you to discuss in full the extent of your offending, and to provide insight and progress warranting consideration for downgrading.

The Category A Team considered that you have provided no convincing evidence of a significant reduction in your risk of re-offending in a similar way if unlawfully at large. It agrees with the local advisory panel's recommendations that you should continue to maintain positive dialogue with the professional staff in order to identify the most appropriate treatment path to fully establish your level of risk and treatment need. The Category A Team concluded that there are at present no grounds on which a downgrading of your security category could be justified and that you should remain in category A at this time"

29. **The parties' submissions**

Mr Bunting for the Claimant submitted there were two grounds of challenge:

i) The decision of 21st September 2018 was made in breach of the standards of procedural fairness at common law; and

ii) The Defendant failed to properly or fairly apply PSI 08/2013

On the first issue it was submitted that the central issue in this case was the extent to which the Claimant had demonstrated a reduction in risk, notwithstanding his ongoing maintenance of innocence. The psychology reports were unanimous in confirming a significant reduction in risk. The decision makers appear to have rejected the opinions of the psychologists as to risk assessment without attempting to hear either them or the Claimant to allow them to deal with any points which were troubling the decision makers. The fact that the Parole Board had strongly recommended downgrading (being aware of the appropriate test before doing so) was another factor which should have pointed to the

need for an oral hearing before rejecting the recommendation. An oral hearing may have assisted the quality of the decision making and reflected the Claimant's legitimate interest in being able to participate in a decision with important implications for him, where he may have had something useful to contemplate.

30. It was submitted that the Defendant is obliged to follow its own policy and if CART had followed the policy expressed in PSI 08/2013 properly or fairly it would have ordered an oral hearing. The majority of pointers said to be in favour of ordering an oral hearing in the policy were present: the claimant was post tariff and had never had an oral hearing before; there was a significant dispute on the expert materials between CART and both the Parole Board and the expert psychologists; the Claimant had been categorised in category A for 22 years ; and an impasse has developed. It was submitted that despite the views of the Parole Board the Claimant is stuck in category A with no means of being able to demonstrate a further reduction in risk, having completed all the courses available to him and his sentence planning targets being to preserve the status quo.

31. Mr Cohen for the Defendant resisted the assertion that CART were wrong to refuse an oral hearing. In his submission, CART or the Director as appropriate have to decide whether an oral hearing is necessary. It will only be necessary if a hearing would elicit important information or opinion which has not otherwise come to the notice of the decision makers and which is relevant to the test to be applied, namely convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced. In this case, it is submitted, there was no significant doubt on matter on which the prisoner's own attitude might make a critical difference. The critical issue in this case is the prisoner's failure to acknowledge his guilt. His attitude on that issue is well known, unlikely to change and would not significantly influence CART who have to assume he was correctly convicted.

32. In this case CART had a significant quantity of evidence including: the reports of psychologists; a report by the Claimant's offender supervisor; risk assessments; the Parole Board decision; the decision of the local advisory panel and submissions made in writing on behalf of the Claimant. All of this evidence was taken into account and calling the individual report writers to give evidence would not have made any difference as the positive contributions made in the prisoner's favour were not challenged by the decision-makers. The Claimant had participated in the process throughout by speaking to the report writers and being allowed to make his own submissions having seen all the material available. The decisive issue for CART was the absence of openness and insight by the Claimant into his offending which would not have changed at an oral hearing where he would, most likely, have maintained his innocence.

33. On the issue of compliance with policy the Defendant submits that its decision was compliant. There is no real dispute of fact in this case, other than whether the Claimant is guilty of the offence. There is no significant dispute on the expert materials as CART did not disagree with the experts (including the Parole Board), they merely reached a different view applying a different test to the same materials. The existence of an impasse does not always mean an oral hearing is necessary especially where the reason for the impasse is the prisoner's denial of guilt. The resolution of the impasse still therefore remains in his own hands it was argued.

34. **Analysis**

Mr Bunting for the Claimant submitted that there is actually a distinction between the two grounds in this case- that common law fairness and failure to follow its own policy are separate issues which may not always lead to the same conclusion. Mr Cohen for the Defendant submitted that the policy published is merely guidance to CART to assist to reach decisions which are procedurally fair, in line with its undisputed common law duty to act fairly. This esoteric discussion is not one I need to resolve in this case as on the facts both analyses lead to the same conclusion. I recognise the fact that this is not a rationality challenge. This court has the obligation to decide whether or not CART were wrong to decide not to hold an oral hearing. It would be convenient to consider first, whether the Defendant complied with the guidance set out in PSI 08/2013.

35. PSI 08/2013 expressly states at paragraph 4.6, that the guidance involves "*identifying factors of importance…that would tend towards deciding to have an oral hearing*". The process is said not to be "a *mathematical one",* but the policy suggests that "*the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed"*.

36. There are some factors which are clearly established in this case and not disputed by the Defendant:

i) The prisoner has never had a hearing before [4.7 (d)];

ii) The prisoner is post-tariff, with the result that continued detention is justified on grounds of risk [4.7(c)];

iii) Lengths of time involved in a case are significant – the Claimant has been on category A post-conviction for 22 years: [4.7 (c)]

37. I think it is probably accepted by the Claimant that paragraph 4.7 (a) does not properly apply in this case –"where important facts are in dispute". I certainly accept the submission by the Defendant that there would be no point in holding an oral hearing to explore why the Claimant continues to deny his guilt. I accept there is a genuine dispute about the risk of the Claimant re-offending if at large and the Claimant could and would like to address the panel to explain why his risk has substantially reduced but that, in my view, is a matter of assessment rather than a question of fact. The value of hearing the Claimant to deal with this issue is clearly relevant, but not perhaps under this particular subheading.

38. There is a dispute between the parties whether paragraph 4.7 (b) is effectively engaged – "*Where there is a significant dispute on the expert materials*".

The guidance continues:

> *"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."*

The Defendant submits that this consideration is not "squarely in play" in this case because the LAP did not take the view that downgrading was justified. That is technically correct, but I take the view that in this case a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds. In addition, the Parole Board has in fact expressed strongly worded and positive views about a prisoner's risk levels which might be appropriate to explore at a hearing. Giving the prisoner the opportunity to address the panel about his attitude to issues which might impinge on his risk assessment might also be helpful.

39. It was submitted on behalf of the Defendant that there was no dispute on the expert materials as the CART panel had read them and did not challenge the contents. Whilst the former is true, and the latter may be technically correct it begs the question why CART would reach a completely different conclusion to the two psychologists and Parole Board without providing any real reasons why they reached such a decision. The fact that the Parole Board and CART are looking at two different tests is accepted, but when the Parole Board are making recommendations as to categorisation, they are actually applying exactly the same test as CART. The only distinction which CART made in respect of the psychological evidence was the reference to a caveat expressed in one paragraph of one report about the prisoner's stance towards his conviction "*may have impacted on the outcome and reliability of these assessments and the assessment should be reviewed should his stance towards the present offence change*". Whilst no doubt Ms Triffitt would stand by this caveat it is noteworthy that it did not prevent either her or Ms Gibson the other report writer providing evidence of a substantial reduction in risk in a number of categories which was actually the issue which CART was ultimately tasked to decide. It could not be said either that they were not addressing the right test as both of them were aware that their evidence was to be supplied for a categorisation review where the test was "*convincing evidence the prisoner's risk of re-offending if unlawfully at large had significantly reduced*". Whilst I accept this claim is not a challenge to the lawfulness of the decision to refuse to downgrade the Claimant's category A status it must be relevant to the decision whether to hold an oral hearing to look at the evidence as a whole and provisionally assess which way it is pointing and whether the panel might benefit from additional information where there is real doubt about an important issue. In my judgment this factor is clearly "in play" in this case.

40. The final factor under consideration is whether there is an "*impasse which has existed for some time"* [4.7(c)]. The Claimant submits that there clearly is. The Claimant has been in category A throughout his time in custody, he has completed all courses available to him, his custodial behaviour is exemplary, he has been recommended for down-grading to open conditions by the Parole Board yet his request to be recategorised have traditionally failed as he cannot convince CART that there is a substantial reduction in his risk of re-offending if unlawfully at large. The Defendant accepts that this is the background to the case, but the Claimant's difficulties are largely of his own making, if he admitted his guilt he could then be re-assessed with perhaps some offence related work being done so that he could then demonstrate a significant reduction in

risk. The Defendant submits that an oral hearing would not effectively change this position.

41. Mr Hopkin's situation is slightly different from those in the past who have contended that they were the victim of an impasse. Classically, a prisoner who denied his guilt would not be able to access the courses which would have enabled him to prove the necessary reduction in risk. As Mr Justice Elias said in *Roberts:*

> *"However, it is a condition of a number of these courses that the prisoner must admit his guilt. That is so, I am informed, for the Sex Offences Treatment course, the CALM course (controlling anger and learning to manage), and the CSCP course (cognitive self change programme). By not participating in such courses or programmes the prisoner inevitably makes the task of the review team more difficult, and in some cases practically impossible"*

42. It seems to me that learning around the issue of risk assessing and treating sex offenders has changed significantly since Elias J heard this case in 2004. At that point in time many courses were not available to prisoners who denied their offences as offence focussed work was considered to be an important element of the course and essential to be able to achieve a reduction in risk. The logic of this seemed sensible- only by addressing the motivation behind and the reasons for the original offence could the prisoner reflect on their offending, achieve insight and empathy with the victim to reduce their risk in the future. Over time however, those developing these programmes have recognised the unfairness to those prisoners who continue to deny their offences and have developed programmes for prisoners which can include those in denial. This Claimant has completed many courses, including CALM and Resolve and would have been able to take the Horizon course (the replacement for SOTP) had his risk of re-offending not been so low. So, this Claimant is not in the same impasse as Mr Roberts. He has not been denied access to the courses which he needs to demonstrate a reduction in risk. He has completed all the courses he has been recommended to undertake and appears (at least to two psychologists and the Parole Board) to have succeeded in reducing that risk. It is still an impasse however, as it would appear that only by admitting his guilt can he convince CART that his risk has been reduced sufficiently.

43. Just leaving aside for a moment whether it is fair to effectively insist that a prisoner admits his guilt before he is qualified for recategorisation and release (my own view is that it is not), why logically should it make all the difference? In the time of *Roberts* it made a difference because a prisoner could not access the courses required but as Mr Hopkins can testify, this is no longer the case. Ms Gibson in her report written for the benefit of CART opined that research suggests that denial is not associated with an increased risk of sexual recidivism. I have read the report she refers to and it supports this view[1] based on a number of other studies which reached the same conclusion. The logical fallacy of the contrary view is perhaps best illustrated by the Impact Evaluation of the prison-based Core Sex Offenders Treatment Programme (almost exclusively restricted to those who had admitted their guilt) which in 2017 showed a higher incidence of recidivism in those who had undergone the treatment programme than those who had not. This was the gold standard for treatment of sex offenders from 1992

[1] *Craissati – Should we worry about sex offenders who deny their offences* Probation Journal 2015 62 page 395-405

to March 2017 when it was withdrawn. If the only reason why the Claimant could not demonstrate a significant reduction in risk was his failure to admit his guilt then this reason should not weigh as heavily in 2019 as it did in 1992 in my view.

44. On any view, the Claimant had reached an impasse and, other than by admitting his guilt, it would appear that the impasse might continue indefinitely. There is no doubt in my judgment that this issue was also "fairly in play".

45. Having considered the various factors which should have been weighed in the balance before making a decision whether to hold an oral hearing I will now consider how that affects the duty of the Defendant to act fairly in making that decision. Each decision is fact specific but, in my view, the overall context needs to be taken into account. This is a decision which is particularly significant to the prisoner and in *Hassett and Price* the Court of Appeal acknowledged at §2 the impact that a decision to maintain a prisoner in Category A has on his conditions of detention and on his prospects of being granted parole:

> *"Where a prisoner is placed in Category A, that will affect the conditions of detention to which he is subject, as the Secretary of State has to take special care to prevent his escape. It is also likely to affect his prospects of being granted parole, as it would only be in a very rare case that the Parole Board would order release of a prisoner from Category A detention without his suitability for release first being tested in more open conditions as a Category B, C or D prisoner: R v Secretary of State for the Home Department, ex p. Duggan [1994] 3 All ER 277 (DC), 280 and 288; R (Williams) v Secretary of State for the Home Department [2002] EWCA Civ 498 [2002] 1 WLR 2264, [23]-[24]."*

46 In the passages of *Duggan* cited by Sales LJ, Rose LJ observed:

> *"It is common ground that 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; educational 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." (280h-j)*
>
> *"So long as a prisoner remains in category A, his prospects for release on parole are, in practice, nil. The inescapable conclusion is that which I have indicated, namely, a decision to declassify or continue the classification of a prisoner as category A has a direct impact on the liberty of the subject." (288d)*

47 Similarly, in the passages from the Court of Appeal's judgment in *Williams* which Sales LJ cited in *Hassett and Price*, Judge LJ (giving the judgment of the Court) observed at [24]:

"We are not surprised to be told that, with the exception of the release of three prisoners under the "Peace Process" in Northern Ireland, no Category A prisoner serving a sentence of life imprisonment has been released."

48. The decision whether to hold an oral hearing is one therefore which has to be taken with care taking into account all the relevant factors set out in the PSI and any additional considerations which are found to be relevant. Most of the factors set out in the PSI were present but two in particular should have carried particular weight – the significant dispute on the expert materials and existence of an impasse. Where there is evidence of an impasse which is not within the prisoner's power to resolve (save by admitting his guilt) fairness clearly calls for an oral hearing *to explore the case and seek to understand the reasons for, and the potential solutions to the impasse* as the guidance states. In this case there was actually no evidence that his risk assessment would change if he admitted his guilt or that he would qualify for any further courses to assist him in demonstrating a reduction in risk. To refuse to downgrade him and deny him the opportunity to try to demonstrate how his attitudes have changed to show a reduction in risk without a hearing seems to me to be unfair.

49. It is clear from the guidance that a difference of opinion between CART and either the Parole Board, the local advisory panel or an expert psychologist can all be considered a *significant dispute on the expert materials* where the dispute relates to the main issue of risk reduction. In the current case two expert psychologists had supported the downgrading from category A and reported a significant reduction in risk. This no doubt influenced the Parole Board as did the support of Offender Supervisor and Offender Manager. It is likely that the evidence of the Claimant himself also influenced the Parole Board as after hearing what he said Ms Wordie, having supported a transfer to open conditions went further and said it would not be a mistake to release the Claimant. This material, which appears to conflict with the views of the CART panel should have influenced them when deciding whether an oral hearing would be helpful. The submission made by counsel for the Defendant that there was no effective conflict with the contents of the various reports would only be persuasive if the panel had accepted the views of the authors.

50. In the passage from the judgment of Lord Justice Gross in *Mackay* quoted above in paragraph 14 he uses the situation where the " *the Parole Board concluded that there <u>had</u> been a significant reduction in risk"* as an example of an application where there was "*a proper foundation for an oral hearing"*. Where the CART panel have evidence from expert psychologists and the Parole Board of a significant reduction of risk it seems to me to be unwise to disagree with or dismiss that evidence without taking considerable care to examine the evidence fully and reach conclusions which are logically supportable. To do so on the basis that the Claimant had not admitted his guilt when both the Parole Board and psychologists were aware of that issue and reached their conclusions notwithstanding it was perhaps unwise. In my judgment, if the panel had genuine doubt whether the risk assessments carried out by the psychologists and relied on by the Parole Board were reliable the safer course would have been to conduct an oral hearing and hear from one or both of them so that the appropriate questions

could be asked and the views of the experts considered. It may also have been both helpful and fair to hear from the Claimant why he felt his risk of re-offending had reduced even though he still maintained his innocence. This would no doubt involve him explaining what he had learnt from the programmes he had undertaken and how he had put this learning into practice in his more recent attitudes and conduct.

51. In my judgment this is a case where the CART panel should have given considerable thought before going behind the expert evidence supplied and reaching a different conclusion without giving themselves the opportunity to hear from the experts and the Claimant. Had they done so it surely would have improved the quality of decision making based upon what they could have learnt from questioning the experts and hearing the Claimant. As Lord Justice Sales said in Hassett in the passage quoted in paragraph 17 above, this was surely a case where they should have been 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"*. The CART panel were obliged to take into account the fact that the Claimant was a post-tariff prisoner who had been in Category A for 22 years post-conviction and had never had an oral hearing before. He was subject to an impasse which had existed for some time and there was a significant dispute on the expert materials. For the reasons I have outlined above in deciding not to hold and oral hearing the CART panel did not properly or fairly apply PSI 08/2013 and in doing so breached their duty at common law to act fairly. The decision not to hold an oral hearing I find is unlawful and accordingly the claim for judicial review succeeds.

52. I would like to express my thanks to both counsel for their very helpful submissions both in writing and orally.