Neutral Citation Number: [2022] EWHC 170 (Admin)

Case No: CO/359/2021

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

1 Oxford Row,
Leeds LS1 3BG
28th January 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of JOHN WILSON)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

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- -

Matthew Stanbury (instructed by Bhatia Best Solicitors) for the **Claimant**
Benjamin Seifert (instructed by Government Legal Department) for the **Defendant**

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Hearing date: 13/1/22

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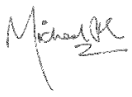
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a case about whether to have an oral hearing in deciding whether to change a prisoner's security categorisation from Category A to Category B ("Downgrading"). It comes before the Court as the substantive hearing of a claim for judicial review to challenge a decision taken on 18 November 2020, for the Defendant, by the Director of the Long Term and High Security Estate ("the Director"). By that impugned decision,

the Director decided: (1) that the Claimant (also "Mr Wilson") should not be Downgraded; and (2) that it was not necessary to convene an oral hearing. It is the latter – the refusal to conduct an oral hearing – which is the target and focus of the challenge. Permission for judicial review was granted on the papers on 5 July 2021 by HHJ Gosnell, who said this:

> ***[T]he issue of whether the Claimant has demonstrated a reduction in risk is clearly at issue. He has never previously had an oral hearing and there is a clear dispute on the expert materials. He may be able to argue an impasse has been reached. In my view the claim is clearly arguable.***

The mode of hearing before me was by MS Teams. That mode of hearing had been organised by the Court, in conjunction with the parties, in the context of the pandemic. The mode of hearing eliminated any risk to any person from having to travel to, or be present in, a courtroom. Both Counsel were satisfied, as was I, that the remote mode of hearing involved no prejudice to the interests of their clients. The open justice principle was secured: the case and its start time were published, together with an email address usable by any member of the press or public who wished to observe the public hearing. I should explain at the outset two acronyms. Under the applicable legal and procedural framework, Category A review decisions are sometimes made by the Director and sometimes by a Category A Team ("CAT"), decisions being informed by a dossier including a reasoned recommendation by a local advisory panel ("LAP").

Relevant law

2. Both Counsel accepted that I could take, as a 'general legal platform' for the submissions in the present case, the following points, all found in R (Steele) v Secretary of State for Justice [2021] EWHC 1768 (Admin) at §§1 and 3-5.

   i) The test for Downgrading is whether the Director has "convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced, such as evidence that shows the prisoner has significantly changed their attitudes towards their offending or has developed skills to help prevent similar offending": see Prison Service Instruction 08/2013 ("the PSI") at §4.2. This Downgrading test reflects that need for "cogent evidence in the diminution of risk" which has been endorsed by the Courts as "plainly a proper requirement": see R (Hassett) v Secretary of State for Justice [2017] EWCA Civ 331 [2017] 1 WLR 475 at §70.

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

   iii) Oral hearings are addressed in the PSI at §§4.6 and 4.7. These can be seen set out, in full, in Hassett at §21. The PSI has been revised and updated, including in the years subsequent to the October 2013 decision of the Supreme Court in R (Osborn) v Parole Board [2013] UKSC 61. At §4.6, the PSI discusses the extent to which there are parallels and differences between Category A review decisions and Parole Board decisions, as does Hassett at §51. At §4.6 the PSI

says "this policy recognises that the Osborn principles are likely to be relevant in many cases in the [Category A review] context", referring to the PSI as "guidance [which] involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing".

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

v) At §4.7 the PSI identifies four factors which would tend in favour of an oral hearing being appropriate, under headings on which (in the case of the first three) the text then elaborates. The four headings are: (a) "where important facts are in dispute"; (b) "where there is a significant dispute on the expert materials"; (c) "where the lengths of time involved in a case are significant and/or the prisoner is post-tariff"; and (d) "where the prisoner has never had an oral hearing before; or has not had one for a prolonged period". It is appropriate to consider these four factors "in the round, by considering them cumulatively" (R (Nduka) v Secretary of State for Justice CO/617/2019 (25 October 2019) at §34), that being a point made at §4.7 of the PSI ("the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed").

vi) Hassett at §56 endorsed the guidance in R (Mackay) v Secretary of State for Justice [2011] EWCA Civ 522 and R (Downs) v Secretary of State for Justice [2011] EWCA Civ 1422. Within this line of authority are to be found the following points. (1) The common law principles identified in the parole context in Osborn do not apply with the same force to Category A review decisions (Hassett §§59-61). (2) The general guidance in the PSI is lawful and not apt to mislead a decision-maker as to the applicable legal standards, a point decided in the specific context of a challenge to factor (b) (Hassett §66). (3) A Category A review decision "has a direct impact on the liberty of the subject and calls for a high degree of procedural fairness" (Mackay §25). (4) It is "for the Court to decide what fairness requires, so that the issue on judicial review is whether the refusal of an oral hearing was wrong; not whether it was unreasonable or irrational" (Mackay §28). The decision-maker may need to "exercise a judgment on whether an oral hearing would assist in resolving … issues and assist in better decision making" and the question for the Court is whether the CAT "was wrong to decide against an oral hearing" (Downs §45). (5) Where a prisoner denies the offending of which they were convicted, which may in consequence mean ineligibility or unsuitability for participation in courses relevant to satisfy the decision-maker that the risk to the public has been significantly reduced, the decision-maker's "starting point can only be the correctness of the jury's verdict" and the denial "may … in many cases severely limit … the practical opportunity of demonstrating that the risk has diminished" (Mackay §27). (6)

Although it has been said that "oral hearings will be few and far between" (Mackay §28) and "comparatively rare" (Hassett §61), that is prediction rather than principle: there is "no requirement that exceptional circumstances should be demonstrated" (Mackay §28). (7) The fact that there is a "difference of professional opinion" between two experts (eg. two psychologists), the fact that the decision-maker has "two clear, opposed views to consider", and the fact that the decision-maker's "task was to decide which view it accepted" does not – in and of itself – make an oral hearing necessary (Downs §§44-45, 50; Hassett §69).

3. To this 'general legal platform' can be added these further points, all emphasised in the present case by Mr Stanbury for the Claimant:

   i) The PSI states that reports prepared for the decision-maker should provide "a comprehensive summary of the prisoner's behaviour and progress to date", to "enable an assessment of any reduction in the prisoner's level of risk" (§4.17); and that a psychologist's report should address whether the prisoner has "demonstrated any evidence that the risk of serious reoffending has reduced, including through offending behaviour programmes" (Annex B of the PSI, at p.29).

   ii) As the Court of Appeal (Gross LJ) explained in MacKay at §25: "Self evidently, categorisation as a Category A prisoner has serious consequences for the prisoner. Not only is he subject to a more restrictive regime and higher conditions of security than prisoners in other categories but, given the meaning of categorisation as a Category A prisoner, so long as he remains such, his prospects of release on parole are nil… Accordingly, the decision as to continued classification of the prisoner as Category A has a direct impact on the liberty of the subject and calls for a high degree of procedural fairness".

   iii) As Cranston J explained in R (H) v Secretary of State for Justice [2008] EWHC 2590 (Admin) at §23: where an LAP "has recommended that the claimant should be re-categorised", if Category A status is maintained by the Director, the position is as follows. "There is an inconsistency between, on the one hand, the approach of the [LAP] and, on the other hand, that of the Director…" Although that is not "an impasse", and although the recommendation of downgrading by the LAP is "not the same as a decision of the Parole Board", nevertheless "this inconsistency supports the case for an oral hearing to explore it in greater depth", even if ultimately "there may be no inconsistency but simply a difference of opinion, and for very good reasons".

Context and circumstances of the present case

4. The Claimant is aged 72 (at the time of this judgment). In August 2004 (when aged 54) he was sentenced, upon being convicted by a jury in the crown court, to the following: a mandatory life sentence with a minimum term of 24 years for murder; and two concurrent 14 year sentences for conspiracy to cause grievous bodily harm. The convictions related to events which took place on 19 June 2003. As the Director put it in the decision:

> ***John Wilson and his associates planned and carried out an attack on a man and his family who ran a cannabis farm, killing the man and inflicting extreme violence on others. They ambushed the victims, bound them and either inflicted or oversaw extreme and prolonged torture to gain access to their money. They suspended the murder victim from a beam, forced into watch the torture of his son and daughter, and killed him by beating and the insertion of stables and a metal bar into his body. The sentencing judge accepted John Wilson was not physically present but had been deeply involved in directing the attack and subsequent events.***

The sentencing judge described the acts of violence as "extreme and sadistic". They took place over a period of more than three hours, and the deceased victim was found to have 123 external physical injuries. The context was said at the trial to be a £20,000 drug debt owed by the deceased victim to the Claimant. The Claimant was linked, on the evidence, by virtue of prior telephone contact with the perpetrators. His case was that he had given information about the whereabouts of the victim who they went on to kill, but maintained that he did not know or intend that any act of violence would take place. The sentencing judge referred to the Claimant as having been "directing operations from afar", and as having been in the relationship of "master and servant" to those whose actions he was directing. The Claimant has continued to deny his guilt of the offences for which he was convicted.

5. At the time of the Director's decision, the Claimant had been incarcerated for more than 16 years; it is now more than 17 years. Two of his co-defendants, who were direct perpetrators of the violence and who were also convicted of the murder, have been Downgraded from Category A, in November 2016 and September 2019. Both Counsel referred to the Claimant's 'tariff expiry date' as being a date in 2028. I have noted that at least one document gives an earlier date (19.9.27), but nothing turns on this difference. The 'tariff expiry date' is the earliest date on which the Claimant could be released, depending on what risk he is assessed to pose at that stage. Mr Stanbury submits, by reference to the 'nil prospects' point in MacKay (cited above) that the Claimant is already at a "point in his tariff" where his Category A categorisation is "beginning to bite", given that he will need to be Downgraded in order to face any prospect of release once that tariff date has been reached.

6. The case has a number of further themes. These include the Claimant's accepted good behaviour in custody; his engagement with assessments in prison; and his stated willingness to undertake those courses and programmes of work which are made available to him. So far as concerns courses and programmes of work, four matters are particularly noteworthy and featured prominently in Counsel's submissions. (1) First, the Claimant undertook the Enhanced Thinking Skills (ETS) course in 2007. (2) Secondly, the Claimant was assessed in 2015 as unsuitable for the Resolve programme, by reason of his denial of guilt. (3) Thirdly, the Claimant was assessed in 2018 as unsuitable for the Thinking Skills Programme (TSP), being assessed not to "need" the TSP, applying the relevant criteria. (4) Fourthly, there is certain "bespoke work" which has been identified as being suitable and appropriate for the Claimant, for which he has been on a "waiting list".

7. Prior to the impugned decision, there had been these key events and expressions of view:

   i) The Previous Review 2019. On the Claimant's previous annual security review, the Director decided on 11 September 2019 not to Downgrade him. That was notwithstanding the following: (a) a psychologist's report (from an "S

MacDonald") dated 25 April 2019, recommending Downgrading ("the MacDonald Report"); and (b) a reasoned recommendation by an LAP ("LAP Report 2019") also recommending Downgrading. In the 2019 decision, the Director reasoned as follows:

> ***The Director acknowledged Mr Wilson's positive engagement with staff and with the regime. There is no evidence of offence-paralleling behaviour and Mr Wilson has engaged in one-two-one work on his lifestyle. He noted Mr Wilson has nonetheless engaged in no offence-focused work that might provide evidence of significant insight and risk reduction relating directly to his offending and associated risk factors. He noted the recommendation for Mr Wilson's downgrading is mainly based on his age, ill health and regime adherence, rather than evidence of significant offence-related progress. He did not accept a suggested manageability within Category B provides such evidence. While he noted Mr Wilson's age and ill-health, he considered there is no evidence these significantly affect his capacity to similarly reoffend, or show his escape can be made impossible in less secure conditions. The Director considered evidence of a significant reduction in Mr Wilson's risk of similar reoffending if unlawfully at large is not yet shown. He is satisfied Mr Wilson therefore must stay in Category A at this time.***

ii) The Mitchinson Report 2020. A further psychologist's report dated 30 July 2020 (by Hayley Mitchinson) explained the use of an assessment method called the Historical, Clinical and Risk Management-20 version 3 ("HCR-20"). In her report ("the Mitchinson Report"), Ms Mitchinson said this:

> ***I have utilised the HCR-20 in order [to] provide an assessment of Mr Wilson's risk of future violence at either Category A or Category B security status. I would assess Mr Wilson as a moderate risk of future violence and a high risk of serious physical harm, though this is considered to be of low imminence whilst he remains in custody. I would not consider that Mr Wilson's risk would be significantly increased if he were to be downgraded to Category B security status.… Based upon the available information, the outcome of Mr Wilson's risk assessment has determined that his risk would not be significantly increased if his security status were to be downgraded. Therefore, it is my view that he could be managed in lower security conditions as a Category B prisoner …***

iii) The LAP Report 2020. By a reasoned recommendation of a LAP dated 5 October 2020, a six-person panel (also described as a "board"), including a psychologist (Gemma Tock), said this:

> ***The board noted Mr Wilson's good custodial behaviour and compliance with the wing regime. He has engaged with psychological services for the purposes of an assessment (include within the dossier). He has been recommended for some bespoke work to explore his attitudes to violence/condoning lawbreaking. Mr Wilson has expressed willingness to complete this work and is on the waiting list, however in the current circumstances it is not possible to provide a start date for such work. Given the outcome of the current (and previous psychological risk assessment) it is not considered that this work must be completed prior to downgrading. The board noted that Mr Wilson's risk is not manifesting, he has consistently displayed good custodial behaviour without any adjudications and his age and health now should come to the forefront of a significant reduction in risk. The outstanding bespoke work can be completed in lower security conditions and would not serve to reduce his risks but to explore attitudes only. The board felt no reason to depart from their previous decision and to recommend a downgrade.***

8. I turn to the impugned decision, the Director's reasoned decision of 21 October 2020. Under relevant headings, the decision discussed the "present circumstances", the

"representations" from the Claimant's solicitors, and the "LAP recommendation" (LAP Report 2020). The substantive decision was reasoned as follows:

> ***The Director considered Mr Wilson's offending showed he would pose a high level of risk if unlawfully at large, and that before his downgrading could be justified there must be clear and convincing evidence of a significant reduction in this risk. The Director again accepted Mr Wilson has abided by the regime for many years and poses staff no problems. He took into account also Mr Wilson's age and health problems. He considered the reports nonetheless provide no real evidence Mr Wilson has achieved offence -related insight or progress despite these good points. The reports in fact show Mr Wilson has achieved no effective insight into his high potential risk shown in the sentencing remarks and by his tariff. He noted Mr Wilson acknowledges some previous criminal behaviour, but effectively denies any serious or risky behaviour. Mr Wilson also denies the serious risk factors suggested by his present offences, of which he has been lawfully convicted. He recognised Mr Wilson's sustained regime adherence might suggest he could be managed insecure category B. But he confirmed that this is not convincing evidence of a significant reduction in risk if unlawfully at large. In the meantime, he had no evidence Mr Wilson's health or mobility are so impaired they would significantly reduce his risk … The Director considered evidence of a significant reduction in Mr Wilson's risk of similar reoffending if unlawfully at large is still not shown, despite his continued adherence to the regime. He is satisfied Mr Wilson therefore must stay in Category A at this time'.***

9. On the question of whether to have an oral hearing – which is the focus of this claim for judicial review – the Director's reasoned decision was as follows:

> ***The Director considered also an oral hearing is not necessary for Mr Wilson's present review. He considered the available information and assessments are readily understandable and that there are no issues that need further resolution through an oral hearing. He did not believe his disagreement with the LAP or reports in itself represents a dispute warranting an oral hearing. He considered Mr Wilson is also free to show further evidence of insight and progress by discussing the offences of which he has been lawfully convicted, as recommended in the current reports and by the LAP. He considered there is accordingly no impasse. He noted also Mr Wilson is some years from tariff expiry, and therefore his Category A status is not presenting a barrier to his progression. There are also no alternative assessments, such as from the Parole Board, suggesting Mr Wilson has achieved significant risk reduction.***

The challenge

10. Against the legal backcloth which I have set out, Mr Stanbury submitted – in essence – as follows. In the exercise of the Court's own objective judgment – as to the 'correctness' of the Director's conclusion as to whether to convene an oral hearing – the Court should conclude that an oral hearing ought to have been granted in this case, having regard to the relevant features identified in the PSI and in the relevant case law, so as to achieve fairness and to promote better decision-making, in light of a combination of relevant factors. That combination includes these four factors in particular.

    i) The first factor relates to the appropriateness of a closer scrutiny, which an oral hearing could bring, given the "inconsistency" (as identified by Cranston J in H) between the favourable reasoned recommendations, of Ms Mitchinson, and (in particular) in the LAP Report 2020. Ms Mitchinson's report was a careful and detailed 'structured risk assessment' based on more than four hours of interviews with the Claimant. Included within it was a clear and positive recommendation in relation to Downgrading, alongside a clear assessment utilising HCR–20. The LAP Report 2020 recommendation was a clear and positive recommendation of Downgrading. It clearly involved grappling with

the relevant question, given the test for Downgrading, and it answered the relevant question favourably to the Claimant. In particular, that can be seen from the LAP Report 2020's reference to "a significant reduction in risk", based on a number of features: the fact that the claimant's "risk is not manifesting"; his consistent display of good custodial behaviour; his age and his health. Both the Mitchinson Report and the LAP Report 2020, in terms, recognised that the outstanding "bespoke work" could be completed in Category B conditions. Those two reports had been written in the following circumstances: in a context, and under a framework, where experienced individuals were involved in producing or overseeing the reports; where the question needing to be answered by the Director (the Downgrading test) is clear from the PSI; where reports are to be prepared using the guidance given in the PSI. To refuse the Claimant's Downgrading, in light of these Reports and recommendations, and in circumstances where there had been similar previous favourable recommendations in 2019 by both another psychologist (the MacDonald Report) and an earlier LAP (the LAP Report 2019), gave rise to the H "inconsistency" as a feature which "supports the case for an oral hearing to explore it in greater depth".

ii) The second factor is the Claimant's age (71, at the time of the hearing before me) and the passage of time, involving more than 16 years (now more than 17 years) in prison. This is an important feature. It links to the well-recognised difficulties in assessing risk 'on the papers', after a substantial passage of time in custody.

iii) The third factor is the relevant and straightforward fact that the Claimant has never had an oral hearing.

iv) The fourth factor was a point which Mr Stanbury introduced at the substantive hearing. He was able to link it to the Claimant's solicitors' representations which had been made to the Director (on 18.9.20), and which the Director had summarised in the impugned decision (18.11.20). Mr Stanbury accepted that – unlike the first three factors – the fourth had not as such been identified in the grounds for judicial review, nor in the skeleton argument. The fourth factor came to this. Mr Stanbury submitted that there is in this case a 'present material uncertainty' as to the availability to the Claimant of courses and programmes, which an oral hearing would have assisted in resolving. Ultimately, Mr Stanbury advanced two contentions. (i) First, that the Resolve course had previously been assessed as inappropriate in the light of the claimant's denial of guilt, but a 'material extant uncertainty' arose as to whether Resolve would remain unavailable to the Claimant *even if* the Claimant were now to accept his guilt. Mr Stanbury characterised this as part of a broader 'present material uncertainty' as to 'what difference it would make' if the Claimant did now accept his guilt of the offences for which he was convicted. (ii) Secondly, that it is unclear that the "bespoke work" – clearly said in both Reports to be available in Category B conditions – is in fact available to the Claimant in Category A conditions (so that expecting him to undertake it before Downgrading to Category B would be a 'catch-22' impasse, requiring resolution). Mr Stanbury submitted that these were matters which – alongside the other three factors – called for probing at an oral hearing.

Post-permission events

11. Documents were placed before the Court by the Defendant evidencing developments in relation to the Claimant's categorisation, since the grant of permission for judicial review in July 2021. There was a report and recommendation of another LAP on 21 September 2021 ("the LAP Report 2021"), recommending that the Claimant should not be Downgraded. There was a decision of a CAT dated 25 October 2021 ("the CAT Decision 2021"), deciding against Downgrading and deciding not to convene an oral hearing. Mr Stanbury sensibly did not object to the Court being made aware of – and seeing – these materials. But he submitted that they were nevertheless legally irrelevant (a) to this Court's assessment of the correctness of the Defendant's decision to refuse an oral hearing in November 2020 and (b) to this Court's decision (if satisfied that it was incorrect to refuse an oral hearing) as to the grant or refusal of a remedy. Mr Stanbury submitted that the Court should focus squarely on the position as it was in November 2020, when the impugned decision was made by the Director. He also submitted that the recommendation in the LAP Report 2021 and the CAT Decision 2021, may themselves be premised on (and yield to) the Director's 2020 impugned decision and, if there ought to have been an oral hearing in conjunction with that decision, reconsideration with an oral hearing remains the just outcome. There is also this point in the Claimant's favour: the LAP Report 2021 and recommendation on their face focus on a specific temporal period. They ask whether there have been 'significant developments in between' the review decision of November 2020 and the September 2021 assessment. The oral hearing called for in November 2020 was, necessarily, by reason of the position and circumstances which pre-existed at that time, so that the existence or non-existence of changes after that time is not the point.

Discussion

12. I will start with the post-permission events (§11 above). On this topic, I agree with Mr Stanbury. In my judgment, for the purposes of the present case, it is appropriate to proceed by putting aside the unfavourable LAP Report 2021 and CAT Decision 2021. I accept, for the purposes of the present case, that if this Court is satisfied that it was incorrect in November 2020 – in the circumstances as they then were – for the Director to deny the Claimant an oral hearing then the position would be this. The claim for judicial review, for which permission was granted, would in principle be made out, and what should happen in this case is an oral hearing at which all relevant materials are considered, on an up to date basis. I can see that there could be cases where post-permission events might be highly material to a judicial review claim such as the present. One obvious example is where a subsequent decision – with whatever outcome – has involved an oral hearing. Another is where a subsequent decision has involved a Downgrading. Another is where subsequent events have put beyond doubt some highly relevant disputed factual matter, about which there was previous uncertainty previously justifying an oral hearing. In my judgment, the LAP Report 2021 and CAT Decision 2021 do not, and should not, influence the Court's assessment of the issue in this case. Putting those materials aside is, in my judgment, the appropriate, just and fair course.

13. I deal next with the fourth factor, introduced by Mr Stanbury (§10(iv) above). In my judgment, there is nothing in this point, which for good reason did not feature in the grounds for judicial review or the skeleton argument. This is not a case in which there has been a 'present material uncertainty', in relation to the application by the Director of the test for Downgrading, regarding the actual or contingent availability of any

course or programme. The position in relation to all four aspects of the courses and programmes is clear on the evidence and I set it out earlier in this judgment. The ETS programme was suitable, available and was undertaken in 2007. The Resolve course was assessed in 2015 as unsuitable by reason of the claimant's denial of his guilt. The TSP was assessed in 2018 as inappropriate on the basis of unmet criteria relating to need. The "bespoke work" has been identified as suitable and appropriate, notwithstanding that the Claimant continues to maintain his innocence. There is no doubt at all that that the "bespoke work" is available in Category A custody. The LAP Report 2020 made this very clear, referring to the Claimant being "on the waiting list", and saying that "in the current circumstances it is not possible to provide a start date" for the work. There is no 'catch-22', where work necessary to get to Downgrading is only available after Downgrading. Whether the Resolve course would be treated as unavailable, for some further reason, if the Claimant were at some stage in the future to admit his guilt, involves a hypothetical and contingent question which does not and cannot directly engage the Director's application of the Downgrading test; especially in circumstances where the "bespoke work" is in principle available and awaited. If the Claimant did acknowledge his guilt, that would itself plainly be a highly relevant circumstance, whether or not it led to the Resolve course. The answer to the question whether, if he did so, the Resolve course would then be available could produce any one of three answers: yes; no; or maybe. Identifying, now, one of these answers rather than the other two would not and could not assist in answering the Downgrading question. The Director's decision involves applying the test, by deciding whether there is convincing evidence of a significant reduction in risk of reoffending if unlawfully at large. The decision does not involve having to identify a 'pathway' of future steps; or give an 'indication' of what might open up for the Claimant were he to acknowledge his guilt; or having to evaluate questions of availability based on future contingencies. What matters in this case are the other three factors, and the combination of them.

14. Was the Director right to conclude that fairness and promoting better decision-making did not call for an oral hearing, given the favourable, reasoned reports and recommendations in the LAP Report 2020 and the Mitchinson Report 2020, together with the favourable, reasoned reports and recommendations of the 2019 LAP and the 2019 psychologist, alongside the other features of the case including the Claimant's age and his length of time in custody and given the fact that he had never had an oral hearing? In my judgment, the Director was right to arrive at that conclusion. Mr Stanbury submits that fairness and promoting better decision-making called for an oral hearing to be convened, at which Gemma Tock (the psychiatrist on the six-person LAP 2020 panel) and Ms Mitchinson could give oral evidence and be asked questions, as could the Claimant. I cannot agree.

15. I accept that there was an H "inconsistency" between a refusal to Downgrade the Claimant and the reasoned recommendation of the LAP Report 2020 (and LAP Report 2019) and a reasoned recommendation in the Mitchinson Report of 2020 (and McDonald Report of 2019). Mr Stanbury says this kind of "inconsistency" can be characterised as being one "sense" of the word "impasse". Cranston J evidently did not think that "impasse" was an apt description. But whatever verbal description is used, the idea is the same. I accept of course that such a divergence – an H "inconsistency" – can support the case for an oral hearing, to explore the divergence of view in greater depth. But, in my judgment, the present case is one in which the reasoned reports and recommendations were clear on their face. There was no dispute or disagreement whose

nature called for an oral hearing to achieve fairness and promote better decision-making. Nor was that called for by this feature alongside the combination of other factors in the case.

16. It was clear what Ms Mitchinson was saying in her Report. She used HCR-20 to assess the Claimant's risk of future violence. She assessed that risk of future violence as "moderate" and with a "high risk of serious physical harm". She proceeded, again with clarity, from "moderate" risk of future violence – carrying a "high risk of serious harm" – to an observation which was about "low imminence" of this risk while the Claimant remained in custody. She explained, again with clarity, that she assessed the risk as being substantially the same whether the Claimant were (a) in custody in Category A conditions or (b) in custody in Category B conditions. Ms Mitchinson's recommendation was, clearly, based on determining that the Claimant's posed risk would not be significantly increased if his security status were to be Downgraded. As she earlier expressed it, she was seeking to achieve her Report's purpose, "to determine suitability for downgrade from Category A to Category B security status", by an assessment in which the Claimant's "risk management factors were considered in the context of if he were to remain at his current security status or be downgraded and relocated to a lower security establishment". These were views which Ms Mitchinson was plainly entitled to hold. They were very clearly expressed. They were logical and reasoned. They did not require clarification or explanation.

17. It is important to remember that what the Director had to decide – in light of all the materials including Ms Mitchinson's expressed views – was whether he had "convincing evidence" that the Claimant's "risk of re-offending if unlawfully at large has significantly reduced", such as evidence that showed the Claimant "had significantly changed their attitudes towards their offending" or "developed skills to help prevent similar offending". Indeed, as the Director had said in the 2019 Review – in a passage which the Mitchinson Report had begun by setting out verbatim – evidence of "manageability within Category B" was not the same as "evidence of significant offence-related progress".

18. As to the LAP Report 2020 and its positive recommendation (which I have set out earlier in this judgment), the points there made were also clear on the face of that reasoned assessment. They included a point about good custodial behaviour. They also included a point about the Claimant's risk not manifesting. On that latter point, an earlier passage in the LAP Report 2020 had said: "There is no evidence of a manifestation of risk, in fact his interactions on the wing indicate that he holds no influence with other prisoners". Then there were the points made about the Claimant's age and health. The positive recommendation was clear, as was its basis. Again, there was nothing on the face of it requiring to be asked of the six-person LAP or of the psychologist Gemma Tock who was a member of that panel.

19. The Director knew he was in the position of needing to decide what to make of the materials, including these assessments, based on the underlying facts. There was no disputed primary fact as to the Claimant's conduct or his compliance or his engagement. There was no 'present material uncertainty' relating to whether courses and work had been done; nor as to the appropriateness and availability of courses and work which could be done. There was no disputed matter relating to insight or acknowledgement regarding the index offending, since the Claimant's position had remained consistent and was well documented. The Director was in a position to summarise accurately the

present circumstances, the position in relation to the various programmes and work, the key contents of the 2020 reports (including the Mitchinson Report), the key contents of the solicitors' representations, the substance of the LAP Report 2020 and recommendation, so as to take all of those into account. That is what the Director was not only able to do, but what he then did do in the decision. The Director was also well aware of the length of the incarceration, and the absence of any prior oral hearing, but these did not – with the other factors – suffice to warrant an oral hearing.

20. In my judgment, the available information and assessments were indeed, as the Director put it, "readily understandable" and there were "no issues that need[ed] further resolution to an oral hearing". In my judgment, although the Director was 'disagreeing' with the LAP Report 2020 and Mitchinson Report recommendations (and the 2019 recommendations which had been made in the LAP Report 2019 and the MacDonald Report of 2019), that was not in the nature of a "dispute warranting an oral hearing". In my judgment, there was no "impasse", and there were ways forward which enabled the Claimant to "show further evidence of insight and progress". Although the Claimant had been incarcerated for a substantial period, he was nevertheless in my judgment clearly several years away from 'tariff expiry'. There was appropriate "bespoke work" which he would be able to do, so that his Category A status did not present a "barrier to his progression", as would be the case in a 'Catch-22' situation. There had been no alternative assessment, for example from the parole board, suggesting that he had achieved a "significant risk reduction". These points are the very points that the Director made in the impugned decision, on the subject of whether to have an oral hearing. Adopting the most favourable position for the Claimant – and using a straight objective 'correctness' standard of review – the reasons and the conclusion are unimpeachable. In my judgment, the Director was correct to conclude – and for the reasons that he gave – that this was not a case in which an oral hearing was required. In those circumstances, the claim for judicial review fails.