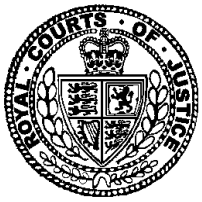

Neutral Citation Number: [2022] EWHC 188 (Admin)

Case No: CO/976/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2022

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE QUEEN **on the Application of** **WAHEED ZAMAN**	**Claimant**
- and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

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

Hearing date: 25 October 2021

Approved Judgment

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circulated to the parties: 24 January 2022

- -

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Monday 31 January 2022.

Mr Justice Henshaw:

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(A) INTRODUCTION

1. The Claimant challenges the lawfulness of the Defendant's decision on 18 January 2021 to retain the Claimant as a Category A prisoner, the highest security category. The Defendant's director of the long-term and high-security estate ("***the Director***") declined to hold an oral hearing of the Claimant's Category A review. The Claimant alleges that, in so doing, the Director breached common law procedural fairness and the operable prison policy, PSI 08/2013. The Defendant responds that the Claimant had a fair opportunity to present his case, and there was no breach of law or policy.

2. For the reasons set out below, I have come to the conclusion that, on the facts of this particular case, the Claimant was entitled to an oral hearing and that the Director's refusal to grant one was therefore unlawful.

(B) FACTS

3. On 12 July 2010, the Claimant was sentenced to life imprisonment following his conviction of an offence of conspiracy to murder. The minimum term was set at 16 years and 28 days. It is due to expire on 12 August 2026.

4. The Claimant had no previous convictions. He was convicted as part of the "*airline plot*". The allegation was that he was a "*foot soldier*", who had not been aware of the plot to detonate bombs on aeroplanes but had been willing to act as one of a number of suicide bombers. The Claimant's defence was that he had made a martyrdom video as a spoof to frighten the public.

5. Between October 2017 and June 2018, the Claimant completed the Healthy Identity Intervention ("***HII***"), an offender behaviour programme specifically aimed at terrorism-related offenders.

6. On 15 July 2019 the Local Advisory Panel ("***LAP***") sitting at HMP Whitemoor recommended to the Defendant that the Claimant be downgraded to Category B.

7. On 14 August 2019, the Claimant joined the progression "*Psychologically Informed Planned Environment*" ("***PIPE***") unit at HMP Whitemoor, in order to consolidate skills learned from the HII programme. The purpose of the PIPE unit is to provide a supportive and enabling environment for prisoners to consolidate skills learned on previous offending behaviour work. It provides opportunities for consolidation of skills

and allows prisoners to live as part of a pro-social community that replicates ordinary life.

8. On 11 September 2019, the Director refused to re-categorise the Claimant, or to hold an oral hearing of his Category A status review. The Director indicated that, although the Claimant had completed HII, engaged satisfactorily, and completed recommended work, his progress was relatively recent. The Claimant's engagement needed to be confirmed through a further period of sustained good behaviour and application of skills.

9. In October 2020, the Defendant gathered a dossier of relevant reports for the purposes of the Claimant's upcoming Category A review. The dossier included:

   i) a report from Daniel Talbott, an officer on the PIPE unit;

   ii) a report from a prison psychologist, Ieva Cechaviciute, dated 24th September 2020, which was based on a full extremism risk guidance 22+ assessment; and

   iii) a report from the Claimant's probation officer, Joanna Boulton, dated 21 September 2020, including a risk assessment which assessed the Claimant as presenting a low risk of reconviction and a low risk of serious harm in custody; and

   iv) a security report which indicated that there was no relevant intelligence during the reporting period.

10. Mr Talbott's report summarised the progress the Claimant had made on the PIPE unit. He said the Claimant made a "*good contribut[ion]*" towards the community, always interacted very well with staff and residents, and built a good professional relationship with Mr Talbott. The Claimant had also taken up leadership roles in the garden, recreation, and on the PIPE spur. He worked as a laundry worker. He received "*lots of praise and positive comments*" in his prison records. The Claimant's peers "*look up to him as a positive role model within the community*". He had shown "*a lot of progress*" on the unit. He carried out his roles in a pro-social and constructive way. His "*positive outlook on everything he does has a good positive outcome, he has received awards and also positive feedback from governors and also staff from the education department*." He "*shows good understanding of himself and how he feels in situations which links really well with putting his skills into practice. He has been very open in our keyworker sessions about difficult situations he has faced and difficult emotions that he has whilst being on the PIPE unit.*"

11. Mr Talbott's report included the following paragraph in relation to structured sessions:

> "Working with Waheed on the Pipe on a daily basis it is clear that his peers on the pipe unit look up to him as a positive role model within the community, he has a very positive outlook on Pipe and is committed to structured sessions which helps to motivate others whilst the sessions are taking place, he has an active involvement in all the socially creative sessions like gardening, cooking, arts and crafts and team building. Waheed is always an active group member who is willing to give his

> opinions and examples in all the sessions helping others in the group to engage also."

12. The report made reference to a particular incident during the Covid lockdown:

> "There was an incident at the start of the lockdown due to Covid-19, the pipe residents were told that they would be locked up for 14 days due to a resident having symptoms. There was several prisoners on the landing that took exception to the fact they would be locked up for 14 days and blocked their observation panels, this included Waheed. As Waheed's keyworker I went to talk to him at his door, Waheed removed the paper blocking his panel and chatted with me. Waheed was upset that he was being locked up for so long and said it felt like a punishment, he said this was his way of showing that he was upset. Once I had spoken to Waheed regarding the issues and explained the situation Waheed was more understanding of the reasons why they may be locked up for so long, he had removed the paper from his panel and said he wouldn't put it up again and also apologised. This was out of character for Waheed but he thought it was a way to get his point across in a decent manner."

13. Mr Talbott's report that explained that the Claimant had no negative comments, warnings, or disciplinary findings against him in the past year or any positive drug results. He had "*received positive feedback from staff for helping to calm situations and also for his positive contributions in Rep and other meetings with governors*".

14. The report from Ms Cechaviciute included the following matters.

    i) It stated that the Claimant demonstrated low engagement with extremist ideology.

    ii) Under the heading "*Need to redress injustice and express grievance*", the report indicated that the Claimant used appropriate avenues and skills to manage potential issues related to actual or perceived injustice.

    iii) However, the report then mentioned two apparently adverse matters. The first was the observation flap incident referred to in Mr Talbott's report. Ms Cechaviciute's report referred to that incident in these terms:

> "There is also some indication that at times the feelings of injustice could be more difficult to tolerate. On 6th of April 2020 Zaman, as well as a number of other prisoners, and their observation panels covered in an act of protest against lockdown regime. Mr Zaman explained that in the beginning of the pandemic the expectation of 14 day self-isolation was unreasonable and he wanted to speak to staff, but they were not responding. He also saw that other prisoners were getting frustrated. Mr Zaman explained that rather than behaving similarly to those prisoners, he instead did something that he saw as symbolic and non-violent, and partially covered up his flap

> until officers came to speak to him. Mr Zaman believed that in this context he was acting proportionally to achieve an objective. Although this would indicate that Mr Zaman engaged in a peaceful protest in order to gain attention from the authority figures, his chosen action was outside of the permissible behaviour. *During report disclosure Mr Zaman noted that he did not receive any negative consequences for this behaviour from prison and he also removed the covering then ordered by staff the first time*."

iv) Ms Cechaviciute's report described the second incident as follows:

> "In addition, there is also some indication of references to the actions of others as discriminatory. Staff noted that on 7th of August 2020 when locking away staff overheard Mr Zaman who was loudly saying "this PIPE is racist they want another prisoner to stay, after all that's happened, Tamsin wants him to stay on as a resident". The staff further commented that they spoke to Mr Zaman and calmed him down and explained the situation, after which Mr Zaman 'was happy with this and thanked me'. It is possible, therefore, that in some situations that are deemed unjust (potentially relating to perception of discrimination of the group that he identifies with), the level of emotion elicited for Mr Zaman could be more difficult to contain, compared to his usual measured and calm demeanour. In the above situation staff intervened to calm Mr Zaman down and it appeared that he did not hold his views rigidly the explanation provided. During report disclosure Mr Zaman stated that this event never happened and that staff never needed to calm him down. He also noted that he now thinks he can't raise any racial discrimination issues."

v) Following reference to these two matters, Ms Cechaviciute's report stated:

> "Overall, it appears that Mr Zaman predominantly has used a normal range of coping mechanisms for coping with feelings of injustice in the current reporting period, with several exceptions in situations where either Mr Zaman was not able to achieve his objective using assertive communication and chose rule breaking behaviour, or where the situation triggered a high level of emotion in relation to seeing others' actions as discriminatory against the group he identified with. These two situations also present high risk situations for Mr Zaman as they are paralleling his own offence pathway. This factor is, therefore, assessed as partially present."

vi) The risk factor of "*need to defend against threat*" had reduced from "*strongly present*" to "*not present*".

vii) Under the heading "*Need for identity, meaning and belonging*", the report included a number of positive factors and some less positive. The latter included

reference to some rigidity of thinking. (As to this, the Claimant noted that he tried to speak up about various issues as an 'opposite' action to how he found himself not speaking up during his offending.) There was also some reference to the Claimant's apparent investment in his positive behaviour being noted and recorded, and a high level of awareness of the hierarchy. This created some doubt about the genuineness of the Claimant's presentation. Similarly, the report noted that the security department questioned the genuineness of the Claimant's presentation due to some behaviours inconsistent with his stated identity (for example, being seen on some occasions to associate with individuals outside of PIPE who were considered to present a serious threat to the good order and discipline of the prison). The Claimant had commented that the security department had never raised this with him. Overall, Ms Cechaviciute this risk factor remained as "*partially present*".

viii) The risk factor of susceptibility to indoctrination had reduced from "*partially present*" to "*not present*".

ix) The risk factor of "*political / moral motivation*" had reduced from "*fully present*" to "*not present*".

x) The risk factor of "*family and/or friends support extremism*" had reduced from "*fully present*" to "*not present*".

xi) The risk factor of "*transitional period*" had reduced from "*partially present*" to "*not present*".

xii) The risk factors of "*attitudes that justify offending*" and "*harmful means to an end*" had reduced from "*fully present*" to "*not present*". The Claimant was able to give detailed examples of how he disapproved of terrorism. Staff and the security department did not express any concerns in this regard.

xiii) The Claimant's capability to commit an extremist offence was rated as low.

xiv) The section on assessment of treatment gain, in relation to the index offending, noted that there continued to be a discrepancy between the Claimant's version of events and his actual conviction.

xv) The same section included a sub-section on "*Protective factors*", which included the following passage recapping on, and to a degree adding to, concerns expressed earlier:

> "As already noted previously, staff observed some inconsistent behaviours from Mr Zaman with regards to labelling another group of people or sometimes associating with 'risky' individuals, and his relationships with some PIPE staff were very different in terms of lack of warmth observed, which raised questions about the authenticity of Mr Zaman's presentation. Although indicating that he was highly committed to the PIPE unit, he was not fully following up with PIPE commitments, for example, not consistently filling in structured workbooks and not signing up to creative sessions. According to PIPE staff, Mr

> Zaman he was not meeting the minimum session engagement requirements consistently throughout the reporting period. He attended structured sessions and culture and community meetings and appeared to genuinely enjoy structured sessions, but he was not fully using the PIPE opportunities provided to him and left the impression to some pipe staff that he has not seen his commitment through fully…. During report disclosure Mr Zaman noted that this needs to be seen in the context that going to pipe for him was voluntary and without any encouragement. He also stated that he did not attend some sessions due to specific issues surrounding those sessions (for example, non-halal meat being used during cooking sessions) and he stated that he informed staff of the reasons for this."

15. Overall, the assessment found that the majority of the risk factors were rated as "*not present*". There was a predominance of information to indicate positive, protective, pro-social, and offence-replacement behaviours in the current reporting period. The Claimant had provided evidence of working towards "*all of the domains that could demonstrate development towards individual's positive integration with society after leaving violent extremism, including social relations, coping, identity, ideology and action orientation*". At the same time, there were some limited behaviours that indicated offence-paralleling behaviours, and the Claimant's commitment to the PIPE unit was questioned due to his limited involvement in the activity/learning opportunities provided in that environment. The report noted that the Claimant appeared aggrieved and confused by these assertions, and indicated that it was unfair to question his integrity based on staff impressions that were not written down.

16. Ms Cechaviciute's report recommended that the LAP should discuss the weight to be given to allegations of paralleling offending behaviour within the context of his wider behaviour during the current reporting period, and

> "Should the LAP decide that the significant place on Mr Zaman's offence paralleling behaviour does not outweigh the significance of all the positive behaviour and offence-replacement demonstrated by Mr Zaman, then a downgrade is recommended. Conversely, should LAP decide that the offence paralleling behaviour instances are concerning enough that a further period of consolidation is needed for Mr Zaman's risk reduction to be confirmed, a downgrade is not recommended."

17. The report from the Claimant's probation officer, Ms Boulton, referred to the Claimant having settled into the PIPE unit quickly, and having a good relationship with both his peers and staff as evidenced by the numerous positive entries in NOMIS, of which she set out many examples. Her report concluded:

> "It is my assessment that Mr Zaman has continued to make good progress during this review period. He has done everything asked of him in relation to Offending Behaviour work and he has consolidated these skills. Mr Zaman has protective factors in place and therefore my recommendation that Mr Zaman is

> downgraded to Category B so that he can be tested in less restrictive conditions and progress through his sentence".

18. On 27 October 2020, the Claimant's solicitors submitted written representations in connection with the Category A review. They suggested that, if the LAP or the Director had any concerns about the conclusions in the Claimant's reports, the appropriate steps would be to raise those concerns with the report-writers and the Claimant so that they could be properly addressed before a final decision was reached. They explained that the Claimant either denied or could contextualise the three behavioural allegations raised by Ms Cechaviciute in her report.

19. On 19 November 2020, the LAP met to discuss the Claimant's case. The LAP was made up of senior prison officers with regular experience of the Claimant, including the deputy governor of HMP Whitemoor, the head of psychology, a senior probation officer, the offender manager, and other officers. Although Ms Cechaviciute did not attend the LAP, her report was presented to the LAP by Natasha Sargeant, the head of psychology.

20. Ms Sergeant drew attention to some of the points made against the Claimant in Ms Cechaviciute's report. Ms Boulton responded and provided more context to one of the factual allegations against the Claimant (about the covering of the observation panel). Ms Sergeant did not stay for Ms Boulton's response and so did not provide any further input. Another member of the psychological team, Roisin Orchard, did, however, remain in the meeting.

21. The LAP recommended for a second time that the Claimant be downgraded to Category B. It concluded:

> "The LAP discussed that they believed that during the time since his last review Mr Zaman had shown fully an application of skills and sustained good behaviour and that the LAP are recommending a downgrade."
>
> and:
>
> "It is the assessment of the LAP that Mr Zaman has continued to make good progress during this review period. He has done everything asked of him in relation to Offending Behaviour work and he has consolidated these skills. Mr Zaman has protective factors in place and therefore the recommendation is that Mr Zaman is downgraded to Category B so that he can be tested in less restrictive conditions and progress through his sentence."

22. On 18 January 2021, the Defendant's Category A Team wrote to the Claimant to explain that the Director had decided to retain the Claimant as a Category A prisoner. It indicated that the Director's review had taken place on 16 December 2020. In his summary of the Claimant's case, the Director said it was documented that there "*appears to be a difference between his social presentation and his personal identity and it is suggested that the social identity he has built in the PIPE unit does not truly represent the person his family knows*", and that whilst the claimant was assessed as having demonstrated sustained good behaviour, multiple offence-replacement

behaviours and application of skills, "*several offence-paralleling behaviours have been observed for further skills development and offence-related reflection*". The Director's reasons for his decision were stated as follows:

> "The Director considered Mr Zaman's offending showed he would pose a high level of risk if unlawfully at large, and that before his downgrading could be justified [t]here must be clear and convincing evidence of a significant reduction in this risk.
>
> The Director recognised Mr Zaman has maintained a good standard of behaviour in the PIPE unit as recommended at his last review. Mr Zaman has previously engaged in relevant intervention work. He accepted that there is a large amount of positive information showing Mr Zaman's adherence to and good use of the regime, including through education. There are however a number of important points made in the reports concerning Mr Zaman's strength of treatment gain, full commitment to the PIPE unit and insight into his offending. The reports show that despite completing the HII Mr Zaman has yet to achieve a full acceptance of or insight into his own potential for harm, or the harm posed by his offending. There has been evidence of offence-paralleling behaviours and of a limited commitment to the PIPE unit. The reports also confirm that several positive factors, including Mr Zaman's model citizen behaviour and family contact, were present when he became involved in the present offences. The Director concluded that a longer period of progress was needed to explore and provide further evidence of Mr Zaman's insight into these issues. He considered that more evidence was needed to dispel these concerns, particularly taking into account the extreme ideologically-led nature of Mr Zaman's offending."

23. The Director considered there to be no grounds to hold an oral hearing because there were no significant facts in dispute nor any alternative assessments showing significant progress. He did not accept that disagreeing with the LAP in itself justified an oral hearing. He suggested that the Claimant was free to discuss his offending more openly and to show more effective insight and skills management. The Claimant was several years from tariff expiry and was not in an impasse.

24. The Claimant's solicitors sent a judicial review pre-action protocol letter before claim to the Defendant on 8 February 2021, challenging the refusal to hold an oral hearing on procedural fairness grounds.

25. The Defendant's Category A Team responded on 18 February 2021. The Category A Team considered that the Director's decision was rational based on the available evidence. It asserted that the Director was entitled to reach his own decision on rational grounds. An oral hearing was not appropriate or necessary on the basis of a disagreement with his decision. The Director was not bound to hold an oral hearing as he had reached a different conclusion to report-writers or the LAP. The response asserted that the Claimant's solicitors had identified no coherent evidence either that the decision was irrational or that the Director had misrepresented available

information. There were no "*significant alternative assessments … suggesting Mr Zaman has significantly reduced his risk if unlawfully at large*."

(C) APPLICABLE PRINCIPLES

26. Section 12 of the Prison Act 1952 provides that:

> "(1) A prisoner, whether sentenced to imprisonment or committed to prison or remand or pending trial or otherwise, may be lawfully confined in any prison.
>
> (2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct; and may by direction of the Secretary of State be removed during the term of their imprisonment from the prison in which they are confined to any other prison…"

27. By section 47 of the same Act, the Secretary of State may make rules for the regulation and management of prisons and the classification, treatment, employment, discipline and control of persons required to be detained therein. As the Defendant points out, this is a wide discretion, overlaid by provisions in the Prison Rules (SI 1999/728) which provides that prisoners may be classified according to "*their age, temperament and record 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*" (rule 7).

28. The guidance as to the review of Category A prisoner and the procedure for determining whether an oral hearing is necessary is set out in Prison Service Instruction 08/2013 ("***PSI 08/2013***").

29. A Category A prisoner is defined as "*a prisoner whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible*" (PSI 08/2013, §§2.1).

30. Review decisions are not made at prison level but centrally. Category A review decisions are ultimately made by the Director, on the advice of the Category A Review Team ("***CART***") (PSI 08/2013, § 4.1). The test to be applied by the CART and the Director is that, before downgrading a prisoner from Category A, there must be:

> "convincing evidence that the prisoner's risk of reoffending 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" (§ 4.2)

31. Oral hearings are addressed at §§ 4.6 and 4.7, which provide as follows:

> "Oral Hearings
>
> 4.6 The DDC High Security (or delegated authority) may grant an oral hearing of a Category A / Restricted Status prisoner's annual review. This will allow the prisoner or the prisoner's

representatives to submit their representations verbally. In the light of the clarification by the Supreme Court in Osborn, Booth, Reilly of the principles applicable to determining whether an oral hearing should be held in the Parole Board context. The Courts have consistently recognised that the CART context is significantly different to the Parole Board context. In practical terms, those differences have led to the position in which oral hearings in the CART context have only very rarely been held. The differences remain; and continue to be important. However, this policy recognises that the Osborn principles are likely to be relevant in many cases in the CART context. The result will be that there will be more decisions to hold oral hearings than has been the position in the past. In these circumstances, this policy is intended to give guidance to those who have to take oral hearing decisions in the CART context. Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing. The process is of course not a mathematical one; but the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed. Three overarching points are to be made at the outset:

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

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

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

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

a. Where important facts are in dispute. Facts are likely to be important if they go directly to the issue of risk. Even if important, it will be necessary to consider whether the dispute would be more appropriately resolved at a hearing. For example,

where a significant explanation or mitigation is advanced which depends upon the credibility of the prisoner, it may assist to have a hearing at which the prisoner (and/or others) can give his (or their) version of events.

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

It is emphasised again that oral hearings are not all or nothing – it may be appropriate to have a short hearing targeted at the really significant points in issue.

c. Where the lengths of time involved in a case are significant and/or the prisoner is post-tariff. It does not follow that just because a prisoner has been Category A for a significant time or is post tariff that an oral hearing would be appropriate. However, the longer the period as Category A, the more carefully the case will need to be looked at to see if the categorisation continues to remain justified. It may also be that much more difficult to make a judgement about the extent to which they have developed over the period since their conviction based on an examination of the papers alone.

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

Where there is an impasse which has existed for some time, for whatever reason, it may be helpful to have a hearing in order to explore the case and seek to understand the reasons for, and the potential solutions to, the impasse.

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

32. The Court of Appeal in *MacKay v Secretary of State for Justice* [2011] EWCA Civ 522 stated as follows:

"For present purposes, the legal framework may beset out as follows. First, it is necessary to outline the significance of categorisation as a Category A prisoner. A Category A prisoner is defined in Prison Service Order 1010 ("PSO 1010") as:

> "…. A prisoner 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."

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: see, *R v Secretary of State for the Home Department, ex parte Duggan [1994] 3 All ER 277*, esp., at pp. 280 and 288, *per* Rose LJ. 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." (§ 25)

"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. By way of brief amplification:

i) As to the common law duty of procedural fairness and the holding of an oral hearing, Lord Bingham of Cornhill said this in the distinct if not altogether unrelated context of the recall to prison of a prisoner on licence:

> "35. The common law duty of procedural fairness does not ... require the board to hold an oral hearing in every case where

> a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision–maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."

R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350, at [35].

In helpful observations on this passage, Cranston J, in *R (H) v Sec of State for Justice* [2008] EWHC 2590 (Admin), said this, at [21]:

> "Lord Bingham's statement of principle makes clear that common law standards of procedural fairness affecting an oral hearing are flexible, may change over time, and in general terms depend on the circumstances of the case. Clearly oral hearings are not required in all or even most cases, but importantly the context in which procedural fairness is being considered is determinative. There is no test of exceptionality. One considers the interests at stake and also the extent to which an oral hearing will guarantee better decision—making in terms of uncovering of facts, the resolution of issues, and the concerns of the decision—maker. Cost and efficiency must also be considered, often on the other side of the balance."

Earlier in the same judgment, at [1], Cranston J had remarked on the "greater confidence" given by an oral hearing that the "relevant standards" had been properly applied; he also observed:

> "It is clear that procedural fairness does not impose the straitjacket of a quasi–judicial process and more informal procedures than what one expects before the courts or even tribunals may be acceptable. An oral hearing does not necessarily imply the adversarial process."

…" (§ 28)

On the fact of that case, the LAP's conclusion was unequivocal and adverse to the prisoner (§ 34).

33. Aikens LJ observed in *Downs v Secretary of State for Justice* [2011] EWCA Civ 1422 that "…*oral hearings are not required in all or even in most cases: (I would add that it is clear that they will be rare)…"* (§ 45).

34. In *Morgan v Secretary of State for Justice* [2016] EWHC (Admin), William Davis J described the fact that a prisoner had been in custody for a significant period of time as amongst "*the more nebulous potential justifications for an oral hearing*".

35. In *Hassett & Price* v *Secretary of State for Justice* [2017] EWCA Civ 331 the Court of Appeal made the following observations:

> "The CAT/Director are officials of the Secretary of State carrying out management functions in relation to prisons, whose main task is the administrative one of ensuring that prisons operate effectively as places of detention for the purposes of punishment and protection of the public. In addition to bringing to bear their operational expertise in running the security categorisation system, they will have other management functions which mean that in striking a fair balance between the public interest and the individual interests of prisoners, it is reasonable to limit to some degree how elaborate the procedures need to be as a matter of fairness for their decision-making. Moreover, in relation to their decision-making, which is part of an overall system operated by the Secretary of State and is not separate from that system, it is appropriate to take account of the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering processes within the system as a whole. So, for example, in the present cases it is a relevant factor that both Mr Hassett and Mr Price have had extensive discussions with and opportunities to impress a range of officials of the Secretary of State, including significant contact with prison psychology service teams. The decision-making by the CAT/Director is the internal management end-point of an elaborate internal process of gathering information about and interviewing a prisoner..." (§ 51(i))
>
> "the guidance given by this court in *Mackay* and *Downs* regarding when an oral hearing is required before the CAT/Director continues to hold good. The cases in which an oral hearing is required will be comparatively rare." (§ 56)
>
> "... whilst it is no doubt the case that the CART/director could not lawfully refuse an oral hearing on these grounds if fairness required one, it is a relevant consideration in assessing whether it does that the courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate

> diversion of excessive resources to the categorisation review function, away from other management functions." (§ 60)
>
> "Some of the factors highlighted by Lord Reed JSC [in *R (Osborn v Parole* Board [2014] AC 1115] 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" (§ 61)
>
> "… Para 86 of the judgment in *Osborn's* case has to be read as part of a judgment giving guidance on the procedural requirements in the context of decision-making by the Parole Board, and cannot simply be read across to the materially different context of decision-making by the CART/director. Appropriate modification is required for guidance relevant to the latter context, which is what paragraph 4.7(b) seeks to give.
>
> In my view, paragraph 4.7(b) gives lawful general guidance regarding procedural requirements for the purposes of Category A decisions by the CART/director. It is unnecessary to consider whether the guidance in PSI 08/2013 is precisely aligned with common law fairness standards. Some differences in expression are to be expected as between internal administrative guidelines and a judgment of a court of law. However, I am satisfied that paragraph 4.7(b) is not liable to mislead officials into applying a lower standard of procedural protection than the law would require: … Accordingly, this is not a case in which it would be appropriate for this court to strike down or seek to modify paragraph 4.7(b)" (§§ 65-66)
>
> "... even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CAT/Director to hold a hearing to allow them ventilate their views orally. This might be so because, for example, there may be no real prospect that this would resolve the issue between them with sufficient certainty to affect the answer to be given by the CAT/Director to the relevant question, and fairness does not require that the CAT/Director should hold an oral hearing on the basis of a speculative possibility that that might happen ..." (§ 69)

(I should record that the Claimant reserved the right to argue on any appeal that *Hassett* was wrongly decided, and informed me that the Supreme Court on 8 April 2019 refused

permission to appeal in the case of Mr Price who had by then been granted Category B status.)

36. In *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin), Karen Steyn QC, sitting as a Deputy High Court Judge, noted in the context of PSI 08/2013 that:

> "It is well established that a decision-maker must follow his own policy unless he has a good reason not to do so. This public law principle is grounded in fairness and, more broadly, the requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. It is also clear that the meaning of a policy is a question of law for the court to determine. See, for example, *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546 at [29]-[31] (per Lord Wilson JSC, with whom all members of the Court agreed). These basic principles were not in dispute." (§ 42)

The judge concluded, on the facts, that:

> "In my judgement, in deciding not to hold an oral hearing, the Director did not properly or fairly apply PSI 08/2013. Whilst oral hearings in the context of categorisation reviews will be "comparatively rare" (*Hassett and Price*, at [61]), all save one of what are described by the policy as important factors tending in favour of an oral hearing are squarely in play in this case. Above all, this was a case where the thrust of the evidence and the LAP recommendation favoured down-grading of a post-tariff life prisoner and, if he was not down-graded, there was an impasse. This does not mean that it was not open to the Director to make a rational finding that Mr Rose should remain in Category A. But it does mean that he could not lawfully do so without giving Mr Rose an opportunity to address the points that were troubling him at an oral hearing." (§ 62)

37. Similarly, in *R (Harrison) v Secretary of State for Justice* [2019] EWHC 3214 (Admin), Heather Williams QC (sitting as a Deputy High Court Judge) noted that PSI 08/2013 indicates at §4.6 that the more of the factors set out in that section of the policy are present, the more likely it is that an oral hearing will be needed. The judge further noted that:

> "54. The Defendant accepts that other than the presence of an impasse, the factors identified in sub-paragraphs (c) and (d) of para 4.7 of PSI 08/2013 are present. The Claimant has been a Category A prisoner for almost 20 years. He is nearly ten years post-tariff and he has not had an oral hearing at any of his previous Category A classification reviews.
>
> 55. … in and of themselves these factors are unlikely to give rise to a requirement to hold an oral hearing, as it would not necessarily follow from them being present, that there was an

> issue of substance that would benefit from consideration at such a hearing. In a similar vein, in *R (Morgan) v Secretary of State for Justice* [2016] EWHC 106 (Admin) at para 47, William Davis J. characterised these factors as "*the more nebulous potential justifications for an oral hearing*". Mr Manknell [for the Secretary of State] rightly accepts that when these factors are present, the question of whether to hold an oral hearing requires particularly careful consideration. I would add that if there is also a more specific reason for a hearing (an important dispute of fact / a significant dispute between the experts and/or an impasse), then the extent to which these factors are present will provide important context within which to evaluate the potential value of an oral hearing."

and concluded as follows:

> "72. … the assessment of whether an oral hearing is appropriate is not determined by a mathematical exercise of simply totalling up of the number of factors mentioned in para 4.7 of PSI 08/2013 that are in play. However, as para 4.6 recognises: "*the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed*". Moreover, it will be pertinent to consider the strength of each of the factors that are in play. In this instance, for reasons I have already identified, there were compelling reasons for an oral hearing in light of the significant differences of views between the Director (on the one hand) and the prison psychologist and the LAP (on the other) regarding the central issue of risk reduction; and the impasse that resulted from the continuation of the Claimant's Category A status. These considerations were supported by the factors I have discussed at paragraph 55 above. However, when declining to hold an oral hearing, the Director did not identify these considerations, all of which arose from a proper application of PSI 08/2013 and instead he wrongly concluded that "*an oral hearing was not needed to fully understand the strengths of Mr Harrison's progress or the reasoning in the available assessments*". In so concluding, the Director did not properly or fairly apply PSI 08/2013.
>
> 73. I have kept in mind the Court of Appeal's guidance in *R (Hassett and Price) v Secretary of State for Justice* [2017] 1 WLR 4750. Nonetheless, this was a case where the combination of factors pointed very strongly in favour of an oral hearing before the Director made his decision. Furthermore, the circumstances were not dissimilar to those contemplated by Sales LJ at para 61 of his judgment (paragraph 37 above); as the Director was not persuaded by the assessments of the prison psychologist or the recommendation of the LAP, this ought to have been a situation where, "*having read all the reports… [he*

> *was]…left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference"*."

38. Calver J in *R (Smith) v Secretary of State for Justice* [2020] EWHC 2712 (Admin) cited and followed the statement in *Rose* § 42 quoted above. Applying PS 08/2013, he concluded on the facts before him that the case was one of those comparatively rare ones where fairness would require an oral hearing before the CART (§ 28). As part of his review of the various factors in play, Calver J stated:

> "Whilst perhaps a factor which is of somewhat less weight than the factors referred to in (1)-(5) above, I also consider that now that the Claimant has satisfactorily completed over an 8 year period the various programmes and psychological counselling sessions for which he has been assessed to be suitable, and particularly since the Director has not heard directly from the Claimant for the 14 years that he has been imprisoned as a Category A prisoner, it might make a significant difference to the outcome of the review for the Director to hear, face-to face, from the Claimant himself about his own attitude to the issue of why there is now a significant reduction in the risk of his reoffending." (§ 34(6))

39. In *R(Bamber) v Secretary of State for Justice* [2020] EWHC 2842 (Admin), on a renewed permission application, Julian Knowles J stated:

> "I am entirely satisfied…that the Claimant had a fair opportunity to present his case on why he ought to be re-categorised even without an oral hearing… I find that the Claimant had a full and fair opportunity to present his case, and that an oral hearing would have added nothing. I agree with the Secretary of State's submission that, essentially, the question was: what inference about the level of risk could properly be drawn from the largely undisputed facts? I do not consider that an oral hearing would have meaningfully aided the inference-drawing process. In other words, it would have provided no greater degree of certainty about the correct inference on risk than was possible from an analysis of the written evidence alone. The fact that the experts disagreed about what inference should be drawn about risk did not of itself justify an oral hearing." (§ 47)

That was evidently a case where the question for the Director was what inferences should be drawn from essentially undisputed facts.

40. In *R(Smart) v Secretary of State for Justice* [2021] EWHC 1898 (Admin) Thornton J stated:

> "I have considered the extent to which the Claimant had a fair opportunity to present his case at other stages of the information gathering process. I am satisfied that he had a fair opportunity to do so….His representatives were provided with the dossier of information compiled for the decision making….The Claimants'

> representatives submitted detailed representations setting out the legal framework; the policy in relation to oral hearings; relevant guidance on denial of an index offence; the Claimant's recent reviews; his offending behaviour work, including RESOLVE; his prison discipline. The Claimant's psychology report was summarised and an oral hearing requested….
>
> It is not apparent to me what could have been said at an oral hearing that was not said on paper." (§§ 66-67)

(D) THE PARTIES' CASES IN OUTLINE

41. The Claimant submits, in outline, that a fair application of the applicable policy, PSI 08/2013, and of common law principles, indicate that an oral hearing was necessary:

    i) There was a dispute between the Director and the authors of the main written evidence on the key question, namely whether there had been a significant reduction in risk. The Director rejected key recommendations from report-writers without giving them or the Claimant an opportunity to put his case.

    ii) The Defendant relied on factual allegations recorded in the psychologist's provisional report, which the psychologist made clear were disputed (namely that the Claimant had demonstrated offence-paralleling behaviour and shown a lack of commitment to his specialist prison unit). These allegations were not only disputed by the Claimant, but they were also inconsistent with all of the other evidence. The Defendant purported to resolve this factual dispute against the Claimant without hearing from him about any of them.

    iii) The central questions of whether the Claimant had consolidated his previous learning and/or shown a lack of insight into his index offending were inherently subjective. Their resolution depended on the Claimant's presentation in oral evidence.

    iv) The Claimant has been in Category A conditions for a significant period of time and has never had an oral hearing before.

    v) This was therefore a case in which the Defendant ought to have been in significant doubt on a matter on which the prisoner's own attitude might make a critical difference.

42. The Defendant notes that:

    i) The Claimant was convicted of unusually serious offending. Whilst he did not know the precise target, he was willing to be a suicide bomber. The Claimant was party to a conspiracy which contemplated mass murder by an unspecified number of suicide bombers. In order to protect the public, there is a pressing need to prevent prisoners who pose an undue risk if unlawfully at large from being able to evade the checks and restrictions of being imprisoned.

ii) The Director had a dossier to consider, which included positive comment on the Claimant from officers who worked with him. There can be no concern that the Director was unaware of points in the Claimant's favour.

iii) The psychological assessment was thorough. It included points in the Claimant's favour and details of more questionable conduct. On any view it was a comprehensive assessment. The psychologist recognised the risk of the Claimant's offence paralleling behaviour.

iv) There are numerous recommendations for the Claimant's further development if not downgraded.

v) The risk assessment considered that the Claimant poses a 'high' risk to the public in the community.

vi) To the extent that the dossier contained negative entries in respect of the Claimant it also contained the Claimant's reply.

vii) Detailed submissions were made on the Claimant's behalf by his solicitors.

43. The Defendant submits that:

i) The report-writers' conclusions and the bases for them were clearly apparent from the terms of their reports, and having an oral hearing to ventilate the differences between them would have added nothing to the process.

ii) A dispute on the expert materials is, in any event, only one of the factors listed in PSI 08/2013 as tending to favour an oral hearing. Such a dispute is only relevant (if at all) where the dispute is significant, there is a real live dispute on particular points of real importance, and a hearing would be of assistance in dealing with the dispute. Whilst the LAP took the view that the Claimant should be recommended for a downgrade, the Director was fully entitled to assess that the parallel-offending outweighed the Claimant's positive behaviour. In addition, Ms Sargeant the psychologist who attended the LAP meeting, did not recommend the Claimant's downgrade.

iii) The Director recognised that the Claimant had maintained a good standard of behaviour in the PIPE unit and that there was a large amount of positive information showing the Claimant's adherence to and good use of the regime. The positive case that could be advanced on behalf the Claimant in an oral hearing was therefore already well-known and considered.

iv) The Director was fully entitled to rely on the conclusions in Ms Cechaviciute's report, which had been prepared following discussions with the Claimant himself and set out where the Claimant disagreed with her conclusions. The Director took all of this into account when reaching his decision. Ms Cechaviciute identified a discrepancy between the Claimant's version of events and his actual conviction, and a possible outstanding need to address the area of "*intent to harm*". She therefore did not accept that the Claimant had developed a full acceptance into the potential harm caused by his offending behaviour, and the Director was fully entitled to agree with that view.

v) There was no need for an oral hearing for the Claimant to show that he had demonstrated greater insight and evidenced consolidation of the skills learned on treatment programmes.

vi) The fact that the Claimant has been in custody for a number of years does not justify an oral hearing without other supporting grounds.

vii) There is no impasse. Ms Cechaviciute's report clearly sets out further risk reduction work available to the Claimant, specifically the recommendations in Appendix 1 to her report.

viii) Even if all four of the factors set out in PSI 08/2013 § 4.7 were met, there would no obligation to hold an oral hearing. Each case must be considered on its own facts, as the guidance makes clear. The fundamental question is whether the procedure as a whole was fair.

ix) In fact, the only factor met here is that the Claimant has not previously had an oral hearing. That is not sufficient.

x) It is not accepted that important facts are in dispute. The report set out where the Claimant disputed the views of the psychologist, and the Director was satisfied that he was clear on the position without needing to hear evidence from the Claimant.

xi) There is no significant dispute on the expert materials. The difference between the LAP and the Director was not of a sort that could be assisted by an oral hearing, and the Director is fully entitled to form a different view from that of the LAP.

(E) ANALYSIS

44. In his written submissions, counsel for the Defendant suggested that the decision in *Hassett* was "*largely dispositive*" of the present case, in holding that oral hearings will be rare, and in emphasising the difference contexts in which Parole Board and categorisation decisions are taken. However, the statements in *Hassett* that oral hearings will rarely be required do not in themselves state the legal test to be applied: though they do serve as a reminder that in this particular context it will be rare that the common law principles and policy guidance summarised above will result in an oral hearing being required. The Court of Appeal in *Mackay*, while acknowledging the same point, made clear that there is no requirement that exceptional circumstances should exist in order for an oral hearing to be necessary (§ 28).

45. I do, however, accept the Defendant's further submissions that:

i) the paramount question for the court is whether or not the Claimant has been given a fair opportunity to make his case; and before concluding that an oral hearing is necessary, the Defendant is entitled to ask what purpose such a hearing would have: what issues might such a hearing resolve? and

ii) the fact that positive views are expressed concerning a prisoner does not occupy the field. It is permissible for the Defendant to conclude that the test for a downgrade has not been met and that a hearing is not required.

46. I consider that, on a straightforward application of the legal principles and policy summarised in section (C) above, the present case is one of the comparatively rare cases where an oral hearing was required.

47. I bear in mind the emphasis placed in *Hassett* on the other case law to which I have referred on the administrative nature of the decision and the need to consider the fairness of the process as a whole. I also bear in mind the importance of the ramifications of a category A classification: both in terms of public protection and for the prisoner himself.

48. I consider that in this case several factors which would tend to point towards the need for an oral hearing were present, some to a significant degree.

49. First, in my view there were important disputed facts. The reasons given for the decision to maintain the Claimant's category A status rested, at least in very significant part, on three key factors:

i) that the Claimant had yet to achieve a full acceptance of or insight into his own potential for harm, or the harm posed by his offending;

ii) evidence of several offence-paralleling behaviours; and

iii) evidence that the Claimant had a limited commitment to the PIPE unit.

50. In relation to at least the second and third of these there were in my view significant disputed facts. The Claimant suggests that there were also significant disputed facts in relation to the first reason, insight, but I do not need to decide that question. I bear in mind that insight was one of the important matters which the Director took into consideration, but that it was not the only important factor. The terms of the decision indicate that it was based on the combination of all three of the factors listed above, and the fairness of the procedure has to be considered in that context. There is also some force in the Claimant's point that factors (ii) and (iii) may themselves have had some bearing on the view formed about the Claimant's insight.

51. The Defendant submits that the Director did not determine any of these matters against the Claimant, but merely had regard to existence of evidence. However, it is evident that the Director must have regarded the above points as having significant force, as they were among the relatively few stated bases of the decision.

52. As to factor (ii) above, the suggestion that there had been offence-paralleling behaviours was based on two matters.

53. The first of these was the observation panel incident referred to in the reports of Mr Talbott and Ms Cechaviciute. It might be said that this involved little in the way of disputed facts, and that the papers before the Director set out relevant context provided by the Claimant and Mr Talbott. On the other hand, an oral hearing would have enabled the Director to see the Claimant and Mr Talbott at first hand, in order assess whether

the incident was out of character (as Mr Talbott said). It would also, in any event, have provided a proper opportunity to address whether it was right to view this incident as offence-paralleling behaviour, bearing in mind also the apparent gulf between a peaceful protest of this kind (immediately discontinued when challenged) on the one hand, and the risk of criminal behaviour on the other. It is also relevant to bear in mind that the Court of Appeal in *Mackay* (a case about categorisation) considered pertinent Lord Bingham's statement in the different context of recall from licence that *"Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him"* (see § 32 above).

54. Perhaps more acutely, there appears to have been a direct conflict of fact in relation to the incident referred to in the quotation in § 14.iv) above, where the Claimant was said to have made an accusation of racism and to have needed to be calmed down. So far as one can discern from the papers, this allegation came from an unspecified source and concerned events on an unspecified date. It seems somewhat at odds with Ms Boulton's and Mr Talbott's stated experiences of the Claimant's interactions with the PIPE team, in terms of both whether the Claimant would have been likely to make an outright allegation of racist against the PIPE team, and how like it is that he would have required to be calmed down in any significant sense. An oral hearing would have allowed the matter to be explored. It is true that not all questions of disputed fact will prove capable of resolution at an oral hearing, and also that categorisation decisions do not necessary require hard-edged factual findings to be made. However, as the authorities recognise, an oral hearing provides a better opportunity for disputed facts with a material bearing on the categorisation decision to be assessed in a fair way.

55. As for factor (iii), the concerns expressed in Ms Cechaviciute's report about the Claimant's apparent failure to engage sign up with creative sessions, and engagement with PIPE more generally, appear at odds with the comments in Mr Talbott's and Ms Boulton's reports summarised in §§ 10-11 and 17 above. In those circumstances, for the Director to hear from them orally would have produced a fairer process.

56. The Defendant's **written submissions** made the point that Ms Cechaviciute's made clear that some of these incidents were disputed, but that since the report fairly set out the Claimant's side of the case, the procedure was fair. It thus seems to be accepted that there were disputed facts. However, the fact that written materials presented to the Director made that clear cannot, at least in all cases, be a complete answer. One of the benefits of an oral hearing is that material disputed facts can be better assessed, including by hearing from the key people involved, giving an opportunity to ask them questions and hearing from the Claimant himself.

57. Secondly, although PSI 08/2013 § 4.6 focusses on instances where an independent psychologist has provided a report, the circumstances in which an oral hearing would help provide a fair assessment of psychologist matters are not limited to such instances. Here, the prison psychologist expressed a provisional view, deferring however to the LAP, which concluded in the Claimant's favour. The Director, for the second time in a row, disagreed with the LAP's recommendations. In those circumstances, an oral hearing would have provided a chance for the concerns which led the Director to form a different view from the LAP to be understood and addressed. I note that Calver J in

Smith considered it relevant that the Director had more than once disagreed with the LAP about downgrading (§ 34(2), citing *H* § 23). The fact that the Director has disagreed with the LAP does not automatically mean there must be an oral hearing, but in combination with other factors such as exist in the present case, disagreement twice in a row is a factor tending to point towards the need for such a hearing.

58. Thirdly, the length of time for which the Claimant had remained in Category A, though of course in no way decisive, was a factor in favour of an oral hearing.

59. Fourthly, the fact that the Claimant had never had an oral hearing is a further factor in the same sense.

60. Fifthly, the Claimant was four years from tariff expiry. Remaining in Category A at this stage had a potential adverse impact, as the pre tariff expiry review would be due to begin in August 2023, and the lack of a category downgrade now would affect the Claimant's potential progress towards possible ultimate release on licence.

61. In my judgment, the combination of these factors made this a case where an oral hearing was necessary in order for the procedure to be fair, and to comply with PSI 08/2013.

(F) CONCLUSIONS

62. The Claimant's claim succeeds in principle. I shall hear submissions from counsel as to the appropriate form of relief, but I note the indication given at the hearing that, in all the circumstances, declaratory relief may be the most appropriate remedy.

63. I am grateful to both parties' counsel for their helpful written and oral submissions.