Neutral Citation Number: [2023] EWHC 160 (Admin)

Case No: CO/1229/2022

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

Date: 30/01/2023

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

THE KING on the application of OMAR KHYAM	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Miss Daniella Waddoup (instructed by **Birnberg Peirce Ltd**) for the **Claimant**
Mr Harry Adamson (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 13 December 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 30th January 2023

Her Honour Judge Belcher :

1. The Claimant, Omar Khyam, is a prisoner currently detained at HMP Full Sutton. He challenges the decision taken by the Category A Team (the "CAT") on behalf of the Defendant on 7 January 2022, which determined he should remain a Category A prisoner and not be downgraded to a Category B prisoner (the "Decision").

2. Permission was sought for three Grounds of challenge. Permission was refused on Ground 1 which asserted that the decision was based on material errors of fact/failures to take account of relevant considerations and/or the taking into account of irrelevant considerations. Thus, whether the Claimant should have been downgraded on the evidence and expert material before the CAT is no longer in issue.

3. Ground 3, now the Claimant's central ground of challenge, is that the CAT should have held an oral hearing ("the "Oral Hearing Ground"). Ground 2 asserts that the Claimant was not given adequate reasons for the Decision (the "Reasons Ground").

4. References in this Judgment to the hearing Bundles will be in the form [CB/tab/Page number] for the Core Bundle, and [SB/Tab/Page number] for the Supplementary Bundle.

The Facts

5. In 2007 the Claimant was convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property, contrary to S3(1) Explosive Substances Act 1883, and possession of material for terrorist purposes, contrary to S57(1) Terrorism Act 2000. The circumstances of that offending were that the Claimant, together with four Co-Defendants, was a party to an agreement that a significant explosion be caused in the UK, to be achieved by an improvised explosive device made from ammonium nitrate fertiliser and aluminium powder. Discussions took place about potential targets which included places where large numbers of innocent members of the public would congregate, such as nightclubs or shopping centres.

6. The Claimant received a life sentence with a minimum tariff of 20 years in relation to the conspiracy, and a concurrent 8 year determinate sentence on the possession of material for terrorist purposes. In his sentencing remarks the Judge said:

> "…….….. all of you were determined to cause indiscriminate death and injury to suffering and unsuspecting and innocent members of the community…" [CB/D1a/128]

Referring specifically to the Claimant, the sentencing remarks included the following:

> "….. you, radicalised as you were from a young age, made terrorism the principal focus of your life with all its dreadful consequences.
>
> You eventually directed your energies and attentions to the United Kingdom. You supported your ambitions by

> serious fraud. You trained in explosive techniques and passed that on to others and provided training to others who had come to Pakistan from the United Kingdom specifically for that purpose.
>
> You were the energy behind this conspiracy. You involved others by bringing them into the plan. Your activities in Pakistan became focused upon revenge attacks in the United Kingdom. You were the principal behind the purchase of 600 kg of ammonium nitrate fertiliser and you brought aluminium powder to mix with it from Pakistan. You were closely involved in the development of the remote-controlled device in Canada. You spoke with enthusiasm and pleasure of the slaughter of non-believers.
>
> You are ruthless, devious, artful and dangerous, and it will be a matter for the future whether you are ever fit for release." [CB/D1a/130-131]

7. In June 2008, the Claimant was further sentenced to an indeterminate sentence with a minimum tariff of 4 years for an offence of causing grievous bodily harm with intent contrary to S18 Offences Against the Person Act 1881, for pouring hot oil over a fellow prisoner. The Judge sentencing him for that offence said:

> "….. from the actual description of the event, it is clear that you did that quite callously and deliberately without any regard for the physical or mental effect of your conduct on your victim. The injuries that were caused involved second and third degree burns and were truly horrific." [CB/D1i/218-219]

8. The Claimant's minimum tariff expires in March 2024, and he will then become eligible for parole. The Claimant is now 41 years of age, and was a young man aged 19-22 at the time he committed the serious terrorism offences. There is no dispute that prior to 2015, the Claimant declined to engage with sentencing programmes. In 2015 he first agreed to engage with the ERG 22+, a tool for assessing and managing the risk of extremist offending. It is common ground that since 2015 he has made commendable progress.

9. As a result of his progress, on 16 November 2020 the Defendant authorised a pre-tariff review by the Parole Board of the Claimant's suitability for Category D open conditions. In doing so, in a letter addressed to the Claimant, the Defendant noted the following points, amongst others:

> "… that qualified prison staff are recommending that you should be downgraded to Category B due to your exemplary behaviour for a number of years, whilst fully engaging with offence specific and theological intervention….
>
> ……You have been assessed as requiring no further offence specific intervention, your targets will now be to

> consolidate progress made thus far and maintain your good conduct.
>
> The Secretary of State will only authorise a pre-tariff review on the basis there is an evidential prospect of success that the Parole Board will recommend to the Secretary of State that the offender's risk is manageable in category D open conditions. In your case, the Secretary of State therefore authorises your pre-tariff review." [SB/B3/51-52]

10. On 7 January 2022, the CAT made the Decision. It will be necessary to visit the detail of that decision and the reports leading to it, but for the purposes of setting out the background facts it is sufficient to record the CAT's conclusion that the Claimant's offending "…. shows you would pose a high level of risk if unlawfully at large, and that before your downgrading can be justified there must be clear and convincing evidence of a significant reduction in this risk" [CB/C1/107-108].

11. On 2 March 2022, the Parole Board directed that the Claimant's pre-tariff review should be determined at an oral hearing. In so doing, Parole Board member Geering identified issues for the parole review including the circumstances of the Claimant's earlier offending; the Claimant's position in relation to earlier offending and in particular whether he was minimising either the plot or his engagement in it; and to make an up-to-date assessment of perceived progress and the genuineness of that progress recognising that time had passed since the reports of the offender supervisor ("OS") and the offender manager ("OM"). [SB/C1/149-150]

The Reports

12. A number of reports from various professionals working within the prison system were in evidence before the CAT when it made the Decision. Some of these reports were prepared specifically for the categorisation review. Others were prepared as part of the parole review but were before the CAT. Plainly the reports were prepared for different purposes. The purpose of the parole process was to assess the suitability of the Claimant for open conditions (that is, a Category D prison). The purpose of the CAT review is to assess the risk the prisoner would pose if unlawfully at large.

13. The following reports which were before the CAT are of particular relevance in this case.

The "Parvez Report" [SB/B2/14-50]

14. This report dated 10/2/2020 was prepared by Gaz Parvez, a prison offender manager, in November 2019 and is entitled Post Healthy Identity Intervention (HII) Assessment of Risk of Extremist Offending Behaviour. Ms Parvez concludes that there is evidence that Mr Khyam has developed good insight into his own areas of risk and the protective factors beneficial for him to maintain to help him live and offence free life. In Ms Parvez' opinion, Mr Khyam has received intensive intervention which has been sufficient to the risk he presents. Ms Parvez notes that Mr Khyam does not require any further structured interventions in custody and states "it could be argued that Mr

Khyam has reduced his risk enough to be managed as a Category B prisoner" [SB/B2/47-48].

The "Peacock Report" [CB/D1e/203]

15. Section 7a of the Category A dossier (prepared for the categorisation review) contained a report dated 12 January 2021 from A.Peacock, a custodial manager at HMP Full Sutton. This report was a "Current Assessment of Risk from the Security Department". This report identified no relevant intelligence, but also noted that Covid 19 had "….. limited the opportunities for prisoners to associate with others and for them to demonstrate either positive or negative behaviours". It also noted that Mr Khyam "… still associates… with TACT prisoners". TACT prisoners are terrorist and counterterrorist prisoners. It further notes that Mr Khyam fully engages in a positive manner with his key worker and the imam.

The "Vassie Report" [CB/D1f/204]

16. Section 8 of the Category A dossier is a report dated 15 January 2021 from the Muslim prison chaplain, Dr Vassie. He noted that Mr Khyam arrived at HMP full Sutton just after the start of the Covid 19 lockdown and that his engagement with the chaplaincy had therefore been limited to interactions during association or exercise, or through his cell door. The report notes that Mr Khyam is always willing to engage and expresses an appreciation of the negative consequences of his choices on members of his family as well as on himself. Dr Vassie concludes that Mr Khyam's family is a protective factor as is his desire to acquire useful knowledge, coupled with his ".. willingness to talk somewhat openly about, and to acknowledge, the wrong choices - based on ignorance as well as youth - that led to his conviction and the consequences thereof".

The "First Stewart Report" [CB/D1g/205-208].

17. Section 6 of the Category A dossier contained a report dated 31 January 2021 from Mark Stewart. Mark Stewart was the Claimant's prison OM. The report rated Mr Khyam's risk to the public in the community as "high". The report notes that the Claimant has completed the HII (healthy identity intervention course) and completed a post HII ERG 22+ (extremism risk guidelines assessment process), and reports have been received. The post-treatment ERG assessment completed in November 2019 was noted to be positive about the Claimant's engagement and progress made, and Mr Stewart quoted the following from the conclusions and opinions section of that report:

> "In summary, Mr Khyam appears to take ownership of his actions and has demonstrated consistent behavioural change since completing HII and theological work."
>
> "It could be argued that Mr Khyam has reduced his risk enough to be managed as a Category B prisoner."

Mr Stewart goes on to note that since completion of the ERG, Mr Khyam has continued to engage with the prison imam, Dr Vassie, and that Dr Vassie's report (which appeared at section 8 of the Category A dossier) appeared to support the conclusions of others that Mr Khyam no longer accepts the Islamist interpretation of Islamic teaching as requiring violent jihad.

18. Mr Stewart's conclusions are as follows:

> "Over the last seven years, Mr Khyam has undergone intensive intervention designed to address the factors underpinning his offending, namely his acceptance of Islamist teaching. The reports of all assessors are positive in terms of his engagement and progress and his custodial record is evidence of positive engagement with key workers and good conduct generally. It has to be acknowledged that Mr Khyam is an intelligent and resourceful individual, not given to impulsive or reckless behaviour who has previously used his considerable talents for illegal, disruptive and potentially harmful ends. His parole eligibility date is only three years away and it is fair to consider whether or not his positive engagement has been driven more by the prospect of potential release, than acceptance of prosocial beliefs and a desire to change.
>
> My view is that the overwhelmingly positive assessments of Mr Khyam from different professionals with religious and psychological expertise, obtained over an extended period, suggests his claims to have rejected extremist Islamist beliefs are sincere and the prospect of further offending is also therefore, significantly reduced.
>
> In light of this consistent evidence of rehabilitative progress and positive behaviour, I propose that Mr Khyam's security be reduced to category B" [CB/D1g/208].

The "Second Stewart Report" [CB/D1h/209-214].

19. Mr Stewart produced a Sentence Planning and Review Report for the parole process. His report is dated 12 February 2021 and was supplemented by a brief further explanation on 15 July 2021. Mr Khyam's risk to the public was again rated as "high", although the risk of reoffending was low. Mr Stewart noted that Mr Khyam's conduct had been "exemplary". He again considered the possibility that this was simulated but concluded that it was not. He maintained his proposal for downgrading to Category B.

"The Bray Report" [CB/D1i/215-233]

20. Mr Bray, the Claimant's community offender manager, produced a PAROM 1 Report (Parole Assessment Report Offender Manager) dated 22 February 2021 as part of the parole process. Mr Bray reported that Mr Khyam continued to maintain that it was never his intention to attack targets within the UK, rather he asserted he intended to return to Pakistan and/or Afghanistan in order to continue with jihad in those areas. Whilst Mr Bray reported that Mr Khyam did not seek to minimise the efforts he made to engage in this behaviour and his willingness at the time, he noted that Mr Khyam maintains that elements of the case against him were taken out of context. Mr Bray found this difficult to accept,

[CB/D1i/217], and whilst acknowledging the very positive reports of Mr Khyam's progress over a period of 7 years, given the Judge's sentencing remarks referring to Mr Khyam as the "energy" behind the conspiracy offences, Mr Bray was of the opinion that "…the balance between progression and caution is key" [CB/D1i/231].

21. Mr Bray considered the Claimant's current risk of serious harm to the public if in the community to be "High" [CB/D1i/224]. He noted that Mr Khyam's ability to progress significantly in relation to sentencing objectives was not currently possible as a result of Covid 19 [CB/D1i/223]. He recommended that consideration be given to a progressive move to Category B, which would balance ongoing security monitoring whilst broadening the range of academic and vocational opportunities available to Mr Khyam. [CB/D1i/231]. It is clear from the report generally that Mr Bray feels that move to Category B conditions would provide Mr Khyam with the opportunity to show that he can maintain progress and to further pursue his sentencing plan objectives including the development of a coherent resettlement plan.

The "Dybell Report" [CB/D1k/237-250]

22. Section 5a of the Category A dossier contained a report dated 25 February 2021 and 30 July 2021 from Louise Dybell, a registered forensic psychologist. In his Witness Statement in these proceedings Steven Easton of the CAT explains that Ms Dybell's report was updated in July 2021 to use the correct template, and that whilst some additions were made for clarity, none made a material difference to the CAT's decision [CB/D1/117, footnote 1 to Paragraph 19.7]. Ms Dybell's report contains the "Current assessment of risk from the Psychology Department" [CB/D1k/237]. Ms Dybell recognised that Mr Khyam had made significant progress towards risk reduction. She compared the results of the ERG assessments in 2016 and 2019 and agreed with the prison OM's 2019 overall rating for engagement with extremism as "low".

23. She states it should be noted, however, that one area for consideration when considering risk is the area of family and/or friends supporting extremism. Mr Khyam's aunt, Rukhsana Rauf, was found to be sending Mr Khyam large quantities of money which amounted to thousands of pounds until as late as 2018, and that he only desisted in this when challenged about this behaviour. The report states that Mr Khyam reported that this money was sent with the intention to support other Muslim prisoners from engaging in any further criminal activity. It is clear from the context that should refer to "not" engaging in further criminal activity. Ms Dybell acknowledges that there is no indication that the monies were received with the intention to fund any terror-related behaviour but noted that this was done with little question or exploration as to the intent with which the money would be used. She was of the opinion that family may be directly or indirectly complicit with any future means of Mr Khyam's engagement [CB/D1j/240]

24. Ms Dybell accepts that Mr Khyam has progressed with regard to his level of intent which was deemed low. However, she states this "is with caution" as it is of some concern that Mr Khyam has yet to fully explore his level of involvement and his position within the terrorist organisation. She notes this has been an objective persistently set for Mr Khyam, and that he has made some progress with regards

to acknowledging he was aware that the fertiliser was likely to be used in some way, but that he maintains his involvement was minimal and his position was considered low in the hierarchy. In interview Mr Khyam reported he was not considered to be instrumental in the terrorist organisation. He asserted he had progressed in the group due to his capabilities (including fluency in both Pakistan and English language and computer literacy) rather than his intentions for harm. Ms Dybell states that he was vague about what his intentions were, meaning harmful means to an end may still be an area requiring further exploration to be confident this has reduced to "not present". Whilst denial should not be a bar to progression, she states Mr Khyam should consider what function holding onto details of his involvement and intent serve him given all the extensive effort he has recently undertaken to demonstrate progress and what this may suggest about his genuine commitment. [CB/D1j/242]. She states that his motivation for progression will remain in question whilst he does not fully explore his role in offending [CB/D1j/247]

25. Ms Dybell also agrees with the prison OM's overall capability assessment through the ERG in 2019 as "some". This is based on Mr Khyam being an intelligent and tactical individual with the capability to access networks, individuals, and equipment. She recognises these areas of knowledge and skill are not a direct indication of increased risk of future reoffending. She notes that his capability factors could be used as a harmful means to an end as well as positively to help him progress. She further states that given the restrictions from the recent Covid 19 pandemic, Mr Khyam may not have had the full opportunity to evidence progress. [CB/D1j/242-243]

26. Further Ms Dybell raised concerns about Mr Khyam's future living situation "…due to uncertainty of his future life choices, with regards to returning to Pakistan or remaining in the UK". She acknowledges he has a supportive family but caveats that, since his family were supportive of him at the time of his offending and have since provided him with large quantities of money without question whilst in custody. [CB/D1j/244]

27. Ms Dybell acknowledges that Mr Khyam has reduced his risk and that no further work is deemed necessary with regards to offending behaviour. However, given that he has partially present concerns with regards to the two Capability factors (knowledge and access to funding) and one in Engagement (political and moral motivations), she states he may require an extended period of observation to further evidence and support his assertions to desist. Whilst acknowledging that Covid 19 restrictions should not impact on someone's ability to progress, she states that it is difficult to ascertain whether the fact he has been helpful and compliant throughout is a true reflection of progress, especially given the added factors she has already referred to.

28. She concludes that positive behaviour indications alone are not sufficient to warrant a reduction in security provisions at this time and recommends that Mr Khyam remain a Category A status prisoner to give him sufficient time to evidence his commitment to progression, outside of the Covid 19 restrictions with the following targets:

> "Mr Khyam should work towards providing a more open account of his role and intentions in his offending, which has been an ongoing target throughout his sentence. ……. His apparent reluctance to [fully explain his role as a central key figure in the planning and carrying out of terror attacks as intelligence suggests] will continue to cast a shadow over his genuine motivation towards redirecting his capabilities for positive means, rather than using his skills for his own continued political gains. Therefore, caution in reducing restrictions will continue to be necessary"[CB/D1j/248]
>
> "He should continue with the positive work he has undertaken to grow educationally and theologically, as well as continue to self reflect and build diverse relationships and engage positively with the regime. A further period of increased supervision offered by Category A status would not present as a barrier to his progression towards eventual release. Should Mr Khyam now be using his capabilities identified as a genuine approach towards growth and change, the extra surveillance should provide continued evidence to increase confidence in those managing him." [CB/D1j/248 and 250]

"The Crundwell Report" [CB/D1o/280-309].

29. Lucy Crundwell, a registered forensic psychologist, prepared a report dated 20 October 2021 on the instructions of the Defendant as part of the Parole Bard process. She reported that Member Case Assessment directions requested that a psychological risk assessment be conducted using appropriate assessment tools, and drawing on previous ERG 22+ assessments, along with other sources of information. The directions noted that the risk assessment should review progress made and risks he presents with and consider options for managing his risk in three scenarios: closed conditions, open conditions, and community (although release was not an option at that stage) [CB/D1o/282].

30. For her report she conducted interviews with Mr Khyam in September 2021 lasting approximately 6-7 hours in total [CB/D1o/284]. She used an ERG 22+ to assess risk, and consider protective factors present for Mr Khyam. The ERG 22+ highlighted that Mr Khyam's current level of engagement in extremism was "low", his intent to engage was "low" and his capability was "some". There was no evidence to suggest that this would change if he were to transfer to a lower secure establishment within the closed estate. If he were to transfer to open conditions, her opinion was that his current levels of engagement, intent and capability could remain the same, but she had a concern that he might struggle with such a big transition and that this could present as a vulnerability for engagement. If he were to be released, she considered there would be factors present which would make him vulnerable to engagement such as needing to build a support network, trying to be accepted back in the mosque to continue his faith studies, and potentially having to adjust to living in solely the UK or

Pakistan. She noted he did not have robust plans or goals for when he was in open conditions or in the community and she recommended he should work on this.

31. Whilst there were no outstanding treatment needs requiring formal treatment or intervention, Ms Crundwell believed he would benefit from a slow progression through lower category closed conditions, once he is downgraded from Category A. This would allow him to test his skills, engage in education and training, and consider his future goals and plans fully, whilst continuing to develop working relationships with staff. A bigger adjustment would be difficult to manage and could result in him being vulnerable to factors that could lead him back towards extremism. [CB/D1o/283: Executive Summary].

32. At paragraph 7.2.3 of her report, she noted that from her review she agreed with the items in the 2019 post-HII ERG 22+. The only change is that the engagement factor "political/moral motivation" was now "not present". At paragraph 7.3 she includes in table form the ERG 22+ assessments 2013 through to 2021 showing the progression and showing her conclusion that none of the engagement factors was present in 2021 [CB/D1o/290-291]. From her 2021 ERG22+ assessment she agreed with the 2019 ERG22+ that there was "some" capability in respect of 2 factors [CB/D1o/293, paragraph 7.5].

33. At paragraph 7.3.3 of her report, Ms Crundwell noted that Mr Khyam himself recognised that he prefers slow, gradual change and identified that some of the transitional periods he experienced as a younger man contributed to his vulnerability to extremism, indoctrination and group influence. As such Mr Khyam said he believed a slower progression through the system would help him better adjust and be successful in his progression, compared to a transfer to open conditions or release. Ms Crundwell agreed with this opinion and believed that too drastic a change could increase Mr Khyam's vulnerability in some of the engagement areas [CB/D1o/292]. In relation to Louise Dybell's psychological contribution to the CAT, Mr Khyam reported that he felt it was unfair that he was criticised for not giving an open account of his index offence as he felt he was not asked about it or provided with the opportunity to talk about it [CB/D1o/285].

34. At Paragraph 9.3 of her report, she stated her opinion that Mr Khyam does not require the level of supervision he currently has and could be managed in lower secure conditions with a reduction in his level of supervision [CB/D1o/303]. It is accepted by all in the case (including Steven Easton of the CAT [CB/D1/118 at Paragraph 19.9]) that this amounts to a recommendation for downgrading, notwithstanding all her conclusions are inevitably couched in terms that everything is dependent on a reduction in Mr Khyam's security classification by CAT (See, for example, [CB/D1o/283, 303 and 305]).

The "LAP Recommendation" [CB/D1p/310-312]

35. Section 9 of the Category A dossier contained the minutes and recommendations of the Local Advisory Panel ("LAP"), dated 21 October 2021. The LAP is a five-member panel within HMP Full Sutton and included the Deputy Governor, the Head of Offender Management Services, the Head of Psychology and Interventions, and two Prison OMs. Under PSI 08/2013 LAPs are to consider prisoner reports and representations and provide a recommendation to the CAT.

36. The chairman of the LAP placed on record that since March 2020 the service had been in command mode, and as such much of the regime was restricted, limiting the opportunity for prisoners to engage with staff or purposeful activity. The LAP was requested to bear this in mind and balance their opinions and views appropriately, i.e. that they should consider what has been achieved against what has been available. The previous Category A review was in December 2018. Mr Khyam arrived at HMP Full Sutton in March 2020, with the result that at Full Sutton he had been subject at all times to the restricted regime required by the COVID-19 restrictions. The LAP noted it would be difficult to say how Mr Khyam would behave in normal Category A conditions, and that perhaps he has not yet had an opportunity to consolidate and present himself in those normal times.

37. The LAP noted that there had been a number of positive assessments from professionals with different religious and psychological expertise obtained over a period of time suggesting the prospect of further offending is significantly reduced. Whilst the Head of Offender Management Services acknowledged the POM's report (i.e., the First Stewart Report), he reminded the panel in relation to the seriousness and context of the offences and suggested it would be beneficial to allow a further period of observations before a downgrade could be recommended.

38. Summarising the 2019 ERG 22+, the Head of Psychology and Interventions noted that Mr Khyam appeared to be motivated to engage in the psychological assessment and was open about his current custodial behaviour; referred to him providing other extremist offenders with money that he had received from an external source; and noted his positive motivation to challenge and expand his theological learning. She noted that it was unfortunate that Mr Khyam minimised his involvement with the terrorist organisation during his work with the imam and remained vague towards his United Kingdom involvement. She stated this reluctance to explore in any great depth his role and personal intent continues to be a barrier to progression. Whilst Mr Khyam had reduced his risk to the level where no further work is necessary, it was noted there was still concern regarding outside capability factors including his knowledge and his access to funding.

39. The LAP concluded that positive behavioural indications are not sufficient to warrant a reduction in security level and that Mr Khyam would benefit from providing a more open account of his intention surrounding the index offence. It noted that caution should be applied in relation to considering Mr Khyam's positive skills to be purely protective, as they are also the skills which allowed him to climb the ranks in the terrorist organisation. The LAP recommended that Mr Khyam needed a further period of supervision within Category A conditions, for consolidation and to contribute a more open account of his role. They did not consider he had significantly reduced his risk.

40. The LAP minutes note that "Legal representations and other supporting documentation had been submitted however they were not received until sometime after the deadline- this being the case they were not considered but will be enclosed with the review paperwork when the case is submitted to the Category A team for their comments" [CB/D1p/310]. Thus, in making their recommendation the LAP did not take into account the Crundwell Report, or

representations from Mr Khyam's solicitors dated 19 and 25 October 2021, the latter specifically addressing the Crundwell Report.

The Decision [CB/C1/107-108]

41. On 7 January 2022, the CAT issued the Decision to maintain Mr Khyam in Category A conditions. It noted that Mr Khyam's offending shows 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 risk. Whilst acknowledging good behaviour within the regime, the CAT considered that Mr Khyam's general regime adherence was insufficient to show a significant reduction in his risk if unlawfully at large, particularly taking into account the specific nature of his offending.

42. The CAT noted that the dossier reports were uniformly favourable in relation to Mr Khyam's participation in offender work and his expressed motivation to progress. Given the reasons challenge in this case, I consider it appropriate to quote the reasons section verbatim:

> "The reports and the LAP nonetheless highlight a number of areas where further progress could be made, or where the true extent of your progress is as yet unknown. This includes the probation officer's report, which highlights the possibility that your progress may be simulated as a means to an end. It [i.e., the CAT] noted the reports confirm that, despite the extensive work completed, you still deny full direct responsibility for involvement in your offending, which in the case of such serious offending is clearly a legitimate cause for concern. The reports show that it remains unclear in which direction you will choose to direct your interpersonal skills in future. The reports also show your recent progress has been made during a period of restrictions. This has resulted in an incomplete assessment of the quality and strength of your skills, particularly when no longer within your present secure environment. It supported the view of the LAP that your willing engagement and recent behaviour are to your credit. A further sustained period of progress and assessment is however needed to establish the precise level of risk reduction
>
> The Category A team considered that convincing evidence of a significant reduction in your risk of similar reoffending if unlawfully at large is not shown. It is therefore satisfied you must stay in Category A at this time.
>
> The Category A Team noted your representations but consider these also provide no clear and convincing evidence you have achieved a significant reduction in your risk of similar offending if unlawfully at large. It noted the recent psychological assessment included in the

> representations broadly reflects the other assessments relating to your recent progress. This assessment nonetheless also refers to the uncertainty over the strength of your management skills (and development of future plans), and therefore recommends your staged progression. It [i.e., the CAT] considered this assessment provides no convincing evidence you have at this time achieved a significant reduction in your risk if unlawfully at large. It considered there are also no grounds to consider this review further through an oral hearing, in accordance with the criteria in PS1 08/2013." [CB/C1/108]

The reference in the final paragraph to the recent psychological assessment refers to what I have called the Crundwell Report.

The Law and Relevant Guidance

43. There is no dispute as to the relevant law and guidance in this case. The dispute is as to its application to the facts of this case. I have been assisted by both Counsel and this section of my judgment is drawn from both the Statement of Facts and Grounds and the Detailed Grounds of Resistance.

44. Pursuant to S12 of the Prison Act 1952, a prisoner may be lawfully confined to such prison as the Defendant directs. Under S47 of the Prison Act 1952, the Defendant may make rules for the classification of prisoners. Rule 7(1) of the Prison Rules 1999 (made pursuant to S47(1) of the Prison Act 1952) states:

> "Prisoners shall be classified in accordance with any directions of the Secretary of State, having regard 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 purposes of their training and treatment…"

45. All male prisoners are classified into one of four categories from A to D. Paragraph 2.1 of Prison Service Instruction 08/2013 ("PSI 08/2013") defines a Category A prisoner 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."

46. Paragraph 1.4 of The Framework Policy on Categorisation (the "FPC") makes it clear that any categorisation decision must be taken on risk factors alone and is neither a reward for good, compliant behaviour, nor used as a punishment. Section 8 of the FPC deals with categorisation reviews. Paragraph 8.1 provides:

> "Categorisation reviews ensure that individuals continue to be assigned to the security category most appropriate to managing their risk throughout their time in custody. The aim is that they will, at all stages of their sentence, be held in the lowest security conditions necessary to manage the identified risk."

Paragraph 8.12 provides:

> "The categorisation review must assess the individual's current risks, information about their behaviour in custody and positive efforts made towards rehabilitation, and whether the identified risks can be managed in a different (lower) level of security."

47. The first formal review of confirmed Category A status is normally at two years, with annual reviews thereafter. A number of paragraphs of PSI 08/2013 are relevant to the issues in this case:

> "4.1……These annual reviews entail consideration by a local advisory panel (LAP) within the establishment, which submits a recommendation about security category to the Category A Team. If the LAP recommends continuation of Category A, and this is agreed by the Category A Team, then the annual review may be completed by the Category A Team without referral to the DDC High Security….. The DDC High Security (or delegated authority) will remain solely responsible for approving the downgrading of a confirmed Category A/Restricted Status prisoner, following consideration at the Deputy Director's panel.
>
> 4.2. Before approving a confirmed Category A/Restricted Status prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of reoffending if unlawfully at large has significantly reduced, such as evidence that shows the prisoner has significantly changed their attitude towards their offending or has developed skills to help prevent similar offending.
>
> 4.4 Parole assessments are however based on different criteria from security category reviews. A favourable parole assessment does not necessarily indicate that the prisoner would not be highly dangerous if unlawfully at large.
>
> 4.6. The DDC high security… 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….. The courts have consistently recognised that the [CAT] 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 [CAT] context have only very rarely been held. The differences remain; and continue to be important. However, the policy recognises that the [Supreme Court in] Osborn principles

> are likely to be relevant in many cases in the [CAT] 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 [CAT] 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 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.

48. Paragraph 4.7 of PSI 08/2013 identifies the following factors which 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 a strongly worded and positive views about 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 period 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 of 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……..
>
> d. Where the prisoner has never had an oral hearing before; or has not had one for a prolonged period."

49. Paragraph 4.28 of PSI 08/2013 provides for detailed reasons to be given for the decision, taking into account any progress the prisoner has made in the reduction of risk, and addressing any relevant points made in the prisoner's representations.

Relevant Case Law

50. It is a question of law whether an oral hearing should have been held. 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 v Secretary of State for Justice* [2011] EWCA Civ 522 at Paragraph 28. The basic test for when an oral hearing is required is whether, on the facts of the particular case, "…such a hearing is necessary for a fair disposal of the case": *R (Shaffi) v Secretary of State for Justice* [2011] EWHC 3113 (Admin), at Paragraph 38.

51. The guidance in PSI 08/2013 was considered by the Court of Appeal in *R (Hassett and Price) v Secretary of State for Justice* [2017] EWCA Civ 331; [2017] 1 WLR 4750. The court rejected the contention that the Supreme Court's guidance given in *R (Osborn and Booth) v Parole Board* [2014] AC 1115 ("*Osborn*") in relation to when the Parole Board should hold oral hearings applied equally in the case of Category A reviews. In the course of his judgement Sales LJ (as he then was, and with whom the other members of the Court agreed) discussed the differences in the two types of hearings. At Paragraph 51 of his judgment, whilst recognising that both decisions have significant effects upon prisoners and their prospects for release, Sales LJ stated that there are material distinctions between the CART [the Category A review team]/director and the Parole Board in relation to each aspect of the enquiry regarding the requirements of fairness. He identified the following distinctions. Firstly, that the Parole Board is an independent judicial body, whereas CART/the Director are officials of the Secretary of State, with operational expertise in running the security categorisation system which is part of the management function in relation to prisons. Secondly, the Parole Board considers when a prisoner can be safely released at an appropriate point in his sentence in the light of the support and supervision he will then receive to contain and safeguard against the risk he might otherwise pose. By contrast a Category A review involves what Sales LJ described as "the far starker question" of assessing the risk to the public interest if the prisoner escapes and is at large in society without any prospect of management in the community. Thirdly, Sales LJ noted that the statutory framework for the decision-making is different and that the requirements of Article 5.4 of the European Convention on Human Rights underpins the Parole Board's decision-making, but do not apply in relation to CART/the Director.

52. Having identified those differences, Sales LJ concluded that the guidance given by the Court of Appeal in the cases of *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 ("*Mackay")* and *R (Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422 ("*Downs*") regarding when an oral hearing is required before the CART/the Director continues to hold good, noting that the cases in which an oral hearing is required will be comparatively rare (Paragraph 56 of his judgment). At Paragraph 61 of his judgment, Sales LJ stated:

> "Some of the factors highlighted by Lord Reed JSC [in *Osborn*] 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 the decision to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing."

At Paragraph 69, Sales LJ said

> "I would add that even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/director to hold a hearing to allow them to ventilate their views orally. This might be so because, for example, there may be no real prospect that this would resolve the issue between them with sufficient certainty to affect the answer to be given by the CART/director to the relevant question and fairness does not require that the CART/director should hold an oral hearing on the basis of a speculative possibility that that might happen…"

53. Notwithstanding that oral hearings in the CAT context may be rare, this does not mean that there is any requirement that compelling or exceptional circumstances should exist for an oral hearing to be necessary: See *Mackay* at Paragraph 28; *R (Zaman) v Secretary of State for Justice* [2022] EWHC 188 (Admin), ("*Zaman*") at Paragraph 44.

54. The question of whether an oral hearing is required is fact specific in each case. It is not simply a question of totalling the number of factors in Paragraph 4.7 of PSI 08/13. However, the more such factors that are present in any case, the more likely it is that an oral hearing will be needed. The strength of each factor in play in a particular case will need to be considered: See *R (Harrison)* v *Secretary of State for Justice* [2019] EWHC 3214 (Admin), ("*Harrison*") at Paragraph 72.

The Oral Hearing Ground

55. This Ground is described in Miss Waddoup's skeleton argument as the Claimant's central ground of challenge. The Claimant's case is that both common law procedural fairness and the operable prison policy, PSI 08/2013, require an oral hearing. In relation to the factors identified in paragraph 4.7 of the PSI, Miss Waddoup submitted that factors (a) and (b) are both present, namely that there are important facts in dispute, and that there is a significant dispute on the expert materials.

56. Miss Waddoup submitted that the first real and live dispute on a point of particular importance to the decision is whether, as the CAT concluded on the papers, the Claimant "still denies full or direct responsibility for involvement in his offending". Ms Dybell's assessment was that the Claimant "…remained vague as to his UK involvement and intent during our interview" and had been reluctant "to explore in any great depth his role and personal intent" [CB/D1k/247, Paragraph 5.6]. Ms Crundwell's assessment, following 6 to 7 hours of interview time, was that the Claimant had spoken to her "…at length about his index offence" [CB/D1o/285-286, Paragraph 5.1.2]; that at the time of the offence he "…felt he had a right to defend Muslims" [CB/ D1o/297, Paragraph 8.2]; and that "…his commitment and involvement at the time was such that he would have done an attack if ordered to" [CB/ D1o/285, Paragraph 5.1.2]. He also described in detail the skills that had led to him being selected in Afghanistan to a "leading role" in the conspiracy [CB/D1o/294, Paragraph 7.5.1], although he maintained

there were others higher up than him in the broader terrorist organisation, i.e., Al-Qaeda [CB/ D1o/297, Paragraph 8.2].

57. Ms Crundwell referred to Mr Khyam's most recent psychological report for the Category A board (i.e., the Dybell Report) and the recommendation for Mr Khyam to give a more open account of his role and intentions within his offending. Ms Crundwell stated that in her opinion he had given an open account of his offending [CB/ D1o/303, Paragraph 9.2].

58. Miss Waddoup also pointed to the views of other professionals who have come to know the Claimant well over a sustained period of time and which do not align with the view of Ms Dybell. For example, the imam Dr Vassie described as a protective factor the Claimant's "… willingness to talk somewhat openly about, and to acknowledge, the wrong choices -based on ignorance as well as youth - that led to his conviction and the consequences thereof" [CB/ D1o/204]. Mr Stewart, the prison OM noted that the Claimant admitted that he knew the materials he had acquired were likely to be used for terrorist purposes, claimed he had not been directly instructed to carry out any attacks, but had also admitted that, had he been instructed, he would willingly have done so. Mr Stewart commented that he sees little difference in terms of accepting responsibility between planning to carry out attacks as asserted by the CPS or being prepared to carry out attacks if asked which is what Mr Khyam admits [CB/ D1l/251].

59. Miss Waddoup submitted that to the extent there is uncertainty as to whether the Claimant is in fact in a state of denial in relation to his responsibility for the index offence, this is a complex issue and one which the CAT would be much better placed to resolve by hearing from the Claimant directly, as well as from the experts as to the reasons for their differing views. She pointed to the fact that all reports agree that there is no further offending behaviour intervention required or available to the Claimant. She noted that all reports, with the exception of the Dybell Report, are very positive about the Claimant. She submitted that there has been a significant reduction in risk, and she pointed to the Parvez Report and the Crundwell Report, both of which recommend downgrading to Category B.

60. She also relies on the Secretary of State's decision to refer the case to the Parole Board for consideration pre-tariff of a transfer to open conditions and in particular, to the fact that the Secretary of State will only authorise a pre-tariff review on the basis there is an evidential prospect of success that the Parole Board will recommend to the Secretary of State that the offenders risk is manageable in Category D open conditions. By letter dated 26 November 2020, it was expressly confirmed to the Claimant that the Secretary of State authorised a pre-tariff review in his case on that basis. (See Paragraph 9 above).

61. In considering this aspect of the case, Miss Waddoup reminded me that the Crundwell Report was not before the LAP but was before the CAT. She submitted, therefore, that the apparent unanimity between the LAP and the CAT that the Claimant should not have his categorisation changed from Category A, is not "determinative" of the issue as to whether an oral hearing is required. I accept that given the LAP expressly disregarded the Crundwell Report as having been submitted after the relevant deadline, it cannot be said with certainty that the LAP recommendation would necessarily have been the same. I agree therefore that the

unanimity between LAP and the CAT in rejecting re-categorisation has to be approached on that basis. It is obviously important to recognise that materials were before the CAT which were not before the LAP. The issue here is whether all the materials before the CAT were such that procedural fairness/ PSI 08/2013 required there to be an oral hearing.

62. Miss Waddoup also submitted that there is a dispute as to whether uncertainty exists "over the strength of the Claimant's management skills and development of future plans". Ms Dybell was of the view that the Claimant's strong interpersonal skills could serve to increase his risk or could act as protective factors, depending on how he chooses to direct those skills. For Ms Dybell, this uncertainty militated against re-categorisation. Miss Waddoup pointed to Ms Crundwell's reasoning that a downgrade would allow for a gradual progression through conditions of lesser security which would in turn give the Claimant the time and opportunity to develop future plans, goals and skills.

63. Miss Waddoup further submitted that there was a dispute as to whether the Covid restrictions had resulted in an incomplete assessment of the quality and strength of the Claimant's skills and recent progress and that an oral hearing could assist in clarifying those matters. She submitted it is implicit in Ms Dybell's report that she considered the Covid restrictions to have inhibited a full assessment of the Claimant's commitment to progression [CB/ D1k/248, Paragraph 5.7]. Miss Waddoup submitted that by contrast it is implicit in Ms Crundwell's report, as well as the other reports supporting re-categorisation, that the restrictions did not preclude those report authors from safely assessing the Claimant's risk and the question of whether that risk could be managed in less secure conditions.

64. Finally, Miss Waddoup submitted that there is an obvious and important dispute between Ms Dybell on the one hand, and all the other report writers on the other hand, as to whether the test for re-categorisation is met. She submits that there is a clear dispute between the experts and that the psychological assessment produced by Ms Dybell is disputed on tenable grounds in relation to the above issues by Ms Crundwell and others.

65. In relation to these areas of alleged dispute, Miss Waddoup attached importance to the Parole Board decision to hold an oral hearing in which it identified as the issues to be considered the circumstances of the Claimant's earlier offending; the Claimant's position in relation to earlier offending and in particular whether he was minimising either the plot or his engagement in it; and to make an up-to-date assessment of perceived progress and the genuineness of that progress recognising that time had passed since the reports of the OS and the OM (See Paragraph 11 above). Miss Waddoup submitted that these are the very issues which are in dispute on the facts and between the experts for the CAT, and which equally require an oral hearing before the CAT.

66. Further, Miss Waddoup does not accept that the dispute between the Crundwell report and the Dybell report is diminished by reason of Ms Crundwell's report being prepared in the parole context. She relies on the fact that the Parole Board is considering whether the Claimant's risk can be managed in less secure prison conditions which, by definition, includes an assessment of the risk of escape or abscond occurring. Ms Crundwell considered the risks of the Claimant being

released too soon into the community, but Miss Waddoup submitted this does not detract from the stark difference between Ms Crundwell's view (which accords with the First and Second Stewart Reports and the Parvez Report) that the Claimant's risk could be managed in Category B conditions, and the views of Ms Dybell, the LAP and the CAT that it could not.

67. In addition to her points regarding the presence of a dispute of facts and a dispute between the experts, Miss Waddoup pointed out that the Claimant has been held in Category A conditions since his arrest in March 2004, a period of more than 18 ½ years, and that he has never had an oral hearing before. Whilst accepting that these factors in and of themselves are unlikely to give rise to a requirement to hold an oral hearing, she drew my attention to the dicta of Heather Williams KC sitting as a deputy High Court Judge in the case of *Harrison v Secretary of State for Justice* [2019] EWHC 3214 (Admin), ("*Harrison"*), that when these factors are present, the question of whether to hold an oral hearing requires particularly careful consideration. Pausing there, in *Harrison*, in addition to the length of time (almost 20 years as a Category A prisoner), and the fact of no previous oral hearing on any previous Category A review, there was the additional factor that the prisoner was nearly 10 years post tariff. In relation to those matters, at Paragraph 55 of her judgment the Judge said:

> "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"

68. In this case Miss Waddoup submits that the proximity to tariff expiry of March 2024 is a further factor pointing towards an oral hearing being necessary. She referred me to Paragraph 60 of the judgement of Henshaw J in *Zaman* where he said

> "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 on licence"."

I accept the obvious importance of that factor, but in that case the judge found that there were important and significant facts in dispute, and the Director had disagreed for the second time in a row with the LAP recommendation for downgrading. In concluding that an oral hearing was necessary in order for the procedure to be fair and to comply with PSI 08/2013, Henshaw J did so on the basis of the combination of those factors together with the length of time the Claimant had remained in Category A, the fact he never had an oral hearing before, and the fact that he was 4 years from tariff expiry. Thus, the imminence of tariff expiry was one of a combination of factors leading to the conclusion that an oral hearing was necessary in that case.

69. Mr Adamson on behalf of the Defendant submitted that no oral hearing was required applying both the criteria at common law and pursuant to PSI 08/2013. He submitted that notwithstanding some differences, the relevant professionals reached materially similar conclusions about the risk Mr Khyam would pose if he escaped and was

unlawfully at large. He submitted this was not one of the rare cases where an oral hearing would have assisted the CAT.

70. Mr Adamson reminded me that the CAT has an essentially administrative function and he referred me to the remarks of Sales LJ at paragraph 60 in *Hassett*

> " .. 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".

Whilst that is undoubtedly right, as Sales LJ expressly recognised, the CART/director could not lawfully refuse an oral hearing on these grounds if fairness required one. In those circumstances, I do not consider Mr Easton's evidence in relation to the resource that would be required if a large proportion of the 200 or so annual requests request for an oral hearing were granted is relevant to the decision I have to make in this case. The issue has to be whether fairness makes an oral hearing necessary on the facts of a particular case, without imposing unduly stringent standards on a prison management function.

71. In relation to the alleged dispute as to Mr Khyam's openness about his offending, Mr Adamson accepted that Ms Dybell and Ms Crundwell reached differing views. Mr Adamson referred to Paragraph 61 of *Hassett* (set out in paragraph 52 above) and accepted that an oral hearing might be appropriate if, having read all the reports, the CAT is left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference. Mr Adamson submitted, however, that the alleged dispute as to Mr Khyam's openness about his offending is not, on any view, an issue which would make a critical difference given the weight of the other evidence as to the risks Mr Khyam would pose if he were to abscond.

72. Mr Adamson submitted that in considering the significance of the Crundwell Report, it is of critical importance that it was produced for a different purpose to Ms Dybell's report and was addressing a different question. For re-categorisation, the issue is the risk posed by an offender who has escaped and is unlawfully at large, that is, in the community unmanaged and unsupervised, and subject to the stressors and pressures which would flow from being "on the run" (See *Mckay* Paragraph 26). Mr Adamson submitted that the Crundwell Report does not dispute the overarching conclusion of the CAT and Ms Dybell because it does not address the issue.

73. Mr Adamson pointed out that Ms Crundwell reaches no conclusions as to the risk that Mr Khyam would pose to the public if he were "on the run". As noted above (Paragraph 30), the Crundwell report noted that "release into the community….. would be too much of a big transition and something he could struggle to manage effectively" and noted that Mr Khyam himself recognised he would better adjust with slow gradual change and that he preferred that (Paragraph 33 above). She concluded that Mr Khyam would struggle with the "big transition" even to open conditions and that anything other than a staged transition would "be difficult to manage and could result in him being vulnerable to factors that could lead him back towards extremism" [CB/D1o/ paragraph 10.5). She reached a similar view about Mr Khyam's likelihood of using serious violence [CB/D1o/300, paras 8.5.2 and 8.5.3]. Mr Adamson submitted that once the

relevant reports, and the Crundwell Report in particular, are seen in the light of the specific question the CAT had to be determine, and when they are read as a whole as *Mackay* makes clear is required (paras 34-35 *Mackay*), they cannot be said to reflect significant, substantial disagreement with the views of Ms Dybell, the LAP and the CAT on the overarching question of whether there was clear and convincing evidence of reduction in risk in the specific context of an unmanaged escape.

74. In my judgment there is force in these submissions. I accept Miss Waddoup's submission that the fact that Ms Crundwell's report is prepared for the Parole Board is not conclusive. However, as recognised in the case law, a report prepared for the Parole Board inevitably addresses a different question to that being considered by the CAT. Whilst a recommendation that a prisoner can be managed in a less secure environment involves, at least implicitly, a consideration of him being placed in conditions where the level of security designed to prevent escape is inevitably less, that is very different from considering the risks posed to the public by a prisoner unlawfully at large and "on the run". Mr Adamson reminded me that paragraph 4.4 of the PSI expressly states that parole assessments are based on different criteria from security category reviews, and that a favourable parole assessment does not necessarily indicate that the prisoner would not be highly dangerous if unlawfully at large. A recommendation that a prisoner is suitable for parole plainly involves a recommendation for release into the community, albeit subject to management in the community and recall if conditions of parole are not met. Plainly a recommendation that a prisoner is suitable for parole is very different from a recommendation for management at Category B in a secure environment, which is what we have in this case.

75. Furthermore, the recommendations being made are with a view to Mr Khyam's progression, and to test his progress and how well he can sustain it in the Category B estate where he would have less close supervision and would, therefore, have to rely more on the skills he has been working on. Whilst each case must of course be decided on its own facts, Mr Adamson relies on the decision of Thornton J in *R (Simon Smart) v the Secretary of State for Justice* [2021] EWHC 1898 (Admin), ("Smart"). In that case there was a similar dispute between the experts and in particular an independent psychology report prepared on behalf of Smart concluded he could be managed in Category B conditions. Thornton J found that CAT was entitled to come to the view that an oral hearing would not be of assistance. The decision letter in that case had pointed out that management within Category B conditions is not the criteria to warrant a downgrade. What is needed is "convincing evidence that the prisoner's risk of reoffending if unlawfully at large has significantly reduced". Mr Adamson submitted that the case of *Smart* deals with Miss Waddoup's submissions that a recommendation for progression to Category B must include a consideration of the risk of escape. It is plain that a recommendation of progression to Category B conditions does not, without more, address the issue of the prisoner's risk of reoffending if unlawfully at large.

76. Whilst the Secretary of State expressly confirmed to the Claimant that he was authorising a pre-tariff review on the basis there is an evidential prospect of success that the Parole Board will recommend to the Secretary of State that his risk was manageable in Category D open conditions, that self-evidently refers to a future prospect which will depend upon the conclusions reached by the Parole Board in due course. The Parole Board has not yet held its oral hearing, (or if it has, has not yet issued its decision), and it follows that this is not a case where the CAT has reached a

conclusion which differs from any recommendation from the Parole Board. After an oral hearing, a Parole Board panel may accept Ms Crundwell's conclusions, but that cannot be assumed as necessarily the case. If, for example, it concluded that the Claimant's progress was not genuine (one of the issues identified for consideration), her recommendations might be rejected. In any event, it is clear from the reports prepared for the Parole Board that it is not considered that Mr Khyam's risk is in fact manageable in Category D open conditions. Even if it were, that still does not address the difference between being managed in open conditions subject to supervision and other protective factors (such as family support), as opposed to being "on the run".

77. In my judgment, there is an obvious difference between the Parole Board requesting an oral hearing to clarify matters relevant to the issues they are considering, and the issue of whether an oral hearing is required to consider quite different issues, namely the risk Mr Khyam would present to the public if unlawfully at large. Furthermore, the Parole Board makes judicial decisions and manages its procedure according to different criteria. Re-categorisation is a decision forming part of the management function within prisons. Mr Adamson submitted that the decision to direct an oral hearing for the Parole Board is irrelevant to this judicial review as it post dates the decision under challenge. It is undoubtedly right that it post dates the decision under challenge, but it is not suggested that it is something which should have been taken into account by the CAT. It is relied on by the Claimant for its evidential value in showing what matters the Parole Board considered would be worthy of exploration at an oral hearing, and by way of support for the Claimant's case that the same matters should have been identified by the CAT to reach its own decision on the need for an oral hearing. In my judgment, it cannot be said to be irrelevant, but nor does it prove the Claimant's claim.

78. In relation to the other alleged factual disputes, Mr Adamson submitted that there is no substantial disagreement over the strength of Mr Khyam's management skills, and development of future skills. Ms Crundwell acknowledged that he did not have "robust plans or goals" [CB/D1o/283], and indeed she recommended his gradual progression through conditions of lesser security which would allow him the time and opportunity to develop future plans, goals, and skills. Mr Adamson submitted that insofar as Ms Crundwell found that the Claimant was "effectively using self-management skills" [CB/D1o/300, Paragraph 8.5.2], that is inevitably a reference to his management skills within prison, and not after absconding. I accept those submissions.

79. In relation to the alleged dispute as to whether Covid 19 restrictions had "resulted in an incomplete assessment of the quality and strength of his skills", Mr Adamson submitted that there is no dispute between the experts. Ms Crundwell merely notes Ms Dybell's views on this, without comment [CB/D1o/288]. Mr Adamson submitted that the Claimant is thus required to submit that this area of dispute is implicit from their different overall conclusions as to risk. He submitted that this does not follow, since the report writers were addressing different tests. Again, I accept this submission. I cannot see what an oral hearing would be clarifying in relation to these matters, or that clarification of these matters would make any difference to the decision as to whether an oral hearing was necessary.

80. There is no doubt that this Claimant had ample opportunity to put his case, both to the report writers, and in written representations from his solicitors to the CAT. Whilst Miss Waddoup made the point that Ms Dybell only spent 40 minutes with Mr Khyam, Ms Dybell was addressing the specific issue as to his risk should he unlawfully abscond.

Miss Waddoup made the point that Ms Crundwell spent 6 to 7 hours with Mr Khyam, and Miss Waddoup relied upon the fact that the Crundwell Report is more recent than the Dybell Report. The length of time spent with Mr Khyam is plainly not conclusive, and Miss Waddoup did not suggest it was. Mr Adamson pointed to the fact that this is not a case where there is any criticism by any other professional of the Dybell Report. In particular, Ms Crundwell has not criticised Ms Dybell's report in any respect.

81. In my judgment this is not a case where common law fairness or PSI 08/2013 requires there to be an oral hearing in addition to the extensive written process which took place. In my judgment, for the reasons given above, there is no critical difference of opinion of relevance to the CAT in considering the risks posed if Mr Khyam were unlawfully at large, and that resolution of such areas of difference as there are, would not have affected the CAT's conclusions as to those risks. In my judgment no oral hearing by the CAT was required in this case.

The Reasons Ground

82. I adopt the following legal principles from Mr Adamson's skeleton, which principles are not in dispute.

> "44. …..the CAT was required to give reasons for its decision which were proper, adequate and intelligible in all the circumstances, pursuant both to common law and PSI 08/2013 Paragraph 4.28. In ***South Buckinghamshire DC v Porter [2004] UKHL, [2004] 1 WLR 1953 Paragraphs 33-36***, the House of Lords set out the standard for *"adequate"* and *"intelligible"* reasons. The relevant well-known principles to be applied are:
>
> 44.1. Reasons will not be inadequate just because a claimant can identify some *"forensic"* (as opposed to *"genuine")* doubt about the basis for the decision: at Paragraph 33, citing ***Clarke Homes v Secretary of State for the Environment (1993) 66 P.& C.R. 263, 272.***
>
> 44.2. The reasons must address the *"principal important controversial issues",* including the key points made by the subject of the decision: Paragraph 34. However, they need not refer to *"every material consideration":* Paragraph 36.
>
> 44.3. Decision letters must be read straightforwardly, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced: Paragraph 36
>
> 44.4. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision: Paragraph 36
>
> 45. The Court must be alive to the nature of the body which produced the decision: *"Decisions of lay administrative tribunals should be interpreted with a degree of benevolence*

> *[…] Such decisions should not be construed as if they were statutes or court judgements, nor subjected to pedantic exegesis"* or *"excessive legalism or exegetical sophistication"*: ***Corkish v Wright [2014] EWHC 237 (Admin) Paragraph 12; Clarke Homes p272.*** It is *"important to maintain a sense of proportion…. and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served": **Uprichard v Scottish Ministers [2013] UKSC 21, Paragraph 48.***"

83. Miss Waddoup challenged the adequacy of the reasons in four respects. She challenged the finding that there was no convincing evidence of a significant reduction in risk if unlawfully at large by reference to Ms Crundwell's recommendation for a staged progression which she submitted equated to a recommendation in favour of a downgrade to Category B. In my judgment this challenge fails to recognise the difference between the tests being applied by the CAT and that being addressed by Ms Crundwell for the Parole Board, and fails to recognise, as set out above, the risks Ms Crundwell identified if the Defendant was in open conditions. I reject the submission that this reason is neither intelligible nor adequate.

84. The same applies in relation to her challenge about the lack of clarity as to what Mr Khyam's long-term living situation and plans would be. Miss Waddoup referred to the practical reality that downgrade to less secure conditions is the only way to develop more specific and robust plans of this kind. That may well be right but is not the issue which the CAT was addressing, namely the risk to the public if Mr Khyam was unlawfully at large.

85. Miss Waddoup submitted that the CAT's conclusion that a further sustained period of progress and assessment is needed to establish the precise level of risk reduction does not help the Claimant to understand what further progress is expected of him. I do not accept that characterisation of what is said. It needs to be read together with the CAT's conclusion that a further sustained period of progress and assessment is needed to establish the precise level of risk reduction, a conclusion which she challenges separately. The decision letter needs to be read as a whole. The decision letter acknowledges the favourable reports in relation to Mr Khyam's participation in the further assessments and theological work and expressly notes that no further intervention work to explore offending and the underlying issues is required. However, the decision letter also makes it clear that recent progress has been made during a period of restrictions, which has resulted in an incomplete assessment of the quality and strength of skills, particularly when no longer in a Category A environment. This, it is said, supports the view that a further sustained period of progress and assessment is needed to establish the precise level of risk reduction. Put simply, the CAT was saying continue with the good progress, but we need longer to assess the precise level of risk reduction. In my judgment that is entirely clear from the decision letter bearing in mind it is addressed to parties well aware of what the issues involved are. Further the Dybell Report clearly sets out the positive work he should continue with to evidence further risk reduction/genuine commitment [CB/D1k/248-250], matters which would be well known to Mr Khyam and those advising him. This decision is to be judged in the light of the audience to which it is addressed.

86. I turn then to the reason which has caused me the greatest concern which is the following:

> "The reports and the LAP nonetheless highlight a number of areas where further progress could be made, or where the true extent of your progress is as yet unknown. This includes the probation officer's report, which highlights the possibility that your progress may be simulated as a means to an end." [CB/C1/108]

There is no dispute that reference is to the First Stewart Report, and the First Stewart Report does indeed identify the possibility that progress may be simulated. However, Miss Waddoup submitted this is inadequate and unintelligible reasoning given that Mr Stewart's report explicitly rejects the possibility that the Claimant's progress has been simulated and concludes that "…his claims to have rejected extremist beliefs are sincere" [CB/D1g/212]

87. Mr Adamson submitted that this amounts to an attempt to resurrect the Claimant's challenge to the merits of the decision for which permission was refused. Miss Waddoup did not accept that. She submitted that this reason rests on a material misunderstanding and as such is neither adequate nor intelligible. In the alternative she submits that the CAT should have explained if it was rejecting Mr Stewart's conclusion that the Claimant was sincere about his rejection of Islamist beliefs. I can see how, on one analysis, this could be said to be a challenge to the merits of the decision, but equally if the reason for a decision is given which appears to be completely wrong on its face, that could be said to raise an issue as to the adequacy/intelligibility of the reasons without addressing what if any impact it might have had on the decision. Accordingly, I consider it important to consider the Claimant's case in relation to this particular reason.

88. Mr Adamson's skeleton does not address the failure to record Mr Stewart's conclusion that notwithstanding the possibility of simulation, Mr Khyam's rejection of his extremist beliefs was believed to be sincere. Mr Adamson simply refers to the fact that Mr Bray had also noted this concern [CB/D1i/226]. Whilst that is correct, the decision letter makes no reference to Mr Bray's concerns, specifically refers to The Stewart Report, and fails to refer to Mr Stewart's conclusion. Ultimately, this is simply Mr Stewart's conclusion and a conclusion which CAT would be entitled to reject. However, no reasons have been given for rejecting it and no reference is made to Mr Bray's concern in this respect. In passing I note that Ms Dybell also raised concerns as to the genuineness of Mr Khyam's commitment. [CB/D1j/247 and 248]

89. If this had been the sole reason for refusing re-categorisation and/or rejecting an oral hearing, I would be enormously concerned by the failure to acknowledge Mr Stewart's conclusion. Having said that, it is entirely understandable why the CAT should be concerned about the possibility that progress is simulated, particularly given the extremely serious nature of the underlying offending. If progress is simulated, then potentially none of the underlying risks has in fact been addressed and/or reduced.

90. However, I do not consider that even if the CAT failed to appreciate Mr Stewart's conclusions, this would have merited an oral hearing in this case. In my judgment, the reality is that if that issue had been determined in Mr Khyam's favour, it would have

made no difference to the decision CAT made. In my judgment it would not alter the fact of the identified risks if at large by reason of the other matters, in particular Ms Dybell's report taken together with Ms Crundwell's conclusion that a **managed release** (my emphasis) into the community would be a struggle for Mr Khyam and could result in him being vulnerable to factors that could lead him back towards extremism.

91. In those circumstances, I conclude that even if incorrect and Mr Khyam is not simulating progress, this reason does not undermine the decision as a whole, and that the reasons given as a whole are sufficient and adequate. If I am wrong about that in relation to the failure to mention Mr Stewart's opinion that Mr Khyam's progress is not simulated, or to give reasons for rejecting that conclusion, I have concluded that it is highly likely that the outcome for Mr Khyam would not have been substantially different if the conduct complained of had not occurred, and in those circumstances Section 31(2A) Senior Courts Act 1981 obliges me to refuse to grant any relief.

92. Accordingly, I dismiss the Claimant's claim for judicial review of the Decision.