Neutral Citation Number: [2024] EWHC 682 (Admin)

Case No: AC-2023-LDS-000154

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

Leeds Combined Court Centre
The Courthouse, 1 Oxford Row
Leeds, LS1 3BG

Date: 22/03/2024

Before:

MRS JUSTICE HILL DBE

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Between :

THE KING
(On the application of
AHMAD SHAH)

Claimant

- and –

SECRETARY OF STATE FOR JUSTICE

Defendant

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Stephen Tawiah (instructed by **Bhatia Best Solicitors**) for the **Claimant**
David Manknell (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: Friday 23 February 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 22 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. The Claimant is currently a Category A prisoner serving a 29 year sentence of imprisonment at HMP Full Sutton. By this claim, issued on 21 June 2023, he seeks judicial review of the decision of the Secretary of State for Justice, acting through the Category A review team ("CART" or "CAT"), dated 20 March 2023, that he is to remain classified as a Category A prisoner and to conclude the Category A review without an oral hearing.

2. The Claimant advances two grounds of judicial review: (1) the decision to refuse an oral hearing in the circumstances did not comply with the Defendant's published policy; and (2) due to the failure to conduct an oral hearing, the decision that the Claimant is to remain a Category A prisoner was tainted by procedural unfairness at common law.

3. The Defendant's position is that, for the reasons set out in decision letters of 20 March 2023 and 25 April 2023, the Claimant's case falls well short of evidencing the features that would require an oral hearing.

4. The Claimant was granted permission on the papers by Richard Wright KC, sitting as a Judge of the High Court, on 8 September 2023. I am grateful to both counsel for their clear and concise written and oral submissions.

The factual background

5. On 6 June 2013 the Claimant was sentenced to a determinate sentence of 29 years imprisonment for drug importation and money laundering offences. The offences concerned a very large amount of heroin (over 500kg with a street value of over £94m). The Claimant has admitted his part in the money laundering but has consistently denied knowledge of the drugs. He is currently located at HMP Full Sutton and classified as a Category A prisoner (Standard Escape Risk).

The 16 March 2022 categorisation decision

6. In Autumn 2021, a dossier was collated for the Claimant's annual Category A review.

7. The dossier included evidence from the Claimant's then keyworker, Officer Proctor. This officer made observations regarding the Claimant's lack of adjudications, negative entries or warnings; noting that overall, he had made positive progress.

8. The dossier also included a report from the Claimant's Offender Supervisor, who recorded that his risk was assessed as Medium to the Public (and low to all others) in the community. The Offender Supervisor described the Claimant's conduct and engagement with staff in positive terms; noted that there were currently no offence-focussed programmes available to the Claimant; and recorded his concern that the Claimant continued to maintain his innocence in respect of part of his convictions.

9. Finally, the dossier contained evidence from Ailish Carroll, a Trainee Forensic Psychologist, supervised by Catherine Wordie and Elizabeth Horseman, Registered

Forensic Psychologists. Ms Carroll noted that the Claimant had been unable to access interventions due to there being no accredited interventions suitable for him.

10. However, she recommended that he be assessed for the Motivation and Engagement ("M&E") programme and engage with it if deemed suitable for him. She later described this as "a validated intervention consisting of 11 tasks [with] a focus on goal setting". That said, she also deemed the Claimant's concerns about the M&E programme "not directly targeting his risk" to be "understandable". Ms Carroll also recommended that the Claimant complete a My Strengths Record ("MSR"). This is a "non-accredited, self-led workbook which aims to encourage individuals to identify their strengths and protective factors".

11. On 29 December 2021 the Claimant's solicitors made detailed representations to the effect that the Claimant's categorisation should be downgraded to Category B and submitting that an oral hearing was required if there was no decision to downgrade on the papers. The representations argued that the Claimant was at an "impasse" in terms of achieving and demonstrating risk reduction.

12. On 6 January 2022, the Local Advisory Panel ("LAP") considered the Claimant's case. In summary, the LAP concluded that the Claimant had failed to demonstrate any reduction in risk. It was the opinion of the LAP that the Claimant remain Category A.

13. The CART refused to convene an oral hearing. In a decision dated 16 March 2022, the Defendant's CART decided that the Claimant had to remain in Category A conditions. The letter stated that no offence-specific programmes were available to the Claimant; that he still denied or minimised his involvement in the most serious aspects of his offending; and that there was otherwise no evidence that he had at that time "achieved any offence-related insight, or have developed skills to prevent you similarly reoffending in the future".

14. The letter referred to the two programmes that had been recommended for the Claimant by Ms Carroll.

The 2022 judicial review proceedings

15. On 9 May 2022, the Claimant's legal representatives served a letter before action, submitting that the decision to refuse a downgrade to Category B without offering an oral hearing failed to comply with the applicable policy. On 20 May 2022 the Defendant's CART replied, maintaining the decision both as to the substance of the review and the decision not to hold an oral hearing.

16. On 16 June 2022, the Claimant commenced judicial review proceedings to challenge the Defendant's decision of 16 March 2022. The Defendant defended the claim, in part because while there were no offence-specific programmes available to the Claimant, this was not the only way in which he could show a reduction in risk in circumstances where he did not admit all of his offending. Reference was made to the recommendation that he undertake the M&E programme.

17. The Claimant was granted permission to bring his judicial review claim on the papers. However, on 16 February 2023, he withdrew his claim. This was because by this stage, the Claimant had completed all the recommended courses, including the M&E programme, ahead of a further review; and the Defendant had provided the Claimant with a dossier ahead of that review.

The process leading to the 20 March 2023 decision

18. The Claimant's keyworker, Officer Price, emphasised his lack of adjudications, negative entries or warnings; and gave good feedback on the Claimant's engagement with the M&E programme. Officer Price also noted that the Claimant interacted well with staff and had good relations with his peers. The officer observed that the Claimant rarely brought himself to the attention of staff in a negative manner.

19. The Claimant's Offender Supervisor, Officer Taylor, provided a report. This noted the following:

> "As stated previously, Mr Shah is not able to show a significant reduction in risk through offence focussed work due to a lack of work being available. He has engaged well with the programmes department during the reporting period having completed the My Strengths workbook and the M and E course, he continues to use his time constructively through education. Mr Shah is not a control problem on the wing associating well with his peers, engaging with his keyworker and engaging with other staff.
>
> Behaviour alone being taken into consideration Mr Shah could be managed as a category B prisoner. He has done everything he is able to do to evidence his willingness to engage but whether this shows a big enough reduction in risk would be for the panel to decide.

20. Officer Taylor's report also provided more detail about a negative entry on the Claimant's record, which involved the Claimant refusing to go to the television room while his cell was being searched, and insisting on going for a shower, and then kicking a cleaning bucket across the floor. Mr Taylor also stated that the Claimant continued to minimise his offending, as follows:

> "Mr Shah does not take any responsibility for the offences for which he has been convicted; minimising any involvement and suggesting he was oblivious to any drug related trade. Mr Shah largely seeks to justify his actions on the basis that he was deceived by Mr Farooq and others".

21. Reports were also included from the chaplain and instructors from the workshop.

22. On behalf of the Psychology department, Ms Carroll provided a report dated 9 November 2022, but not a formal risk assessment. She recorded that the Claimant had been assessed and found unsuitable for both the Thinking Skills Programme and the RESOLVE programme in December 2015.

23. She noted that in the Claimant's previous Category A Review, it was acknowledged that the nature of the Claimant's index offence provided him with limited options for offending behaviour work but highlighted the recommendations from Psychology department that the Claimant engage with the M&E and MSR programmes.

24. Ms Carroll confirmed that during the reporting period, the Claimant had completed both courses. She reported positively on the Claimant's work and reflection in both the M&E and MSR programmes, saying as follows:

> "Positively, Mr Shah engaged fully with the recommendations from his previous Psychological Category A Report. This is particularly important given his initial hesitation to engaging with the suggested work and his efforts should be commended".

25. Her overall recommendation was to this effect:

> "I recommend that during the coming year Mr Shah continues to demonstrate his learning from the MSR and the M&E programme through interactions with others and by following the goals he outlined. This learning could then be considered in a future risk assessment for the purpose of his Category A review. Additionally, I recommend that Mr Shah maintains his motivation to engage with education and to undertake an industrial cleaning course."

26. On 18 January 2023, the LAP considered the Claimant's case and found as follows:

> "Due to the nature of his offence, and being unsuitable for interventions, combined with a language barrier Mr Shah has had limited engagement with his Keyworker or POM [Prison Offender Manager]. There is limited interaction or work that can be undertaken with Mr Shah and therefore at this time the LAP have no option but to recommend he remain Category A".

The 20 March 2023 decision

27. On this date the CART wrote to the Claimant setting out its decision that he should remain in Category A conditions, as follows:

> "This decision has been reached following careful consideration of all relevant factors, including the nature and circumstances of your present offence, the length of sentence imposed, your previous offending and the prison reports. You were provided with copies of your latest security category review reports and factual information relevant to the determination of your security category.
>
> Your present offences involved you engaging in large-scale drug trafficking and money laundering. The sentencing judge stated you played a significant role in the conspiracies relating to the importation of massive amounts of heroin into the UK. The Category A Team considered your offending showed you would pose a high level of risk

> if unlawfully at large, and that before your downgrading could be justified there must be clear and convincing evidence of a significant reduction in this risk.
>
> The Category A Team noted that your custodial behaviour in the reporting period has been mostly good with you having received one negative IEP warning but no adjudications. You have received some positive IEP entries and you are an enhanced IEP prisoner. It is recorded by staff that you interact well with your peers and staff.
>
> The Category A Team noted that you have completed the MSR and M&E programme. It is noted that you are recommended to continue to demonstrate your learning from the MSR and M&E programme through interactions with others and the goals you have outlined. The reports nonetheless confirm that you still deny or minimise your involvement in the most serious aspects of your offending. There is otherwise no evidence that you have at this time achieved any offence-related insight, or have developed skills to prevent you similarly reoffending in the future.
>
> The Category A team encourage you to continue to demonstrate positive custodial behaviour and to continue to demonstrate your learning from the MSR and M&E programme. The Category A Team considered that at present there is no convincing evidence you have achieved a significant reduction in your risk of similar reoffending if unlawfully at large. It is therefore satisfied that Category A status remains appropriate at this time".

The Defendant's 25 April 2023 letter

28. On 19 April 2023, the Claimant's legal representatives served a letter before claim contending that the decision to refuse a downgrade to Category B without offering an oral hearing failed to comply with the applicable policy.

29. The CART considered those further representations and responded by way of letter on 25 April 2023. The letter maintained the decision both as to the substance of the review and the decision not to hold an oral hearing, as follows:

> "… the decision not to downgrade was rational for the reasons given· and does not require further resolution through an oral hearing. The Category A Team are satisfied the available evidence was entirely clear and there is no evidence an oral hearing is needed to further understand or determine this information. The Category A Team are satisfied the decision to not hold an oral hearing was rational, lawful and reasonable for the reasons given and there is no evidence to suggest otherwise.
>
> In your letter you state Mr Shah's Offender Supervisor suggested he could be managed in Category B conditions. Whilst the Category A Team would have taken this into consideration, they did not agree and

> are entitled to come to their own conclusion. It also needed evidence of significant progress addressing the risk factors influencing his offending…
>
> The Category A Team noted Mr Shah's behaviour has been mostly good in the reporting in period. He has interacted well with staff and has posed no disciplinary problems. It considered however that his regime adherence alone is insufficient to show a significant reduction in his risk if at large. It is satisfied that Mr Shah's possible manageability in Category B provides no such evidence.
>
> As stated in the decision letter the Category A Team noted that Mr Shah has completed MSR and M&E programme. It noted that Mr Shah is recommended to continue to demonstrate his learning from the MSR and M&E programme through interactions with others and the goals he has outlined. The reports nonetheless confirm that he still denies or minimises his involvement in the most serious aspects of his offending. There is otherwise no evidence that Mr Shah has at this time achieved any offence-related insight, or has developed skills to prevent him similarly reoffending in the future.
>
> The Category A Team consider that there is no evidence of an impasse. The Category A Team are satisfied that there are no other issues relevant to Mr Shah's risk assessment and review that can be resolved or understood only through an oral hearing.
>
> The Category A Team…consider the evidence provided was more than sufficient enough to reach the decision and there would be no additional benefit from verbal representations or from meeting face to face. The Category A Team are satisfied that there are no further grounds for an oral hearing, in accordance with PSI 08/2013. The Category A Team recognise that Mr Shah has been in custody for several years, and has never had an oral hearing, but consider these are insufficient grounds for an oral hearing without other supporting reasons. The Category A Team note the courts accept it does not follow that an oral hearing would be appropriate just because a prisoner has been in custody for a significant time or is post-tariff. The courts have also stated these are the more nebulous potential justifications for an oral hearing.
>
> The Category A Team consider there are no grounds to amend this decision or revisit this review through an oral hearing."

30. The Claimant has a provisional date for release on licence of 4 October 2027. However it is now anticipated that by agreement he will be deported to Pakistan before then, in January 2027.

The legal and policy framework

31. The Prison Act 1952, s.12 provides lawful authority for the Secretary of State to allocate prisoners to prison confinement. Under s.47 of the same Act, rules may be made for the classification of persons required to be detained in prison. Accordingly, Rule 7 of the Prison Rules 1999 (SI 1999/728), entitled 'Classification of Prisoners', provides:

> "(1) Prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3".

32. Prisoner categorisation reviews are governed by Prison Service Instruction 08/2013 ("PSI 08/2013", most recently revised on 10 June 2016), entitled ' The Review of Security Category - Category A/Restricted Status Prisoners'.

33. A Category A prisoner is defined at para. 2.1 of the PSI 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".

34. A key feature of the Category A regime is that review decisions are not made at prison level. Rather, they are made centrally. Specifically, Category A review decisions are ultimately made by the Director on the advice of the CART: see para. 4.1 of the PSI.

35. Para 4.2 of the PSI explains that the test 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".

36. Oral hearings are addressed at para. 4.6 of the PSI:

> "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".

37. The PSI continues:

"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".

Relevant case law

(i): R (Hassett & Price) v Secretary of State for Justice [2017] EWCA Civ 331; [2017] 1 WLR 4750

38. In Hassett, the Court of Appeal specifically considered the procedural fairness requirements of security reviews of Category A prisoners, and the need for an oral hearing. Sales LJ (in a judgment with which both other judges agreed) considered the applicability of the Supreme Court's guidance in R (Osborn) v Parole Board [2014] AC 1115 to this context, making the following observations:

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

39. At [59] he concluded that the guidance in Osborn could not be transferred wholesale from the context of Parole Board decisions to CART decisions. He noted the range of reasons identified by Lord Reed in Osborn which illustrate that the contexts are different. He continued:

> "60…The courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate diversion of excessive resources to the categorisation review function, away from other management functions.
>
> 61. Some of the factors highlighted by Lord Reed 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."

40. On the facts of Hassett, the Court held that the decision to refuse an oral hearing in his case was lawful. The relevant question was whether he would present a risk to the public if he escaped from prison and there was no real or significant dispute between the expert psychologists; nor was an oral hearing involving Mr Hassett required: he had already had a "fair opportunity to explain himself to both psychologists" and he "could not realistically be expected to provide further assistance on the question being addressed" at such a hearing: [68].

(ii): Further general principles

41. In R (Steele) v Secretary of State for Justice [2021] EWHC 1768 (Admin) at [4], Fordham J distilled the following principles to be drawn from Hassett and the earlier Court of Appeal authorities of R (Mackay) v Secretary of State for Justice [2011] EWCA Civ 522, R (Downs) v Secretary of State for Justice [2011] EWCA Civ 1422:

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

> (6) Although it has been said that "oral hearings will be few and far between" (Mackay paragraph 28) and "comparatively rare" (Hassett paragraph 61), that is prediction rather than principle: there is "no requirement that exceptional circumstances should be demonstrated" (Mackay paragraph 28).
>
> (7) The fact that there is a "difference of professional opinion" between two experts (eg. two psychologists), the fact that the CAT has "two clear, opposed views to consider", and the fact that the CAT's "task was to decide which view it accepted" does not – in and of itself – make an oral hearing necessary (Downs paragraphs 44-45, 50; also Hassett paragraph 69).

42. In R (Seton) v Secretary of State for Justice [2020] EWHC 1161 (Admin) at [49] HHJ Belcher (sitting as a Judge of the High Court) noted that "whilst a multiplicity of factors is more likely to support the need for a hearing (as expressly acknowledged in Paragraph 4.6 of the PSI), it is obviously not the case that the presence of one factor only must of necessity mean that a hearing is not required", with every case having to be considered on its own facts [49].

43. In R (Green) v Secretary of State for Justice [2023] EWHC 626 (Admin), at [34] HHJ Walden-Smith (sitting as a Judge of the High Court) observed as follows:

> "PSI 08/2013 does not mandate for an oral hearing either generally, or in specific circumstances. The policy is expressed in terms that provide some guidance to the decision maker as to whether some assistance will be given to the decision maker by holding an oral hearing. …"

(iii): "Impasse" cases

44. Several first instance decisions have considered the issue of an "impasse" within paragraph 4.7.c of the PSI set out at [37] above.

45. In R (Rose) v Secretary of State for Justice [2017] EWHC 1826 (Admin) at [54], Karen Steyn QC (sitting as a Deputy High Court Judge, as she then was) held that "[…] whatever the reason for it, the policy makes clear its existence is a "factor of importance" tending "in favour of an oral hearing" because, even if the reasons for the impasse are understood, it may be helpful to have a hearing to explore the potential solutions to the impasse".

46. In R (Harrison) v Secretary of State for Justice [2019] EWHC 3214 (Admin) at [70]-[71], Heather Williams QC (sitting as a Deputy High Court Judge, as she then was) found an impasse to have arisen in circumstances where a prisoner had undertaken all intervention work recommended and made available to him; and concluded that such an impasse was liable to continue for the foreseeable future without resolution, if his security classification was simply maintained.

47. In R (Wilson) v Secretary of State for Justice [2022] EWHC 170 (Admin) at [20] Fordham J found that on the facts of that case, "there was no "impasse", and there

were ways forward which enabled the Claimant to "show further evidence of insight and progress". The Claimant was several years away from 'tariff expiry'; and there was appropriate "bespoke work" which he would be able to do, so that his Category A status did not present a "barrier to his progression", as would be the case in a 'Catch-22' situation. Adopting "the most favourable position for the Claimant" and using a "straight objective 'correctness' standard of review" he concluded that the decision that this was not a case in which an oral hearing was required was correct.

48. Similarly, in R (Baybasin) v Secretary of State for Justice [2022] EWHC 2781 (Admin) at [30] Dexter Dias KC concluded that the impasse in that case was not one that could be better "fully and fairly ventilated" at an oral hearing, but was "unmistakably evident" on the papers. Accordingly, an oral hearing "would add nothing of value" to resolve the dispute about the efficacy of risk reduction steps.

Submissions and analysis

49. Mr Tawiah advanced the Claimant's two grounds for judicial review together and Mr Manknell responded in the same fashion. This was appropriate given the parties' agreement that the principles of fairness underpinning the PSI and those derived from the common law are congruent.

50. By way of context, it is right to recall that there is no requirement that exceptional circumstances should be demonstrated to justify the need for an oral hearing (Steele at [4](6)); and that, as Mr Manknell accepted, the case law variously describing oral hearings as "rare", "comparatively rare" and/or not required in "most cases" do not constitute a legal test to be applied. That said, those indications do provide what he described as a "barometer or metric" of how the criteria in the PSI should be interpreted. Accordingly, he argued, the criteria should not be interpreted in an "overly expansive manner" which would result in oral hearing in many or most cases.

51. In my judgment, the following agreed factual matters are also relevant to the context of the decision in this case: (i) the Claimant still denies or minimises his involvement in the most serious aspects of his offending; (ii) none of the professionals who contributed reports to the dossier made a positive recommendation that the Claimant's categorisation should be downgraded; (iii) the LAP gave an unequivocal recommendation that he should remain Category A at this time; and (iv) the Claimant is not a life sentence prisoner: rather, he is serving a determinate sentence and will be released on licence in 2027 regardless of his categorisation, but will in any event be deported before that date (see [30] above).

52. Against that background, Mr Tawiah's arguments focussed on the following key themes.

(i): The alleged impasse

53. Mr Tawiah's primary submission was that an impasse has existed for a prolonged period of time in the Claimant's case; and that it would 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", such as to engage paragraph 4.7.c of the PSI.

54. It is acknowledged that the Claimant is not able to show a significant reduction in risk through offence focussed work due to a lack of such offence focused programmes being available. He has now completed both the M&E programme and the MSR, the two specific recommendations identified by the Psychology department in the March 2022 Category A Review. There is no further programme available to him to demonstrate risk reduction. The LAP noted that due to the nature of his offence and being unsuitable for interventions combined with a language barrier, the Claimant has had limited engagement with his Keyworker or POM.

55. Importantly, no clear pathway has been identified to enable the Claimant's further progress and consideration for downgrading. There are a series of blockages to any way forward for the Claimant, namely the lack of any available programmes to demonstrate risk-reduction; his unsuitability for interventions and a language barrier. These meant he has had limited engagement with his Keyworker or POM and is missing out on opportunities to demonstrate insight or to show he has developed skills to prevent similar re-offending. These blockages effectively prevent him from demonstrating the necessary progress that the Defendant refers to in the decision under challenge.

56. Mr Tawiah submitted that the Defendant's consideration of whether an impasse existed was not in accordance with the relevant case law. The Claimant was in the same position as the Claimant in Harrison, as he had undertaken all intervention work recommended and made available to him. The Defendant's suggestion that the Claimant continue to demonstrate his learning from the M&E programme and MSR was of no assistance, particularly where it is unclear for how long the Claimant would need to continue demonstrating this learning. As in Harrison, such an impasse was liable to continue for the foreseeable future without resolution.

57. It is insufficient for the Defendant to assert that the Claimant should continue to demonstrate his positive custodial behaviour and learning from programmes he has completed. He has demonstrated positive custodial behaviour throughout his time in custody; and there has already been a period of consolidation following completion of these programmes. In addition, many of the issues noted by the professionals appear to be insurmountable: such as the Claimant's language barrier which contributes to his limited interaction with professionals.

58. An oral hearing would provide an opportunity for the blockages which have led to there being no interventions or programmes available to demonstrate risk reduction to be discussed. The decision maker's conclusion penalises the Claimant for failing to demonstrate significant reduction to risk but fails to appreciate the significance of blockages which prevent this.

59. This, Mr Tawiah contended, was an impasse akin to that found in Harrison at [70]-[71] and Rose at [54]. As in Rose, the potential realistic and meaningful solutions for this impasse ought to have been explored with the Claimant and experts at an oral hearing.

60. As a preliminary observation, it is relevant that the CART's sole task is to assess whether the prisoner has demonstrated the necessary reduction in risk. The responsibility for providing the necessary opportunities for prisoners lies with others

in the prison system. Here, the Claimant's case at its highest was that there was no identified and structured path for risk reduction. As Mr Manknell highlighted, this is not a matter for the CART, the only relevance of any impasse being its potential relevance when assessing risk.

61. However, more fundamentally, as persuasively as Mr Tawiah advanced these arguments, I cannot accept that an impasse exists in this case.

62. Ms Carroll made a clear recommendation that during the coming year the Claimant "continues to demonstrate his learning from the MSR and the M&E programme through interactions with others and by following the goals he outlined". She anticipated that this learning "could then be considered in a future risk assessment for the purpose of his Category A review". She also recommended that the Claimant "maintains his motivation to engage with education and to undertake an industrial cleaning course". Both of the Defendant's decision letters specifically referred to Ms Carroll's recommendation that the Claimant continue to demonstrate his learning from the two courses through interactions with others and the goals he had outlined.

63. In my judgment Ms Carroll's recommendation illustrates that an impasse of the kind present in Harrison and Rose does not exist here. She has, contrary to the Claimant's submissions, identified a "clear pathway" for the Claimant to follow. She is clearly not satisfied that there has, yet, been a sufficient period of "consolidation" of the Claimant's learning before she can recommend a downgrading of his category. She also clearly does not consider that such blockages as he faces are insurmountable. For example, he had been able to converse with her satisfactorily about his learning from the courses, in which he had been able to participate notwithstanding his language difficulties. Moreover, hers is not an open-ended recommendation, suggesting a situation that will "continue for the foreseeable future without resolution": she specifically acknowledged that the Claimant's progress should be considered at his next review.

64. I note that in Harrison, it was not only that there was no formal intervention work available, but the psychologist had found specifically that the Claimant had no outstanding areas of clinical need, and on that basis she supported his category being downgraded: [17]. The position is very different here: the psychologist has not only recommended a further plan (demonstrating his learning from the MSR through interactions with others and by following the goals he outlined), but she did not recommend downgrading.

65. I also bear in mind that in Mackay at [28(iv)], the Court of Appeal emphasised that courts "should not be too ready to conclude that there is an impasse or even an inconsistency when there may be no more than a difference of view, perhaps for very good reasons."

66. In any event, the existence of impasse, even if present, does not result in the policy requiring an oral hearing, unless the CAT considered that it would 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"; see also Mackay at [28(iv)]. Here, given the lack of impasse, and the unanimity among the professionals that the Claimant's category should not be downgraded, a hearing was not required.

(ii): The length of time the Claimant has been in Category A conditions and the lack of a previous oral hearing

67. Further, Mr Tawiah argued that it is significant that the Claimant has been in Category A conditions since the commencement of his sentence in 2013, and so over 10 years ago. Further, it has been clear since at least December 2015 that the Claimant is not eligible for the 'usual' offending behaviour programmes through which Category A prisoners can achieve and demonstrate a reduction in risk. This is significant because as the years pass, the accumulated weight of time may itself call for an oral hearing.

68. He also contended that it is relevant that the Claimant has never had an oral hearing on his Category A status before during his sentence, such that his case falls within paragraph 4.7.d of the PSI.

69. Both these features are plainly present in the Claimant's case. However they have been recognised in the case law as less important than others: see, for example, (i) Mackay at [37(iii)], where the Court of Appeal held that the fact that the Claimant was a post-tariff prisoner and the fact that he had not had an oral hearing did not "carr[y] weight"; and (ii) Morgan at [47], where Williams Davis J (as he then was) described these factors are "the more nebulous potential justifications for an oral hearing".

70. Similarly, in Harrison at [55], the Judge accepted that "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."

71. In my judgment the same approach applies here. Absent the impasse, these factors do not, even taken together, show that an oral hearing was required. Indeed, as Mr Manknell highlighted, the cases show that a relative lack of importance is attached to these factors in the case of an indeterminate sentence prisoner. The weight to be attached to them is even less where, as here, the Claimant is a determinate sentence prisoner.

(iii): The Claimant's overall case

72. Mr Tawiah submitted that when assessed separately each factor supported the need for an oral hearing, but that they should be considered collectively in accordance with Seton at [49].

73. Even applying that cumulative approach, and adopting the most favourable position for the Claimant (per Wilson at [20]), in my judgment the decision that this was not a case which required an oral hearing was correct. As per the PSI, the process is 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. Here, the only two factors present are those considered under section *(ii)* above, and they are insufficient.

74. In my assessment, overall, neither the PSI nor the common law principles of fairness required an oral hearing in this case: the Defendant's Category A team was able to come to a fair decision in the Claimant's case without such a step.

Conclusion

75. Accordingly, for all these reasons, despite the conscientious way in which the case was presented on the Claimant's behalf, his claim fails.