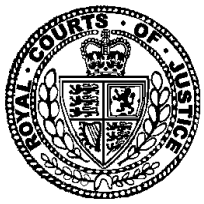

Neutral Citation Number: [2024] EWCA Civ 861

Case No: CA-2023-001511

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE ADMINISTRATIVE COURT AND PLANNING COURT
Mr Clive Sheldon KC (sitting as a Deputy High Court Judge)
CO/1428/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2024

Before :

LADY JUSTICE KING
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

THE KING (on the application of ANTHONY CLARKE)	**Appellant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Respondent**

- -
- -

Philip Rule KC and Daniel Henderson (instructed by **Coninghams Solicitors**) for the **Appellant**
William Irwin (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 26 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 24 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant, Mr Clarke, is serving a sentence of life imprisonment which was imposed when he was convicted of murder in 2008. He is a Category A prisoner. On 19 January 2021, the Category A Team ('the CART') decided that that category should not change ('decision 1'). The CART maintained decision 1 on 25 March 2021 (decision 2'), in response to further representations from Mr Clarke.

2. He applied for judicial review of decision 1. The hearing was listed before Mr Clive Sheldon KC, sitting as a Deputy Judge of the High Court (as he then was) ('the Judge'). At that hearing, the Judge also gave Mr Clarke permission to challenge decision 2. By an order dated 13 October 2022, the Judge dismissed the application for judicial review. Mr Clarke now appeals, with the permission of Phillips LJ.

3. On this appeal, Mr Clarke was represented by Mr Rule KC and Mr Henderson. Mr Rule represented him before the Judge. The Secretary of State for Justice ('the Secretary of State') was represented by Mr Irwin, who also appeared below. I thank counsel for their written and oral submissions.

4. The first issue on this appeal is whether, before decision 1 was made, Mr Clarke should have been given the chance to consider and make representations about a recommendation and report by the Local Advisory Panel ('the LAP'). That recommendation and report were given to him, but only one day before decision 1 was made. He contends that that was unfair, and that it was a breach of Prison Service Instruction 08/2013 (as amended), which is entitled 'The Review of Security Category – Category A/Restricted Status Prisoners' ('the PSI'). The second issue is whether the CART should have held a hearing before making decision 1 or 2.

5. For the reasons given in this judgment I consider that the CART did not breach the PSI and did not act unfairly in any of the respects I have described in the previous paragraph of this judgment.

The facts

6. I have largely taken the facts from the Judge's judgment ('the judgment'). He gave an appropriately full description of the facts, but, in the light of the issues on this appeal, it is not necessary for me to set them all out in as much detail as he did. I have, to some extent, supplemented his summary from the case documents.

The offence

7. In 2008 Mr Clarke was convicted of murdering his ex-girlfriend. His two co-defendants were his uncle (also called Mr Clarke) and a Mr Savin. They were convicted of false imprisonment and of assisting an offender, but not of murder. The victim had made five allegations of violence against Mr Clarke in the three weeks before he killed her. She had been due to make a statement to the police about those allegations. The Crown accepted that she had said to Mr Clarke that she would sign a statement unless he paid her £1000. She arranged to meet him. He and Mr Savin bundled her into a car. They drove her to a garage owned by his uncle, put her into a

van and held her there for several hours. She was then driven to a secluded country lane. Mr Clarke stabbed her several times in the abdomen and then set her alight. She managed to crawl to a nearby house. She was still smouldering. People tried to help her. She was taken to hospital. She died there later that evening.

8. Mr Clarke was sentenced to imprisonment for life with a minimum term of 25 years. His tariff will expire in 2032. At that point, but only if the Parole Board considers that he is then no longer dangerous, he would be released on licence. He has two previous convictions, for handling stolen goods.

Mr Clarke's progress in prison

9. Mr Clarke has been in Wakefield Prison since 2018. He has done several relevant courses since his imprisonment. In September 2019, he graduated from the Open University with a 2:1 Honours Degree in Business. He has said that he would be interested in doing a Master's Degree in Development Management.

10. If a prisoner is in Category A, that category is reviewed every year. The LAP in the relevant prison makes a recommendation about the prisoner's security category to the CART. The Deputy Director of Custody (High Security) ('the DDC'), or someone with authority delegated by him, is responsible for approving the downgrading of a Category A prisoner. In 2019, the LAP recommended that Mr Clarke should be moved to Category B. The Director of Long Term and High Security Prisons did not approve that recommendation. More needed to be known about Mr Clarke, and a PCL-R (a psychopathy checklist) was necessary to explore his risk factors.

The May 2020 dossier

11. Mr Clarke was given a dossier of materials on 20 May 2020. There were some positive observations about him and his behaviour, but also some concerns about his risk and the work which was necessary to reduce it (paragraph 6). In paragraphs 7-26, the Judge summarised the contents of that dossier.

Ms McCraw's report

12. The Judge's summary included, in paragraphs 9-25, a full description of a 26-page psychological report by Ms McCraw. I will refer to some features of that report. Ms McCraw interviewed Mr Clarke for about four and a half hours and also spoke to the Senior Psychologist at HMP Wakefield, the Treatment Manager at that prison, Mr Clarke's keyworker, and the Prison Offender Manager.

13. She noted that while Mr Clark did not deny murdering the victim, his account of the murder was different from the 'official' version. He accepted that he had set the victim on fire, but said that she had been stabbed by Mr Savin (admittedly, in his presence).

14. He accepted, in his interview with Ms McCraw, that he had been involved with 'anti-social peers' (including his uncle) during the two years before the murder. 'Anti-social' is an understatement, for reasons which will soon be clear. 'Organised crime' (see the fourth sentence of paragraph 18, below) is a more accurate description. He said that he had not been directly involved in 'drug-trafficking and theft, which he

indicated his co-defendants were actively involved with at the time'. He acknowledged to Ms McCraw 'the benefits of being associated with individuals who had a reputation for violence and the associated perceived benefits of their lifestyles, for example, money and women'. He also 'identified the benefits of such associations for his business ventures, noting he was aware of the influence for protection, stating "I knew that no-one would f**k with me. If I needed a payment, if they took the p***, I knew that I had back up that was going to get paid" [sic]'.

15. Ms McCraw also described protective factors; Mr Clarke's hard work to get qualifications in prison to help with his future employment, and his desire to make something of himself, in order to make his family proud and to re-pay their faith in him. She described the 'unrelenting support' of his wider family 'of all generations', and his positive relationships with professionals 'of all disciplines and grades' in the prison.

16. The Judge said, in paragraph 9, that the details of her report, when compared with the views of the private psychologist on whom Mr Clarke relied (Dr Pratt), helped 'to illustrate some of the issues that were in dispute between the parties'. Dr Pratt is an experienced independent consultant clinical psychologist. Ms McCraw's conclusion was that Mr Clarke posed a 'moderate/elevated risk of violence', but not an imminent risk. She considered that '…specialist management strategies' were necessary to address that risk of violence. His behaviour would indicate that he could be considered for a move to Category B but aspects of his thinking and behaviour could benefit from 'further exploration'. She was particularly concerned about his association with 'anti-social peers' (an understatement: see paragraph 14, above) and the impact of these relationships on this thinking and behaviour at the time of the murder and in the preceding two years. She recommended that he should stay in Category A 'at this stage of his sentence'. Of the available treatments, she thought that the 'Identity Matters' programme was most suitable, because, unlike the two other programmes, it did not involve work in a group. That programme was provided at three other Category A prisons.

17. She did not think that a PCL-R was necessary. She referred, however, to a further concern, which had been noted by Dr Gregory in an assessment in 2017, that Mr Clarke had a 'capacity for impression management', which needed to be taken into account in any risk management plan. Mr Clarke seemed to have 'a high level of self-esteem' and to be confident and articulate. He was willing, in an appropriately formal way, to argue his corner with professionals. He wanted to 'secure a positive appraisal of his behaviour', and to be moved to Category B. Ms McCraw suggested that this could be seen as 'offence paralleling behaviour to some degree'. What she meant, I think, was that the murder seemed to be motivated in part by a desire to stop the authorities finding out information which 'could have been damaging to his character and position'. He was not now using violence to achieve his aims, but he had been 'persistent in his attempts to challenge and seek modification of appraisals of his behaviour' which might 'hinder his sentence progression'.

18. In paragraph 25, the Judge referred to her description of an exchange between her and Mr Clarke (by video link) when they discussed her assessment. He questioned her view that he 'engaged in impression management'. He told her that he did not question the views of professionals in order to change them, but in order to ensure that

they were based on correct factual information. He disagreed that he tried to get round procedures, and denied that he had been associated with organised crime since his arrest for the index offence. He was willing to take part in the Identity Matters programme, but did not want to go to the other Category A prisons which provided it. He asked whether he could do that programme in segregation at HMP Frankland, another Category A prison.

The other material in the dossier

19. The dossier also included reports from Mr Cook, Mr Clarke's key worker at HMP Wakefield, and Ms Barton and Ms Terrington, who are probation officers.

Mr Clarke's representations to the LAP

20. On 10 August 2020, Mr Clarke's solicitors made representations to the LAP. They said that his risk was low enough to mean that he should be moved to Category B. The Judge described those representations in paragraphs 27 and 28. The professionals had decided that a PCL-R was not necessary. The solicitors pointed out that, under the PSI, he was entitled to be provided with the LAP's recommendation immediately, so that he could make representations on it before a final decision was made. They provided two reports from Dr Pratt, one of which responded to Ms McCraw's report. They invited the LAP to prefer the approach of Dr Pratt. They contended that there was no evidence that Mr Clarke had had any anti-social associations in custody, and that that invalidated one of Ms McCraw's concerns. They pointed out that Mr Clarke had already done a group course (the RESOLVE programme), and that she had not explained how her preferred course would reduce his risk. They also asked the LAP to say whether or not it would be helpful for the Director to hold a hearing, in order to resolve any doubts about Mr Clarke's progress and the disagreement between the experts about his level of risk.

Dr Pratt's first report

21. In his first report, Dr Pratt's advice was that there was no need for a PCL-R. He concluded that Mr Clarke's risk if unlawfully at large had reduced to the extent that he could be held as a Category B prisoner, agreeing with the LAP's recommendation in 2019. He supported a 'Therapeutic Community' for Mr Clarke.

Dr Pratt's second report

22. Dr Pratt considered risk assessments by Dr Gregory from 2018, and Ms McCraw's in her recent report. He did not agree with her that Mr Clarke had a personality disorder. He disagreed with her view that Mr Clarke's tendency to make detailed representations and his frequent use of the request complaint procedure were evidence of a 'personality pathology', or even a kind of 'offence paralleling behaviour'. There was no 'menace or threat'. He simply wanted to engage 'thoroughly' with 'professional processes, which will have a major impact on his future'. He had not tried to discredit the authors of the reports and his complaints were not thought to be vexatious. Dr Pratt accepted that Mr Clarke had some 'violent attitudes'. There was no evidence that they had got worse in prison, or that he had had them recently. Mr Clarke's behaviour was consistently 'pro-social' and he had consistently good relationships, 'at least with uniformed staff'. Those were strong indications that he was not 'consciously trying to manipulate or manage' people's impressions of him,

but 'simply reacting instinctively and naturally'. It was evident that Mr Clarke feared for his life if he were transferred to HMP Long Lartin or HMP Whitemoor. The presence of 'violent attitudes' was 'partial'. There was 'little or no' evidence of 'offence parallelling behaviour'. He had a 'reliable pro-social personality', which, in Dr Pratt's opinion, was 'to his credit'. It was not necessary for him to take part in the 'Identity Matters' programme before he could safely be moved to Category B. The Therapeutic Community could help Mr Clarke to 'explore the thinking styles behind the callous murder and destruction of somebody with whom [Mr Clarke] has been in an intimate relationship'. That was 'perhaps an outstanding area of concern'. It would not be covered by Identity Matters. His conclusion was that Mr Clarke should be moved to Category B.

The LAP's recommendation and minutes

23. On 20 January 2021, the LAP made a recommendation and provided the minutes of its discussion. The Judge described the LAP's views in paragraph 35. The LAP noted that there were positive features in Mr Clarke's case, but that he needed to address the elements of domestic abuse in his offending, that he presented himself very well, but needed 'specialist strategies' for managing violence. The LAP recommended the Identity Matters programme. Mr Clarke was keen to keep his lifestyle before he went to prison, chose to overlook or minimise any use of violence, and could be evasive when asked direct questions.

24. The minutes referred to 'Security Information'. It was noted that he had been moved from one wing to another because there had been allegations of 'bullying' in October. That allegation was not disclosed to Mr Clarke in the dossier. The minutes also recorded that he had had an adjudication hearing in April 2020 about a physical altercation between him and another prisoner, but that the charge had been dismissed. The minutes added, 'In the last year he has displayed offence paralleling behaviour with violence and bullying, and while he gives a consistent impression of having changed there are some concerns that he very much manages the image which he presents. This requires further assessment'.

25. The LAP recommended that Mr Clarke should stay in Category A. He was given the LAP's recommendation on 18 January 2021.

Decision 1

26. The next day, the CART made its decision that Mr Clarke should stay in 'Category A (Standard Escape Risk)'. The Judge quoted the decision letter extensively in paragraph 39. The CART said that the offence showed that Mr Clarke would 'pose a high level of risk if unlawfully at large'. There had to be 'clear and convincing evidence of a significant reduction in risk' before he could be moved to Category B. It noted his good behaviour and engagement with education. His 'treatment gain and full acceptance of responsibility' for his offence had not been 'resolved' by this work. Further assessments and, possibly, further treatment were recommended, including assessment of his personality and of the part it played in the offence. No 'significant risk reduction ha[d] therefore been shown'.

27. The CART recognised that his 'overall behaviour' had been 'satisfactory' since his last review. While noting that there was 'some alleged negative information, including

possible bullying', it nevertheless acknowledged that he had had no recent adjudications and continued to 'make good use of the regime'. His general 'adherence' to the regime was not enough to show a significant reduction in his risk if unlawfully at large. The CART still needed 'convincing evidence of' Mr Clarke's 'progress addressing and amending the risk factors shown by [his] serious offending'. After recording some positive features, the CART then said that there were still 'key issues influencing your present offence and subsequent behaviour in custody requiring further exploration'. Mr Clarke's personality was an important factor. It suggested both 'impression management' and that his apparent 'progress through interventions may be unreliable as an indicator of significant change'. He should stay in Category A and take part in the Identity Matters programme. The CART agreed with the LAP. The necessary 'convincing evidence' had still not been shown. The CART 'carefully noted' his representations. They did not provide the necessary convincing evidence. Dr Pratt's reports 'took a different view' about his 'level of progress and treatment needs'. Those reports nevertheless concluded that Mr Clarke needed 'further substantial treatment to address the core risk factors…albeit through a different route'. The CART also observed that Dr Pratt had applied the wrong test, by asking whether Mr Clarke was manageable in Category B. It did not 'believe that [those] reports showed that the prison and LAP conclusions on [his] progress and unsuitability for downgrading [were] irrational'.

Mr Clarke's solicitors' further representations

28. Mr Clarke's solicitors made further representations, including a third report from Dr Pratt, on 24 March 2021. They asked the Director to have a hearing, because fairness demanded it, given the complexity of the case, the disputed expert evidence and 'the current impasse'. They made three main allegations of unfairness: Mr Clarke had not been given the chance to comment on the LAP's recommendation; the LAP's recommendation was based on material which he had not seen, or which was inaccurate in some respects (seven examples were given); and the decision of the CART was flawed because it gave weight to unsubstantiated allegations of bullying, no account was taken of Dr Pratt's view that the Identity Matters programme was not suitable, and Dr Pratt had applied the right test. They submitted that there was an important dispute of fact about Mr Clarke's behaviour which could be assessed at a hearing. There was also a very significant dispute between the experts on at least three issues. The 'practicalities' of Identity Matters could be explored at a hearing, as could the experts' disagreement about 'offence paralleling behaviour'. There was a longstanding 'impasse' about the appropriate treatment. He might not be suitable for the Identity Matters programme, and a place might not be available for several years. He could not take part in a Therapeutic Community (Dr Pratt's preference) unless he was a Category B prisoner.

Dr Pratt's third report

29. Mr Clarke' solicitors enclosed a further report from Dr Pratt with the representations. He could not recommend that Mr Clarke should be required to complete the Identity Matters programme before the CART could conclude that there was cogent evidence of a reduction in risk. There was little indication that Mr Clarke's risk of violence was imminent. He had done the RESOLVE programme. The process should continue in a Therapeutic Community. The risk, if Mr Clarke was unlawfully at large, did not merit Category A.

Decision 2

30. The CART asserted that decision 1 was 'rational' on the information available to it. It rejected the argument that the process breached the PSI. The CART was not obliged to wait for further representations on the LAP's recommendation before it could make a decision. Mr Clarke had 'provided no coherent evidence that information having a material bearing on the decision was insufficiently disclosed, misrepresented or overlooked'. It added, having considered the relevant criteria in the PSI, that there were no grounds for an oral hearing. Mr Clarke's disagreement with the prison reports, the recommendation of the LAP or decision 1 did not 'represent a significant dispute warranting an oral hearing'. Decision 1 explained clearly why Dr Pratt's recommendations were not 'coherent evidence of significant risk reduction', in accordance with the PSI. The recommendations did not, therefore, represent 'a significant dispute warranting an oral hearing'. Mr Clarke had been in prison for several years and had never had an oral hearing; but those were not enough, without more, to show that an oral hearing was necessary. There was no evidence that Mr Clarke was in an 'impasse'. It also noted that there were more than ten years before Mr Clarke's tariff would expire, 'therefore no credible claim can be made [that] his Category A status is preventing his consideration for liberty'. There were no 'other issues relevant to his review and risk assessment that can be resolved only through an oral hearing'.

The legal framework

31. The Judge considered the legal framework in paragraphs 47-65. I have somewhat supplemented that summary.

32. Section 1 of the Prison Act 1952 ('the Act') is headed 'General control over prisons'. It provides that 'All powers and jurisdiction in relation to prisons and prisoners which before the commencement of the Prison Act 1877 were exercisable by any other authority, shall, subject to the provisions of this Act, be exercisable by the Secretary of State'. Section 3(1) gives the Secretary of State a wide power 'for the purposes of this Act' to 'appoint such officers and employ such other persons as he may, with the sanction of the Minister for the Civil Service, as to number, determine'. Section 4 is headed 'General duties of the Secretary of State'. The Secretary of State has 'the general superintendence of prisons…' (section 4(1)).

33. Section 12(1) of the Act provides that a prisoner 'may be lawfully confined in any prison'. Section 12(2) provides that 'Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct; and may by direction of the Secretary of State be removed during the term of their imprisonment from the prison in which they are confined to any other prison'.

34. Section 47 of the Act is headed 'Rules for the management of prisons and places for the detention of young offenders'. Section 47(1) gives the Secretary of State power to make rules 'for the regulation and management of prisons…and for classification, treatment, employment, discipline and control of persons required to be detained therein'. Rules made under section 47 'shall make provision for ensuring that a person who is charged with an offence under the rules shall be given a proper opportunity of presenting his case'.

35. The Prison Rules 1999 (1999 SI No 728) are made in the exercise of that power. Rule 7(1) provides that prisoners are classified, in accordance with any directions of the Secretary of State, having regard to the factors listed in rule 7(1). The main published policy relating to the classification of prisoners in Category A is the PSI.

The PSI

36. The first page of the PSI lists some information about it. An entry in the left-hand column reads, 'Provide a summary of the policy aim and the reason for its development/revision'. The adjacent text reads 'Provides establishments with *instructions and guidelines* regarding the procedures for reviews of Category A/Restricted Status prisoners' security category …' (my emphasis). Consistently with that description, a box at the end of the second page says '**Notes: All mandatory actions throughout this instruction are in italics and must be strictly adhered to**' (original emphasis).

37. The Executive Summary says that the PSI is one of several which 'form the Category A Function of the National Security Framework'. It is one of two which replace PSI 03/2010. It 'sets out *guidelines* for the procedures for reviews' (my emphasis) of the Category to which prisoners are assigned, and for deciding and reviewing Category A prisoners' escape risk. It has two 'desired outcomes'. First, escapes of 'highly dangerous prisoners' should be prevented. Second, categories should be 'reviewed appropriately and on time', and 'appropriate security measures' should be 'applied lawfully, safely, fairly, proportionately and decently'.

38. Paragraph 1.4 says that mandatory requirements, which are derived from the 'Manage the Custodial Sentence' specifications are 'highlighted in the shaded boxes'. Paragraph 1.6 provides that the PSI 'should be used by all staff involved in the review of categorisation and escape risk'. In italics, and under the heading 'Mandatory actions', paragraph 1.8 tells prison governors and directors of contracted prisons that they 'must ensure they have local security strategies in place and adhered to which are in accordance with the instructions set out in this PSI'.

39. Section 2 is headed 'Operational Instructions'. Under the heading a shaded box repeats that text in shaded boxes 'indicates requirements' from 'Manage the Custodial Sentence…'. Paragraph 2.2 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'. The Deputy Director of Custody ('DDC') High Security is responsible for the categorising and allocation of Category A prisoners. He may 'delegate decision-making as deemed appropriate, in accordance with the provisions of this instruction' (paragraph 2.3). Paragraph 2.4 provides for the division of Category A prisoners into three groups. Paragraphs 2.5-2.8 make provision about escape risk.

40. Section 4 provides for reviews of 'Confirmed Category A prisoners'. Paragraphs 4.1-4.5 are headed 'General'. Only paragraph 4.2 is in italics. It provides that before approving a move from Category A to Category B, the DDC 'or delegated authority' '*must have convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced, such as evidence that shows that the prisoner has*

significantly changed their attitudes towards their offending or has developed skills to help prevent similar offending'.

41. Paragraph 4.1 provides that there should 'normally' be a review two years after the first formal review (which is considered in paragraphs 3.30-3.43). After that, reviews should be every year 'on the basis of progress reports from the prison'. The LAP submits a recommendation about security category to the CART. If the LAP does not recommend a change and the CART agrees, the decision may be made by the CART, without being referred to the DDC, unless the DDC has not reviewed the case for five years. If that is so, the case will automatically be referred to the DDC. The DDC is 'solely responsible' for approving a change of category to Category B (paragraph 4.1).

42. Paragraphs 4.6 and 4.7 (about two pages of text) are headed 'Oral hearings'. Only the text of three bullet points in paragraph 4.6 is italicised. Paragraph 4.6 gives the DDC ('or delegated authority') power to have an oral hearing of the annual review of a Category A prisoner. It describes the relevant legal background, by reference to three cases, including *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 ('*Osborn*'). The courts are said to have recognised that the CART context is different, and that oral hearings have only rarely been held in such cases. There are differences, and they are 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 hearing than has been the position in the past. In these circumstances, this policy is intended to give *guidance* [my emphasis] to those who have to take oral hearing decisions in the CART context. Inevitably the *guidance* [my emphasis] 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'.

43. The three italicised bullet points are introduced with the words 'Three overarching points are to be made at the outset'.

    1. Each case must be considered on its own facts. They should all be weighed in the decision.
    2. The decision should be approached 'in a balanced and appropriate way', with an evidently open mind. Decision makers should take into account that there is a 'potential, real advantage' in an oral hearing both because it helps decision-making and because it recognises the importance of the issues to the prisoner. Cost should not be treated as a 'conclusive' argument against an oral hearing. Whether an oral hearing is allowed should not depend on the likelihood of a change of category.
    3. It is not an 'all or nothing decision'. There can be flexibility about the issues for which an oral hearing might be appropriate. This point is repeated in paragraph 4.7b.

44. Paragraph 4.7 then lists four types of case 'that would tend in favour of an oral hearing'.

    a. The first group is those in which there are disputes about 'important facts'. Facts are likely to be

'important' if they 'go directly to the issue of risk'. Even when facts are 'important', it is necessary to consider whether the dispute can be 'more appropriately resolved at hearing'. If an issue is advanced which depends on 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. The second group is those in which there is 'a significant dispute on the expert materials'. Such cases, it is said, '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'. The examples which are given include a case in which the LAP, 'in combination with an independent psychologist' has recommended a change of category, or where a psychological assessment produced by the Ministry of Justice 'is disputed on tenable grounds'. A decision to have an oral hearing is not 'all or nothing – it may be appropriate to have a short hearing targeted at the really significant points in issue'.

c. The third group is cases in which 'the lengths of time … in case have been significant and/or the prisoner is post-tariff'. Those factors do not automatically mean that an oral hearing is necessary. Nevertheless, the longer a prisoner has been in Category A, 'the more carefully the case will need to be looked at to see if the categorisation remains justified. It may also be that much more difficult to make a judgment about the extent to which they have developed over the period based on an examination of the papers alone'. 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 potential solutions to, the impasse.

d. The last type of case is one in which the prisoner has never had an oral hearing before, or has not had one for a long time.

45. Paragraphs 4.8-4.11 are headed 'Timing of annual reviews'. There is a box of shaded text under the heading: 'Categorisation is reviewed within set timescales'. Paragraphs 4.8 and 4.9 say when various steps will 'normally' be taken. The second sentence of paragraph 4.10 is italicised. It provides that 'The preparation for each annual review must therefore take into account the time needed for completion of reports, disclosure to the prisoner, the dates of the prison's LAPs and the [CART's] consideration'.

46. The heading of paragraphs 4.14-4.16 is 'Annual Review Procedures'. Paragraphs 4.14 and 4.15 are italicised. They provide, respectively, that prison staff must prepare reports at the relevant time, and that there is a copy of the relevant form in Annex A to the PSI. The completed reports must be disclosed to the prisoner at least four weeks

before the prisoner's LAP to allow representations to be submitted. Taking both the reports and any representations into account, the LAP must in turn make a recommendation to the [CART] on the prisoner's suitability for Category A/Restricted Status'. The CART (or the DDC, or 'delegated authority') will then complete the review at headquarters, 'taking into account the reports, any representations and the LAP's recommendation'. Paragraphs 4.17-4.19 deal with the preparation of reports. Only the first sentence of paragraph 4.17 is italicised.

47. Paragraphs 4.20 and 4.21 are headed 'Disclosure'. Paragraph 4.20 is italicised. The review is 'an open one'. The prisoner 'must understand' why he or she has been put in a particular category. The reports 'must be disclosed to allow the prisoner to make informed representations to the prison's LAP. The prisoner must be allowed four weeks to submit representations'. An extension of time may be given on request. 'Records must be kept of when the prisoner is given his/her reports and when he/she is informed of the date of the LAP'.

48. All reports are 'normally' disclosed to the prisoner. Security information which staff believe is relevant to the review can be included in section 5 of the reports, but 'sensitive or confidential information' may be withheld in some circumstances. Five such cases are listed. If sensitive information is withheld, consideration must be given to disclosing a gist or a suitably edited summary in section 5 of the reports. Relevant information which is too sensitive to be disclosed must be included in section 7 of the reports.

49. Paragraphs 4.22-4.25 deal with the LAP's consideration. Paragraph 4.22 is in italics. The word 'must' is used in both sentences. It requires the LAP to consider the prisoner's reports and any representations after the period of disclosure. 'The LAP must include attendance by the prison's Governor or Deputy Governor, and a range of appropriate report-writing staff, including special and security staff'. Paragraph 2.23 is not italicised. It adds that it is not necessary for the people who have written reports, or for prisoners or their representatives to attend, 'as they have the appropriate opportunity to submit written representations to the LAP'.

50. The first sentence of paragraph 4.24 is in italics. It requires the LAP to make a recommendation about the prisoner's category/status and to record it 'using the guidance provided'. The word 'must' is used. The second sentence adds, in plain text, 'The recommendation should also record and comment on any representations, or any factual inaccuracies in the reports that have been taken into account or resolved'. The first sentence of paragraph 4.25 is italicised. The word 'must' is used again. The LAP is required to send the reports, representations and the LAP's recommendation to the LAP 'as soon as possible' for the final decision to be made. The next two sentences are in plain text. 'At this point, the prison will forward the LAP report to the prisoner. The Category A Team review will be completed within 4 weeks of receipt of the LAP report'.

51. Paragraph 4.26 is headed 'Initial Category A Team Consideration'. It is not italicised. When the Category A Team gets 'the prisoner's reports, and representations submitted by the prisoner to the LAP, and the LAP's recommendation', it will 'consider' them, and either make a decision or forward the case to the DDC High Security (or delegated authority.) It will also take into account or forward to the DDC High

Security (or delegated authority) 'any representations received following the prison LAP's consideration'.

52. Paragraphs 4.27 and 4.28 are headed 'Annual Review Decisions by the Category A Team'. They are not in italics. Their effect is that, if the CART supports a recommendation of the LAP's that the prisoner's category/status should not change, it 'will normally' finish the review without referring to the DDC High Security, '(but see exceptions below)', and 'within 4 weeks of receipt of reports' let the prisoner know the outcome. The decision will give 'detailed reasons, 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'. Paragraph 4.29 deals with referrals to the DDC High Security. It gives the CART the option (but does not impose an obligation) to refer the decision to the DDC High Security in the four situations it lists.

53. The next relevant provision is paragraph 4.36, which is headed 'Post-decision process'. The CART will consider and respond to representations against a decision to keep a prisoner in Category A. The DDC High Security (or delegated authority) may re-take the decision where he/she 'considers the representations highlight information not previously considered that could materially affect the decision'.

54. The 'Security Categorisation Policy Framework' ('the Framework') is a second relevant policy. On its cover page, it says that the groups to which it applies 'must adhere to the Requirements section of this Policy Framework, which contains mandatory actions'. By contrast, sections 7-15 are said to contain 'guidance to implement [the Framework] set out in section 6 of [the Framework]. Whilst it is not mandatory to follow what is set out in this guidance, 'clear reasons to depart from the guidance should be documented locally'. A contact is given for any 'questions concerning departure from the guidance'.

55. Paragraph 1.2 provides that security categorisation is a 'risk management process'. Its purpose is to ensure that prisoners are 'assigned to the lowest security category appropriate to managing' five different types of risk which they might pose. Those include the risks of 'escape or abscond' and of harm to the public. The process 'provides for a holistic assessment of risk, taking account of a broad range of information'. Categorisation is not a reward for 'good compliant behaviour', or a punishment. 'Any categorisation decision must be based on risk alone' (paragraph 1.4). The description of Category A prisoners is 'those 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'.

56. Paragraph 8.16, in a section headed 'Recategorisation to Lower Security Conditions' provides that recategorisation to a lower security category is not an automatic progression or right but must be based on an assessment that the individual can safely and securely be managed in lower security conditions. Paragraphs 8.17-8.19 describe some of the relevant factors. Paragraph 8.38 is headed 'Remaining in Current Category'. If the decision is that the prisoner should stay in his existing category, 'the reasons why these security conditions are appropriate must clearly be recorded, together with any recommendations for actions required to evidence a reduction in risk and progression at a subsequent review'. Section 9 lists the general principles

governing categorisation decisions. The general rule is that information which is relevant to the decision should be disclosed to the prisoner, but there are circumstances in which, for example, security information can be withheld (paragraphs 9.7-9.10 and 9.11-9.12).

57. Paragraphs 9.13-9.18 are headed 'Representations'. If a prisoner wants to challenge a decision or the reasons for it, he should make representations in accordance with the Prisoner Complaints Policy Framework. They should normally be made within 28 days of the categorisation decision (paragraph 9.14). Paragraph 9.15 provides that a reconsideration will be 'appropriate' if a policy was not followed, information which was relevant and available at the time was not considered, factually incorrect information was relied on, or if 'any other reason is considered appropriate by the manager'. Paragraph 9.16 explains how that reconsideration will be done.

The relevant cases

Mackay v Secretary of State for Justice

58. We were referred to several cases. Even before the decision of the Supreme Court in *Osborn*, the courts recognised that an oral hearing might be appropriate when a prisoner asked to be moved from Category A. In R (*Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522, this court allowed an appeal from a decision of Bean J (as he then was). Bean J had allowed an application for judicial review of a decision to refuse such a hearing.

59. The prisoner's minimum term had expired. He had consistently denied his guilt for the two index offences (murder of a first victim and forcible buggery of a second victim, and other offences against her). He had had an oral hearing before the Parole Board, which had said that a move to a Category B prison 'might be a constructive move'. It was common ground in this court that the cases in which an oral hearing is necessary are 'few and far between' (paragraph 13). Bean J held that the circumstances of the case, in particular the remarks of the Parole Board, made an oral hearing necessary (paragraph 14).

60. In a judgment with which Sullivan LJ and the President of the Queen's Bench Division agreed, Gross LJ said that the categorisation of a prisoner 'self evidently' has 'serious consequences' for him, and explained why. In particular, a Category A prisoner has 'no prospects of release' (paragraph 25). The CART and the Parole Board have different roles. The latter is concerned with 'the protection of the public following a prisoner's supervised and controlled release' whereas the former is concerned with 'the risks to the public in the event of an escape' (paragraph 26). It is not the function of the Parole Board to supervise the decisions of the CART. On an application for judicial review 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'. It was not necessary to show that there are 'exceptional circumstances' but such hearings would be 'few and far between'. The advantages included better decision-making, and the potential for the resolution of 'disputed issues'. Considerations of cost and efficiency might point in the opposite direction. There was no 'single or general rule'. The 'mere existence of an impasse' or inconsistency with the views of the Parole Board would not necessarily entail an oral hearing. 'The court 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' (paragraph 28).

61. No feature in that case, other than the view expressed by the Parole Board, could have justified an oral hearing (paragraph 31). Gross LJ returned to that subject in paragraph 38, and said that the only factor which might make this one of 'those few cases' was if 'undue significance' was given to a single statement in the Parole Board's decision, if it was read out of context.

62. Gross LJ analysed the views of the Parole Board. Its clear view was that there had been no significant reduction in the risk posed by the prisoner (paragraph 34). On analysis also, there was no inconsistency between the views of the Parole Board and of the CART (paragraph 35). Gross LJ also took into account the factors he listed in paragraph 37, and concluded that they did not mean that this was 'one of those few cases' in which the CART was required to have an oral hearing. Those factors included that the prisoner's minimum term had expired and that he had not previously had an oral hearing before the CART (paragraph 37.iii)). He considered whether or not there was an impasse, and its relevance if there was, in paragraph (37.iv). Sometimes, as he said, 'impasses of this nature are unavoidable'.

R (Downs) v Secretary of State for Justice

63. The prisoner in *R (Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422 challenged two refusals by the CART to give him an oral hearing. He had been sentenced to life imprisonment with a minimum term of 23 years for one offence of aggravated burglary and two murders. In a judgment with which Moore-Bick LJ and Pill LJ agreed, Aikens LJ gave his reasons for dismissing the appeal.

64. The question was whether procedural fairness required an oral hearing. The prisoner argued that there was such a degree of disagreement between the two psychologists in the case that a hearing was necessary in order to enable the CART to 'uncover the facts and resolve' the issues about the prisoner's possible risk to the public (paragraph 24).

65. There were two aspects of the difference in the views of the psychologists; whether the prisoner was suitable for further work under the Sex Offender Treatment Programme, and his level of risk if unlawfully at large (paragraph 52). The dispute between them was not whether there was a sexual element in the offences, but whether they were sexually motivated (paragraph 45). An oral hearing would not enable that dispute to be resolved 'with any certainty'. The CART had to decide which view it preferred, but an oral hearing would not have helped it to do that. The views had been 'well rehearsed' and were already well known, in the light of the correspondence, and had not changed (paragraph 45).

66. The CART was not wrong to take the view that it had all the relevant material in writing, in the light of the length of reports and the correspondence (paragraph 47). The CART had 'two clear, opposed views to consider'. There was no need for an oral hearing 'for those to be rehearsed again. The CART's task was to decide which view it accepted, for which it did not need an oral hearing'. The decision of the CART to refuse to have an oral hearing was 'not wrong' (paragraph 50).

R (Hassett) v Secretary of State for Justice

67. This court considered two appeals in *R (Hassett) v Secretary of State for Justice* [2017] EWCA Civ 331; [2017] 1 WLR 4750. In both cases, the CART decided that the prisoner should stay in Category A, and did not have an oral hearing. The prisoners challenged those decisions, and the lawfulness of paragraph 4.7 of PSI 08/2013, which gave a list of the factors which would favour an oral hearing. One such factor was a significant dispute on expert materials. The prisoners argued that paragraph 4.7(b) of PSI 08/2013 did not reflect the guidance given by the Supreme Court in *Osborn*.

68. Sales LJ (as he then was), giving a judgment with which Moylan LJ and Black LJ (as she then was) agreed, described the significance of categorisation in paragraph 2. He described the different functions of the CART and of the Parole Board in paragraph 4. The prisoners' main argument was that the guidance about whether the Parole Board should hold an oral hearing which was given by the Supreme Court in *Osborn* should apply to the CART. That guidance suggested that the Parole Board should hold oral hearings more often than it had done. That submission had been rejected in several first instance decisions.

69. Sales LJ quoted paragraphs 4.6 and 4.7 of PSI 08/2013 in paragraph 21. They are identical to paragraphs 4.6 and 4.7 of the PSI (see paragraphs 42-45, above) except that paragraph 4.6 of the PSI refers to two more authorities than paragraph 4.6 of PSI 08/2013.

70. In paragraphs 50-62, Sales LJ described the implications of the decision in *Osborn* for decisions about Category A. The requirements of procedural fairness depend on the context of the decision (paragraph 50). In paragraph 51, he acknowledged that decisions by the Parole Board and by the CART both have significant effects on prisoners and on their prospects of release. He then listed three differences between the functions of the Parole Board and of the CART.

    i. The Parole Board is an independent judicial body and must observe high standards of procedural fairness. The CART and director are officials 'carrying out management functions in relation to prisoners'. Their various management functions meant 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. It is also 'appropriate to take into account the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering process', such as 'extensive discussions' with, and 'opportunities to impress', a range of officials, including contact with 'prison psychology service teams'. The decision of the CART is the culmination of an 'elaborate internal process of gathering information about and interviewing the prisoner' whereas the Parole Board makes a decision which is independent of the system for managing the prison.

    ii. The two bodies make different decisions. The Parole Board adjudicates on rights which affect the prisoner's liberty, whereas the CART makes

administrative decisions which ensure that prisons are managed properly and effectively in the public interest.

iii. The relevant statutory frameworks reflect those points. For example, article 5.4 of the European Convention on Human Rights applies to the Parole Board, but not to the CART.

71. The standards of fairness which now apply to the Parole Board are more stringent than in the past (paragraph 53). In paragraph 56, he said that the factors which were given particular weight in the guidance in *Osborn* 'either do not apply at all or with the same force' to decisions by the CART. He added that the guidance in *Mackay* and in *Downs* (see paragraphs 58-66, above) 'still holds good. The cases in which an oral hearing is required will be comparatively rare'.

72. He referred to paragraph 2 of *Osborn*, in which Lord Reed summarised his conclusions, and paragraph 86. In paragraph 59, Sales LJ explained, by reference to points Lord Reed made about the different context in that case, why it is clear that Lord Reed's reasoning did not directly apply to the CART. In paragraph 60, Sales LJ further explained that, because the Parole Board is an independent judicial body, he did not address the other factors which were relevant to the CART, the members of which had wider responsibilities for managing prisons. While the CART could not lawfully refuse an oral hearing on grounds of cost if fairness demanded one, it was a relevant consideration when courts were deciding what standards of fairness to impose (paragraph 60).

73. Some of the factors in *Osborn* were relevant to the CART, 'but they will usually have considerably less force in that context'. Fairness would nevertheless sometimes require an oral hearing, 'if only in comparatively rare cases'. In particular, if having read all the reports the CART were left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact of the decision on him 'would be so marked that fairness would be likely to require an oral hearing' (paragraph 61). In paragraph 62, he held that there are still material differences between the Parole Board and the CART and that those differences meant that 'the procedural requirements are different in the two cases'.

74. He considered the lawfulness of the PSI (in particular, of paragraph 4.7(b)) (see paragraph 44.b, above) in paragraphs 63-65. The Secretary of State was right that the existence of a significant dispute between experts was a factor which tended in favour of an oral hearing. The rest of the text of that sub-paragraph was 'a fair amplification of that basic idea'. The criticism that paragraph 4.7(b) did not track paragraph 86 of *Osborn* was misplaced. The example given had to be read subject to the guidance given earlier in that sub-paragraph. That was not unlawful. Paragraph 86 of *Osborn* could not be read directly across to this context. The modification in the rest of the text of that sub-paragraph was appropriate. Paragraph 4.7(b) gave lawful general guidance. It was not 'liable to mislead officials into applying a lower standard of procedural protection than the law would require'.

75. In paragraphs 67-69 and 71-72, he considered the decisions in the cases of both appellants. He held that they were both lawful. In paragraph 69, he added that even when 'there is a significant difference of view between experts', a hearing will 'often be unnecessary to allow them to ventilate their views orally', if, for example, there

would be 'no real prospect that this would resolve the issue between them with sufficient certainty to affect' the decision of the CART. Fairness does not require a hearing to investigate 'a speculative possibility'. In paragraph 69, he also approved paragraph 45 of *Downs* (see paragraph 65, above). He added, in paragraph 70, that if a prisoner refuses to accept responsibility for an offence, that is likely to affect any assessment of his risk.

The Judge's reasoning

76. The Judge said that Mr Rule submitted that the Secretary of State had failed to apply his published policy (that is, the PSI) and the procedure was unfair at common law.

77. Mr Rule submitted that there was a breach of the PSI because Mr Clarke had not been given the chance to comment on the LAP's recommendation. There were also several factors which favoured an oral hearing. Those included 'factual' disputes about several issues, about Mr Clarke's true attitudes, whether he had been involved in bullying, whether his interactions with professionals had been appropriate, and whether he would be at risk at another Category A prison. They also included disputes between the experts (listed in paragraph 72 of the judgment). It was not clear that the CART had understood the views of the experts. Mr Clarke had not had an oral hearing, and had been in prison for 13 years. There was an impasse about whether he should be treated in the Therapeutic Community or should take part in the Identity Matters programme.

78. The Judge recorded that Mr Rule relied on similar arguments about fairness. 'The same factual points …applied'. He recorded Mr Rule's further point: 'the fact that the case concerned a matter of real significance to [Mr Clarke] who has been maintained at Category A status for 13 years, despite engagement with offence-based programmes and even the positive recommendation of the LAP in the past and from an independent expert supporting a downgrade'. There were various advantages to an oral hearing, which would 'assist the quality of the decision-making and reflect [Mr Clarke's] legitimate interest in being able to participate in a decision with important implications for him' (paragraph 76). The question was whether Mr Clarke had had 'a fair opportunity to make his case, especially where [he] had not had an opportunity to see the LAP recommendation and report before it was considered by the CART' (paragraph 77).

79. The Judge recorded Mr Irwin's submissions in paragraphs 79-83.

80. The Judge considered, first, whether or not the Secretary of State had breached the PSI (paragraphs 82-104). He held that the PSI does not require the Secretary of State to allow the prisoner to make representations on the LAP recommendation before the CART decision is taken (paragraph 85). The Judge explained why in paragraphs 86-88.

    i. The text of paragraph 4.26 is not italicised. It is not, therefore, mandatory.
    ii. Paragraph 4.26 is permissive. It means that if and in so far as representations are received after the LAP recommendation, they should be taken into account or forwarded before the final decision is taken. It does not 'imply that there must be an opportunity to make

representations with respect to the LAP's recommendation'. That made sense, as it was clear that representations would normally be made 'before and so as to influence, the LAP's recommendation'; see the italicised text in paragraph 4.20 (see paragraph 47, above).

iii. In principle, fairness will not always require that the prisoner have a chance to comment on the LAP's recommendation before the CART decision, given that he has had an opportunity to make representations to the LAP.

81. The CART did not explain in decision 1 why it had decided not to have an oral hearing. Decision 2 gave an explanation. That explanation was consistent with the PSI. There were no significant factual disputes which had to be resolved. The terms of decision 1 showed, either, that the CART did not agree with the position of the LAP about bullying or violence, or, if it did, that that had no influence on decision 1. The CART 'recognised that your overall behaviour has been satisfactory since your last review' (paragraphs 91 and 92). The Judge did not consider that the other factors relied on by Mr Rule gave rise to important disputes of fact which the CART needed to resolve. Most were matters of clinical judgment 'about which experts could disagree'. Others were not important enough to the real issue, that is, the risk posed by Mr Clarke (paragraph 93). In the view of the CART, Dr Pratt's views were not 'coherent evidence of significant risk reduction', so that nothing would be gained by an oral hearing (paragraph 94). This approach did not depart from paragraph 4.7 of the PSI (see paragraph 44, above). The mere fact that there is a difference between the experts is not enough to make an oral hearing necessary; nor does paragraph 4.7 say otherwise. The focus, rather, was a 'real live dispute on particular points of real importance to the decision' (paragraph 95). The Judge explained that conclusion in paragraphs 96-100. There was 'a reasonable basis for the CART to conclude' that it was not necessary to hear further from Dr Pratt, or to ventilate the issues further, so as to resolve the key question of Mr Clarke's risk (paragraph 97). Even Dr Pratt accepted that Mr Clarke had to do 'further substantial treatment to address the core risk factors influencing [his] current offence, albeit through a different route' (paragraph 99).

82. The Judge agreed with the CART, in paragraph 102, that neither an alleged impasse nor the length of time Mr Clarke had spent in Category A made an oral hearing necessary. There was no impasse, because there were ways in which Mr Clarke could show a reduction in his risk, and as the tariff would not expire for some time, 'His consideration for liberty was not precluded by his Category A status'.

83. In paragraphs 103-109, the Judge considered whether 'common law fairness called for an oral hearing'. He directed himself correctly, in paragraph 103, that that was a question for the court to decide. The Judge took into account the administrative or managerial character of the decision, and held that Mr Clarke knew what case he had to meet, and had an ample opportunity to make written representations, so that there was no need for an oral hearing. He had all the material he needed (paragraphs 104 and 105).

84. As he had been extensively involved in 'contributing to the assessments and making his own representations', an oral hearing was not required for him 'to participate in a decision which has important implications for him'. Mr Clarke spoke to the relevant staff and had an 'extensive opportunity to engage with Ms McCraw' as part of her

assessment. He was also able to give her his comments on her assessment. He had copies of that and of all the reports. He and his legal team were also able to comment on the reports. He was able to provide reports from Dr Pratt. Although he did not see the LAP recommendation before the CART decision, he was able to comment on it afterwards, and to try to persuade the CART to reconsider decision 1. He was able to comment on the two matters in the LAP recommendation which might have given rise to unfairness 'if they were to be relied upon by the CART'. In the event, the CART did not rely on those as being factually correct, so that an oral hearing was not necessary to resolve any factual dispute about them (paragraphs 107 and 108).

85. There were no other factors which called for an oral hearing. In particular, the differences between the experts were about points on which opinions could vary 'and it was open to the CART to reach their own view as to which set of opinions to prefer simply from reading the reports. An oral hearing would not necessarily have illuminated the issue more clearly for the CART; nor would it have been likely that either of the experts would have changed their position as a result of an oral hearing' (paragraph 109).

The grounds of appeal

86. There are nine grounds of appeal.

i. It was unfair not to give Mr Clarke the chance to make written representations on the LAP's recommendation.
ii. It was also a breach of the PSI.
iii. The Judge was wrong in principle about the importance of the decision and so underestimated the high standard of fairness required.
iv. The value of an oral hearing does not depend on whether it would have influenced the outcome.
v. The Judge's decision is inconsistent with two other first instance decisions (*R (Zaman) v Secretary of State for Justice* [2022] EWHC 188 (Admin) ('*Zaman*') and *R (Seton) v Secretary of State for Justice* [2020] EWHC 1161 (Admin)) ('*Seton*').
vi. The Judge was wrong in principle to hold that because Mr Clarke was given documents and made written representations, he did not need an oral hearing. As Mr Irwin pointed out in his oral submissions, Mr Rule did not elaborate on this ground at the hearing. I would add that this ground is a re-statement, in different words, of the argument that an oral hearing was required on the facts of this case.
vii. The Judge was wrong not to treat the disputes in this case as disputes which could 'benefit' from an oral hearing.
viii. The Judge was wrong to decide the question whether an oral hearing was required by reference to the evidence which was available as more evidence would have come to light in the oral hearing.
ix. The Judge was wrong to hold that fairness did not require an oral hearing.

Mr Rule's submissions

87. In paragraphs 47 and 48 of his skeleton argument, dealing with ground iv., and criticising the approach of the Judge in paragraph 109, Mr Rule suggested two tests

for deciding when an oral hearing is necessary (as Mr Irwin pointed out in his oral submissions).

i. There should be a hearing when it is 'reasonably *capable* of possibly leading to a different outcome' (original emphasis).
ii. 'The focus of procedural fairness is not upon whether the existing adverse decision *could* be reached on the current material, but whether it is possible that following a fair procedure there might be a possibility of a different outcome' (original emphasis).

88. Mr Rule submitted that whether or not the procedure was fair was a question for the Judge to decide, and that the question for this court was whether or not the Judge's view was wrong. He emphasised six points: Mr Clarke had had no oral hearing in the course of 12 annual reviews, he had not been able to make representations on the LAP's recommendation, there was a question about the right 'pathway', Dr Pratt supported a downgrade, as had the LAP in 2019. Further, there was a 'plausible case for a downgrade' for Mr Clarke to advance.

89. He summarised the views of the experts. Ms McCraw had acknowledged that Mr Clarke could be considered for a downgrade. He acknowledged that Dr Pratt had assessed Mr Clarke by video link. There were several disputes between the experts. That meant that an oral hearing would be valuable. Mr Clarke's insight could have been explored at an oral hearing. He was not involved in the LAP process. There was negative information about bullying in the LAP recommendation. He had no opportunity to deal with that allegation, which might, consciously, or unconsciously, have influenced the CART. It was therefore relevant, even if the CART did not expressly rely on it. An oral hearing might have led the CART to find that there had been a significant change in the risk he posed.

90. Mr Rule submitted that if the PSI required the prisoner to be given the chance to comment on the LAP's recommendation, then that requirement could not yield to the points relied on by the Judge (see paragraph 80, above). It was for the court to interpret the policy; but if the policy required something, it required it. The policy could not distinguish between mandatory instructions and optional guidance. Every part had to be followed, unless there was a good reason for departing from it. The distinction which the PSI tried to draw between instructions and guidance was not coherent. The authorities show that there is, indisputably, a public law obligation to comply with a policy. He accepted that paragraph 4.26 does not, in terms, say that a prisoner must be given a chance to make representations on the LAP recommendation before the CART makes its decision. I think he accepted that the test for implying words in the policy was whether such an implication was necessary. It was important to have regard to the 'purpose and the context'. When asked what text should be implied, he said, 'in order to comply with paragraph 4.26, a reasonable opportunity should be allowed to the prisoner to do so'. He accepted that 'reasonable opportunity' could not be more than 4 weeks, having regard to paragraph 4.25 of the PSI.

91. He was asked about a suggestion (skeleton argument paragraph 42 and onwards) that the Judge had erred in not recognising the importance to Mr Clarke of the decision. He could not point to an express misdirection in the judgment, but nevertheless submitted that the Judge had not appreciated how important the decision was, and that this had led him to underestimate the importance of an oral hearing. The Judge had

not correctly applied the relevant principles. There were important omissions from the judgment. On analysis this criticism seemed to be that although the Judge had referred to the relevant authorities, such as *Hassett*, he had not set out enough passages from the authorities in his judgment.

92. Paragraph 109 of the judgment (see paragraph 85, above) did not reflect the relevant principles. The Judge should not have focussed on his perception of the outcome. The question was whether an oral hearing would 'add value'. The Judge had erred, in paragraph 97, by asking whether what the CART had done was reasonable.

93. Mr Rule referred to *Zaman* and *Seton*, which showed, he submitted, that if the correct principles were applied, a prisoner is entitled to an oral hearing. They emphasise the value of an oral hearing, and how issues might 'more appropriately' be resolved at an oral hearing. In answer to a question, he submitted that, on the facts of this case, there was only one right answer, which was that the CART should have given Mr Clarke an oral hearing.

Mr Irwin's submissions

94. Mr Irwin accepted that there were positive factors in favour of Mr Clarke, as was evident from the dossier and from decisions 1 and 2. There was an issue between the psychologists about whether Mr Clarke's conduct included 'impression management'. Mr Clarke had the opportunity, which he took, to make submissions before the LAP made its recommendations. Dr Pratt was able to comment on Ms McCraw's report and did so in his second report. Mr Clarke's submissions also addressed that topic. Ms McCraw's report was careful and balanced.

95. Paragraph 4.2 of the PSI set a high threshold which had to be met to justify a change of category (see paragraph 40, above). That high standard feeds into procedural questions, as Sales LJ explained in paragraph 51 of *Hassett* (see paragraph 70, above). Decision 1 was the culmination of a long process of gathering evidence.

96. The Judge's interpretation of paragraph 4.26 of the PSI was correct (see paragraphs 51, and 80, above). Mr Irwin also relied on paragraph 4.20, by contrast (see paragraph 57, above), as a clear mandatory requirement. It is italicised, and uses the word 'must'. The prisoner must be given an opportunity to make representations. There is also an express timetable. The PSI clearly distinguishes between 'instructions' and 'guidelines'. That distinction runs through the PSI and is reflected in the difference between italicised and plain text. The policy could include both instructions and guidelines. Paragraphs 4.6 and 4.7 illustrated that point (see paragraphs 42-44, above).

97. Mr Irwin submitted that the Judge directed himself correctly in the opening paragraph of the section in the judgment in which the Judge considered common law fairness, that is, paragraph 103 (see paragraph 83, above). The Judge was right to hold, by reference to the text of decision 1, that the CART had not relied on the bullying allegation. Nor had the CART referred to the PCLR test. That criticism was, therefore, not material.

98. The section of the PSI which dealt with oral hearings clearly distinguishes between mandatory directions and guidelines. Paragraph 4.7 was clear that various factors

'tend' towards an oral hearing, but it does not stipulate anywhere that an oral hearing must be held. It did not follow that the guidelines could be ignored; but they do not dictate a result. Paragraph 4.7 listed indicative factors. Mr Irwin agreed with the suggestion that paragraph 4.7 listed potentially relevant considerations.

99. The authorities on fairness at common law also suggest factors which might influence a decision to hold an oral hearing, but they are not prescriptive. He referred again to paragraph 51 of *Hassett*. The presence of one or more factors was not decisive. So, for example, if there was a dispute between the experts, but the resolution of that dispute would not influence the ultimate decision, an oral hearing was not required. Paragraph 69 of *Hassett* is clear that a speculative potential influence on the outcome is not enough to entail an oral hearing, which meant that Mr Rule's two formulae (see paragraph 87, above) were wrong. The question is whether there is any real possibility that the dispute between the experts would be resolved by an oral hearing, and, if so, whether the test in paragraph 4.2 of the PSI (see paragraph 40, above) would be met, which is a high threshold. The differences between the experts were narrow. It was difficult to see how, even after a hearing, the CART could have been satisfied that the test was met.

100. The submission that the Judge did not appreciate the importance of the decision for Mr Clarke relied on an argument that the Judge erred in law by failing to say something, while accepting that everything the Judge said was 'technically correct'. There was no issue in the hearing about the importance of the decision: it is obvious that it is important.

101. The new test proposed by Mr Rule (in whichever form: see paragraph 87, above) was inconsistent both with the authorities and with the terms of the PSI. Mr Clarke had not challenged the lawfulness of the PSI.

102. Mr Irwin also submitted that ground v. (see paragraph 85, above) should be dismissed. The two first instance decisions on which Mr Rule relied were based on the facts of those cases. That different judges had reached different decisions on different facts about whether or not fairness required an oral hearing is not surprising. It does not begin to show that the Judge was wrong in this case.

Discussion

103. There are two broad issues in this appeal (and several sub-issues). The two broad issues overlap to some extent. It is important, nevertheless, to understand that they are different, because the approach of the court to each of them is different. The first broad issue is whether the Judge was wrong to hold that the Secretary of State (for this purpose, the CART) complied with his relevant policy, that is, with the PSI. The second is whether the Judge was wrong to hold that the Secretary of State (for this purpose, the CART) did not act unfairly at common law (whether by not holding an oral hearing, by not giving Mr Clarke an opportunity to comment on the LAP's recommendation before making decision 1, or in any other respect). I will consider those issues in turn. I will then consider the other arguments raised in the grounds of appeal, to the extent that that is necessary.

Was the Judge wrong to hold that the Secretary of State did not breach his policy?

104. It is necessary to know what the policy requires before it is possible to decide whether or not the Secretary of State breached it. The first question, therefore, is what the relevant parts of the PSI mean. There is an overarching point before I consider the terms of paragraphs 4.26 and 2.6 and 4.7. I accept Mr Irwin's submission that the PSI clearly distinguishes between instructions and guidelines. That distinction is reflected in the use of italics for the mandatory parts of the policy, and plain text for the guidelines, and supported by the use of the word 'must' in the italicised text, and its absence elsewhere. The plain general intent of the policy is that decision-makers must do what the italicised text tells them to do, and must be guided by, that is, must take into account, the provisions in plain text.

105. Mr Rule accepted that paragraph 4.26 does not in terms say, or suggest, that it means what he would like it to say. First, it is not in italics. Second, it does not use the word 'must'. The verbs are indicative and are in the future tense. Third, it does not say that the CART must, or even that it will, send the LAP's recommendation to the prisoner before it makes a decision, and allow the prisoner any time, let alone a specific period, in which to make representations on the LAP's recommendation before it makes its own decision. What it says, instead, is that 'It will also take into account or forward to the DDC High Security (or delegated authority) *any* representations received' (my emphasis). I agree with the Judge that that language is permissive, not mandatory. Paragraph 4.26 clearly means that if (but only if) the prisoner does make representations 'following the LAP's consideration', and the CART receives those before it makes its decision, it will take them into account.

106. That meaning is clear. But if there were any doubt about it, the presence of paragraph 4.20 on the previous page of the PSI resolves that doubt. I accept Mr Irwin's fall-back submission that paragraph 4.20 shows that the drafter of the PSI knew that it was possible to craft a precise, binding, and express requirement of the kind which Mr Rule contends is implied by paragraph 4.26. The contrast between paragraph 4.20, in which such a requirement is present, and paragraph 4.26, from which it is missing, is fatal to Mr Rule's argument. The drafter could have drafted paragraph 4.26 in a similar way to paragraph 4.20, but chose not to. The clear inference is that the difference is deliberate and, therefore, that the language of paragraph 4.26 does not mean what Mr Rule submits that it does.

107. For those reasons, I reject Mr Rule's submission that the CART breached the PSI by not giving Mr Clarke an opportunity to comment on the LAP's recommendations before it made decision 1. The Judge was right to reject that argument for the reasons he gave in paragraphs 85-89. He was also right to hold that fairness does not require such an opportunity to be given, as the prisoner has had the chance to 'feed their representations to the LAP' (paragraph 88). The process of gathering evidence in this case, before the LAP made its recommendation was thorough and detailed. It very much involved Mr Clarke, his representatives, and his expert. That is the necessary background to the question whether fairness required Mr Clarke to be given an opportunity to make representations on the LAP's recommendation before the CART made its decision.

108. A similar approach applies to the meaning of paragraphs 4.6 and 4.7. The first part of paragraph 4.6 starts by making it clear that the decision-maker may hold an oral hearing, and by outlining the law as it applies to these decisions after *Osborn*. Mr

Rule did not suggest that that outline was inaccurate. The clear intent of the drafter is that the decision-maker must, against that legal background, apply the three 'overarching points' described in the three italicised bullets at the end of paragraph 4.6. I did not understand Mr Rule to suggest that the CART in this case had failed to follow the strictures in those three bullets. In any event, there is no evidence of such a breach in the language of decision 1 or of decision 2.

109. Paragraph 4.7 of the PSI is not in italics. It does not use the word 'must'. The clear intent of paragraph 4.7 is to guide decision-makers who have to consider whether or not to have an oral hearing about the factors which 'would tend in favour of an oral hearing being appropriate'. Paragraph 4.7 tells decision-makers what the indicative factors are. Significantly, however, it does not dictate what weight, if any, a decision-maker is to give any factor, or what relative weight those factors should be given. Moreover, the language requires a decision-maker to make a series of judgments on the facts of the particular case: for example, whether a fact is 'important', whether a factor 'goes directly to the issue of risk', whether a dispute would be 'more appropriately resolved at a hearing', whether there is 'a real and live dispute on particular points of real importance to the decision' and so on. Unsurprisingly, paragraph 4.7 does not tell a decision-maker what those judgments should be on particular facts. It follows that a decision-maker who conscientiously applies his mind to the facts and makes the judgments which he considers arise on the particular facts will comply with paragraph 4.7. I reject Mr Rule's submission that the only answer which was available to the CART in this case, having weighed the factors identified in paragraph 4.7, was that an oral hearing was necessary. The CART is much better placed to make those assessments than the Judge was, and considerably better placed to make them than is this court.

110. The Judge was also entitled to conclude, as he did in paragraphs 89-102, when considering the various criticisms which Mr Rule made, that the CART was either 'right' to reach particular conclusions or (as in paragraph 97) that there was 'a reasonable basis' for the CART's conclusion, or (as in paragraph 100) that it was 'open to' the CART to reach a conclusion. I reject Mr Rule's submission that the last two formulae show that the Judge erred in law. The issue he was considering in this part of the judgment was not whether the CART had acted unfairly (which is a question for the court) but the distinct question whether the CART had complied with the PSI. As I have indicated, paragraph 4.7 gives the CART the job of making a series of evaluative judgments. The issue for the Judge in relation to compliance with the policy was not whether those judgments were right, but whether it was open to the CART to make those judgments on the facts. In those instances where the Judge found that the CART was 'right' to reach a conclusion, he went further than he needed to; but he did not err in law either in paragraphs 97 or 100, or by going further in those paragraphs in which he went further.

Did the CART act unfairly?

111. The Judge directed himself correctly that this was a question for the court (paragraph 103). He decided that issue in favour of the CART, for the reasons he gave in paragraphs 102-109. The authorities show that whether the CART has acted unfairly in not holding an oral hearing depends on the evaluative assessments by the court about whether relevant factors are present in a particular case, and, if so, about the

weight which the court should give to the factor or factors which is or are present. It is clear that no one factor must be given decisive weight. The Judge carefully considered the various ways in which it had been, or might be, argued that the CART had acted unfairly, whether by not giving Mr Clarke a chance to make representations about the LAP's recommendations, or by not holding an oral hearing. It is not for this court on an appeal to make its own assessment in those respects, but to decide whether or not the Judge's assessments were wrong. I do not consider that any of the Judge's assessments was even arguably wrong.

112. That conclusion is obviously not entailed by my conclusion that the CART complied with the relevant provisions of the PSI, but my first conclusion supports my second conclusion. Two significant background factors are that the CART did not breach paragraph 4.26 of the PSI and that when the CART decided not to hold an oral hearing, it directed itself correctly in law, by reference to paragraphs 4.6 and 4.7 of the PSI, and that it complied with the PSI by taking account of and weighing the relevant matters. That does not in principle insulate decision 2 from a challenge on the grounds of unfairness, but, as a matter of fact, makes it implausible that the CART, despite its correct understanding of the legal position, and the fact that it addressed its mind to the relevant factors, nevertheless somehow managed to act unfairly in not giving Mr Clarke an oral hearing. Mr Rule's submissions on this issue amounted to an invitation to this court to substitute its assessment of the relevant factors for that of the Judge, despite the fact that he has not shown that the Judge erred in law. That approach is wrong in principle.

113. I reject Mr Rule's two suggested answers to the question when it will be unfair to decide not to have an oral hearing (see paragraph 87, above). I accept Mr Irwin's submission that those formulae introduce a degree of speculation into the test which, the authorities make clear, is not the law (paragraph 45 of *Downs* and paragraph 69 of *Hassett*: see paragraphs 65 and 75, above). The Judge cited the relevant paragraph of *Hassett* in paragraph 65 of the judgment. The same reasoning also applies to grounds iv. and viii., with which this point significantly overlaps.

The other grounds of appeal (to the extent that it is necessary to consider them)
Did the Judge understand the significance to Mr Clarke of a decision about his category and its impact on fairness?

114. It is clear from the detailed statement of facts and grounds in the application for judicial review, from Mr Rule's skeleton argument for the hearing of the application for judicial review, and from the authorities to which the Judge was referred during the hearing, that a decision on his Category is important to a prisoner, and why. The suggestion that the Judge did not know that it was an important decision for Mr Clarke is, therefore, not only adventurous, but implausible. It is significantly undermined, further, by a close reading of the judgment. In paragraph 76, the Judge noted Mr Rule's two linked submissions that one of the factors which pointed to an oral hearing was 'the fact that the case concerned a matter of real significance to [Mr Clarke] who has been maintained at Category A status for 13 years…An oral hearing would …reflect [Mr Clarke's] legitimate interest in being able to participate in a decision with important implications for him'. The latter point was echoed in paragraph 106 of the Judge's reasons: 'Furthermore, given Mr Clarke's extensive involvement in contributing to the assessments and making his own representations, an oral hearing was not required for him to participate in a decision which had

important implications for him'. Finally, the objective significance of the decision about Mr Clarke's category should not, in any event, be overstated. As the CART knew, and noted in decision 2, he was, when decision 2 was made, 'over 10 years from tariff expiry'. As the CART said in decision 2 (see paragraph 30, above), it followed that 'no credible claim' could 'therefore be made [that] his Category A status is preventing his consideration for liberty'. In other words, a decision that Mr Clarke should stay in Category A could not, at that distance from the expiry of his tariff, have a significant negative impact on the likelihood of his release. Paragraph 102 of the judgment shows that the Judge was also conscious of this point (see paragraph 82, above). It is, therefore, clear that the Judge did fully understand the significance of the decision to Mr Clarke. Given the Judge's extensive citation of the relevant authorities, the linked submission that the Judge did not understand, either, what the relevant standard of procedural fairness was, is hopeless, and I reject it.

The other first instance decisions

115. The Judge's decision and those in *Zaman* and *Seton* (see paragraph 86.v., above) were made on different facts. They are all first instance decisions. The legal issues in all the cases were similar. So the decision of each judge involved the assessment, and weighting, of the various factors which happened to be relevant in each case. No point of any legal significance can be deduced from the fact that two other judges have reached different decisions from the Judge. Each case was different. A submission to the contrary is close to a submission that every judge in such a case must decide, as a matter of law, that an oral hearing is required. Any such contention is wrong.

Conclusion

116. For those reasons I would dismiss this appeal.

Lord Justice William Davis

117. I agree.

Lady Justice King

118. I also agree.