Neutral Citation Number [2019] EWHC 3247 (Admin)

Case No: CO/5891/2017

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

The Court House
Oxford Row
Leeds LS1 3BG

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

THE QUEEN (ON THE APPLICATION OF SIMON GOLDSMITH) — **Claimant**

- and –

SECRETARY OF STATE FOR JUSTICE — **Defendant**

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- -

Mr Philip Rule for the Claimant
Mr David Manknell for the Defendant

Hearing date: 27 September 2019
Date draft circulated to the Parties 21 October 2019
Date handed down 28 November 2019

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I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Introduction

1. The claimant, Mr Simon Goldsmith received concurrent life sentences on 20 December 1999 for 2 offences of rape and false imprisonment. As was required by law at that time, since this was his second offence of rape, he received an automatic life sentence. The minimum term of the sentence before he became eligible for parole was ultimately set at 6 years. He has accordingly been eligible for release by a Parole Board since 2005.

2. On admission into the prison system he was designated in Category A security conditions and has remained a Category A prisoner since that time. Prison Service Instruction (PSI) 40/2011 paragraph 2.1 and PSI 08/2013 paragraph 2.1 define a Category A prisoner as one "*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*".

3. The regime under which a Category A prisoner exists within the prison system is much more restrictive than applies in respect of prisoners in lower categories. In addition, in practical terms, it is very unlikely indeed that a Category A prisoner would ever be granted parole.

4. There is of course a mechanism for the review of the category in which a prisoner is held. This is set out in paragraph 4 of PSI 08/2013 to which I shall shortly come in more detail. Suffice it to say that, subject to various exceptions, decisions relating to re-categorisation are made annually by a Category A Review Team (CART).

5. Paragraphs 4.6 and 4.7 of PSI 08/2013 make provision for CART to grant an oral hearing to a prisoner which would allow the prisoner or his/her representatives to submit verbally their representations in support of a downgrading of categorisation.

6. In their reviews conducted in 2017, 2018 and 2019 CART concluded that re-categorisation was not appropriate. It did so in each year without an oral hearing. The respective decisions were communicated to the claimant by letters of 6 September 2017, 11 September 2018 and 3 September 2019.

7. The claimant challenges the lawfulness of all 3 decisions on the basis that substantively all the decisions to maintain category A status were wrong and he also

challenges them on the basis that it was procedurally unfair not to convene an oral hearing before making the substantive decisions. He complains of a failure even to consider whether an oral hearing was required in 2017 and 2019. He also alleges a failure to comply with a common law duty to give reasons why no oral hearing was granted in the annual reviews of 2017 and 2019.

8. The claim as originally issued merely challenged the 2017 decision. Permission was granted by His Honour Judge Gosnell sitting as a High Court Judge on 14 February 2018. In his order he observed as follows:

> *"The claimant made a specific request for an oral hearing and this request was not addressed at all in the decision letter. It is not surprising that the claimant feels aggrieved about the ex post facto justification for the decision in the letter of response. This prisoner appears to have reached somewhat of an impasse in his progress and he did have some limited support from 2 independent clinicians in relation to future assessment of risk. The claim is arguable*."

9. The claim was amended subsequent to the 2018 decision in order that that decision could also be challenged. On 10 June 2019 Her Honour Judge Belcher sitting as a Judge of the High Court granted permission to amend and granted permission for judicial review based on that amendment. Her observations recorded in her order are as follows:

> "*Whilst the approach of the parties as set out in the Statement of the parties is different, D recognises that the second decision should form a part of these proceedings. Further he accepts that the court, having granted permission in relation to the first decision, is likely to grant permission for the second decision, given both are decisions on categorisation, with the same result and commonality of grounds of challenge. Further C argues that the second decision looks at changes, if any, since the earlier decision and asserts that if the earlier decision falls away, the second must also. D argues that the first decision is now academic and overtaken by the second decision. Permission having been granted, the court cannot prevent C having a hearing on the first decision. Accordingly, it is sensible for matters to proceed together*"

10. There are actually 7 formal grounds of challenge contained in the Amended Facts and Grounds but inevitably there is considerable overlap:

    a. Ground 1 asserts a failure to consider the question of an oral hearing in 2017.

    b. Ground 2 alleges a failure to properly apply the published policy contained in PSI 08/2013 with regard to the circumstances in which an oral hearing should be held.

    c. Ground 3 asserts a failure to act in accordance with common law duties of procedural fairness on the basis that common law requires the provision of an oral hearing (in both 2017 and 2018) to do fairness to the claimant's case.

d. Ground 4 alleges a failure to act in accordance with the common law duty to give reasons. This is a criticism of the fact that albeit a request for an oral hearing was made in respect of the 2017 categorisation review, no reasons were actually given why that request was declined.

e. Grounds 5 and 6 allege that there were errors of the factual nature in the 2017 decision which taint it and, as a result the 2018 decision. This is because categorisation decisions are not stand alone but are an ongoing process whereby the previous decision is reviewed and contributes to the decision-making at the subsequent annual review. Therefore, errors contained in an earlier decision will taint more recent decision. This has been divided into 2 grounds because the contention is that it impugned the substantive decisions not to downgrade categorisation but also gives rise to a challenge on the basis that it affects the lawfulness of the decision not to hold an oral hearing.

f. Ground 7 alleges a failure to act rationally or proportionately in accordance with common law principles. The contention is that the decision is outside the range of reasonable decisions open to CART

11. The matter before me initially proceeded also on the basis of a challenge to the 2019 decision notwithstanding that there is no re-amended pleading addressing this decision. This is because this decision was only communicated by letter as recently as 3 September 2019, a matter of 3 weeks before the hearing. Indeed, in his skeleton argument at paragraphs 4 and 5, Mr David Manknell, counsel for the Secretary of State (who is responsible for the decisions of CART) argues that it is not only desirable for the court to adjudicate on the 2019 decision, but the court should only consider the challenge to that decision and should not decide on the challenges to the 2017 and 2018 decisions on the basis that they are academic.

12. Mr Philip Rule, counsel for the claimant urged me to consider the lawfulness of the 2019 decision but also to make a determination in respect of the two earlier decisions so that any further reconsideration by CART would be on the basis of a clean slate. He asserted that this was important not least because, as I have said, his understanding is that decisions on re-categorisation are based upon changes in circumstances since the last re-categorisation review (he relies upon *R (Falconer) v SSJ* (2009) EWHC 2341 (Admin) at [18] for this submission).

13. In fact, as the case progressed it became clear that there were difficulties in considering the 2019 decision because, whilst ostensibly the challenge is to the decision of CART not to downgrade the claimant's categorisation or convene an oral hearing before completing their review, an issue arose as to whether it could be said that CART was wrong to reach the conclusion that it reached on the information with which it was presented in the dossier to which I shall refer below and which provides CART with the information upon which to make its decisions.

14. Insofar as CART's decision might be based on inaccurate information in the dossier, Mr Manknell argued that that was a different issue, it was not a complaint against CART but rather a complaint against the compiler of the dossier and thus the quality

of the dossier upon which CART relied. That was a different argument and one with which Mr Manknell was not equipped to deal.

15. This is of course one of the difficulties in attempting to deal with matters "*on the hoof*", which essentially dealing with 2019 decision would have been. Having said that, I should make it clear that I have absolutely no criticism of counsel in initially seeking to incorporate into this hearing a review of the 2019 decision and I appreciate the consensus now reached between them that, in the circumstances, that is not realistic at least without further submissions. I recognise that this is something of a volte face from the shape that both counsel (and myself) had initially expected the case to assume. Indeed, as I have said Mr Manknell was initially of the view that this hearing should be confined only to a consideration of the 2019 decision. However, by the end of their oral submissions both counsel had recognised and accepted the difficulty in seeking a determination as to the lawfulness of the 2019 decision, at least without further submissions.

16. It was accordingly agreed with counsel that the matters for determination were in reality:

    a. the lawfulness of the 2017 decision and whether an oral hearing should have been held prior to it.

    b. the lawfulness of the 2018 decision and whether an oral hearing should have been held prior to it.

17. I should add for completeness that there was also an issue raised as to the obligations in terms of procedural fairness on the part of CART to give reasons for not convening an oral hearing if they are not asked to give reasons and whether, if they are asked, giving reasons after the event rather than at the time of the original decision meets the obligation of fairness. Counsel also agreed that, pending further representations on such issues, if they are necessary, they do not look to me for determination on the question of whether reasons for refusal to hold an oral hearing must be given even if not asked for and/or can validly be given after the event.

The Law

18. The legal framework by which re-categorisation decisions are made has been set out in many previous cases. By section 12 *Prison Act* 1952 a prisoner may lawfully be confined to any prison, as the Secretary of State directs. By section 47 of the 1952 Act the Secretary of State may make rules for the regulation and management of prisons and the classification, treatment, employment, discipline and control of prisoners.

19. The *Prison Rules* (SI 1999/728) have been made pursuant to s47 of the 1952 Act and paragraph 7 of the SI requires the classification of prisoners 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."*

20. *Prison Service Instruction* (PSI) 40/2011 dated 31 August 2011 sets out (in paragraph 2.1) the current categories under which adult male prisoners are held and they range

from Category A to D. As sated in paragraph 2 above, a category A prisoner is one 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."*

21. Security conditions become less restrictive as the categories change so that a prisoner in category B is one for whom the "*very highest conditions of security are not necessary but for whom escape must be made very difficult*". A prisoner in category C is one "*who cannot be trusted in open conditions but who does not have the resources and will to make a determined escape attempt.*" A prisoner in category D represents a low risk and *"can therefore can reasonably be trusted in open conditions and for whom open conditions are appropriate".*

22. Section 3 of PSI 40/2011 states that:

> *"all prisoners must have assigned to them, the lowest security category consistent with managing their needs in terms of security and control and must meet all the criteria of the category for which they are being assessed…"*

23. Category A prisoners are subject to a special regime for the review of their categorisation. This is set out in PSI 08/2013 entitled the *Review of Security Category – Category A Restricted Status Prisoners* which came into effect on 27 March 2013 and was revised on 10 June 2016. At paragraph 2.1 it repeats the definition of a Category A prisoner as was set out in PSI 40/2011.

24. By paragraph 4.1 a prisoner will have his Category A status reviewed 2 years after the first formal review (which takes place shortly after conviction and sentence) and thereafter Category A status is reviewed annually. A key feature of the Category A regime is that review decisions are not made at prison level. Rather they are made centrally at the headquarters of the National Offender Management Service (NOMS) ostensibly by the Deputy Director of Custody (DDC) High Security although the DDC can and does, subject to exceptions, delegate that responsibility to CART.

25. CART will consider categorisation on the basis of a recommendation made from a Local Advisory Panel (LAP). The LAP is situated within the prison in which the prisoner is incarcerated. If the LAP recommends continuation of Category A status and this is agreed by CART then the prisoner remains in Category A (subject to any successful judicial review).

26. If CART disagrees with the LAP the matter has to be referred to the DDC. This is the first exception to which I refer in paragraph 24 above. The second exception arises where the DDC has not reviewed a category A categorisation for 5 years. In such a case the categorisation review decision will be automatically referred to the DDC.

27. Paragraph 4.2 of PSI 08/2013 provides that:

> "*Before approving a confirmed Category A prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of reoffending if unlawfully at large has significantly reduced, such as evidence that shows the prisoner has significantly changed their*

attitudes towards their offending or has developed skills to help prevent similar offending".

28. There is scope for oral hearings of a Category A prisoner's annual review. This is covered by paragraphs 4.6 and 4.7 of PSI 08/2013. This will allow the prisoner or the prisoner's representatives to submit verbally their representations in favour of re-categorisation.

29. It is as well for the purposes of this application to set out in their entirety paragraphs 4.6 and 4.7.

> *4.6 The DDC High Security (or delegated authority) may grant an oral hearing of a Category A / Restricted Status prisoner's annual review. This will allow the prisoner or the prisoner's representatives to submit their representations verbally. In the light of the clarification by the Supreme Court in Osborn, Booth, Reilly of the principles applicable to determining whether an oral hearing should be held in the Parole Board context. The Courts have consistently recognised that the CART context is significantly different to the Parole Board context. In practical terms, those differences have led to the position in which oral hearings in the CART context have only very rarely been held. The differences remain; and continue to be important. However, this policy recognises that the Osborn principles are likely to be relevant in many cases in the CART context. The result will be that there will be more decisions to hold oral hearings than has been the position in the past. In these circumstances, this policy is intended to give guidance to those who have to take oral hearing decisions in the CART context. Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing. The process is of course not a mathematical one; but the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed. Three overarching points are to be made at the outset:*
>
> - ***First,*** *each case must be considered on its own particular facts – all of which should be weighed in making the oral hearing decision.*
>
> - ***Secondly,*** *it is important that the oral hearing decision is approached in a balanced and appropriate way. The Supreme Court emphasised in Osborn that decision makers must approach, and be seen to approach, the decision with an open mind; must be alive to the potential, real advantage of a hearing both in aiding decision making and in recognition of the importance of the issues to the prisoner; should be aware that costs are not a conclusive argument against the holding of oral hearings; and should not make the grant of an oral hearing dependent on the prospects of success of a downgrade in categorisation.*
>
> - ***Thirdly,*** *the oral hearing decision is not necessarily an all or nothing decision. In particular, there is scope for a flexible approach as to the issues on which an oral hearing might be appropriate.*

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

a. Where important facts are in dispute. Facts are likely to be important if they go directly to the issue of risk. Even if important, it will be necessary to consider whether the dispute would be more appropriately resolved at a hearing. For example, where a significant explanation or mitigation is advanced which depends upon the credibility of the prisoner, it may assist to have a hearing at which the prisoner (and/or others) can give his (or their) version of events.

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

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

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

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

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

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

30. The procedure for annual reviews is set out from paragraph 4.14 of PSI 08/2013. Prison staff must prepare the reports for the prisoner's annual review (paragraph 4.14) which must be disclosed to the prisoner at least 4 weeks prior to the prison'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 CART on the prisoner's continued suitability for Category A (paragraph 4.15). CART will complete the review taking into account the reports, any representations and the LAP's recommendation (paragraph 4.16).

31. The reports produced by the prison staff must be a comprehensive summary of the prisoner's behaviour and progress to date that will enable an assessment of any reduction in the prisoner's level of risk (paragraph 4.17). Additional further relevant documents may be included or referred to in the reports. These may include offending behaviour program reports, sentence planning review board assessments, OASys assessments[1], psychological or psychiatric assessments or parole reports (paragraph 4.19). All the documents to which I refer in the 2 preceding paragraphs constitute the dossier to which I referred in paragraph 13 above.

32. As PSI 08/2013 paragraph 4.6 makes clear, important jurisprudential guidance has been provided on the approach to be taken on a review of categorisation and the need for an oral hearing. Paragraph 4.6 specifically refers to the Supreme Court decision in *Osborn, Booth and Reilly* (2013) UKSC 61 with regard to the principles applicable to determining whether an oral hearing is appropriate in the Parole Board context. But it recognises the distinction between decisions of CART on the one hand and those of the Parole Board on the other regarding requirements of procedural fairness.

33. That distinction is exemplified by *R (Williams) v Secretary of State for the Home Department* (2002) EWCA civ 498 when Lord Justice Judge, (as he then was) said:

> "*The views of the Discretionary Life Panel (DLP) of the Parole Board on categorisation, however strongly expressed, are not and cannot be determinative of the categorisation decision. On this aspect of their decision as Harrison J concluded, the review team was right.*
>
> *This does not produce the lamentable consequence that the recommendations of the DLP are irrelevant to the categorisation decision, or indeed the decision-making process. It was rightly accepted that these must always be considered by the review team"*

34. In the more recent case of *R (Hassett and Price) v Secretary of State for Justice* (2017) EWCA civ 331 Lord Justice Sales gave the lead judgment and had this to say at paragraph 4:

[1] Offender Assessment System

> "4. T*he status and role of the CART and the director and his panel (the DDC) are to be contrasted with those of the Parole Board. The Parole Board is an independent judicial body which makes judgments about the suitability of prisoners for release on licence or parole among other things. It too was concerned with questions of risk to the public, but in the different context of asking whether the release of a prisoner on licence would pose an unacceptable risk of harm, having regard to a range of management measures which may be put in place to support the prisoner and manage that risk if he is released. The difference in the function of the CART and the director and his panel, on the one hand, and the Parole Board, on the other, in assessing risk was emphasised by this court in R (Williams) v Secretary of State for the Home Department at (22) and 27*).

35. Then, at paragraph 56, he goes on to say:

> "56. T*he 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 decision is 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."*

36. The reference to *Mackay* is a reference to the case of *Mackay v Secretary of State for Justice (2011)* EWCA civ 522 in which, at paragraph 28 Lord Justice Gross stated:

> "28. *The common law duty of procedural fairness will sometimes require CART to convene an oral hearing when considering whether or not to downgrade a Category A prisoner. As Bean J rightly observed (at (27) of the judgment) it is for the court to decide what fairness requires, so that the issue on judicial review is whether the refusal of an oral hearing was wrong; not whether it was unreasonable or irrational. Whether an oral hearing is required in an individual case will be fact specific. Given the rationale of procedural fairness, there is no requirement that exceptional circumstances should be demonstrated – there will be occasions when procedural fairness will require an oral hearing regardless of the absence of exceptional circumstances. But oral hearings are plainly not required in all cases; indeed, oral hearings will be few and far between*."

37. The reference to *Downs* is to the case of *R (Downs) v Secretary of State for Justice* (2011) EWCA civ 1422. In that case it was argued that procedural fairness required CART to have agreed to an oral hearing where there was a dispute between 2 psychologists as to whether the claimant was sexually motivated to commit his crimes. Despite the fact that there was disagreement between the experts, the court held that an oral hearing was not necessary because it was not a dispute that could be resolved with certainty. At paragraph 45 Lord Justice Aikens stated:

> "45. *CART had to exercise a judgment on whether an oral hearing would assist in resolving these issues and assist in better decision-making. I cannot say the CART was wrong to decide against an oral hearing on these points where the views had been so well rehearsed, were so well-known already and had not changed."*

And at paragraph 47 he stated

> *"47 …… It seems to me that CART was entitled to take the view that it had all the relevant material which had put the points cogently and that the points would not be improved upon or elucidated further (bearing in mind the correspondence that had taken place) by oral presentations. It was not wrong to reach that conclusion."*

Further, at paragraph 50 the court concluded that there was no need for an oral hearing in Mr Downs's case simply for the differing views of the psychologists to be rehearsed. *"CART's task was to decide which view it accepted, for which it did not need an oral hearing."*

38. In fact, Mr Rule does not take issue with the analysis set out in paragraph 4.6 of the PSI to the effect that 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 his skeleton argument at paragraph 23 he recognises that the purport of *Hassett* is that the guidance of the Supreme Court in *Osborn, Booth and Reilly* cannot be transferred wholesale and unedited from the context of Parole Board decisions to CART decisions.

39. The point that he does make however is that Lord Justice Sales in *Hassett* himself concedes that there will be cases where, in a categorisation review, CART may consider an oral hearing is fairly required. In paragraph 24 of his skeleton argument he refers me to paragraph 61 of the judgment of Lord Justice Sales wherein it is stated:

> "61. *Some of the factors highlighted by Lord Reid (in Osborn) will have some application in the context of decision-making by the CART/director but will usually have considerably less force in that context. However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/director, if only in comparatively rare cases. In particular, if in asking the question whether upon escape the prisoner would represent a risk to the public the CART/director, having read all the reports, were left in significant doubt on a matter on which the prisoner's 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. In paragraph 25 of the skeleton argument Mr Rule refers me to *R (Rose) v Secretary of State for Justice* (2017) EWHC 1826 (Admin). This was a case decided since *Hassett* and having considered that judgment.

41. In that case the LAP recommended that the claimant be downgraded from Category A to Category B despite the fact that the claimant denied the murder for which he was convicted. The LAP noted that he had made progress with regard to an offence of kidnapping and stated that they were "*encouraged that parallels between the kidnap and the index offence highlighted in the RESOLVE have developed some insight*" However the DDC concluded that Mr Rose had not shown significant progress on the risk factors shown by his serious offending or a significant reduction in Mr Rose's risk of similar offending if unlawfully at large and, on that basis, refused to downgrade Mr Rose's security status.

42. The court accepted that there had been a failure by the DDC to properly apply the policy in PSI 08/2013 regarding an oral hearing. The court identified (at paragraph 44), that PSI 08/2013 states at paragraph 4.6 that the guidance involves "*identifying factors of importance that would tend towards deciding to have an oral hearing. The process is not a mathematical one, but unsurprisingly the policy suggests that more of such factors that are present in any case, the more likely it is that an oral hearing will be needed*".

43. In applying paragraphs 4.6 and 4.7 of the PSI and despite finding that there was no difference of view between the experts, the court held that the decision not to hold an oral hearing was unlawful.

44. Mr Rule also referred me specifically to paragraphs 59, 60 and 62 of *Rose* where it is stated:

> *59. "It may be said that there is no significant difference of view between the experts. The LAP has recommended that Mr Rose should be downgraded, and their recommendation is consistent with the thrust of the reports from both the prison psychologist and the independent psychologist as well as the Offender Supervisor. However, in my judgment, the fact that it is not only the LAP in combination with an independent psychologist recommending downgrading but this is also consistent with the prison psychologist's report cannot assist the Secretary of State. It renders Mr Rose's case for an oral hearing all the stronger.*
>
> *60. As Lord Bingham observed in R (West) v Parole Board (2005) 1 WLR 350 at paragraph 35 it "*may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker*". In circumstances where the LAP concluded Mr Rose had demonstrated a significant reduction in risk, and recommended downgrading him to Category B, and the evidence could fairly be said to be consistent with and supportive of the LAP's recommendation, the opportunity that an oral*

hearing allows to discover and address the points that were troubling the decision-maker was particularly vital.

62. In my judgment, in deciding not to hold an oral hearing, the director did not properly or fairly apply PSI 08/2013. Whilst oral hearings in the context of categorisation reviews will be comparatively rare (Hassett and Price, at (61)) all save one of what are described by the policy as important factors tending in favour of an oral hearing are squarely in play in this case……. This does not mean that it was not open to the director to make a rational finding that Mr Rose should remain in Category A. But it does mean that he could not lawfully do so without giving Mr Rose an opportunity to address the points that were troubling him at an oral hearing."

Chronology

45. The claimant is now aged 56. The offences of rape which have resulted in his life sentence were committed in June 1996. They involved him taking his victim, a prostitute, to a secluded area, holding her there by force and raping her twice before she managed to escape. He had previous convictions for rape, theft, possessing counterfeit currency, burglary, wounding, criminal damage, grievous bodily harm, handling stolen goods and aggravated vehicle taking.

46. During the course of his incarceration he has completed a number of courses designed to enable him to confront his offending and to be rehabilitated. These include Enhanced Thinking Skills (ETS), Alcohol and Drugs Awareness, Core Sex Offender Treatment Programmes (SOTP), Controlling Anger and Leading to Manage It (CALM), Healthy Sex Programme (HSP).

47. He has also undergone various psychological assessments. In December 2010 he underwent a Structured Assessment of Risk and Need and Responsivity (SARNR). The trainee psychologist who completed that assessment, Alex Gill, concluded that the claimant had not evidenced significant risk reduction and was currently appropriately placed as a Category A prisoner.

48. In May 2015 a decision was made that the claimant remain in Category A. That decision was repeated in July 2016. The decision suggested that completion of the HSP in 2014 to which I refer above only achieved limited insight and progress and it notes recommendations for assessment of the claimant's personality traits on the basis that they may be hindering progress and receptiveness to interventions.

49. In November 2016 the claimant underwent a psychological assessment by Dr Terri Van Leeson. Her opinion was that the claimant met the criteria for a negative diagnosis across each of the defined personality disorders using the IPDE framework. She concluded however that "*current dynamic risk is currently ameliorating historical risk"*.

50. At paragraph 1.8 of her report she stated:

> "*current and future risk (coming 6 to 9 months) is accurately represented as low and manageable in lower security*".

And at paragraph 1.11 she concludes that "*current dynamic risk of sexual violence is <u>low</u> (her emphasis) and well-managed. Both his non-sexual and sexual violence risks could be effectively managed across the lower secure estate. Mr Goldsmith's risks of interpersonal violence (sexual or nonsexual) are neither high nor imminent currently towards staff and other inmates*

51. At paragraph 1.13 she concludes as follows:

> "*Although at the current time I would not recommend to the Parole Board to progress Mr Goldsmith to open conditions or release him into the community, I would recommend SPD (personality disorder) referral is removed from his sentence plan. I further recommend he is progressed out of the Category A estate as it is counter to his rehabilitative progress at this stage in my opinion*.

52. These conclusions were essentially repeated at other points in her report most notably at:

    a. *"When considering his level of remorse and regret and understanding on a cognitive level that he caused his victims serious distress it cannot be said that his risk has not reduced at all since being detained on the current sentence. He would undoubtedly function well and continue to adhere to all regime parameters were he housed in lower security. His risk of committing interpersonal violence to staff and prisoners around him is not high or imminent." (*paragraph 6.91*)*

    b. *"Current dynamic risk is ameliorating historical risk". (*paragraph 7.12*)*

    c. *"Mr Goldsmith also needs to gain further insight into how his attitude towards prostitutes (i.e. a business deal) increases risk of future sexual violence in his particular case." (*paragraph 7.13*)*

    d. *It is my opinion current dynamic risk of nonsexual violence is low and well-managed. It is also my opinion this risk could be acceptably managed in a lower secure environment other than the Category A estate (against the Category A review criteria in addition to how he functions on an everyday level). It is more likely than not within the coming 6 – 9 months Mr Goldsmith will continue to refrain from using interpersonal violence towards staff and prisoners. (*paragraph 7.14*)*

    e. *"It is my opinion against the assessment outcomes that current dynamic risk of sexual violence is low and well-managed. It is also my opinion this risk would be low and not imminent across the entire custodial estate including Open Conditions. However, I would suggest Mr Goldsmith does need to enhance his insight into himself and issues outlined in paragraphs 7.12 before a progressive move should be considered"*[2] *(*paragraph 7.21*)*

[2] paragraph 7.12 recommends that the claimant is helped in understanding a diagnosis of autism and what that means about his "interpersonal style" and also what he needs to do to become more consciously aware of and manage (his diagnosis) and how his diagnosis is linked to his life history and lifestyle, offending and intimate relationships.

f. *"I would recommend Mr Goldsmith is progressed to lower security. It is my view that the current environment is not an enabling environment for him with his individual needs. Additionally, his current dynamic risks are not high nor imminent to others around him" (*paragraph 7.31*)*

g. *He does though require some further work to help him develop his insight into atypical autism as outlined. He would also benefit from some regular interpersonal feedback on how he can be perceived or experienced by others. This would not be to assist him to change internal emotional characteristics because he is not wired in a neuro typical way and his characteristics are fixed. However, it would allow him to be able to set out logically for himself that he should attend to certain cues in others and have prompts to check himself in how he is putting over a point or issue when he is frustrated." (*paragraph 7. 32*)*

53. In preparation for the 2017 annual review the usual dossier was provided by the defendant. It included a short report by Alexandra Gill, senior registered forensic psychologist at HMP Full Sutton dated 9 March 2017.

54. She had this to say at paragraph 2.1:

> "*The purpose of this report is to provide CART with information relevant to Mr Goldsmith's risk in order to aid decision-making regarding his security classification. This report intends to meet the objectives highlighted in PSI 08/2013 as to whether there is convincing evidence the prisoner's risk of reoffending if unlawfully at large has significantly reduced. As per this PSI I will not be making specific recommendations regarding categorisation*".

55. It seems clear, from para 2.3 of her report, that one of the reasons why Ms Gill chose not to give any recommendation was because she took the view that a report was required from a clinical neuropsychologist with a background in autism spectrum disorder (ASD) and risk. In those circumstances she made clear that her report is merely a factual report.

56. I add though that in the summary of her report, Ms Gill reports that:

> 6.1 *"In summary, Mr Goldsmith's most recent OASys indicates that he is a low risk of reconviction as assessed by the OGRS,OVP and OGP. Mr Goldsmith has been assessed as medium risk of reconviction for a sexual crime using RM 2000/s."*

57. The neuropsychological report to which she referred is that of Dr Rachel Worthington and is dated 21 May 2017. My attention has been drawn specifically in her report to the following:

a. *"In my opinion it would be of benefit for Mr Goldsmith to be provided with an opportunity to be in an alternative environment with more opportunities for natural behaviour in which he can be provided with support and monitoring to clarify his skills and needs." (*Paragraph 6.32)

b. *"In addition, both Dr Van Leeson and I are in agreement that Mr Goldsmith has made some progress on addressing his offending and would benefit from obtaining regular interpersonal feedback on how he can be perceived by others and this could provide him with prompts about how he communicates. I would also agree that this would provide him with an opportunity to engage in activities that give him a sense of achievement. I would also agree that an environment such as a personality disorder pathway or a PIPE[3] may be a helpful way forward to achieve the needs identified in both the HSP and the SARN, those identified above and those identified in the report of Dr Van Leeson. I am also in agreement that Mr Goldsmith would benefit from being provided with a decreased level of security and, based on the information that has been made available to me, he does not present with behavioural difficulties that warrants Category A conditions nor DSPD*". (Paragraph 6.56)

58. For the purposes of his categorisation annual review in 2017 the claimant himself made representations to the LAP on 15 June 2017 following Dr Worthington's report. Within those representations the claimant repeated his belief that he was "*warehoused*" at HMP Full Sutton and pointed out the requirement for DSPD/PDTS had now been removed (after 7 years) following Dr Worthington's report. The claimant pointed out that a 2005 LAP had recommended that downgrading to Category B could then be considered.

59. The LAP report is dated 6 July 2017. It did not recommend downgrading. The claimant accordingly made his own submissions to CART. Amongst other things, the claimant suggested that if clarification was needed from the experts[4] who both agree he should be moved out of Category A then they should be asked. He suggested that if there was some confusion the experts could be asked to clarify it. He made a specific request for an oral hearing and suggested that the experts could attend to further explain their conclusions.

The 2017 Decision

60. On 6 August 2017 CART conducted the annual review armed with the dossier, the various expert reports, the LAP report and the claimant's representations in respect of it. Their decision was communicated to the claimant on 6 September 2017. CART did not recommend a downgrading and reached that decision without holding an oral hearing. The decision itself and the omission to hold an oral hearing are the first decisions under challenge.

61. The decision recognises amongst other things that:

    a. No security reports or adjudications have been generated

    b. The claimant associates well with other prisoners

[3] Psychologically Informed Planned Environment

[4] on the basis that there was some divergence of opinion between Dr Van Leeson and Dr Worthington as to whether the claimant was actually autistic. Dr Worthington eschewed the diagnosis of atypical autism in favour of a finding of traits of antisocial personality disorder.

c. There has been no violent behaviour drug or alcohol misuse or "offence paralleling behaviour"

d. He has completed significant number of courses

e. His overall progress was assessed as limited as he showed "*poor insight and awareness of further risk"*

f. That the report from Dr Van Leeson noted that he "*needed to gain further insight into the risk factors associated with his violent sexual offending*"[5] Mr Rule says compare this to what is said actually by her at 7.12 and 7.32 of the report

g. An OASys assessment in July 2016 "*suggests he (the claimant) would present a high risk of serious harm if in the community at this time, he would present high risk of serious harm to the public, media risk of serious harm to children and low risk of serious harm to known adults and staff*."

h. A SARN written in 2014 assessed him as having major treatment needs in 3 of 4 domains namely sexual interests, relationships and struggling with life's problems but that he had made some progress in exploring elements of his sexual related risk however, it was not considered a significant.

i. Dr Worthington believes the claimant "*would benefit in a decreased level of security and he does not present with behavioural difficulties that warrant Category A conditions nor DSPD"*

j. That Dr Worthington agrees with the claimant that he does not require DSPD

k. That both Dr Worthington and Dr Van Leeson agree that a transfer to a PIPE in less secure conditions is appropriate

l. That Dr Van Leeson is of the view that his "*current dynamic risk is low for both violent and sexual reoffending"*

m. That if downgrading is not recommended, the claimant requests an oral hearing.

62. The reasons for the decision not to downgrade are set out in the final 2 paragraphs wherein it is stated:

> *The director noted Mr Goldsmith has been in custody many years, however there is little or no evidence of significant progress. The director noted Mr Goldsmith had previously took (sic) part in suitable interventions but resulting assessments clearly showed a limited level of treatment gain and risk reduction. He has therefore since been consistently recommended to take part in further interventions and assessments to address outstanding issues and/or to determine a suitable treatment pathway. The present reports help define more clearly a suitable treatment pathway but there is no evidence he has*

[5] the decision refers to the report being dated June 2014 as opposed to June 2017. I shall deal with that below.

achieved any further insight or progress in relation to his offending at this time. The director recommends Mr Goldsmith work closely with prison staff to find a way forward in addressing his outstanding treatment needs.

The director considered that before downgrading could be justified there must be clear and convincing evidence of a significant reduction in Mr Goldsmith's risk of reoffending in a similar way if unlawfully at large. The director concluded that there are at present no grounds on which downgrading of Mr Goldsmith's security category could be justified and that he should remain in Category A at this time."

63. I pause at this point simply to record that Mr Rule makes the point that the decision appears to give no consideration at all to the request for an oral hearing or to give reasons why such request was rejected. He also argues that the assertion that there is no evidence that the claimant achieve further insight or progress in relation to his offending must involve a complete rejection of Dr Van Leeson's and Dr Worthington's conclusion that some progress has been made.

64. At this time the claimant's case was also under consideration by the Parole Board. It will be recalled that the claimant was post tariff and had been for a considerable number of years. The matter was before the Parole Board for the purpose of consideration of whether the claimant should be released on parole or moved to Open Conditions.

65. The Parole Board were also in possession of the various expert reports. On 15 August 2017 the chair of the Parole Board considered it appropriate to order an oral hearing in order to properly assess the claimant's case and to allow for oral examination of the claimant, on the basis that "*there appear to be psychological issues in this case and attitudes to the professionals will be a key feature which can only be assessed in face-to-face contact".* The Parole Board took the view that the hearing would be a substantive and substantial one and allocated 5 hours of hearing time.

66. The Parole Board hearing took place on 20 April 2018. The Board heard up to date oral evidence from 5 professional witnesses including of course Dr Van Leeson, Dr Worthington and Ms Gill. Its decision letter is dated 4 May 2018. Despite the fact that the Board recorded, having heard evidence from the claimant, that he had displayed some insight into his offending behaviour, it concluded that he was not suitable for parole or Open Conditions.

67. This was so despite evidence from:

    a. Dr Van Leeson to the effect that she did not believe the claimant needed to complete a further HSP as he had successfully undergone the treatment.

    b. Dr Worthington to the effect that she was satisfied that the claimant risk could be managed in conditions of lower security, for example a Category B prison.

    c. Ms Gill to the effect that the claimant had made good progress, that the claimant had not failed the HSP and that the claimant would benefit from a PIPE and she made reference to a category B PIPE at HMP Hull.

68. In its decision the Board stated:

> "*All witnesses acknowledged the offence focused work that you (the claimant) had made (sic) and were of the opinion that progression is needed. Clearly the options are restricted if you remain of Category A status. The panel was satisfied that you do not meet the test for open conditions or release and that your risk can only currently be managed in closed conditions. It was nevertheless of the view that the Category A Board (CART) should take into consideration the need for you to progress to the most appropriate PIPE environment, rather than one which is linked to maximum security*".

69. It is also worth recording that the Board considered current risk of reoffending and serious harm in paragraph 6 of their decision:

> *"Using OASys you are assessed as a low risk of further general and violent reoffending, a high risk of serious harm to the public and a known adult and a medium risk of serious harm to children. The panel agreed with the risk assessments for the risk of serious harm but considered the risk of further general and violent reoffending to be underestimated and to be at least at medium level, which is supported by Risk Matrix 2000".*

70. Meanwhile, in April 2018 the process had commenced for the 2018 annual categorisation review and the usual dossier was provided by the defendant. The dossier contained consideration of, and reference to, the reports of the psychologists to which I have already referred.

71. The dossier included confirmation that the claimant:

    a. Maintains a good standard of custodial behaviour not coming to the attention of staff. At the time of compiling this report there is no behaviour which could be assessed as threatening, bullying, manipulative or conspiratorial.

    b. Has not been subjected to any warnings or adjudications over the current reporting period, is less adjudication being in 1999.

    c. Has not failed any drugs tests since being in custody

    d. Has come to the attention of the security department on only one occasion concerning the possibility of stockpiling tobacco

    e. Had complied with all wing rules and regulations and is not a control problem. However, he can be argumentative and opinionated in his interactions with staff.

72. Included within the dossier is a report from a trainee psychologist at HMP Full Sutton, Ms Rachel Sales dated May 2018. Her report was prepared with the intention of providing CART with information relevant to the claimant's risk in order to aid decision-making regarding the security classification. It makes clear that the report is intended to meet the objectives highlighted in PSI 08/2013 and consider whether there is convincing evidence the prisoner's risk of reoffending if unlawfully at large has substantially reduced.

73. In fact, as was the case in the Ms Gill's report, Ms Sales makes no actual recommendation regarding re-categorisation. However, she does record that in oral evidence before the Parole Board the claimant's offender manager had indicated that he would not be concerned if the claimant were downgraded to Category B. She reported that that had been independently verified to her by the offender supervisor concerned.

74. Also around about this time there had been an Annual Sentence Planning Review Meeting. It recorded that the claimant had complied with updated sentence plan targets including having applied to be assessed for a PIPE. The only issue concerned the claimant's decision not to accept the offer of attending a PIPE at HMP Frankland (a Category A prison) because he wished to await the outcome of his parole hearing.

75. On 18 July 2018 the claimant's solicitors submitted representations to the LAP in respect of the upcoming re-categorisation review. The LAP acknowledged those representations and the fact that:

> "*…all the psychological reports and the Parole Board all note that Mr Goldsmith could access these pathways (i.e.PIPE) in a less secure environment. During Mr Goldsmith's Parole Board review the panel stated "that the Category A Board should take into consideration the need for Mr Goldsmith to progress to the most appropriate PIPE environment, rather than one which is linked to maximum security*""

76. Notwithstanding those representations the LAP did not recommend downgrading. In its conclusions it stated:

> "*Taking all the above into account including representations from Mr Goldsmith solicitors, it is acknowledged that Mr Goldsmith has maintained positive custodial behaviour and is engaging with some aspects of his sentence plan and has engaged with offending behaviour work.*
>
> *However, he has still failed to demonstrate a clear reduction in his risk as he has failed to accept the offer of a PIPE placement at Frankland. A placement at a PIPE unit will allow Mr Goldsmith to demonstrate a reduction in his risk through consolidation of the skills he has learned from previous interventions*"

77. There followed further representations by the claimant's solicitors to CART on 17 August 2018. It appears that the solicitors were obliged to include within the representations the Parole Board decision including the Board's view that CART *"should take into consideration the need for the claimant to progress to the most appropriate PIPE environment rather than one which is linked to maximum security*" because up until that point the decision had not been included in the dossier, contrary to the wishes of the Parole Board.

78. The solicitors requested that an oral hearing should be directed if the matter could not be dealt with in favour of the claimant on the papers and that Dr Van Leeson and Dr Worthington should be asked to attend to give evidence.

79. CART's decision is dated 11 September 2018 and is the second decision under challenge because CART rejected the need for an oral hearing and decided against the downgrading of the claimant's categorisation. It is accepted that on this occasion CART did consider whether to grant an oral hearing but it is alleged that it did not provide for fairness by failing to grant a hearing. (Amended Detailed Statement of Facts and Grounds paragraph 3).

The 2018 Decision

80. This decision recognises amongst other things that:

    a. The index offences were serious and that "*your present offences 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*."

    b. The claimant was enhanced IEP and a peer support worker.

    c. The claimant complies with prison rules and regimes but often challenged staff decisions with which he disagreed.

    d. The claimant had received no warnings or adjudications in the relevant period

    e. The claimant's satisfactory custodial behaviour in the controlled environment of a high security prison should not by itself determine the claimant's level of risk and that other factors should be taken into account.

    f. The claimant had attended a number of courses but had declined to take up a place on a PIPE unit at HMP Frankland and that "*it still remains the next appropriate step in your treatment way".*

    g. The claimant previous decisions "*highlighted the need for you to engage with further treatment as resulting assessments from your previous engagement in intervention indicated that you showed a limited level of treatment gain and risk reduction*."

    h. The claimant had no meaningful contact with the psychology or interventions department during the relevant period[6].

    i. There was currently no evidence that the claimant had made further progress to address the outstanding issues in relation to the risk factors associated with his serious offending. It was considered by CART that the claimant's "*unwillingness to engage in the recommended treatment pathway (PIPE) does not assist to show that you have resolved important issues risk reduction through the consolidation of skills you have learnt from your previous engagement with the fence – focused intervention*".

[6] Mr Rule says that this overlooks that no such contact or intervention had been proposed.

j. The reports of Dr Van Leeson and Dr Worthington "*provided no clear evidence that you have achieved significant progress in terms of risk reduction and also recommended that you should take part in further treatment intervention*".

81. As a result, CART concluded that it had not yet been shown that there was convincing evidence of a significant reduction in the risk of similar offending if unlawfully at large. In the conclusion of its decision letter it stated that it:

> "*considers you have provided no convincing evidence of a significant reduction in your risk of reoffending in a similar way if unlawfully at large. The Category A Team concluded that there are at present no grounds on which the downgrading of your security category could be justified and that you should remain in Category A at this time*

82. It rejected an oral hearing because it concluded that the representations "*provided no grounds for an oral hearing in accordance with the criteria of PSI 08/2013*". The letter goes on to state that CART considers "*that all the information available is clearly understood and does not represent a significant dispute on expert material to convene an oral hearing. It also considered that you are not at an impasse in terms of addressing your outstanding risk as the recommended means are available to assist your progression.*"

83. There is specific reference to the comments made by the Parole Board. The decision draws attention however to the different test to be applied by the Parole Board in their consideration of parole or movement to open conditions and the test to be applied by CART in considering downgrading. The decision states:

> *"The Category A Team noted the comments made by the Parole Board in terms of your progression. However it does not consider the specific criteria for placement in Category A and downgrading from Category A i.e. that the prisoner's offending poses a high level of risk, and that before downgrading can be justified there must be convincing evidence of a significant reduction in the prisoner's risk of similar reoffending if <u>unlawfully at large</u> i.e. not if the prisoner is placed in less secure conditions or released on supervised parole*".

Discussion

The 2017 decision

Grounds 1 and 4 (the failure to consider the question of an oral hearing in 2017 or to give reasons for refusing to convene one)

84. It seems sensible to consider these 2 grounds together since there is, I think, a significant overlap.

85. Mr Manknell acknowledges that a request was made for an oral hearing prior to the final decision on the review in 2017 and that the decision letter makes no reference to that. Inevitably therefore, it fails to give any reasons why an oral hearing was considered unnecessary.

86. Mr Manknell argues that there is no specific requirement either under PSI 08/2013 or under the common law for the defendant to provide reasons in the decision letter as to why an oral hearing was not required in order to reach a decision. He argues that that general principle appears to have been one accepted by the claimant. He refers me to paragraph 56 of the unamended Statement of Facts and Grounds (which is actually repeated at paragraph 73 of the Amended Facts and Grounds).

87. Mr Rule's position is that this is not an immutable rule. He cites *R (Doody) v Secretary of State for the Home Department* (1994) 1 AC 531 at 564E in which Lord Mustill accepted that "*The law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied*".

88. He also cites *Oakley v South Cambridgeshire District Council* (2017) EWCA civ 71 in which it was stated that:

> "31 *There are certain categories of case where the courts have required reasons to be given at common law, although the jurisprudence is relatively under-developed, perhaps because statutory requirements are so common. Apart from cases where fairness requires it, or a particular decision is aberrant, the duty has also been imposed where the failure to give reasons may frustrate a right of appeal, because without reasons a party will not know whether there is an appealable ground or not: see e.g. Norton Tool Co. Ltd v Tewson [1973] 1 WLR 45; and where a party has a legitimate expectation that reasons will be given: see Martin v Secretary of State for Communities and Local Government [2015] EWHC 3435 (Admin) where Lindblom LJ held that there was a legitimate expectation that inspectors would give reasons in a written representations planning appeal generated by the Secretary of State's long established practice of giving reasons in such cases.*
>
> *32 There is a strong analogy between the need to give reasons in order not to frustrate a statutory right of appeal and the need to do so in order not to frustrate a potential application for judicial review. However, whatever the merits of the analogy, if this were always to ground a basis for requiring reasons to be given, it would be inconsistent with the lack of any general common law obligation to give reasons. Nonetheless, there will be many cases where it is in the public interest that affected parties should be able to hold the administration to account for their decisions, and in the absence of a right of appeal, the only way to do so is by an application for judicial review. Where the nature of the decision is one which demands effective accountability, the analogy with a right of appeal is surely apt.*

89. Mr Manknell argues, in a response dated 7 December 2017 to a protocol letter sent by the claimant's solicitors on 20 November 2017 the defendant set out its reasons for taking the view that no oral hearing was necessary. The letter stated:

> "*The Category A Team considers there are also no grounds for an oral hearing in relation to Mr Goldsmith review in accordance with the criteria in PSI 08/2013. It considers first his reports were entirely sufficient for the*

purposes of his risk assessment and for the submission of effective written representations. It considers there is no evidence of any significant factual dispute going directly to the issue of risk in this review. It considers the available information is all readily understandable and that there are (no) grounds for the decision maker to hear directly from Mr Goldsmith or any report writers to understand or to resolve this information. It notes the views expressed in the reports of Dr Worthington and Dr Van Leeson relating to his moderate progress and treatment needs. It considers however for the detailed reasons given above relating to the correct criteria for downgrading, these reports do not provide any convincing evidence Mr Goldsmith has achieved a significant reduction in his risk of similar reoffending if unlawfully at large. On that basis it considers these reports do not represent a significant dispute on the expert materials and there are no grounds for the decision maker to convene an oral hearing to further explore or clarify available information. It also notes the LAP has not recommended Mr Goldsmith's downgrading in accordance with the correct criteria having considered both reports.

It accepts Mr Goldsmith is some years over tariff and has never had an oral hearing, but considers these facts provide insufficient grounds for an oral hearing without other supporting reasons. It considers there are no other supporting reasons. It considers also Mr Goldsmith is not in an impasse in terms of addressing his offending, as recommended means to help him further explore and address his offending are available to him in Category A. It considers there are also no issues relevant to his review that can be resolved only through an oral hearing".

Ground 2 (failure to properly apply published policy namely PSI 08/2013 with regard to an oral hearing)

90. First, I accept Mr Rule's contention that there is a public law duty on a public authority to act in accordance with its applicable policy. The issue in this case is whether the claimant has established that the defendant has failed to do so.

91. As I have made clear in paragraph 29 above, PSI 08/2013 requires the defendant to consider the factors set out at paragraphs 4.6 and 4.7a to d.

    a. Mr Rule contends that all these factors are present in this particular case. He draws attention to the guidance at paragraph 4.6 of the PSI that "*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.*"

    b. He argues that the overarching consideration in assessment of whether there should be an oral hearing is to identify those particular factors that would tend towards deciding to have an oral hearing and that involves considering each case on its particular facts and taking a balanced approach to the decision. It further involves approaching the decision with an open mind and on the basis that it is understood that there may be real advantage in having a hearing in order to aid the decision-making process and, importantly, in recognition of the importance of the issues to the prisoner.

92. In what way does Mr Rule contend that the factors identified in the PSI are present in this case?

    i. He argues that an assessment of the claimant in person and particularly of his attitude would have been beneficial to the process but CART deprived themselves of it by refusing to hold an oral hearing.

    ii. He refers to the Parole Board chair's directions of 15 August 2017 to which I refer in paragraph 65 above in which it was noted that attitudes to professionals are a "*key feature*" which can only be assessed in face-to-face contact and that clearly the Board benefited from hearing from the claimant in its assessment of his progress in risk reduction.

    iii. In fact, Mr Manknell also cites the PSI in particular, that notwithstanding all this, paragraph 4.6 of the PSI recognises that, albeit there may be more decisions to hold oral hearings than has been the position in the past, oral hearings in the CART context will only very rarely be held. He also reminds me of the observations of the court in *Hassett* which I cited at paragraph 35 above to the effect that cases in which an oral hearing is required will still be comparatively rare.

b. Where important facts are in dispute and/or where there is significant dispute on the expert materials (PSI 08/2013 4.7a and 4.7b)

    i. Mr Rule contends that an important factor in dispute is whether the fact is that the claimant has significantly reduced his risk if unlawfully at large.

    ii. Mr Manknell argues that the expert reports do not identify any dispute at all except that Dr Van Leeson and Dr Worthington may have differing views about the nature of the claimant's disorder (whether it be autism or antisocial personality disorder) but that is the extent of their disagreement. The point he makes is that that disagreement is not relevant and that neither expert addresses the question of whether the claimant has significantly reduced his risk if unlawfully at large. To adopt the wording in paragraph 4.7a of the PSI, Mr Manknell argues that there are no facts in dispute which go directly to the issue of risk.

    iii. Mr Manknell argues that the experts do not deal with risk in the way that CART must. He points out for example that at paragraph 1.8 of her report Dr Van Leeson seems to have in mind risk to staff and other inmates, at paragraph 1.13 that Category A is "*counter to his ability to progress*", at 6.91 that his risk of *"committing interpersonal violence to staff and prisoners is not high"* and, at paragraph 7.14, that the "*risk of nonsexual violence is low and well-managed and could be acceptably managed in a lower secure environment*" and that "*the claimants current and future risk is "accurately represented as low and manageable in low security*".

iv. Dr Worthington likewise considers that Mr Goldsmith should be "*provided with an opportunity to be in an alternative environment"* (paragraph 6.32) and, at paragraph 6.56 that "*Mr Goldsmith would benefit from being provided with a decreased level of security"*.

v. Mr Manknell's point is that both experts look at the issue on the basis of what is best for the claimant. That is not the basis upon which CART has to consider the matter. They have to consider whether there is convincing evidence that the prisoner's risk of reoffending if unlawfully at large has significantly reduced.

vi. Mr Manknell argues that in the vital context of risk if the claimant escaped from custody it cannot be said that one expert has taken one position with regard to this whilst the other has taken the opposite position.

vii. That situation, he argues, is not changed by an analysis of the reports of Ms Gill or, for that matter, and in the context of the 2018 decision, the report of Ms Sales. With regard to the latter the closest Ms Sales gets to an assessment of risk is to report that the claimant's offender manager would not be concerned if the claimant were downgraded.

viii. I would add that Mr Rule does not appear to demur to any great extent from that assessment. In paragraph 70(2) of his amended statement of grounds he concedes that "*whilst none of the examples of significant, real and live disputes on the expert materials from PSI 08/2013 are present as between the 2 experts, there is a dispute as to whether the CART correctly appreciated what the experts are jointly saying*". Mr Rule's point, as expressed in paragraph 70(2) is that "*there is a dispute as to the proper meaning of the expert evidence being mistakenly ignored or minimised by the defendant.*" And that was the prime issue to be resolved by an oral hearing.

ix. Further, Mr Rule argues that there are areas of dispute. In particular, against the background of positive assessments of some progress CART has taken the view that there is no evidence of significant risk reduction. He argues that it is impermissible to reach that conclusion without at least examining the claimant's current attitude at an oral hearing and that, in not doing so, there has been a minimisation or rejection of the evidence of progress on a basis which is unfair. He also reminds me that a consideration that must be taken into account is the importance to the prisoner.

x. Mr Manknell argues that this is simply a generalised complaint that could be raised by any prisoner. He argues that CART never suggested that there has not been progress and they do not dispute the experts' analysis. He draws attention to the conclusions set out in the 2017 decision which merely state that there is "*little or no evidence of significant progress"*. This has to be judged against the guidance

which requires convincing evidence of progress such that risk of reoffending if unlawfully at large has significantly reduced.

xi. Similarly, in terms of the 2018 decision, it is argued by Mr Manknell that the decision does not suggest that there has been no evidence of progress per se only that there is currently no evidence of progress to address outstanding issues in relation to risk factors associated with serious offending. The risk factors inevitably must be those associated with the claimant escaping and being unlawfully at large because that is CART's remit. Mr Manknell argues that that conclusion was clearly one that it was open for CART to reach.

xii. In terms of the Parole Board, I remind myself that paragraph 4.7b of the PSI states that "*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*". I should add that in the context of the 2017 decision the Parole Board's recommendation is not relevant. It did not appear until the Board's decision of May 2018.

xiii. As regards the 2018 decision, Mr Manknell argues that the observations of the Parole Board in their decision of May 2018 do not make it necessary or even appropriate to convene an oral hearing. And in any event, there was simply a recommendation by the Board that CART should take into consideration the need for the claimant to progress to the most appropriate PIPE environment. Mr Manknell argues that it is perfectly permissible and indeed was appropriate for the CART to conclude that that might be what was best for the claimant but that is not the test that CART needs to apply in considering questions of downgrading.

c. As regards 4.7c and d, the claimant has been in prison since December 1999 and post tariff since December 2005 and has never had an oral hearing.

i. Mr Rule draws particular attention to the statement in the PSI to the effect that "*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".*

ii. He also draws attention to the fact that the PSI suggests that there may be real advantage in seeing the prisoner face to face where the prisoner is post tariff and has spent a long time in prison post tariff.

iii. Mr Manknell of course does not dispute any of this but points out that the PSI itself makes it clear that "*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*". He also points out that Davies J in *Morgan v Secretary of State for Justice* (2016) EWHC 106

(Admin) at paragraph 47 suggested that this was one of "*the more nebulous potential justifications for an oral hearing".*

iv. Mr Rule argues that *Morgan* has no application in the context of this case because that was decided on wholly different facts for a prisoner who was in denial and had refused basic offending behaviour programmes offered to him. In addition, the observation made in paragraph 47 was in the context of a challenge to a lack of reasons giving consideration to that factor. Mr Manknell argues that the judge's observations in this respect were not fact dependent and there is no basis for drawing a distinction.

d. The PSI specifies that where an impasse has been in existence for some time it may be helpful to have an oral hearing.

i. Mr Rule asserts that there is an impasse in this case. This impasse revolves around the fact that the defendants are offering the claimant the PIPE unit, which the experts recommend, at a Category A prison whereas the claimant is only prepared to undertake it at a Category B prison and the experts do not suggest that that is inappropriate, on the contrary they appear to support it.

ii. Mr Manknell contends that there is no such impasse. It is open to the claimant to take advantage of a PIPE unit. The decision not to do so is the claimant's and, as a fact, the claimant has now moved to HMP Frankland which hosts a PIPE unit (although the claimant has not yet agreed to participate). It is suggested by Mr Manknell that this is in itself confirmation of the lack of an impasse.

iii. Mr Manknell also draws attention to the observation in *Mackay* at paragraph 28 (iv):

> *"Although the existence of an impasse or inconsistency (for example between the Parole Board and CART) may increase the likelihood of an oral hearing being required, it should not be thought that the mere existence of an impasse or inconsistency means that an oral hearing will be warranted. Moreover, for my part, 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, perhaps for very good reasons."*

iv. Finally, whilst on the subject of this PIPE, it is suggested by Mr Rule that the 2018 decision holds against the claimant his decision not to take advantage of the opportunity afforded by a PIPE at HMP Frankland. That is not accepted by Mr Manknell. His position is simply that CART recognises that the experts recommend a PIPE and the failure to accept referral to such a unit deprives the claimant of evidence to demonstrate the necessary reduction in risk.

Ground 3 (failure to act in accordance with common law duty of procedural fairness)

93. Mr Rule seeks to rely on *Hassett* and *Osborn* in support of the proposition that there is a failure to act in accordance with the common law duty of procedural fairness.

94. Mr Manknell argues that *Hassett* is not authority for any such proposition and he sets out at paragraphs 35 of his amended detailed grounds of defence and 37 of his skeleton argument what the purport of *Hassett* actually is. It is perhaps worth reproducing what is pleaded at paragraph 35:

> *"35(i) Parliament has entrusted the merits of the decision on re-categorisation to the Secretary of State with the consequence that, as was expressed in Doody at page 561 "the court must constantly bear in mind that it is to the decision maker, not to the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.*
>
> *(ii) In such circumstances, the only legitimate expectation of the prisoner is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion*".

Grounds 5 and 6 (material errors/failure to have regard to material considerations)

95. As I understand it, Ground 5 is a challenge to the refusal to hold an oral hearing on the basis of material errors and Ground 6 is a challenge to the decision not to re-categorise on the basis of material errors. I shall however take these 2 grounds together, not least because in his skeleton argument Mr Rule does the same.

96. They are prayed in aid by Mr Rule on the basis that the errors undermine the conclusions reached and demonstrate unfairness. Essentially, as well as indicating a lack of care and attention in what is an immensely important decision, it is asserted by Mr Rule that the decision fails to have regard to the evidence contained in the various experts reports and/or misrepresents it.

97. The material errors of fact asserted are:

    a. The 2017 decision refers to the report of Dr Van Leeson as being June 2014 rather than 2017. It is argued that this is not a typographical error because, in the decision letter, chronologically it appears above other entries concerning 2014 reports.

    b. The decision notes that the claimant "*needed to gain further insight into the risk factors associated with his violent sexual offending*" and, in the conclusion, suggests that there is "*no evidence he has achieved any further insight or progress in relation to his offending at this time*". It is argued that this is not wholly consistent with what is said in the totality in paragraph 7.12 of Dr Van Leeson's report which suggests that insight is partially evident but that, essentially, the claimant is not to be criticised for that shortcoming bearing in mind that he had only just been provided with the outcomes of the

current assessment and needed help with understanding various issues in relation to it.

c. The defendant has relied on an out of date OASys report dated July 2016 (because, following a complaint upheld by the National Probation Service concerning the scoring of the OASys) a fresh one was produced in 2017.

d. That the opinion of Ms Gill is that there is low risk of harm but this appears to have been overlooked.

98. Mr Manknell argues that the reference to 2014 with regard to Dr Van Leeson's report is clearly simply a typographical error and in any event the date of the report is correctly identified in the letter of 7 December 2017 to which I have already referred. He argues that there is absolutely no evidence that the defendant considered re-categorisation on the mistaken premise that the report of Dr Van Leeson was 3 years old when it was in fact much more recent.

99. As regards to the second material error asserted, Mr Manknell asserts that the observations of CART in connection with Dr Van Leeson's report are accurate. She stated at paragraph 7.13 of her report for example that the claimant "*needed to gain further insight into how his attitude towards prostitutes (i.e. a business deal) increases the risk of future sexual violence on his part"*. In addition, at paragraph 7.21, she suggested that Mr Goldsmith "*does need to enhance his insight into himself and issues outlined in paragraph 7.12 before a progressive move should be considered*".

100. Furthermore, in paragraph 1.8 of her report Dr Van Leeson recognised that, using current assessments, only one clinical item is considered partially evidenced; lack of full insight. Moreover, the decision records that in his further representations following the LAP dated 22 July 2017, the claimant himself agrees "*with suggestion that he needs to gain further insight"*. Mr Manknell argues that it cannot be said under those circumstances that Dr Van Leeson's report has been misrepresented by CART in their decision.

101. As to the OAsys report, although the decision does indeed refer to a report from July 2016, there is no material difference (and the claimant identifies no material difference) that could have affected the decision.

102. Mr Manknell argues that Ms Gill's report has not been overlooked and indeed is specifically referred to in the decision. Furthermore, in any event paragraph 6.1 of her report recognises that the claimant's most recent OASys assesses the claimant at medium risk of reconviction for sexual crime.

103. As regards the 2018 decision, Mr Rule repeats the point that if the 2017 decision is flawed then the 2018 decision is also tainted. He makes the further point however that the 2018 decision contains its own freestanding errors:

a. It states that the claimant raped his victim "*several times before she escaped*" when in fact he raped her twice, not several times.

b. It gives the wrong date for a core SOTP because it refers to being dated 2014 when in fact it was 2004. This, Mr Rule argues is significant because the CART could be forgiven for believing that if the SOTP was relatively recent then there would have been insufficient time for the work involved in it to bed in.

c. That the 2018 decision purports to differentiate the assessment of risk undertaken by the psychologists and by the Parole Board at its oral hearing solely because the Board's ultimate decision is to depend on the risk if released on licence or if placed in open conditions as opposes to the test that CART applies.

It is asserted by Mr Rule that in this context this is a false distinction so far as the analysis of risk reduction is concerned. He asserts that "*both bodies must consider evidence of reduction of risk and rehabilitation progress and the only distinction is then in gauging the results of the risk and progress assessment against the different task of each respective body*." In support of this contention he reminds me of the observations of the court in *Williams* and in particular paragraph 32 where it is said:

"*32. In rejecting the application for an oral hearing (CART) misdirected itself by elevating the theory of the panel's statutory jurisdiction disproportionately above the practical realities and overemphasising the differences between its own functions and those of the panel without sufficiently recognising the link between them*"

104. Mr Manknell argues that, whilst it might have been more accurate for the letter to have stated that the victim was raped twice rather than several times, it cannot be realistically suggested that this materially affected the position. The decision itself recognises that the claimant was convicted of and sentenced for 2 offences of rape.

105. As regards the SOTP, once again this is clearly no more than a typographical error and there is no suggestion at all in the decision letter that this was material or that the decision was in any way predicated on the basis that the claimants have not had sufficient time for SOTP to bed in.

106. Mr Manknell argues that the distinction made by the CART is a proper distinction. The remit of CART is wholly different to that of the Parole Board, as is clear from the authorities to which I have already referred.

Ground 7 (failing to act rationally and/or proportionately in accordance with common law principles).

107. This is a challenge to the actual decision not to downgrade on the basis that it is outside the range of reasonable decisions and is thus Wednesbury unreasonable.

108. Mr Rule asserts that there has been a failure of CART to equip itself with sufficient information to fairly make the decision in breach of the duty identified in *Secretary of State for Education and Science v Tameside MBC* (1977) AC 1014 at 1065B.

109. It is contended that the duty of sufficient enquiry required up to date opinions of risk from Ms Gill, Dr Van Leeson and/or Dr Worthington. Furthermore, it is contended that the 2018 decision is flawed because of its irrational reliance on the failure of the claimant to take advantage of the PIPE unit at another Category A prison.

110. Mr Rule argues that the claimant's reduction in risk is not dependent on him blindly accepting any placement that is recommended on the basis that certain placements may not, on a proper analysis, be the best way in which the claimant can demonstrate his reduction in risk in the long term.

111. Furthermore, Mr Rule argues that CART's decision is irrational for placing too little weight on the Parole Board's decision. He points out that all of the witnesses at the Parole Board hearing universally agreed that the claimant's risk no longer warranted detention in high security conditions and that accordingly it was simply perverse to conclude that there is no evidence that the claimant had made no further progress to address outstanding issues in relation to the risk factors associated with his offending.

112. Mr Manknell argues that an argument as to *Wednesbury* unreasonableness must fail, not least in circumstances where, as here, the LAP itself recommended against downgrading[7]. Furthermore, CART was entitled to take account of the fact that a PIPE had not been attended when the experts had indicated that this was in fact a necessary step in the claimant's progress towards downgrading

113. As for the input of the Parole Board, Mr Manknell makes the same point as was made in relation to this in the context of Ground 6. He points out, at paragraph 45 of his skeleton argument, that the Parole Board expressly record that downgrading from Category A is not a matter for them and the fact is that even the Board after hearing extensive oral evidence concluded that the claimant was not suitable for open conditions and that his OASys assessment of risk was probably understated (see paragraph 69 above.

Conclusions

Grounds 1 and 4

114. First, it seems to me that it does not follow that simply because the decision letter of September 2017 makes no reference to the question of an oral hearing that an oral hearing was not actually considered.

115. It seems to me to be considerably more likely than not that CART would have been aware of the power to grant an oral hearing because it seems unlikely that they were not aware of the provisions to that effect contained in PSI 08/2013 since this is a core document in respect of CART's very existence. If that is the case, then the absence of a reference to it in the 2017 decision is no more than a failure to confirm

[7] I do not overlook that Mr Rule asserts that the LAP recommendation is itself flawed because it applies the misconceived criterion that the claimant must have accepted any placement he is offered in order to demonstrate is reduction in risk.

that consideration was given as to whether an oral hearing was necessary but was thought to be unnecessary.

116. In my judgment that conclusion is given weight by the fact that in the reply to the protocol letter a detailed explanation is given as to why an oral hearing was not considered necessary. Furthermore, it is given additional weight, perhaps ironically, by the fact that the claimant actually did request an oral hearing. It seems to me to be much more likely that no consideration would have been given to an oral hearing had no request been made for one.

117. I do not think that the cases of *Doody* or *Oakley* are of sufficient assistance to the claimant. In so far as *Oakley* requires reasons to be given in circumstances where a failure to do so may frustrate an appeal, that does not strike me as being applicable in this case. Reasons have been given, albeit in a letter that postdates the original decision, it is just that the claimant disagrees with them and indeed the reasons why he disagrees with them from the basis of his challenge in these judicial review proceedings.

118. Insofar as there is a legitimate expectation on the part of the claimant that he will receive reasons for the refusal to convene an oral hearing, once again the fact is that he did receive the reasons and in so far as those reasons are considered to be inadequate, they are the subject matter of his judicial review.

119. Accordingly, I reject Grounds 1 and 4.

Ground 2

120. I do not accept that there has been a failure to apply the policy set out in PSI 08/2013 in regard to the holding of oral hearings. I am satisfied that the decision not to hold an oral hearing was taken in both 2017 and 2018 having proper regard to the PSI.

121. It is regrettable that, as regards the decision of 2017, there is no reference at all to an oral hearing but I have dealt with this above. As regards the 2018 decision, there is specific reference to the criteria in PSI 08/2013. It is true to say that there is not a reference to each of the criteria in paragraph 4.6 and 4.7 but I am not aware of any authority for the proposition that CART must set out each criterion and explain why it does not support an oral hearing.

122. It is clear to me that in respect of both decisions CART looked at the question of an oral hearing on the basis of the guidelines that they are obliged to apply. In my judgment, there is nothing in the evidence with which they were presented which renders unfair or otherwise unlawful the conclusion that the criteria have not been met for an oral hearing.

123. Nor is there anything to suggest to me that CART was wrong to conclude that it would gain nothing by assessment of the claimant in person. His attitude is more than adequately set out in the various reports. There is a recognition of the fact that he is something of a model prisoner, or, if not a model prisoner, something approaching that status.

124. Proper regard was had to the courses that he has undertaken. The 2017 decision recognises that some progress has been made by the claimant in exploring elements of his sexually related risk. But it also recognises that he lacks insight into the risk factors associated with his violent offending. On the basis of paragraph 7.21 of Dr Van Leeson's report and elsewhere it was clearly open to CART to decide that that was a factor that militated against a finding of sufficient reduction in risk to justify downgrading and that progress was not significant.

125. As regards the 2018 decision, Mr Rule himself acknowledges that CART are concerned only with change from the previous year. The only factor that has changed between 2017 and 2018 apart from the fact that the claimant is one further year post tariff is the Parole Board's decision. But the Parole Board does not recommend downgrading, it merely recommends that CART should take into consideration the need for the claimant to progress to the most appropriate PIPE environment.

126. It is worth observing that the Parole Board specifically and over a lengthy part of the decision considers evidence of change and progress in custody and concludes, in section 6 of their report that there is a high risk of serious harm to the public. In addition, I remind myself of the observations of the Board that I set out in paragraph 69 above

127. Having itself had an oral hearing there is a recognition by the Parole Board that the claimant displays some insight into his offending behaviour. It is true that this might be an improvement on the previous year when evidence in the shape of Dr Van Leeson's report suggested that the claimant needed to enhance his insight into his attitude towards prostitutes and into himself (paragraphs 7.13 and 7.21 of her report) but it was clearly not wrong for the CART to conclude that that progress was not sufficient to significantly reduce risk not least when the Parole Board itself considers that he is high risk to the public.

128. As I have said, I am not satisfied that there are any important facts or important areas of dispute between the experts which would justify an oral hearing. And that insofar as the experts recommend a more relaxed regime that is clearly for the benefit of the claimant and his future progress and the risk he poses to personnel and prisoners in the prison environment.

129. I accept that the claimant has been in prison for a long time and has been post tariff also for a great many years and of course I accept that the review is a matter of importance to him and that the importance of the issues to the prisoner as well as time spent are specifically matters which have to be borne in mind. But I do not accept that there was any real advantage in an oral hearing in either 2017 or 2018 on the evidence. And I am satisfied that that conclusion was reached by CART by an application of the guidelines set out in the PSI.

130. I remind myself of the observations of the court in *Morgan* which I have referred to in paragraph 92c above and which I do not accept can be distinguished for the purposes of this application.

131. Neither do I accept that there is an impasse which renders the decision not to hold an oral hearing in either year contrary to policy. I am persuaded by the arguments of Mr Manknell in this connection which I have set out above in paragraph 92d above

132. Accordingly, I do not accept that Ground 2 is established.

Ground 3

133. There is an inevitable overlap between this ground and Ground 2.

134. It would, I think, be unusual for a court to conclude that there has been no failure to act in accordance with the published policy but there has been a failure to act with procedural fairness. It was not suggested to me by Mr Rule that the PSI was in any way unlawful. If there has been compliance therefore with the policy contained in it then, in my view the claimant is in significant difficulty in establishing that, notwithstanding that policy has been applied, there has been procedural unfairness.

135. Leaving that aside it seems to me that the observations in *Hassett*, particularly those I reproduce in paragraph 94 above, are germane and I am not satisfied that there has been any procedural unfairness. In reaching that conclusion I fully recognise that this question must be approached not on the basis of the consideration of whether the procedure adopted by CART was *Wednesbury* unreasonable. The determination that the court must make is whether, as a fact, the procedure followed was fair. That is clear from the speech of Lord Reid in *Osborn*, paragraph 65.

136. For the reasons given above I am satisfied that the procedure adopted by CART in concluding that no oral hearing was necessary was a fair both in 2017 and 2018. I reach that conclusion because, as I have said, I am satisfied that the criteria adopted in the PSI were applied (even if that was not necessarily clear in relation to the 2017 decision until the clarifying letter of December 2017) and that those criteria are fair.

137. Accordingly, I reject Ground 3.

Grounds 5 and 6

138. I do not accept that there have been material errors or a failure to have regard to material considerations. I am satisfied that the arguments of Mr Manknell in this context are the more persuasive.

139. Both decisions appear to take account of all relevant information and indeed refer to it. I do not think it can be fairly said that they misrepresent the positions of the experts whether that be Dr Van Leeson or Ms Gill. There is a recognition that the experts take the view that the claimant can be safely re-categorised but it is clear that the experts have in mind what is best for the claimant rather than applying the test that CART is obliged to apply.

140. The fact that the experts are considering downgrading from the point of view of the claimant rather than the risk to the public if the claimant were unlawfully at large is amply demonstrated in the case of Dr Van Leeson by what she says in

paragraph 6.91 of the report, 7.14 and 7.31 all of which are set out in paragraphs 50 to 52 above. Similarly, Ms Gill recommends downgrading in order to enable the claimant to progress but that is not the test that CART must apply.

141. As I hope I have made clear, whilst there is clearly a link between the functions of the Parole Board and CART, there is clearly also a significant distinction. There is no evidence that in this case CART have elevated the theory of jurisdiction disproportionately above the practical realities. In the 2018 decision regard has been had to the Parole Board's comments but the view was taken, in my judgment properly, that the Parole Board have not considered the specific criteria for downgrading from Category A.

142. I accept that there has been an error in the dating of various reports but I am far from convinced this is anything other than a typographical error in each case. It seems clear that due consideration has been given to the contents of the report because of the repeated reference to the in both decisions.

143. Finally, I do not accept that there has been a rejection of the expert report or the evidence presented generally to CART in either the 2017 or 2018 decisions. Insofar as the 2017 report talks about there being "*little or no evidence of significant progress"*, it merely contends that there has not been significant progress, not that there has not been progress at all. Bearing in mind that CART has to be satisfied by convincing evidence that a prisoner's risk has significantly reduced, it seems to me that those observations must be read in that context.

144. In relation to the 2018 decision, once again there is a reference to *"no evidence that he was made further progress to address the outstanding issues in relation to risk factors"* and that "*convincing evidence of a significant reduction in risk of similar offending if unlawfully at large is not yet shown*". Once again it is clear that there has not been a finding of no progress per se. The 2018 decision refers to the courses that the claimant has completed, it clearly reconsidered the reports of Dr Van Leeson and Dr Worthington. It also recognises the views of the Parole Board.

145. Whilst the conclusion there was "*no clear evidence that (Mr Goldsmith) had achieve significant progress in terms of risk reduction*" might conceivably have been better expressed, the meaning is clear namely that CART has in mind risk reduction in terms of risk to the public if the claimant is unlawfully at large. There is indeed no evidence that either of these reports or the decision of the Parole Board conclude that that risk has been significantly reduced and so, in my judgment, it cannot be said that the decision dismisses, or fails to have sufficient regard, to the evidence before it.

Ground 7

146. I really cannot see any basis to conclude that the decisions in 2017 and 2018 were *Wednesbury* unreasonable in the light of the evidence before CART on both occasions.

147. In the light of what I have said above, I do not think it necessary to set out in any great detail why I conclude that this ground is not made out. I venture to suggest that they are obvious. The fundamental fact which I have repeated on more than one

occasion, is that all the evidence with which CART was presented concerning risk clearly did not address the issue of the claimant's risk to the public if he were unlawfully at large, it addressed the issue of his risk within the prison environment or lawfully at large.

148. I do not accept that the fact that CART clearly had in mind the fact that the claimant had not taken advantage of PIPE renders the decision flawed. For the reasons offered by Mr Manknell which I referred to in paragraph 112 above.

149. In my view the decision not to downgrade was clearly one which it was open to CART to reach. Indeed, I am satisfied, applying the test in *Mackay* to which I refer in paragraph 36 above, that it was not wrong.

150. I was referred to *R (Shaffi) v Secretary of State for* Justice (2011) EWHC 3113 (Admin) paragraph 39 in which it was said that any decision by CART must be rational and that the director must "*ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly"*. I see no basis for concluding that CART did not acquaint themselves with the relevant information. Both decisions clearly make extensive reference to the evidence upon which it relied and the representations of the claimant.

151. In so far as it is argued that the LAP recommendation is flawed, it seems clear to me that the CART made this decision based upon its own views following a careful analysis of the whole of the dossier with which it had been supplied.

152. In the circumstances I am not satisfied that this ground based on irrationality/unreasonableness is made out.

Summary

153. In the light of the above the application for judicial review of the 2017 and 2018 decisions is dismissed.

154. Lest it be thought otherwise, I do make it clear for the sake of completeness that in addition to the authorities which I have cited I have had regard to the various other cases to which I have been referred. These include *Hopkins* (2019) EWHC 2151 (Admin), *Steele* (2018) EWHC 1072 (Admin), "*M*" (2016) EWHC 2455 (Admin), *Bell* (2016) EWHC 1804 (Admin), *Lynch* (2008) EWHC 2697 (Admin) and *Willoughby* (2011) EWHC 3483 (Admin).

155. Suffice it to say that I adopt the observations of HHJ Gosnell at paragraph 19 of *Hopkins:* "*whilst it was interesting comparing the facts of both cases and the reasons why the former claimant succeeded in the latter failed, they are essentially examples of the appropriate principles being put into practice in the factual context of the individual cases*". In other words, each case is fact dependent but there is a general theme that oral hearings will be rare.

Additional remarks

156. As I have said, for the reasons given at paragraphs 13-15 above, both counsel recognised that I may not wish to trouble myself with the 2019 decision. Accordingly,

it might not come as a surprise to the parties to know that I am not inclined to do so. However, there is one point which I think it might be helpful to make in the hope that it may avoid the necessity for this matter coming back for a review of that decision.

157. It appears that the dossier upon which CART made its decision may not have included a reference to the Parole Board decision of 2018. Rather it seems to refer to one of March 2014. In addition, it is suggested it lacks a reference to the support by the experts as to re-categorisation and it makes no reference either to Ms Gill's opinion about downgrading. In essence it is argued that the dossier is incomplete.

158. I did not hear full argument on that but if, and I emphasise "if", that is so[8] and CART made its decision without being in possession of all relevant information it might well be successfully argued that the decision of 2019 ought not to stand. If there is an error or omission (and I make no findings as to whether in fact there was an error or omission or not) it may well be argued that CART made its most recent decision on an erroneous premise or, at the very least, that there is perception that it might have done so.

159. The error or omission might not be the responsibility of CART but rather the author of the dossier but in the final analysis it may well be that that does not matter. I recognise that there may be a respectable argument that the 2019 decision is reviewable if it is based upon incomplete information if only because, at first blush it seems to me to be arguable that a prisoner has a legitimate expectation that his annual review would be based upon complete and accurate information. I have already noted in paragraph 31 above that paragraph 4.17 of PSI 08/2013 requires the reports to produce a "*comprehensive summary of the prisoner's behaviour and progress to date"*

160. I emphasise I have heard no argument on whether indeed the dossier was incomplete and, if so, the effect that that might have on the 2019 decision. I just make these preliminary points in the hope that they may be of assistance to both parties in seeking to avoid this coming back for a consideration of the lawfulness of the 2019 decision.

Final Remarks

I am grateful to counsel for their very able assistance in this matter.

HH Judge Saffman

[8] I recognise that CART in 2019 had the previous CART decisions which refer to these alleged omissions.