Neutral Citation Number: [2020] EWHC 2842 (Admin)

Case No: CO/2195/2020

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

Leeds Administrative Court,
The Courthouse, 1 Oxford Row
Leeds, LS1 3BG

Date: 30/10/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF JEREMY BAMBER	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Matthew Stanbury (instructed by Swain & Co Solicitors) for the **Claimant**
Benjamin Tankel (instructed by GLD) for the **Defendant**

Hearing date: 12 October 2020

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a renewed application by Jeremy Bamber, the Claimant, for permission to seek judicial review of a decision dated 18 March 2020 by the Director of the Long-Term and High Security Estate (the Director) on behalf of the Secretary of State for Justice, the Defendant, refusing to downgrade the Claimant from Category A and refusing to direct that an oral hearing take place on the categorisation question. His Honour Judge Saffman sitting as a judge of the High Court refused permission on the papers on 6 August 2020.

2. I held a remote oral hearing on 12 October 2020. The Claimant was represented by Mr Stanbury and the Defendant by Mr Tankel. I am grateful to both of them for their oral and written submissions. At the conclusion of the hearing I reserved my decision and said I would put my reasons in writing. This I now do.

Background

3. On 28 October 1986 in the Crown Court at Chelmsford before Drake J and a jury Jeremy Bamber was convicted of murdering his adoptive father, Nevill Bamber, his adoptive mother, June Bamber, his adoptive sister, Sheila Caffell, and his nephews, her six year old twin sons. They were shot dead some time during the night of 7 August 1985 at the farm in Essex where the Claimant's parents lived and Ms Caffell and her sons were staying.

4. An application for permission to appeal was dismissed in 1989. In December 2002, following a reference by the Criminal Cases Review Commission (CCRC), the convictions were upheld by the Court of Appeal: [2002] EWCA Crim 2912.

5. The prosecution's case at trial was that Mr Bamber planned and carried out the killings. The defence case was that Ms Caffell, who had a history of mental health problems, killed her parents and children with a shotgun before killing herself with the same weapon

6. The respective prosecution and defence cases were summarised as follows by the Court of Appeal in its 2002 judgment at [145]-[152]:

> *"The Prosecution Case at Trial*
>
> 145. The prosecution case at trial was that the appellant, motivated by hatred and greed, had planned and carried out the killings. Having left White House Farm at about 10 p.m. on Tuesday 6 August 1985 he had returned by bicycle (taking a route which avoided the main roads) in the early hours of the following morning.
>
> 146. He had the means and knowledge to gain entry to the address, one such route being through the bathroom window. He then took the rifle, with the sound moderator attached as normal,

and made his way upstairs to where the members of his family were sleeping.

147. The precise sequence of the killings was unclear. June Bamber was shot whilst still lying in bed but had managed to get up and walk a few steps before she collapsed and died by the main bedroom door. Neville Bamber was also shot in the bedroom but was able to get downstairs into the kitchen where there was a violent struggle before he was overwhelmed and then shot a number of times in the head. The children had been shot in their beds as they slept.

148. Sheila Caffell, probably in a sedated state from her medication, was also shot in the bedroom. When she was dead the appellant set about arranging the scene to give the impression that it had been she who had murdered her family before taking her own life. The appellant then discovered, as he laid the gun upon her body, that it would not have been possible for her to have shot herself with the sound moderator attached since her arms were not long enough to reach down to the trigger. He therefore removed the silencer from the gun and then positioned the Bible by the body, knowing Sheila had been preoccupied with religion in the weeks before her death.

149. The appellant returned the moderator to the gun cupboard and before leaving the address called his home at Goldhanger, leaving the receiver off the hook, thus lending support to the alibi he would later rely upon. He then left the premises, one available route being to climb out of the kitchen window, banging it from the outside to drop the catch back into position and then cycled home.

150. Shortly after 3 a.m. he telephoned Julie Mugford, before calling the police at 3.26 a.m. He chose not to make a 999 call, drove slowly to the farmhouse, gave misleading information about his sister and her knowledge of guns to create as long a delay as possible before the bodies were discovered.

151. The prosecution relied upon the following areas of evidence:

i) The appellant's expressed dislike of his family;

ii) His speaking of his plans to kill his family and thereafter his confessions to his girlfriend, Julie Mugford;

iii) The finding of his mother's bicycle at Goldhanger;

iv) The appellant's admitted ability to effect covert entry into and exit from the farmhouse and the finding of the hacksaw blade outside the bathroom window. His claim to have entered

the house in that way after the first arrest was an attempt to explain these findings;

v) Because on the facts of the case it could only have been the appellant or Sheila Caffell who carried out the killings, the factors below proved they were not the responsibility of the appellant's sister:

a) Although seriously mentally ill, there had been no indication of any deterioration in her mental health in the days before the killings. Neither had she expressed any recent suicidal thoughts and the expert evidence was that she would not have harmed her children or her father;

b) Save for the appellant nobody had seen her use a gun and she had no interest in them. Sheila Caffell also had very poor co-ordination and would not have been capable of loading and operating the rifle nor would she have had the required knowledge to do so;

c) She would not have been able physically to have overcome her father (who was fit, strong and 6' 4" tall) during the struggle which undoubtedly took place before his death in the kitchen;

d) Her hands and feet were clean. They were not blood stained and neither was there any sugar upon them;

e) Hand swabs from her body did not reveal the levels of lead to be expected in somebody who must have re-loaded the magazine of the gun on at least two occasions; and

f) Her clothing was relatively clean and she was not injured in the way that might be expected of somebody involved in a struggle. Her long fingernails were still intact and undamaged.

vi) The sound moderator had on any view been attached to the rifle during the fight with Nevill Bamber in the kitchen. But if Sheila Caffell had committed suicide it must have been removed before she shot herself. The following aspects of the evidence established it was still in place on the gun when the appellant's sister was murdered:

a) The blood grouping analysis proved (on the particular facts of the case) that Sheila Caffell's blood was inside the moderator; and

b) Had the appellant's sister murdered the other members of her family with the moderator attached to the gun and then

discovered she could not reach the trigger to kill herself, the moderator would have been found next to her body. There would have been no reason for her to have removed it and returned it to the gun cupboard before going back upstairs to commit suicide in her parents' room.

vii) The appellant's account of the telephone call from his father could be proved to be false for the following reasons:

a) His father was too badly injured to have spoken to anybody;

b) The telephone in the kitchen was not obviously blood stained;

c) As a matter of common sense, Nevill Bamber would have called the police before the appellant;

d) Had the appellant really received such a call, he would have immediately made a 999 call, alerted the farm workers who lived close to the farmhouse and then driven at speed to his parents home; and

e) Instead he had spoken to Julie Mugford before calling the police. When he subsequently contacted the Police, it was not by way of the emergency system.

viii) He stood to inherit considerable sums of money.

The defence case at trial

152. The defence answered the prosecution case in the following way:

i) The witnesses who spoke of the appellant's hatred and dislike of his family were either lying or had misinterpreted what he had said;

ii) Julie Mugford, the jilted girlfriend, had also lied to prevent anybody else being with the man she had loved;

iii) Nobody had seen the appellant cycling to and from the farm in the early hours of 7 August;

iv) Because the appellant had on a number of occasions before and after the killings entered the house by various ground floor windows there was no probative value in the finding of the hacksaw blade etc;

v) Sheila Caffell had killed her parents and children and then taken her own life for the following reasons:

a) She had a very serious mental illness and it was known that even those with no previous history of violence had killed. She had expressed the morbid thought of an ability to kill her own children;

b) Those who carried out "altruistic" killings had been known to indulge in ritualistic behaviour before committing suicide. Sheila Caffell may have replaced the moderator, changed her clothes and washed herself before killing herself, thus explaining the absence of blood staining, the minimum traces of lead on her hands and absence of sugar on her feet;

c) Having lived on a farm and been present at shoots, the appellant's sister would have understood how to load and operate the rifle;

d) The gun, the magazine and the rounds of ammunition had been left close at hand by the appellant in the room where he had heard an argument about placing the children in foster care;

e) The defendant bore no obvious signs of injury;

f) No bloodstained clothing of his had been recovered by the police; and

g) Dr Craig, Dr Vanezis and the first senior investigating officer had all proceeded on the basis that Sheila Caffell was responsible for the killings.

vi) There was a possibility that the blood in the moderator was not from Sheila Caffell, but represented a mixture of Nevill and June Bamber's blood;

vii) In respect of the telephone call from his father, the appellant had not initially appreciated the seriousness of the situation and then had become frightened to go to the farm alone."

7. Drake J imposed a minimum term of 25 years. In May 2008 Tugendhat J reviewed the sentence in accordance with Sch 22 to the Criminal Justice Act 2003. He ordered that Mr Bamber should be subject to a 'whole life tariff', ie, that he never be released. That decision was upheld by the Court of Appeal: [2009] EWCA Crim 96.

8. Mr Bamber's case is one of the most notorious modern murder cases. Nearly 34 years after he was convicted he continues steadfastly to maintain his innocence. Over the

years since he has relentlessly explored every avenue of challenge up to and including the European Court of Human Rights. He has also made a number of applications to the CCRC. In 2012 he unsuccessfully judicially reviewed the refusal of the CCRC to refer his case to the Court of Appeal: [2012] EWHC 3768 (Admin). Most recently, I heard and dismissed a renewed judicial review permission application for the disclosure of material by the CPS which Mr Bamber wished to deploy in a fresh application to the CCRC: [2020] EWHC 1391 (Admin).

The decision under challenge

9. The Secretary of State has the power to make rules for the classification of prisoners (s 47 of the Prison Act 1952), and he has done so in the Prison Rules (SI 728/1999). Rule 7 provides:

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

10. The Claimant is a Category A prisoner at HMP Wakefield. According to [2.1] of PSI 08/2013 (*The Review of Security Category – Category A/Restricted Status Prisoners*), a Category A prisoner is:

> "… a prisoner whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible."

11. In *R(Hassett) v Secretary of State for Justice* [2017] EWCA Civ 331, Sales LJ (as he then was) said at [2]:

> "… Where a prisoner is placed in Category A, that will affect the conditions of detention to which he is subject, as the Secretary of State has to take special care to prevent his escape. It is also likely to affect his prospects of being granted parole, as it would only be in a very rare case that the Parole Board would order release of a prisoner from Category A detention without his suitability for release first being tested in more open conditions as a Category B, C or D prisoner: *R v Secretary of State for the Home Department, ex p. Duggan* [1994] 3 All ER 277 (DC), 280 and 288; *R (Williams) v Secretary of State for the Home Department* [2002] EWCA Civ 498; [2002] 1 WLR 2264, [23]-[24]. This is an approach of the Parole Board as a matter of practice, rather than the consequence of any rule of law. Nonetheless, it is clear that a decision regarding a prisoner's categorisation has significant implications both for the public interest and for the individual interests of the prisoner himself …"

12. Paragraph 4.2 of PSI 08/2013 provides that before a Category A prisoner can be downgraded to a lesser category there must be:

> "…convincing evidence that the prisoner's risk of re-offending 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."

13. In *Hassett*, supra, Sales LJ said at [20] that [4.2]:

> "… has to be read subject to the definition of a Category A prisoner set out in para 2.1 of PSI 08/2013, set out above, which governs the whole of PSI 08/2013. Downgrading from Category A pursuant to para 4.2 will only be appropriate if the significant reduction in risk takes the prisoner outside that definition."

14. In October 2018 the Claimant completed a foundation course designed to prepare prisoners for accredited offending behaviour programmes. It was recommended that the Claimant should be the subject of a Programme Needs Assessment (PNA) to determine whether there are any programmes that are suitable for him.

15. On 8 December 2018 the Claimant's offender supervisor referred him for a PNA. This assessment has not been completed.

16. As I shall explain, a prisoner's categorisation is reviewed at regular intervals. For this purpose a dossier is compiled with contributions from different people involved with the prisoner (psychologists, probation officers, prison officers, etc). In the Claimant's case, various report writers contributed to his dossier and expressed the view that there was insufficient evidence that his level of risk had been reduced sufficiently or at all, and that accordingly he should remain at Category A.

17. The Claimant's solicitors commissioned an independent report from a forensic psychologist, Dr Kerry Beckley. It is dated 14 May 2019 and was disclosed to the Director. In summary, in relation to risk, Dr Beckley said:

> "27.1 It is difficult to develop a comprehensive formulation of the risk that Mr Bamber poses to the public based upon the available information. He does not evidence the usual range of risk factors known to be associated with violence, and the nature of the index offence was very specific …
>
> 28.1 Mr Bamber can be considered a low risk of future violence in custody. If consideration was also given to Mr Bamber's risk in the community, there is little evidence of him demonstrating the propensity to commit a future act of violence on the basis that the index offence was highly specific. For this reason, I would also deem Mr Bamber's risk to the public to be low were he to be in the community. I am not of the opinion that his risk of future violence warrants him remaining a category A prisoner …
>
> 28.2 I understand that the test for downgrading a Category A prisoner, there must be convincing evidence that the prisoner's risk of re-offending 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. In my opinion this test is met and therefore Category A conditions are no longer necessary to manage Mr Bamber."

18. Section 4 of PSI 08/2013 deals with the categorisation review process for Category A prisoners. These take place annually, in the first instance by a local advisory panel (LAP) at the relevant establishment. The LAP has to submit a recommendation to the Category A Review Team (CART). If the LAP recommends downgrading, the decision on the annual review will be taken by the Director rather than the CART (see [4.25]-[4.27]). The decision-making process may be escalated upwards even in the event of a recommendation that the prisoner's categorisation remain the same, depending on the time since the last review and in other specified circumstances (see [4.29]).

19. On 9 January 2020 the Wakefield LAP (made up of the Prison's Deputy Governor, four prison officers, five members of the Prison Offender Management team, a forensic psychologist, and a security analyst) recommended that the Claimant should remain in Category A. It had regard to the Claimant's compliance with the prison regime, his denial of guilt, and the courses that he had and had not participated in, and taking all of this into account, concluded that there was 'no evidence to suggest any level of personal change'. It encouraged the Claimant to work with his case management team in preparation for his PNA.

20. On 5 February 2020 the Claimant's solicitors submitted further written representations, arguing that there should be an oral hearing in the Claimant's case because he had served nearly 35 years in prison without an oral hearing; because such a hearing would enable a fuller risk assessment; and because there was a dispute of opinion between Dr Beckley and the prison-based report writers as to the risk the Claimant would pose in the community if at large.

21. On 18 March 2020 the Director disclosed his decision (which had been taken on 19 February 2020). He decided that the Claimant should remain in Category A. The minute of the decision recorded the nature of the Claimant's index offences; that the motive for the offences was unclear; that he had adamantly denied guilt throughout his sentence; and that he had not participated in any offending behaviour programmes. As against this, the Director also noted that the Claimant acted as a peer mentor teaching other prisoners to read and write; that he interacted well; and that he was always polite. It was noted that the Claimant had not received any negative behaviour entries, warnings, or adjudications, and that and he presented no management or control issues. It summarised the representations received from the Claimant's representatives and the psychology report of Dr Beckley. In light of all of this material, the Director concluded (emphasis added):

> "… that Mr Bamber's behaviour remains acceptable and he is awaiting assessments for intervention work. At present there is however still no evidence he has discussed and addressed his offending and the related risk factors in a way that enables effective assessment of offence related insight and progress. *The representations include a private psychology report which*

> *confirms [that] assessment of motivation and relevant risk factors remains impossible due to his denial of guilt.* Its recommendation for his downgrading is instead based on his sustained regime compliance, lack of current evidence of expressed violent thinking, and the author's own views on the offences and the inherent risk. He considered [that] these alone however provide no coherent evidence [that] Mr Bamber has achieved a significant reduction in his risk of similar reoffending. He considered [that] the report therefore 13 provides no valid alternative assessment of significant risk reduction warranting further investigation, including through an oral hearing. The Director considered [that] there are also no other grounds for an oral hearing in accordance with PSI 08/2013. He is satisfied [that] Mr Bamber must therefore remain in Category A at this time."

22. The Claimant sent a pre-action protocol letter before claim on 17 April 2020, to which the Defendant responded on 27 April 2020.

23. On 15 May 2020, Dr Beckley sent a further letter, in which she restated:

    a. her opinion that it *was* possible to assess risk based on compliance with the prison regime, current presentation, and the specific nature of the index offence, and

    b. her conclusion that based on these factors, the Claimant's risk had reduced.

Grounds of challenge and the single judge's decision

24. The Claimant challenges the Director's decision on the following grounds:

    a. The Director's decision was unreasonable because it substantially and materially misrepresented Dr Beckley's opinion. It wrongly stated that Dr Beckley had concluded that it was 'impossible' to assess the Claimant's risk when she did not, in fact, conclude that but concluded that whilst it was 'difficult' to assess risk ([27.1]) she was able to do so and concluded at [28.1] that his risk to the public would be low were he to be released into the community.

    b. In any event, fairness required an oral hearing in the Claimant's case because:

        (i) There is a dispute of opinion between Dr Beckley and the prison report writers which should be resolved at an oral hearing;

        (ii) The Claimant has served 35 years without ever having an oral hearing, and the passage of time means that a risk assessment is more difficult without a face-to-face assessment;

        (iii) There is an impasse as the Claimant is willing to engage with a PNA but has been denied access to one.

25. I can summarise His Honour Judge Saffman's reasons for refusing permission as follows.

26. In relation to Ground 1, the judge noted that Dr Beckley had expressed the opinion in her report that the claimant met the test for re-categorisation in [4.2] of PSI/08/2013. The judge agreed that in his decision the Director had described Dr Beckley's report as concluding that a risk assessment was 'impossible' due to the Claimant's denial of guilt'. He said the argument was that at no point in her report did Dr Beckley suggest that assessment of risk was impossible and that accordingly the Director had misrepresented Dr Beckley's opinion rendering his decision unreasonable.

27. The judge said it was not disputed by the Secretary of State that Dr Beckley had not concluded that a risk assessment of risk was impossible. She merely concluded (at [27.1] that 'it is difficult to develop a comprehensive formulation of the risk that (the Claimant) poses to the public based upon the available information'. Later, in the same paragraph she repeated that 'it is difficult to further develop the formulation (of risk) without full access to the trial documents due to (the Claimant's) maintained innocence.'

28. The judge said that it had been accepted by the Secretary of State that in describing Dr Beckley's report as characterising the assessment of risk as impossible the Director misstated the purport of Dr Beckley's report. However, the judge said that it was not realistically arguable that the Director misunderstood the thrust of her report in such a way that rendered his decision unreasonable.

29. The judge said that the Director had recognised that Dr Beckley had assessed risk and concluded that the Claimant should be re-categorised. He had summarised the evidential basis for Dr Beckley's conclusion, namely, the Claimant's sustained compliance with the prison regime; the lack of current evidence of expressed violent thinking; and Dr Beckley's view of the index offences and inherent risk. The judge said that notwithstanding these, the Director had concluded that there was no convincing evidence 'that the Claimant had achieved a significant reduction in his risk of similar reoffending if unlawfully at large and that the report provided no valid alternative assessment of significant risk reduction warranting further investigation including through an oral hearing'.

30. The judge said it was not arguable with any real prospect of success that this was an unreasonable conclusion on the Director's part. He said it was clear that use of the word 'impossible' had been inappropriate, but described it as a 'lazy choice of words' rather than a true representation of the Director's understanding of Dr Beckley's position.

31. The judge said that contrary to what had been suggested in [27] of the Claimant's Statement of Facts and Grounds, namely:

> "This significant misrepresentation of Dr Beckley's opinion within the decision is an error of reasoning which robs the decision of logic and renders it unlawful: *R v Parliamentary Commissioner ex p Balchin* [1998] 1 PLR 1, 13"

it could not be argued with real prospect of success that this mischaracterisation by the Director robbed the decision of logic or rendered unlawful his conclusion that there was no convincing evidence of significant reduction in the risk of reoffending if the Claimant were unlawfully at large so as to justify re-categorisation.

32. Furthermore, the judge said that it was highly likely that had there been no misstatement as to the opinion of Dr Beckley the outcome would not have been substantially different. The judge therefore said permission had to be refused under s 31(3D) of the Senior Courts Act 1981. He said it was not sufficiently arguable that the Claimant would establish that had the Director appreciated that Dr Beckley went no further than to concede that assessment of risk was difficult rather than impossible that the Director would have reached a different conclusion.

33. In relation to Ground 2 and the challenge to the Director's decision not to hold an oral hearing, the judge said that it was not arguable with any real prospect of success that a hearing was necessary to resolve a difference of opinion between the prison report writers on the one hand and Dr Beckley on the other.

34. The judge observed that [4.7(b)] of PSI 08/2013 gave as an example of when an oral hearing might be appropriate the situation where the LAP, in combination with an independent psychologist, took the view that a downgrade was justified. However he said that in this case the LAP had not suggested that a downgrade was appropriate. He also said that it was not realistically arguable that an oral hearing was necessary to resolve the dispute between the prison report writers and Dr Beckley. The issue for the Director to consider was whether there was convincing evidence of significant reduction in risk if the Claimant were to be unlawfully at large. The basis upon which Dr Beckley concluded that there was, was clearly explained in her report. The facts upon which she reached that conclusion were not in dispute. The only issue in dispute was the conclusion to be drawn from those facts. The judge said it seemed clear, on the basis *R (Roberts) v Secretary of State for the Home Department* [2004] EWHC 679, that good behaviour over a period and growing maturity would not, in the vast majority of cases, be likely to be considered enough to demonstrate reduction of risk. He said that whilst it was true that the Claimant had been in custody for many years and that the relevant PSI made clear at [4.7(c) and (d)] that where the individual has served many years in custody it might be more difficult to make a judgment on the papers, the PSI made clear that it did not automatically follow that just because a prisoner had been a Category A prisoner for a significant time that an oral hearing is appropriate. There was no arguable basis for concluding that the Director's decision not to hold an oral hearing because of the length of time that the claimant had been in custody was unfair.

35. Finally, the judge said he was not satisfied that it was arguable that there was an impasse. He said it appeared from [7] of the Statement of Facts and Grounds where it was stated:

> "On 8 December 2018 the Claimant's offender supervisor referred him for a PNA. The assessment has still not been completed, and there has been no input into the Claimant's case from the prison psychology department over the last 18 months. The contribution to the Claimant's Category A dossier from the psychology department, dated 25 October 2019, says:
>
> > '…It is recommended that he does engage with the PNA process once this is allocated …'"

that the Psychology Department had recommended that the Claimant engages with the PNA process. The judge said it was not clear on what basis it was contended that there is an impasse.

36. The judge said that insofar as there were doubts as to the effectiveness of the PNA process, for the reasons set out by the Defendant in [44] of the Summary Grounds of Defence, which stated:

> "The third reason given is that there is said to be an impasse relating to the Claimant accessing a "Programme Needs Assessment" ("PNA"), which is an assessment to identify the prison-based programmes for which the Claimant may be eligible. It is unclear from the Claimant's grounds whether the impasse is said to arise from the absence of a PNA to date, or from doubts as to how helpful the PNA is likely to be. Both points are mentioned. If the former, that is an administrative issue and an oral hearing is not going to help to resolve it. As to the latter, doubts as to whether the PNA or the programmes to which it provides access will confer any benefit do not constitute an impasse. Newly developed programmes are open in principle even to those such as the Claimant who deny their guilt. Moreover, scepticism about the effectiveness of the programmes is not in itself a barrier to the Claimant's eligibility for a PNA. As set out above at paragraph 16, such scepticism may mean that a prisoner is not assessed as being eligible for any of the new suite of programmes. That is part of what the PNA assessment process is designed to identify. The Claimant's potential scepticism will thus fall to be assessed in due course, but is not currently creating any kind of impasse within the meaning of PSI 08/2013. There is thus no impasse for an oral hearing to try to resolve."

he did not consider it arguable that there was an impasse in the sense envisaged by the PSI at [4/7(c)], which provides:

> "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."

Discussion

37. For the substance of the reasons given by His Honour Judge Saffman and for the following reasons I have concluded that permission must be refused on the basis that neither of the grounds of challenge advanced on behalf of the Claimant is arguable.

38. In relation to Ground 1, I agree that the Director was wrong to say that Dr Beckley had concluded that an assessment of risk was 'impossible'. She did not say that, and her report cannot reasonably be read to have reached that conclusion. She expressed her conclusion that such an assessment *was* possible, and she made one. Whether or not this was just lazy language on the Director's part, it was an error. I am not

entirely sure the point was conceded by the Secretary of State in the way expressed by the judge, but whether or not that is correct, what the decision said was wrong.

39. Equally, however, when the Director's decision is read as a whole it is plain that he had the right question in mind and that the reasons he gave for refusing to recategorize the Claimant were ones which were reasonably open to him on the evidence.

40. It is obvious that the Director had well mind the key question, *per* [4.2] of PSI 08/2013, namely, whether there was *convincing* evidence of a reduction in risk. I agree with the Secretary of State's submission that notwithstanding the misstatement I have referred to, the Director correctly understood Dr Beckley's report and the representations that had been made on the Claimant's behalf, including that he did not exhibit the usual range of risk factors known to be associated with violence. The substance of that report was that a conclusion about the Claimant's risk could be drawn solely from evidence of his regime compliance, lack of current violent ideation, and the specific nature of his index offence, and the other matters she mentioned, and that, based on those factors, the inference could be drawn that the Claimant's risk had reduced sufficiently. I consider that the decision letter makes clear that the Director understood this. He expressly noted that, based on these factors, Dr Beckley had felt able to recommend that the Claimant should be recategorized. However, he also recognised that there remained a gap in the evidence base, for example, that it was not possible to assess the Claimant's offence-related insight and progress.

41. Paragraph [4.2] of PSI 08/2013 refers to the need for 'convincing' evidence. Whether the evidence presented on behalf of the Claimant was sufficiently convincing to justify a downgrade was one for the Director's judgment. Overall, the Director's conclusion that there was insufficiently convincing evidence as to the reduction in risk was one which was reasonably open to him on the evidence before him. Dr Beckley reached a conclusion in the Claimant's favour, but her view was nuanced and qualified, as she frankly admitted at [27.1] (set out above) ('… It is difficult to develop a comprehensive formulation of the risk …'). On this basis, whilst there was evidence in the Claimant's favour, the Director was entitled to conclude that it was not sufficiently convincing to meet the test in [4.2].

42. Even if the Director had not made the misstatement about 'impossibility', I have no doubt that his conclusion would have remained the same and he would have declined to re-categorise the Claimant, on the basis that despite Dr Beckley's opinion, the necessary cogency of evidence was not present. Hence, permission on this ground must be refused under s 31(3D) of the Senior Courts Act 1981 in any event.

43. In relation to Ground 2, and whether there should have been an oral hearing, despite the Claimant's submissions, I remain unpersuaded it is arguable that this case is one of those rare ones in which an oral hearing was required.

44. In *Hassett*, supra, Sales LJ said that (emphasis added):

> "51(i) The CART/Director are officials of the Secretary of State carrying out management functions in relation to prisons, whose main task is the administrative one of ensuring that prisons operate effectively as places of detention for the purposes of

> punishment and protection of the public. In addition to bringing to bear their operational expertise in running the security categorisation system, they will have other management functions which mean that in striking a fair balance between the public interest and the individual interests of prisoners, it is reasonable to limit to some degree how elaborate the procedures need to be as a matter of fairness for their decision-making. *Moreover, in relation to their decision-making, which is part of an overall system operated by the Secretary of State and is not separate from that system, it is appropriate to take account of the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering processes within the system as a whole.* So, for example, in the present cases it is a relevant factor that both Mr Hassett and Mr Price have had extensive discussions with and opportunities to impress a range of officials of the Secretary of State, including significant contact with prison psychology service teams. The decision-making by the CART/Director is the internal management end-point of an elaborate internal process of gathering information about and interviewing a prisoner...
>
> …
>
> 60 ... The courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate diversion of excessive resources to the categorisation review function, away from other management functions.
>
> …
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> 69 ... Even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/Director to hold a hearing to allow them ventilate their views orally. *This might be so because, for example, there may be no real prospect that this would resolve the issue between them with sufficient certainty to affect the answer to be given by the CART/Director to the relevant question, and fairness does not require that the CART/Director should hold an oral hearing on the basis of a speculative possibility that that might happen ...*"

45. I am entirely satisfied (per the italicised words above) that the Claimant had a fair opportunity to present his case on why he ought to be re-categorised even without an oral hearing. I set out some of the factual background earlier. From May 2019 onwards, when Dr Beckley completed her report, the Claimant through his solicitors made several sets of representations to the Director on the question of his categorisation. In July 2019 the Director concluded there was insufficient evidence of risk reduction. That conclusion was challenged by the Claimant's solicitors, and the Director agreed to take a fresh decision. That demonstrates both the effectiveness of the Claimant's engagement in the decision-making process, and the extent to which he was able to influence it even in the absence of an oral hearing.

46. As explained in [10-11] of the Claimant's Statement of Facts and Grounds, the reason the Director agreed to re-take the decision was because his first decision had relied upon outdated reports. Thus, as part of the re-taking of the decision, in late 2019 the prison psychology service and a probation officer carried out new assessments of the Claimant. In December 2019 the Claimant's solicitors made representations in response to these assessments. In January 2020 the LAP made its recommendation, which prompted further representations from the Claimant's solicitors in February 2020. They took issue with the LAP recommendation and set out five reasons why an oral hearing was said to be necessary. The Director then made his decision on 19 February 2020.

47. Against this background, I find that the Claimant had a full and fair opportunity to present his case, and that an oral hearing would have added nothing. I agree with the Secretary of State's submission that, essentially, the question was: what inference about the level of risk could properly be drawn from the largely undisputed facts ? I do not consider that an oral hearing would have meaningfully aided the inference-drawing process. In other words, it would have provided no greater degree of certainty about the correct inference on risk than was possible from an analysis of the written evidence alone. The fact that the experts disagreed about what inference should be drawn about risk did not of itself justify an oral hearing, as the extract from *Hassett,* supra, makes clear.

48. I also agree, for the reasons already given, that this was not a situation of impasse.

49. For these reasons, and those given by the judge, I refuse permission to seek judicial review.