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CO/1372/2020

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

Royal Courts of Justice
Strand, London WC2A 2LL
7 June 2021

B e f o r e:
DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN

on the application of

PETER JOHN UNWIN

Claimant

v

(1) SECRETARY OF STATE FOR JUSTICE
(2) EXECUTIVE DIRECTOR OF LONG TERM AND HIGH SECURITY PRISONS

Defendants

Philip Rule (instructed by Coninghams) appeared on behalf of the Claimant
Robert Cohen (instructed by the Government Legal Department) appeared on behalf of the Defendants

Hearing: 16 March 2021 (by remote video)

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 7 June 2021 at 10.30am.

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. The Claimant ("**C**"), who is a prisoner currently held at HMP Whitemoor, brings this judicial review against the decision of the Defendants ("**the Ds**") on 30 December 2019 ("**Decision 1**") to maintain his Category A (Standard Escape Risk) security status without affording C an opportunity of an oral hearing into the issues arising on the review of his status and also in declining to change that decision on a review communicated by letter dated 5 March 2020 ("**Decision 2**"). The D's decisions were taken on the Secretary of State's behalf by the Category A Team ("**CAT**") (formerly the Category A Review Team).

2. Category A prisoners are defined by the Prison Service Instruction, PSI 08/2013 (last updated June 2016), paras. 2.1 and 2.2:

> "Definition of Category A
>
> 2.1 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.
>
> 2.2 In deciding whether Category A is necessary, consideration may also need to be given to whether the stated aim of making escape impossible can be achieved for a particular prisoner in lower conditions of security, and that prisoner categorised accordingly. This will arise in a limited number of cases since escape potential will not normally affect the consideration of the appropriateness of Category A, because the definition is concerned with the prisoner's dangerousness if he did escape, not how likely he is to escape, and in any event it is not possible to foresee all the circumstances in which an escape may occur."

3. The review and Decision 2 followed a decision by the Parole Board dated 7 January 2020 ("**PBR**"), which resulted from an oral hearing conducted by the Parole Board on 7 January 2020, after Decision 1 had been issued. The review had been requested by the C's solicitors in a letter dated 4 February 2020.

4. C was born on 11 June 1965. The C received a discretionary life sentence on 16 July 1993 at Manchester Crown Court for an exceptionally serious offence of manslaughter (on grounds of diminished responsibility), with a minimum period (tariff) of 20 years and 2 days to be served before parole would be considered. The offence was particularly brutal and was described by the sentencing judge, Turner J., in July 1993 in these terms:

> "The nature of the offence … is such that it represents as grave a case of killing as it is possible to imagine. It was a killing without proper motive. It was a killing accompanied by appalling acts of perversion and violence."

5. Turner J. referred to the medical reports which showed the C suffered from a psychopathic disorder as well as a "generalized anxiety disorder with obsessional features" which led various reports to describing him as -

> "an extremely dangerous man, not only in respect of the instant offence but also in the extent to which you have expressed - fantasies and ideas of wishing to kill others whom you believe may have caused harm to you."

6. He also noted that an experienced psychiatrist had described him as -

> "one of the most dangerous men that he has ever come across."

7. C has now been in custody for over 27 years and his tariff expired over 7 years ago. He has therefore been eligible for consideration for release by the Parole Board since 2012 but remains in Category A. As recognised by the C, and in the PBR, there is no question at present of the C being released on licence or into open prison conditions and the only issue is whether his status should be downgraded to Category B.

8. Following his sentence, C has been held in a number of prisons including HMP Durham; HMP Whitemoor (from August 2007 until September 2012 located to the Fens Unit, a Dangerous and Severe Personality Disorder ("**DSPD**") Unit for treatment; then in the Close Supervision Unit); until transfer to HMP Woodhill in May 2013 where he was managed under the Managing Challenging Behaviour Strategy ("**MCBS**") Unit. Subsequently, he was transferred back to HMP Whitemoor.

9. C's 4 years of treatment in the DSPD programme at HMP Whitemoor were not a complete success (reflected in the PBR, quoted below):

   (1) C left the DSPD before completing the programme. In his discharge report of 1 November 2012 it was stated -

   > "As can be seen from the above reports, Peter has always shown considerable potential to do well in therapy and consequently significantly reduce his risk. Whilst Peter has made progress since being on the unit, and has reduced his risk to some extent, the problem has been that his attendance and engagement at most groups and his individual sessions has not been consistent over the period. More importantly is the fact that although Peter has got this great potential to use therapy well he only chooses to do so to a limited level and has not allowed his psychological defences to drop for a consistent enough period to enable a therapy at the fundamental level to truly reduce his risk. Every therapist that has worked with Peter in individual and group therapies have all been able to both see his potential to do well but have been frustrated by his need to psychologically defend himself against acceptance of true care and nurturance. Because Peter has made some progress and does have potential to make real changes, it was decided

> that he should be deselected prior to the end of treatment to enable him to reflect on what he needs to do to be able to accept the treatment available to him so that he can return at a later stage and complete therapy by engaging at the level necessary to bring about sustained change.
> …
> RECOMMENDATIONS
>
> If at all possible Peter should be placed in one of the smaller prison units, such as that at HMP Manchester, where he can work on what he needs to do to be able to fully access the therapy available to him. This would also ensure family contacts can be maintained which will enhance risk reduction and motivation for change. When Peter feels fully committed and motivated to re-engage he should apply to return to The Fens Unit to complete treatment.
>
> As Peter has made some progress, he would not be expected to start at the beginning of the treatment programme but an assessment would be made at the time as to the most appropriate group for him to join and the amount of therapy that he would need to complete."

(2) Whilst on the DSPD he made threats of serious violence against staff as is recorded in the PBR, Section 5;

(3) Ms Betts, in her report produced for the PB hearing, she noted the derogatory terms used for some of the psychologists at HMP Whitemoor -

> "At times Mr. Unwin used derogatory terms for psychologists. He referred to young psychologists at HMP Whitemoor as "Dolly-bird psychologists", and stated that any psychologist "worth their salt" would work in private practice rather than staying in the prison service, among other similar comments."

10. The DSPD is a matter on which the Parole Board ("**the PB**") heard expert evidence and commented and its relevance is an issue raised in the context of this challenge to the Decisions.

11. It is not disputed that the C has completed a number of courses, programmes and treatments in custody (including Offending Behaviour Programmes since 2015) to achieve risk reduction, which have included the Resolve Programme (completed in 2015), the Self-Change Programme (completed in 2017); post-treatment residency in a Psychologically Informed Planned Environment ("**PIPE**") from 2017 to 2019 and an Integrated Substance Misuse Course. Moreover, C has maintained an enhanced level of behaviour on the Incentives and Earned Privileges ("**IEP**") scheme since 2016.

12. It is common ground in these circumstances that C has made progress. There is a clear issue between C and the Ds whether his progress has been sufficient in order for him to

be downgraded to Category B.

13. On 20 November 2017 an Offender Assessment System ("**OASys**") assessment was carried out and which noted (the non-sequential paragraph numbers are original) an "immensely significant improvement in his behaviour":

> "Identify issues about attitudes contributing to risks of offending and harm. Please include any positive factors.
>
> 12.1 Mr Unwin has evidenced an improvement in his behaviour in custody, particularly since he has been moved back to Whitemoor. He has previously evidenced pro-criminal attitudes in custody through his adjudication history. His last proven adjudication, from August 2015 was for smashing a sink in his cell at HMP Woodhill.
>
> 12.3 It is documented that he has been verbally abusive to his therapist and does not interact well with uniformed staff on the Fens Unit, including his personal officer. However, current Offender supervisor provided information in SPR L report for parole that behaviour is "very good " in custody, that he has a positive attitude towards his offender supervisor and personal officer. He has therefore evidenced an immensely significant improvement in his behaviour.
>
> …
>
> 12.6 Mr Unwin needs to demonstrate his understanding for his offending by allowing himself to concentrate on his problems and not try to generalise his therapy. He needs to understand the difference between therapy/help being offered and socialising.
>
> 12.8 His motivation appears to have improved. During his recent parole interview he stated he wanted to progress through the prison system and understood this would mean engaging with sentence planning objectives. Mr Unwin was positive and motivated in interview for his recent parole report. He has said that he will do any course that is asked of him, but conversely, said that he would not be willing start the whole of the treatment over again at the DSPD unit. Having completed 4 years out of 5 might help shed some light on the reasons for his unwillingness. He completed four years on the unit and the treatment should be five years. Prison psychology stated that Mr Unwin will need to complete DSPD in it's entirety. Thankfully, he has successfully completed the self Change Programme since, and it has been established that he won't need to do DSPD again. Now on new Post-Treatment PIPE at HMP Whitemoor. All very positive in the last couple of years."

14. The improvement and progress made is consistently reported by others. For example, on 19 April 2019, Offender Supervisor Mr Richard Kitson (who also attended the LAP and the Parole Board hearing) completed a Sentence Planning and Review Report which recommended as follows:

"**12. Recommendations**

Mr Unwin has displayed a sustained period of progression since arriving at Whitemoor in 2015. He came to Whitemoor having been de-selected from the CSC system but was still being managed on the 'Managing Challenging Behaviour Strategy'. He came off MCBS in November 2016 due to his sustained good behaviour having achieved enhanced on the IEP scheme in August 2016 for the first time ever. He has completed the Self Change Programme in this period including consolidation resulting in him being moved on to the PIPE unit at Whitemoor. He is now coming to the end of the maximum 2 years allowed on the PIPE during which time he has been encouraged to use his skills from SCP and demonstrate continued good behaviour and pro social skills.

Unfortunately Mr Unwin remains in Category A at this time which is restricting his avenues for progression, however should he achieve a downgrade at his next Category A review I would recommend a move to a Category B prison to enable him to demonstrate he is able to maintain his good behaviour and progression outside the High Security estate. Given that Mr Unwin remains on the PIPE unit and we are still awaiting a validation to check whether Mr Unwin has consolidated his learning I am unable to recommend release or transfer to open conditions at this time."

15. On 16 May 2019 a detailed Psychological Risk Assessment Report was produced by Ms Helena Betts, then employed as a Forensic Psychologist in Training at HMP Whitemoor. Her report, which was undertaken under the supervision of Caroline Flowers (Senior Chartered and Registered Forensic Psychologist working for HMPPS Psychology Service based at HMP Whitemoor) stated in respect of the risk presented by C (emphasis original):

"**13. Summary of Risk**

13.1 Following the completion of the HCR-20 it is my opinion that Mr. Unwin currently presents as 'High' risk of future violent offending if released into the community or progressed to open conditions at this time.

13.2 Mr. Unwin has a very high level of risk related to his historical domain. The nature of this domain is that it is unlikely to change significantly over short periods of time. Mr. Unwin's clinical domain indicates that he is managing his risk very well, with the exception of his emotional and behavioural stability, particularly in relation to his use of threats and verbal outbursts. While Mr. Unwin's threatening behaviour is problematic, it is my opinion based on his threatening behaviour formulation (see section 12.5) that it does not increase his risk of **physical violence**. While Mr. Unwin has outstanding treatment need in relation to his interpersonal difficulties related to his personality traits, it is my opinion that Mr. Unwin's risk of physical violence is reduced from very high to high.

13.3 Critical risk factors

13.31 Based on the case formulation, it is my view that the following are

critical risk factors linked to Mr. Unwin's offending:

- Obsessive thinking / rumination / a need to express grievances/ Poor emotional management (high levels of anger and resentment).
- Attachment issues: fear of abandonment/ sensitivity to rejection and low self-worth/ mistrust in relationships.
- A desire for power and control.
- Sensitivity to perceived threat, ridicule, humiliation and criticism / viewing himself as a victim.
- Mental illness, high levels of depression, anxiety and intrusive thoughts.
- The use of substances to avoid emotional distress or attempt to self-medicate.
- Lack of interpersonal skills to resolve conflict / Poor communication skills / Use of threats."

"**14.7 Severity**

14.71 Physical violence

14.711 If Mr. Unwin were to be physically violent in custody the severity is likely to be low. Mr. Unwin's custodial violence has been predominantly spitting, or fighting back when being restrained by staff in protective clothing, mitigating the harm of his physical blows. In the community, If Mr. Unwin were to be physically violent when mentally stable this is most likely to take the form of a punch when he has exhausted his emotional coping mechanisms and his use of threats does not make him feel better. However if Mr. Unwin were to become mentally unstable again, the violence could be significantly more severe, leading me to conclude that the severity of his risk of violence in the community is currently high.

14.72 Psychological violence

14.721 Were Mr. Unwin to be psychologically violent in custody the harm to others is likely to be medium. Mr. Unwin is usually verbally aggressive to members of staff who are somewhat accustomed to his behaviour which mitigates the harm his words cause them. He is however, physically and verbally intimidating when very upset, and this could cause staff to become stressed and frightened. In the community the severity of Mr. Unwin's psychological violence is likely to be high. Mr. Unwin's verbal aggression is likely to have significantly more psychological harm, particularly if these are people which interact with him regularly. Mr. Unwin's threats could be extremely intimidating to someone who has not known him in a professional relationship. If these individuals experienced repeated exposure to his verbal aggression, it would be likely to cause great fear, avoidance and if exposed over a long period of time, may contribute to depressive and anxious mental illness or psychological trauma.":

16. In Section 16 of her Report, Ms Betts considered "work done to address risk factors and outstanding treatment targets" and summarised these at para. 16.2:

> "16.2 In summary, Mr. Unwin has demonstrated a willingness to engage in offending behaviour work, despite his treatment interfering personality traits. Mr. Unwin has some difficulty in consistently applying the tools he has learned from offending behaviour work. He also experiences some issues with his emotional arousal overwhelming the coping strategies that he has learned. In spite of this Mr. Unwin is reported to have made progress in his interpersonal difficulties, and to have continued to improve his use of skills from offending behaviour work. It is my opinion that addressing these traits is critical to enable him to continue the progress he has made with his emotional arousal, and conflict resolution. It would also begin to assist Mr. Unwin in developing more trust in others, and more esteem in himself, therefore feeling less vulnerable and less in need of aggressively defending."

17. The Report concluded:

> **17. Conclusion and opinion in relation to specific areas of instruction**
>
> 17.1 It is my opinion that Mr. Unwin's risk of physical violence is reduced from very high to high, which would be commensurate with him being managed in the category B estate. From my assessment it is my view that Mr. Unwin's future risk items indicate that he is currently of too high risk to be released or moved to open conditions. It is my opinion that Mr. Unwin could be managed with the Category B estate.
>
> **17.2 Recommended future treatment**
>
> 17.21 Given Mr. Unwin's refusal to engage in the DSPD treatment pathway, it is my opinion that the most appropriate treatment pathway still available to him would be to move to a Therapeutic Community. Mr. Unwin would benefit from a similar community to the PIPE, in which he is reported to have made progress in his interpersonal skills. A therapeutic community would provide Mr. Unwin with the continuous feedback and support he has thrived with on the PIPE, as well as direct psychological input on his personality traits. The emphasis on psycho-education and talking therapy is likely to be comfortable for Mr. Unwin. It is important to note that Mr. Unwin is unwilling to go to a Personality Disorder only Therapeutic Community.
>
> 17.22 I recommend that Mr. Unwin remains within a closed custodial environment to continue addressing his outstanding treatment needs such as his conflict resolution, emotional regulation, perceiving himself as a victim, his use of threats, and having difficulty trusting others. I recommend that Mr. Unwin is not suitable to return to a group environment such as the Fens DSPD unit, as he reports treatment interfering trauma experiences, and fear of such environments which make him unlikely to engage or respond to treatment. Mr. Unwin may also benefit from one to one work with his Offender Supervisor to explore his use of threats, and find alternative prosocial means to meet the same needs."

18. C relies on a series of expert reports and statements from Prison Service officials to demonstrate that he has made significant progress such that he no longer presents a threat and that this should be sufficient to lead to his recategorisation.

19. The reports are referred to in detail in the Statement of Facts and Grounds in counsel's submissions. Although I have read them, I have not referred to them all individually since the gist of the reports is sufficiently clear from those I have quoted above. In any event, they were considered by the Parole Board which held an oral hearing on 7 January 2020 and heard from a number of them directly as well as from the C himself.

20. The reasons for the holding of an oral hearing by the PB had been set out in the PB's letter of 14 August 2019:

> "Mr Unwin has been in custody for an extremely long period of time and is now some seven years over tariff. He has yet to have an oral hearing. The representations recognise that Mr Unwin is not in a position to seek release or a move to open, but request an oral hearing none the less in order to obtain an independent assessment of Mr Unwin's risk and his progress to date.
>
> In those circumstances, the Panel agrees with the representations that fairness, and the principles of Osborn, Booth & Reilly [2013] UKSC 61 require that an oral hearing be held in Mr Unwin's case, notwithstanding that it will not lead to a progressive move."

21. The PBR was issued on dated 7 January 2020. Section 2 of the PBR stated as follows:

> **"2. Evidence considered by the panel**
>
> A panel of three members of the Parole Board, including a psychologist member, met at HMP Whitemoor on 7 January 2020 to consider your case. This was your first oral hearing during this sentence. The panel heard oral evidence from you and from your offender supervisor Mr Kitson; forensic psychologist Ms Caroline Flowers; your PIPE key worker Mr Burrows; and your offender managers Ms Kim Wilson and Ms Tina Kenyon who were coworking your case.
>
> Ms Flowers was standing in for the author of the psychological risk assessment, forensic psychologist in training Ms Helana Betts, whom she supervised. Ms Betts was away from the prison for an unknown period. Unfortunately, Mr Coningham had not been aware prior to the hearing that Ms Betts was unable to attend. Ms Flowers explained that she had previous knowledge of you as she had been the SCP treatment manager towards the end of your time on the programme. She did not consider that this had created any conflict of interest in terms of her supervision Ms Betts. Ms Flowers had also been present at the LAP meeting (as indeed had Mr Kitson). Mr Coningham expressed concerns about the absence of Ms Betts, which it was established was unlikely to be resolved by an adjournment, and by Ms Flowers' previous involvement in your treatment and her

> evidence about the LAP, which he described as new and uncorroborated information. There was a short adjournment during Ms Flowers' evidence for Mr Coningham to discuss these matters with you, and Mr Coningham subsequently confirmed that he was content for the hearing to proceed and for Ms Flowers to complete her evidence.
>
> The panel was provided with a dossier containing 397 numbered pages, which included the usual core documents; a psychiatric report from Dr Shaw (March 1993); previous psychological risk assessments (Ms Fielding 2014, Ms Dobson 2017, Dr Gregory 2017); SCP and Resolve post-programme reports; a psychological risk assessment by Ms Betts dated May 2019; and updated reports from Mr Kitson and your previous offender manager Mr Mary. The panel also received a copy of the discharge report from The Fens Dangerous and Severe Personality Disorder Unit (Dr Saradjian November2012). There was no information that could not be disclosed to you.
>
> You were represented by Mr Coningham, who handed the panel a copy of the minutes of a Local Advisory Panel meeting dated 24 November 2019 and a copy of the Secretary of State's re-categorisation decision dated 31 December 2019. Mr Coningham submitted that you were not seeking release or a progressive move to open conditions, but that you sought clarification of your risk and an opinion on the way forward."

22. Since it is not alleged that the PBR failed to deal with any of the important issues raised in their evidence, and the Ds in the review in March 2020 were asked to, and considered the PBR, it is more appropriate to consider how they were dealt with in that report as C's counsel accepted.

23. The PBR sets out the view of the PB having heard and observed those giving evidence and considered evidence of changes since the last review and progress in custody in Section 5 which included the following with regard to the DSPD treatment pathway and future progress:

> "You transferred to HMP Whitemoor in 2004. Between 2007 and 2012 you engaged with the Dangerous and Severe Personality Disorder (DSPD) treatment pathway at HMP Whitemoor, persevering despite your struggles and beliefs that you were mistreated, and making some progress in respect of your treatment targets. You were adjudicated for spitting at a staff member in January 2012. You were deselected in September 2012 after you were reported to have made threats of violence to staff, including to decapitate them and to shoot their family members. You told the panel that you had felt that you had been blackmailed into going to the DSPD as it was the only route out of the segregation unit. You had not liked the approach of some of the psychologists who demanded that you display your vulnerability and were overly 'caring' which you felt to be manipulative. You also said that you found difficult the negativity of other residents.
>
> After your de-selection, you displayed challenging behaviour, and outbursts of verbal aggression and threats of violence although no physical

violence. You remained in the care and separation unit at HMP Whitemoor until May 2013."

24. And -

"You recognise that you need to undertake further work on areas of risk. You find it difficult to see the perspectives of others; for example, you have said that you know you are not going to act on the threats you make and that you feel that others should be aware of that. You attributed your threats and verbal outbursts to situations in which you were restrained by officers, or felt cornered or endangered, but these outbursts have continued, albeit less frequently, although you have been in more stable environments such as the PIPE and your current wing. You accepted that you could be sarcastic and that you 'spoke your mind', but maintained that your verbal outbursts would not escalate to violence. You said that you could control and stop your verbal outbursts if you chose to do so. You do not regard your personality traits as overly problematic currently, but you are willing to continue with work to understand and manage them, as long as you do not have to return to a DSPD. Ms Betts concluded that addressing your personality traits is a critical next step to enable you to continue with the progress you have made in respect of emotional management, and notes that you would be comfortable doing so in the environment of a Therapeutic Community. Ms. Betts stated in her report that she did not consider a return to DSPD to be appropriate as your negative experiences from your previous time at DSPD would act as a treatment barrier.

In your evidence, you told the panel that you had spent a great deal of time during your sentence reflecting on your upbringing, life, behaviour and attitudes. You accepted that your attendance at programmes had helped consolidate your thinking, and provided skills and the vocabulary (such as time-out, self-talk and helicopter view) to describe the changes in your thinking, attitudes and beliefs which you believed you had achieved through your reflection. You said you had matured and were more stable, no longer saw the world as a hostile and dangerous place, and did not want to harm anyone in the future.

In December 2019, your re-categorisation to category B was refused. The LAP minutes and recommendations offered limited detail concerning the rationale for that decision. The panel was surprised that the re-categorisation review had been completed not long before an oral hearing, without the benefit of the panel's decision letter. It noted that the professional witnesses at the oral hearing all recommended a move to a category B prison to enable you to participate in a TC.

As you are currently unable to transfer there were concerns about a loss of momentum. Ms Flowers said that she would look into whether one to one work could be offered by the psychology team at HMP Whitemoor to address personality traits and outstanding areas of risk, although that would not negate the need for time at a TC. You would be willing to undertake one to one work with an individual in whom you could build trust."

25. The PB then set out its assessment of risk:

> "**6. Panel's assessment of current risk**
>
> You are assessed using OASys as having a low static likelihood of both general reoffending (OGP score) and violent re-offending (OVP score). These cannot be regarded as accurate assessments as the scores will be influenced by the very lengthy period you have been in prison. Ms Wilson considered that the risk of violent re-offending if you were in the community should be assessed as high at this stage. Ms Betts' assessment of the risk of physical violence concurred with this; in her opinion this risk had reduced from very high to high. Ms Betts did not consider that your threatening verbal outbursts increased the risk of physical violence. In her opinion the imminence of physical violence was currently low, and would be medium in a lower category closed prison.
>
> The risk of psychological violence, that is verbal aggression, was assessed as imminent by Ms Betts, although Ms Flowers conceded that the frequency of such outbursts had been decreasing and was now 'occasional'.
>
> You are assessed by the probation service as posing a high risk of causing serious harm to members of the public with a medium risk to staff (which is linked to your past assault against a prison officer and your verbal threats).
>
> The panel agreed that the risk of physical violence in a closed prison outside the high security estate was appropriately assessed as medium and noted that you have not been physically violent for many years. The panel also agreed that your risk of causing serious harm to others, if you were in the community, was appropriately assessed as high, and would remain so until, eventually, you are tested in open conditions and can demonstrate your ability to manage your emotions over a sustained period of time.
>
> Warning signs that your risk may be increasing would include not taking your medication; physical outbursts such as property damage; a relapse into substance use; acting on threats towards an individual; or evidence of increasing rumination, obsessive behaviour, or inability to cope with stress.
>
> Ms Betts identified a moderate level of protective factors. In the panel's view, these include the efficacy of your medication and your compliance with it, your learning from reflection and the work you have completed during this"

26. At Section 7, the PBR noted there were no recommendations for release or progression to open conditions and neither were they sought by C:

> "However all the professional witnesses considered that, notwithstanding the 'spice' allegation and the December 2019 drug test, you were ready to progress within the closed estate and recommended a TC [therapeutic community] as the next step.

> Ms Betts did not recommend a further attempt at a Dangerous and Severe Personality Disorder (DSPD) unit, because you have disclosed past traumatic experiences and have a fear of such units, which would present significant barriers to engagement and progress. Ms Flowers agreed with that. You are willing to engage in a TC, where your outstanding treatment needs can be addressed holistically. Mr Kitson noted that you have completed everything asked of you and that, as a return to the DSPD is not recommended, there is nothing further to be achieved in a category A prison. He considered that, having spent 27 years in the high-security estate, you will need to transfer to a therapeutic environment. Mr Burrows said he had been surprised and disappointed that you had not been down-graded to category B at your recent review in light of you having completed the consolidation PIPE and agreed that a TC would be a good next step."

27. The PBR conclusions, which also referred to the recent recategorisation decision, were:

> "**8. Conclusion and decision of panel**
>
> The panel considered carefully all the written and oral evidence, including Mr Coningham's closing submissions. Mr Coningham drew a distinction between your use of violence and your verbal outbursts. He submitted that your derogatory or sarcastic comments did not increase your risk of physical violence. He submitted that you were reflective and had insight into your behaviour and risk; that your positive outlook was protective; and that you had a strong desire to progress to a pro-social environment. Mr Coningham submitted that it was extraordinary that a re-categorisation review had been conducted prior to the oral hearing, although he appreciated that it was not within the panel's remit to comment on the category of closed prison in which you should be located.
>
> The index offence was of the utmost gravity and involved the use of extreme and excessive violence both before and after the death of the victim. You have been in the high security estate for some 27 years and to your credit, you have been willing to engage in work to address aspects of risk. Although you were ultimately deselected from the DSPD you made progress there, and you likewise made progress through SCP and Resolve. You have also completed a great deal of self-reflection.
>
> Your conduct in custody has moderated very significantly during the past few years, and you have not been physically violent in prison for many years. There remain concerns that you still display verbal outbursts, in which you can threaten and use derogatory language towards staff. It appears that these outbursts have become a maladaptive coping mechanism, which you use to release stress or deal with anger or frustration. You told the panel that you had control over these outbursts and could stop them, and the panel's advice is that you should try to do so.
>
> Your evidence to the panel was candid and thoughtful, and you presented well at the hearing. You were able to describe the skills you had gained and the changes in your attitude brought about by your own reflection and the work you have completed.

> You were not seeking release or a move to open conditions and were realistic about your readiness to progress, but you are clearly motivated to achieve a move outside the high security estate to a prison where you can access therapy. You acknowledged that you have more work to do, and you are willing to complete work to understand and learn to manage better your personality traits, provided that this is not at a DSPD unit. Ms Betts was clear in her recommendation that a move to a DPSD unit would not be appropriate for you as there would be barriers to progress, and the panel concurred with this.
>
> At this stage, you are assessed as posing a high risk of violence if you were in the community and as posing a high risk of causing serious harm to others. There were no recommendations for release from professionals and there is core risk reduction work outstanding. The panel concluded that your risk could not be safely managed in the community on licence. It did not direct your release.
>
> In considering your suitability for a move to open conditions, the panel weighed the risks and the benefits to you. It was mindful that a move to open conditions is usually predicated on the fact that all the necessary core risk reduction work has been completed effectively. That is not the case and you accept that there is more to do to address your personality traits, attitudes and beliefs. The panel concluded that the risk of a move to open conditions outweighed the benefits significantly at this stage.
>
> The panel hoped that, notwithstanding the outcome of the recent re-categorisation review, you can progress to a category B establishment to access the further treatment you need without undue delay. In the panel's opinion, it would be unsatisfactory if your progress stalled because you had to spend another year in a category A prison without access to the treatment you need and with which you are willing to engage.
>
> **9. Indication of possible next steps to assist future panels**
>
> At your next hearing, assuming you are able to gain Cat B status and are found suitable for a TC, the next panel would be assisted by an End of Therapy report, an updated psychological risk assessment which takes account of your progress in therapy, and updated reports commenting on your ability to manage your personality traits and your conduct, particularly in respect of your tendency to have verbal outbursts."

28. In parallel with the PB consideration, the Local Area Panel ("**LAP**") considered C's case at a meeting (at which C was not present) and on 26 November 2019 did not recommend downgrading C's security status. Its membership included Mr Kitson, C's offender supervisor and Ms Caroline Flowers who stood in for Ms Betts at the PB hearing (and who had supervised Ms Betts' Report) and had been C's SCP treatment manager as is recorded in Section 2 of the PBR. Both Mr Kitson and Ms Flowers recommended that the C should be downgraded to Category B, as I have noted in the context of Mr Kitson's Sentence Planning and Review Report of 19 April 2019, above.

It follows that the LAP would have had the benefit of their views with regard to C's circumstances, risk and recategorisation.

29. The LAP began by summarising the previous review and then considered the latest information:

> "**9.1 Summary of previous review**
>
> *The Director recognised Mr Unwin has made progress in recent years by moving out of CSCS and MCBS conditions and completing the SCP. Taking into account Mr Unwin's past record he considered Mr Unwin should be given due credit for this. He agreed with the LAP however that Mr Unwin's progress now needs to be strengthened and confirmed through a successful period of good behaviour and skills application. The Director considered evidence of a significant reduction in Mr Unwin's risk of similar reoffending if unlawfully at large is not yet shown. He is satisfied Mr Unwin therefore must stay in Category A at this time.*
>
> **9.2 Minutes of LAP discussion**
>
> The risk of serious harm as assessed on the OASys are Low to the children in the community and High to the public, medium to staff in custody and remain low to children, public and known adult. His identified areas of risk form OASys are analysis of offence, attitudes, drug and alcohol misuse, financial management, emotional wellbeing and thinking & behaviour."

30. Under 9.2 there was then discussion of sentence planning which acknowledged a reduction in incidences of derogatory and abusive comments and aggressive and other negative reactions, engagement with attainting skills and no evidence of drug or alcohol abuse. It then dealt with programmes and interventions:

> "Mr Unwin A5800AL engaged and completed a HCR-20 risk assessment. Mr Unwin's trajectory of emotional coping appears to be improving since he was located on the PIPE. Work on his personality traits remain incomplete following Mr Unwin's de-selection from D wing after 4 years of treatment. He finds it very difficult revisiting this. There are a number of areas of improvement in offence replacing behaviours documented in the most recent risk assessment."

31. In its conclusion, the LAP asserts that in order for a reduction in risk to be evidenced, the following recommendations should be considered/actioned:

> **"9.3 Recommendations:**
>
> *It is recommended that Peter Unwin A5800AL*
>
> • *A - Remain Category A*
>
> In order for a reduction in risk to be evidenced the following recommendations should be considered/actioned:
>
> The LAP acknowledges that Mr Unwin has reached the end of the treatment programme pathway he can access in a Category A environment. During his time on the PIPE, Mr Unwin appears to have made noticeable progress in his emotional management and ability to socialise and problem solve with others which is very encouraging. Whilst the most appropriate treatment pathway remains a PD pathway, Mr Unwin's resistance to engage in this means he will need to explore how else he can address his personality traits sufficiently to reduce his risk and seek a place in a Cat B TC. No recommendation for a downgrade can be considered at this time."

32. The CAT issued Decision 1 on 30 December 2019 that C should remain in Category A:

> "Your security category review has been completed and the decision is that you are to remain a Category A (Standard Escape Risk).
>
> The decision has been reached following careful consideration of all the relevant factors, including the nature and circumstances of the present offence, previous offending history and reports prepared by HM Whitemoor. The prison's recommendation is that you should at present remain in Category A.
>
> You were provided with copies of your latest security category reports and factual information relevant to the determination of your security category. It noted that you did not submit representations towards the review.
>
> Your present offence involved you killing a 62-year-old man in his home. You attacked the victim when he saw him becoming sexually aroused by watching wrestling on the television, by punching and stabbing him repeatedly, shooting him with an airgun, and decapitating and dismembering him. You gave yourself up and admitted to further violent impulses. The sentencing judge noted the perverted violence and diagnosis of an untreatable psychopathic disorder. You have previous convictions for carrying a loaded air weapon in a public place, making off without payment, burglary, theft, and assault occasioning actual bodily harm.
>
> The Category A Team considered that your present offence 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.
>
> It noted you were located on a PIPE Unit to consolidate the skills learnt from your completion of the Self - Change Programme. It noted you

> remained warning and adjudication - free during the reporting period. It noted occasions where you were seen to be verbally aggressive and abusive in your comments, however, it noted you were able to reflect on your wrongdoings on these occasions. Security information noted you expressed anger and threatened to give more abuse towards a member of staff following you not being given a job in Art or shop 1.
>
> During your time on the PIPE Unit you completed work on learning to use your listening skills, on rumination about past experiences. lt noted following your completion on the PIPE Unit recommendations were made for you to continue to consolidate your skills. It noted you engaged with a HCR-20, violence risk assessment during this reporting period which concluded that you currently present a High risk of future violent offending, if released into the community or progressed to open conditions. The report writer indicates that you have outstanding treatment needs in relation to interpersonal difficulties related to your personality traits. The opinion is that your risk of physical violence has reduced from very high to high. A recent assessment listed your critical risk factors to include obsessive thinking/rumination/poor emotional management, attachment issues, a desire for power and control, sensitivity to perceived threat, ridicule, the use of substances to avoid emotional distress, lack of interpersonal skills to resolve conflict/poor communication skills/ use of threats.
>
> In light of your refusal to engage with a DSPD treatment pathway the report writer suggests a move to a therapeutic community. It noted that the local advisory panel made no recommendation for downgrading of your security category. The Category A Team agrees with the overall findings that you have made some progress in developing your protective factor such as your adherence to medication, professionals care, living circumstances and external controls. It noted that your most appropriate treatment path would be PD services and your resistance to engage means that you will need to explore how you can address your personality traits sufficiently to evidence a significant reduction in your risk of similar reoffending, if unlawfully at large and not if in less secure conditions.
>
> The Category A Team concluded that there are at present no grounds on which a downgrading of your security category could be justified and that you should remain in category A at this time."

33. C points out in respect of the decision of 30.12.19 that:

    (1) No consideration was given to the need for an oral hearing.

    (2) The decision was made only 7 days before the Parole Board hearing, and does not refer to it or its possible significance.

    (3) It refers to the LAP recommendation that C remains Category A but does not refer to the recommendations from the psychologists and others that C should be downgraded.

    (4) C's non-engagement with the DSPD is characterised as a refusal although the

psychologist Ms Betts' opinion was that a return to the DSPD Unit would be clinically unsuitable.

(5) There was no acknowledgement that PD services could be accessed in category B conditions or that the Therapeutic Community is engaged with psychology professionals.

(6) No reasons were given as to why the acknowledged progress in risk reduction was not "significant".

34. On 4 February C's solicitors wrote requesting a formal review of the categorisation decision in the light of the PBR issued on 7 January:

> "You will note that the Parole Board has expressed its surprise that the recent category A review was completed when there was a parole hearing due in only a matter of days. The expectation is that the views of the Parole Board and the evidence given at the hearing would be material considerations for both LAP and CART.
>
> The Parole Board records the unanimous view of report writers that Mr Unwin was ready to progress to conditions of lower security and that a return to the DSPD was neither feasible nor desirable. It is quite clear that those findings would have affected the deliberations of both the LAP and CART. Putting aside any issues of unfairness in the process, I submit that fairness requires a new review at which the Parole Board's findings can be given proper weight.
>
> For the avoidance of doubt, I do not think that justice can be done to Mr Unwin without a new review given the assumptions made by both the LAP and CART that are at variance with the findings of the Parole Board. By way of example:
>
> i) The LAP wrongly assumes that Mr Unwin's risk has not been reduced to the level where he could be managed in a TC. Witnesses at the parole hearing unanimously took a different view.
>
> ii) The LAP fails to consider the evidence of risk reduction provided by the successful completion of the PIPE. This evidence was thoroughly considered and accepted by the Parole Board.
>
> iii) The CART decision is at odds with the Parole Board's view that Mr Unwin has demonstrated risk reduction."

35. In Decision 2, dated 5 March 2020, the CAT refused to reconsider C's security categorisation:

> "The Category A Team is satisfied its decision in December 2019 that Mr Unwin stays in Category A at this time was rational for the reasons provided. It recognised Mr Unwin has made some progress through his time in the PIPE unit. The reports and LAP recommendation nonetheless

confirm important issues require further exploration and resolution, in particular Mr Unwin's personality traits and the influence these have on his offending. While Mr Unwin has made progress managing his behaviours within his present highly secure and supported regime, it is still unknown if he has developed the skills to do this if unlawfully at large. It notes one of the security category reports recommends Mr Unwin's downgrading, but on the basis he could possibly be managed in Category B. This report makes it clear Mr Unwin continues to need a high level of support, may not be able to maintain current behaviour without it, and still needs work to reduce his risks.

The Category A Team confirms also this review (in common with all Mr Unwin's previous reviews) was completed entirely in accordance with the correct criteria for downgrading from Category A, i.e. that there must be convincing evidence he has achieved a significant reduction in his risk of similar reoffending if unlawfully at large, and not if in less secure conditions or even if on supervised release. Recommendations for Mr Unwin's downgrading on such grounds as suggested manageability in less secure conditions, access to necessary interventions, or testing in less secure conditions, can therefore be reasonably declined, without other supporting evidence Mr Unwin has achieved significant progress addressing his risk if unlawfully at large.

The Category A Team notes the recommendations from Mr Unwin's Parole Board review oral hearing in January 2020: in particular the suggestion Mr Unwin should soon be considered for progression to enable his access to further treatment. It considers however there is nothing in the Parole Board's recommendations or reasoning to support a conclusion that (contrary to his recent security category review decision) Mr Unwin has achieved a significant reduction in his risk of similar reoffending if unlawfully at large.

The Category A Team notes in fact the Parole Board confirms (among other things) that Mr Unwin: is assessed as posing a high risk of violence in the community with a high risk of serious harm; needs more work to understand and to manage his personality traits; and there is core risk reduction work outstanding. It is satisfied these statements are not compatible with a conclusion Mr Unwin has at this time achieved a significant reduction in his risk if unlawfully at large. It notes the Parole Board's recommendations for Mr Unwin's progression are instead based on a view Mr Unwin could better address his high outstanding risk and treatment needs through a therapeutic community rather than through a PD unit. This recommendation in turn appears based on Mr Unwin's own fear or unwillingness to attend a PD unit (which is available in Category A), rather than an assessment that he no longer requires or is unsuitable for its treatment. For the reasons stated above, and in accordance with PSI 08/2013, it is satisfied these recommendations provide insufficient grounds for Mr Unwin's downgrading at this time. It considers in the meantime there is no evidence Mr Unwin is in an impasse, or that he cannot further address his high outstanding risk within Category A.

> The Category A Team considers there are no grounds for Mr Unwin's security category review to be recompleted at this time. The information from Mr Unwin's Parole Board review can however be taken into account at his next scheduled review."

36. On 15 March 2020 C's solicitors sent a formal letter before claim. This challenged the failure to consider or convene an oral hearing and the refusal to order a new review or to re-make the decision. They sent a further letter to the Ds on 23 March 2020 noting that the Secretary of State has set the next parole review at 24 months' time and that the only target set for that interval is for C to engage with the Therapeutic Community if successful in recategorisation.

37. The Ds replied to C's correspondence on 23 March which included the following:

> "In your letter you state that on a date unknown to the Claimant his Category A review was completed. Mr Unwin acknowledges that he was provided with a category A dossier but wrongly assumed that the review would not take place until completion of his parole review. In your letter you also state that the Category A Team issued its decision that the Claimant should remain Category A on 30 December 2019, a mere 7 days before the Parole Board hearing. However, as stated in PSI 08/2013 the Category A Team is entitled to complete each review within 4 weeks of receipt of the LAP report. It does not accept it has an obligation to wait until a prisoner's Parole Board review has been completed, or that there were exceptional circumstances compelling it to do so in Mr Unwin's case.
>
> In your letter you state the Claimant's solicitors wrote to the Category A Team requesting a new review to reflect the failure of the LAP and the Category A Team to take proper account of the evidence of significant reduction found by the Parole Board. As stated in its letter dated 5 March 2020 the Category A Team considers the request for another review at this time is not necessary. For the detailed reasons given in its reply the Category A Team is satisfied the Parole Board recommendations and reasoning do not support a conclusion that (contrary to his recent security review decision) Mr Unwin has achieved a significant reduction in his risk of similar reoffending if unlawfully at large. The Category A Team also stated in its letter that information from Mr Unwin's Parole Board review can be taken into account at his next review. In your letter you state that Mr Unwin's Offender Supervisor recommended a downgrade. Whilst the Category A Team and the LAP took this into account they are not obliged to agree. The responsibility of both the Category A Team and LAP remains to determine whether Mr Unwin has achieved a significant reduction in his risk of similar reoffending if unlawfully at large, in accordance with PSI 08/2013.
>
> The Category A Team recognises Mr Unwin has been in custody for many years, has never had an oral hearing and his tariff expired in 2012. It considers however these are insufficient grounds for an oral hearing without other supporting reasons. It notes the courts accept it does not

> follow that an oral hearing would be appropriate just because a prisoner has been in custody for a significant time or is post-tariff. The courts have also stated these are the more nebulous potential justifications for an oral hearing. As stated in the decision letter the Category A Team agreed with the overall findings that Mr Unwin has made some progress in developing his protective factor such as his adherence to medication, professionals care, living circumstances and external controls . However, the Category A Team rationally concluded there is at present no convincing evidence he has achieved a significant reduction in his risk, in accordance with the correct criteria in PSI 08/2013.
>
> For the detailed reasons given in its letter dated 5 March the Category A Team is satisfied the Parole Board's recommendations also do not provide convincing evidence Mr Unwin has achieved a significant reduction in his risk if unlawfully at large. It therefore does not consider there is a significant dispute on Mr Unwin's risk assessment warranting an oral hearing. It notes Mr Unwin has been recommended for a therapeutic community in the future as a means of further addressing his outstanding risk, but is satisfied this also provides no convincing evidence he has achieved a significant reduction in his risk if unlawfully at large at this time. It suggests a recommendation for possible future intervention work (whatever that might be) does not in itself show the subject has already achieved substantial progress, let alone significant risk reduction.
>
> The Category A Team considers there is also no evidence of an impasse as a suitable means for Mr Unwin to further address his offending is open to him in his present security category. It considers there are also no other issues relevant to Mr Unwin's risk assessment a11d review that can be resolved or understood only through an oral hearing.
>
> The Category A Team is satisfied its decision that Mr Unwin remains in Category A at this time is rational for the reasons given. It considers there are no grounds to amend this decision or revisit the review through an oral hearing."

38. The C issued proceedings for judicial review on 30 March 2020 and following service of the AOS and summary grounds, permission was granted by Henshaw J. on 31 July 2020 with an extension of time to permit a challenge to Decision 1.

39. Since the judicial review was granted permission, but before the hearing in the case commenced, the C's next review began. It has been suspended pending the outcome of this case and consideration of my views on the issues raised.

Grounds of challenge

40. The C contends:

    (1) There was procedural unfairness in failing to hold an oral hearing in respect of C's review (either before or after the PBR which is said to expose a factual error

in Ds' decision); and/or

(2) Decision 1, to maintain Category A status, was unlawful because in addition to procedural unfairness it was based on material factual errors and/or failure to have regard to relevant considerations and evidence; and/or

(3) Decision 2 was unlawful in the light of C's oral hearing before the Parole Board and its important findings of fact that exposes the erroneous basis upon which Ds' categorisation decision rests. This decision also amounted to a fettering of discretion.

(4) The decision not to downgrade was irrational.

41. These grounds have been further refined in C's skeleton argument and Mr Rule's oral submissions and I will refer to them in considering each of the grounds, though not necessarily in the detail in which they are set out in his skeleton argument.

Legal principles and guidance

42. Section 12 of the Prison Act 1952 confers a discretion on the Secretary of State in respect of which prison a prisoner is held in. This is a wide discretion which is subject to the Prison Rules 1999 (SI 1999/728) which provide, at rule 7(1), for the classification of prisoners -

> "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".

43. PSI 40/2011 dealing with Categorisation and Recategorisation of Adult Male Prisoners (now replaced by the Security Categorisation Policy Framework) stated, in terms consistent with PSI 08/2013:

> "SECTION 1: PURPOSE OF CATEGORISATION
>
> 1.1 The purpose of categorisation is to assess the risks posed by a prisoner in terms of:
>
> - likelihood of escape or abscond
> - the risk of harm to the public in the event of an escape or abscond
> - any control issues that impact on the security and good order of the prison and the safety of those within it
>
> and then to assign to the prisoner the lowest security category consistent

with managing those risks.

Two years is considered to be the maximum time a prisoner should spend in open conditions. However, assessment of a prisoner's individual risks and needs may support earlier categorisation to open conditions. Such cases must have the reasons for their categorisation fully documented and confirmed in writing by the Governing Governor. …

SECTION 2: DEFINITION OF SECURITY CATEGORIES

2.1 Adult male prisoners may be held in one of four security categories

Category A

Prisoners 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.

Category B

Prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult…"

44. I have already referred to paras. 2.1 and 2.2 of PSI 08/2013, *The Review of Security Category - Category A/Restricted Status Prisoners*, above. The PSI refers to the criteria and processes for undertaking reviews of Category A status (the emphasis is original):

"General

4.1 Each prisoner confirmed as Category A / Restricted Status at a first formal review will normally have their security category reviewed two years later, and thereafter annually on the basis of progress reports from the prison. These annual reviews entail consideration by a local advisory panel (LAP) within the establishment, which submits a recommendation about security category to the Category A Team. If the LAP recommends continuation of Category A, and this is agreed by the Category A Team, then the annual review may be completed by the Category A Team without referral to the DDC High Security (unless the DDC has not reviewed the case for 5 years, in which case it will be automatically referred). The DDC High Security (or delegated authority) will remain solely responsible for approving the downgrading of a confirmed Category A / Restricted Status prisoner, following consideration at the Deputy Director's panel.

4.2 *Before approving a confirmed Category A / Restricted Status prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of 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*."

45. Para. 4.2 accordingly sets out the basis for considering downgrading a prisoner's status

from Category A. See also paras. 2.1 and 2.2, above, which define a Category A prisoner as "a prisoner whose escape would be highly dangerous to the public, or the police of the security of the State" and in particular the explanation that

> "the definition is concerned with the prisoner's dangerousness if he did escape, not how likely he is to escape".

46. The PSI deals specifically with whether oral hearings of reviews should be held at paras. 4.6 to 4.7. This includes:

> "4.6 … 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."

47. In ***R (Hassett & Price) v Secretary of State for Justice*** [2017] 1 WLR 4750 at [2], Sales LJ (as he then was), with whom Moylan and Black LJJ agreed, considered the position with regard to Category A prisoners and the standard of fairness required:

"2. "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" (PSI 08/2013, paragraph 2.1; *R v Secretary of State for the Home Department, Ex p McAvoy* [1998] 1 WLR 790, 795). 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, 280, 288; *R (Williams) v Secretary of State for the Home Department* [2002] 1 WLR 2264, paras 23-24. This is an approach of the Parole Board as a matter of practice, rather than the consequence of any rule of law. None the less, 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. PSI 08/2013 provides that the CART should normally review a prisoner's Category A status annually."

48. The judgment in this case is of considerable relevance to the issues before me and the criticisms made of the decisions of the CAT, and the points of distinction drawn by Mr Rule between the approach of the CAT when compared to that of the PB. It is important to recognise the difference in functions and that I should not treat the decisions of the CAT as if they were decisions by the PB. It is important, therefore, to consider the terms of the judgment in ***Hassett & Price*** in some detail.

49. Sales LJ outlined the distinction between the CAT and the PB as follows:

> "3 The CART and the director and his panel are in law emanations of the Secretary of State, on usual Carltona principles (*Carltona Ltd v Comrs of Works* [1943] 2 All ER 560). They are "internal bodies, part of the Prison Service, administering the prisons and organising their security": *Williams's* case [2002] 1 WLR 2264, para 22. They are composed of persons with relevant expertise and experience in making judgments about prisoner categorisation, as an aspect of prisoner management within the prison estate which is their responsibility. The CART and, in relevant cases, the director and his panel address the question of the risk posed by a prisoner in the context of his escaping from prison and being at large, on the run and not subject to any measures of management and support in the community.
>
> 4 The status and role of the CART and the director and his panel 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 is concerned with questions of risk to the public, but in the different context of asking whether 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 *Williams's* case [2002] 1 WLR 2264, paras 22 and 27."

50. Sales LJ then considered whether the approach of the Supreme Court in ***R (Osborn) v Parole Board*** [2014] AC 1115 to fairness in the context of a PB which "pointed towards a requirement for the Parole Board to hold an oral hearing involving a prisoner in more cases than had been its practice up till then" also applied to the CAT when deciding whether or not a prisoner should be placed or remain in Category A. He concluded that it did not.

51. At [50]-[51] he held:

> "50. "What the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." (*Lloyd v McMahon* [1987] AC 625, 702H per Lord Bridge of Harwich; see also *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560D-G, per Lord Mustill.)
>
> 51. Although the CART/director and the Parole Board all make decisions which have significant effects upon prisoners and their prospects for release, there are material distinctions between the CART/director and the Parole Board in relation to each aspect of the inquiry regarding the requirements of fairness identified by Lord Bridge:
>
> (i) As noted above, the Parole Board has been established as a judicial body independent of the Secretary of State and the prisons management organisation. The requirements of fairness to be observed by an independent judicial body adjudicating on aspects of the right to liberty are high, having regard to the need to promote confidence in the independence and impartiality of the judicial adjudicative process. On the other hand, 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, whereas the Parole Board has to make its own decision independent of the prison management system.

(ii) The kind of decision to be made by the Parole Board is different from the kind of decision to be made by the CART/director: (a) the question which the Parole Board seeks to answer is whether a prisoner can safely be released at an appropriate point in his sentence, in circumstances where there are possibilities for his management in the community to contain and safeguard against the risk he might otherwise pose; this is a highly fact-sensitive question with a number of dimensions, which contrasts with the far starker question which the CART/director seek to answer, namely what is the risk to the public interest if the prisoner escapes and is at large in society without any prospect of management in the community? (b) the Parole Board is directly engaged with adjudicating on rights in respect of liberty and the question whether the prisoner should now be released, whereas the CART/director have to focus directly on the question of what security measures should be put in place in relation to the prisoner in the course of managing him while his sentence continues, and the impact on his eventual prospects for release is an indirect side-product of their determination on that issue (see *McAvoy's case* [1998] 1 WLR 790 , 799C); and, related to these points, (c) the decisions made by the Parole Board are judicial determinations of rights, whereas those made by the CART/director are administrative decisions with a particular focus on ensuring the administration of prisons is carried out properly and effectively in the public interest.

(iii) Reflecting and giving further emphasis to the points made above, the statutory framework for decision-making by the Parole Board is very different from that for decision-making by the CART/director. The Parole Board is a body set up under statute as an independent judicial body with power to make binding determinations on whether a prisoner is entitled to be released. Moreover, the need for the Parole Board to be established and to function as an independent judicial body is underpinned by the requirements of article 5.4 of the European Convention on Human Rights and Fundamental Freedoms , as noted in *Osborn's* case [2014] AC 1115 , paras 2(i), 54-63 (especially at para 57: "The courts have … been able to take account of [obligations under the Convention] in the development of the common law … Human rights continue to be protected by our domestic law, interpreted and developed in accordance with [the Human Rights Act 1998] when appropriate") and para 112. By contrast, the role of the CART/director in relation to prisoner security classification is laid out by the Secretary of State in Prison Service Instructions and is an aspect of the prison management regime. Article 5.4 does not apply in relation to their decision-making.".

52. Having considered the development of the law relating to fairness, Sales LJ added:

"53. The standards now applied in relation to the Parole Board are more stringent than they were formerly. By the time of *R v Secretary of State for the Home Department, Ex p Duggan* [1994] 3 All ER 277 the Parole Board in practice supplied certain reports to a prisoner: p 282. However, in view of the impact on prospects for release of a prisoner of a decision by the CART/director, acting for the Secretary of State, to maintain him in Category A, the Divisional Court held that as a matter of fairness the Secretary of State should supply him with the gist of information about him (rather than the categorisation reports themselves), apparently on the basis that this would meet the same standard of fairness as would be required of the Parole Board: p 288. Mr Stanbury submitted that this indicates that the CART/director must now be subject to the same procedural requirements as the Parole Board, as set out in Osborn's case.

54. In my view, however, this inference cannot be drawn from *Ex p Duggan*. The procedural standards observed by both the Parole Board and the CART/director are now more demanding than at the time of *Ex p Duggan*. The common law applicable in each context has developed, so that in each context full reports on a prisoner are provided to him to give an opportunity to comment on them (subject to issues of withholding of information on grounds of public interest immunity) before decisions are made which affect him. But with the development of procedural standards, points of difference between the Parole Board and the CART/director which were of less or no materiality in the context of the less demanding standards in issue at the time of the debate in *Ex p Duggan* have assumed greater significance when exploring what precise procedural requirements are to be imposed respectively in the two different contexts.

55. As the procedural requirements for the Parole Board have become more stringent since *Ex p Duggan*, case law has highlighted the differences between the board and the CART/director and has held that it cannot be assumed that the same requirements always apply in the two contexts: see in particular *McAvoy's case* [1998] 1 WLR 790, 798-799 (Lord Woolf MR); *Williams's* case [2002] 1 WLR 2264, above; *R (Mackay) v Secretary of State for Justice* [2011] EWCA Civ 522 at [25]-[28] (Gross LJ, endorsing the summary of principles by Cranston J in *R (H) v Secretary of State for Justice* [2009] Prison LR 205), in which this court held that a requirement for an oral hearing before the CART will be rare and in the circumstances of that case none was required); and *R (Downs) v Secretary of State for Justice* [2012] ACD 38, paras 2-8 (Aikens LJ, endorsing the guidance in Mackay's case), in which again this court held that a requirement for an oral hearing before the CART will be rare and again held in the circumstances of that case that none was required: see in particular para 45. These judgments preceded *Osborn's* case. I have already referred to first instance decisions in the period after *Osborn's* case in which a series of judges have held that the guidance in *Osborn's* case cannot simply be transposed to the context of decision-making by the CART/director.

56. In my judgment, those first instance decisions have been correct about

> that. The guidance given by the Supreme Court in *Osborn's* case was clearly fashioned in a manner specific to the Parole Board context and factors given particular weight in that context either do not apply at all or with the same force in the context of security categorisation decisions by the CART/director, because of the differences in context which I have highlighted above. In my view, the guidance given by this court in Mackay's and Downs's cases 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."

53. Sales LJ then considered Lord Reed's judgment in *Osborn's* case and held that the principles were not directly applicable to categorisation decisions by the CAT in discharging what is essentially a prison management function:

> "59. In my judgment, it is clear from Lord Reed JSC's reasoning in *Osborn's* case [2014] AC 1115 that it cannot be taken to apply directly in the context of security categorisation decisions made by the CART/director. In support of the common law requirement for the Parole Board to hold oral hearings in a wider range of cases, Lord Reed JSC emphasises a range of points about that context which distinguish it from the Category A decision-making context: (a) article 5.4 of the European Court of Human Rights , applicable to the Parole Board, informs the development of the common law standards laid down by the Supreme Court; (b) the Parole Board has to make its own "independent assessment of risk", so the standards of fairness applicable are what is required to enable it to decide fairly as an independent adjudicative body, and be seen to do so (see paras 81 and 86-91), rather than as part of an overall process of consideration by the Secretary of State, as is the case with the CART/director; (c) the Parole Board is concerned to consider how the risk which it assesses to exist might be "managed and addressed" (see paras 81, 84 and 86), including by management measures imposed after the prisoner is released, and this will typically require a more nuanced examination of the position, including assessment of the extent to which the prisoner might be motivated to co-operate with such management measures, making it more likely that the prisoner could make a useful contribution at an oral hearing, than in relation to the different question the CART/director have to address; (d) the prisoner has a legitimate interest in being able to participate in a decision with important implications for him where he has something useful to contribute (see paras 68, 82, also 88-89 and 96), but in the context of administrative prisoner management decisions by the CART/director the legitimate interest of the prisoner in being able to argue that he should be released is less directly engaged; further, (e) the extent to which he is likely to be able to make a useful contribution at the stage of consideration by the CART/director is much less, because of the question being addressed and the nature of the process leading up to that consideration.
>
> 60. Lord Reed JSC was considering the standards to be expected of the Parole Board as an independent judicial body. Therefore he did not address other reasons why, in striking a fair balance in terms of procedural

> standards between the public interest and individual interests in the context of decision-making by the CART/director, it is legitimate to bear in mind that the director and other officials engaged in the process are not judges required to dedicate their full time and attention to categorisation decision-making, but have wider management responsibilities in running prisons. Lord Reed JSC observes that the Parole Board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense. However, whilst it is no doubt the case that the CART/director could not lawfully refuse an oral hearing on these grounds if fairness required one, it is a relevant consideration in assessing whether it does that the courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate diversion of excessive resources to the categorisation review function, away from other management functions."

54. Sales LJ then added that an oral hearing may be required by the CAT but only in comparatively rare cases:

> "61. Some of the factors highlighted by Lord Reed JSC will have some application in the context of decision-making by the CART/director, but will usually have considerably less force in that context. However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/director, if only in comparatively rare cases. In particular, if in asking the question whether upon escape the prisoner would represent a risk to the public the CART/director, having read all the reports, were left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact upon him of a decision to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing.
>
> 62. For these reasons, I reject the primary submission made by Mr Stanbury. After the decisions in *Osborn's* case, as before it, there remain material differences between the decision-making context for the Parole Board and that for the CART/director, and those differences mean that the procedural requirements are different in the two cases".

55. I will return to Sales LJ's judgment when considering the facts of the present case.

Discussion of the grounds of review

Unfairness: failure to hold an oral hearing when considering recategorisation

56. Mr Rule's submissions (written and oral), which I summarise, are:

    (1) From the various sources of evidence and from the PBR the view was reached that C should be downgraded to Category B and that these matters were not considered, or not properly considered by the CAT. Category B security is not reserved for those who present a medium to low risk nor does it mean that the prisoner is suitable to be at large or released on licence. See the definition

(quoted above) in PSI 40/2011.

(2) For many years, especially the last 6, C has successfully reduced his risk, as the evidence demonstrated, and the independent expert view of the PB accepted, from an imminent risk at a very high level to a high level of risk. That assessment was an objective assessment of the progress C has made. See Section 6 and also the Conclusions of the PBR –

> "At this stage, you are assessed as posing a high risk of violence if you were in the community and as posing a high risk of causing serious harm to others."

(3) There is a dispute about the extent and significance of the reduction of risk and whether there has been a risk reduction sufficient to justify recategorisation and whether it should be capable of resolution by a fair process;

(4) A future pathway should be identified for C to progress and to avoid an impasse. There is a dispute whether an impasse has been reached. C has done what he can and he cannot progress further and no means has been identified for him to deal with it. However -

(a) Decision 1 did not properly engage with this issue and merely noted C's "resistance to engage" with DSPD and his resulting need to "explore how you can address your personality traits sufficiently to evidence a significant reduction in your risk" which ignored the evidence of Ms Betts, accepted by the PB, that there were significant barriers to engagement with the DSPD unit and that a TC was the appropriate course, but this was not available in Category A;

(b) Decision 2, while it refers to the recommendation by the PBR for engagement with a TC which it notes "appears based on Mr Unwin's own fear or unwillingness to attend a PD unit (which is available in Category A), rather than an assessment that he no longer requires or is unsuitable for its treatment" and considered there was "no evidence Mr Unwin is in an impasse, or that he cannot further address his high outstanding risk within Category A". This was inconsistent with the findings and recommendations of the PBR and the evidence presented to it.

(5) In view of the disputed issues, the reduction in risk and the initial decision on recategorisation ahead of the PBR, fair process required the CAT to conduct an oral hearing to enable these issues to be fairly explained and investigated.

57. Mr Cohen, for the Ds, submits in response:

(1) Oral hearings before the CAT are uncommon and are not required by applying the analogy of the PB, for the reasons explained by Sales LJ in ***Hassett & Price***;

(2) The PB and the CAT consider different issues. The CAT must follow the approach set out in PSB 08/2013;

(3) In considering whether an oral hearing is necessary, the CAT may ask what purpose an oral hearing would serve and what issues it might be required to resolve;

(4) The fact that professionals may conclude that there would be benefits to a prisoner in downgrading, e.g. in terms of available treatment, is not relevant to the question of the extent to which the prisoner poses a risk to the public if unlawfully at large.

58. Mr Cohen relies on the statement of Steve Easton of 15 September 2020, who is the Head of Category A Reviews in the CAT, and the signatory of Decision 2. Mr Easton explains that the CAT did consider whether to hold an oral hearing:

> "5. The Category A Team did consider whether or not an oral hearing was required but concluded that it was not. The Category A Team did not refer to the need for an oral hearing in the issued decision for similar reasons given in its replies to Mr Unwin's post-decision representations. The reports showed clearly Mr Unwin continued to pose a high risk, and a treatment pathway to enable him to address this was available to him in Category A. It had no concerns about the accuracy or reliability of available reports and none had been raised through representations. It took into account that Mr Unwin had never had an oral hearing and was post-tariff, but did not believe these facts alone required special consideration for an oral hearing at this review. At that time Mr Unwin's Parole Board review had not taken place and there was no alternative risk assessment to be considered.
>
> 6. The Category A team carried out Mr Unwin's Category A review at the scheduled time. The Category A team had no knowledge of an imminent Parole Board review and would not be aware of this unless the Claimant requested a deferral. The two systems are separate and not dependent on each other's conclusions.
>
> 7. The LAP is responsible for and has the expertise for recommending downgrading, not individual staff. The Offender Supervisor is not an expert, but suggested Mr Unwin's downgrading be considered which it was. The psychologist stated that Mr Unwin's risk remains high, but recommended that he go to a therapeutic community. Neither stated that Mr Unwin had significantly reduced his risk in accordance with PSI 08/2013. It is important to understand that the LAP, the other professionals involved and the Parole Board all broadly agreed about the Claimant's level of risk."

59. Since Mr Easton's evidence arguably extends beyond the question of an oral hearing and fairness, and might be considered to be expressing views on some of the matters in dispute in the challenge (though I recognise there is a degree of overlap), I have

preferred to focus on the terms of the decisions and the contemporaneous documents themselves. Moreover, on issues of fairness, this is primarily an issue for the Court to determine and not the body whose decision is impugned. It is not the role of evidence in judicial review to provide submissions or new evidence except in limited circumstances (including on issues of fairness): see e.g. Holgate J. in ***Flaxby Park Limited v Harrogate Borough Council*** [2020] EWHC 3204 (Admin) at [15] to [20].

60. Mr Cohen submits that important facts in this review were not in dispute, including C's offending history and his conduct in prison. While the PB recommended a move to Category B it was not charged with the same role as the CAT nor did it suggest that the test set out in the PSI was satisfied. The CAT applied the appropriate policy to the facts of this specific case.

61. Further, with regard to the allegation that there was an impasse that requires resolution, there was a finding in Decision 2 that there was not an impasse and Mr Cohen submitted that since C accepted his offence and the need to reduce his risk this is not a typical impasse where a prisoner does not accept guilt and cannot progress to show a decrease in risk. C has rejected one means of reducing his risk (DPSD) and it is for him to reduce it by other means.

Conclusion on fairness

62. Issues of fairness are fact-sensitive and ultimately it is for the Court to judge whether the process adopted in reaching a specific decision, or group of decisions, was a fair one having regard to the principles in the authorities and the applicable policy guidance. It is important in my judgment to recognise the distinction between the functions of the PB and the CAT authoritatively set out by Sales LJ in ***Hassett & Price***.

63. I note that given the proximity of the PB hearing that it was unhelpful for the categorisation review to proceed and to issue Decision 1 when it must have been obvious that the PBR was likely to be delivered within a reasonable timescale and might well include material of relevance to the category review. However, Mr Easton's statement explains that the CAT were unaware of the PB hearing at the time of Decision 1. Be that as it may, the CAT reconsidered Decision 1 in the light of the PBR in Decision 2 and, subject to specific points raised, cannot now be said not to have taken it into account. Therefore, I will approach the refusal to downgrade C from Category A in the light of the review of Decision 1 in Decision 2 since, if it fairly reviewed the issues following Decision 1 and taking into account the findings of the PBR, then there would be no purpose in quashing Decision 1 even if it contained significant errors.

64. Unlike ***R (Rose) v. Secretary of State for Justice*** [2017] EWHC 1826 (Admin), this is not a case where the recommendation of the LAP to downgrade was not accepted by

the CAT and where the case for an oral hearing is likely to be stronger: see the judgment at [59].

65. Like the Deputy Judge, Karen Steyn (as she then was) it is necessary, in the light of all the evidence, to consider Sales LJ's observation in ***Hassett & Price*** at [51(i)] that

> "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"

66. While it is undoubtedly true that a number of those providing evidence and information to the PB considered that the C should be downgraded to Category B and gave oral as well as written evidence to that effect, that information was available to the CAT prior to Decision 2. Moreover, Mr Kitson and Ms Flowers, who were present at and gave evidence to the PB, were members of the LAP when it made its recommendation not to recategorise. Accordingly, their knowledge of C and their assessment (which favoured recategorisation) were available to the LAP when it considered the issue.

67. The issues with regard to risk and progress in risk reduction were thoroughly advanced orally and in writing before the PB and summarised, without criticism by Mr Rule, in the PBR. Decision 2 therefore was made in the full knowledge of that detailed summary and the views of the PB. In view of the lack of criticism of the PBR, that is a compelling factor against the need for an oral hearing by the CAT. It had the benefit of the summary of the evidence and oral hearing before it and the assessment in the PBR was not disputed.

68. Reading the LAP recommendation, and Decisions 1 and 2 together, and their consistency of decision to advise or refuse downgrading, I consider that there has been a fair opportunity within the system as a whole since not only did members of the LAP give evidence to the PB but the PBR, with its detailed summary of the evidence and recommendations, was considered by the CAT when revisiting Decision 1 in Decision 2.

69. There is no reason to doubt the witness statement of Steve Easton on the factual issue that the CAT considered whether to hold an oral hearing. It is also clear from Decision 2 that the PBR was considered and taken into account, thus meeting Judge LJ's concerns in ***R(Williams) v Secretary of State for the Home Department*** [2002] 1 WLR 2264 at [30]-[31] to ensure that the PB and the CAT were working from the same materials. However, it would be preferable in my judgment that where the CAT is considering a request for an oral hearing, to record its decision with regard to that request either in its decision on review, or at least in formal correspondence at the time, to obviate the need for evidence after the event.,

70. I turn to consider the guidance in PSI 08/2013, bearing in mind that it is not definitive of all issues of fairness which still remains an issue for the Court having regard to the circumstances as a whole. It appears to me that considering the factors in para. 4.7 of the PSI points a and b do not arise since there are neither important facts in dispute nor a significant dispute on the expert materials, as Mr Cohen submitted. Point d does not arise. This is a case where the PB assessed C's risk of reoffending as high, in the light of the evidence it received, and although the PB had hoped that C would be downgraded to Category B, it was aware that this was not its role and it was for the CAT to assess whether the latest evidence and assessment of risk was such as to meet the criterion for recategorisation.

71. I do not find ***R. (Hopkins) v Secretary of State for Justice*** [2019] EWHC 2151 (Admin) of assistance here since in that case the risk assessment was low, and despite a PB recommendation to move the claimant to open prison conditions, the CAT refused to downgrade him from Category A and did so without an oral hearing on the basis that he would not admit his guilt. The Deputy Judge HH Judge Gosnell considered this to be an impasse since, without such an admission, and particularly given that he presented a low risk otherwise, it meant the prisoner could not progress to open conditions. Moreover, at [49]-[51] he found there to be a significant dispute on the expert materials within the terms of the PSI and the disagreement concerning the risk assessment required an oral hearing:

> "51. In my judgment this is a case where the CART panel should have given considerable thought before going behind the expert evidence supplied and reaching a different conclusion without giving themselves the opportunity to hear from the experts and the Claimant. Had they done so it surely would have improved the quality of decision making based upon what they could have learnt from questioning the experts and hearing the Claimant. As Lord Justice Sales said in *Hassett* in the passage quoted in paragraph 17 above, this was surely a case where they should have been left in "significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact upon him of a decision to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing"."

72. Those circumstances are very different from those here, which I have already described. This is not a case falling within Sales LJ's primary consideration in ***Hassett & Price*** at [61] where the prisoner's own attitude would make a critical difference on the facts:

> "However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/director, if only in comparatively rare cases. In particular, if in asking the question whether upon escape the prisoner would represent a risk to the public the CART/director, having read all the reports, were left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact upon him of a decision

> to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing."

73. The present case bears some similarities to ***Hassett & Price***, where there was no issue but that C still presented a high risk of reoffending and there was no need for an oral hearing to test the views of experts or other witnesses. Even if there had been a disagreement, Sales LJ noted at [69] that -

> "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."

74. Here, too, with regard to the question of an impasse, the question is whether an oral hearing would assist in the risk assessment and the CAT's decision as to recategorisation.

75. Subject to the issue of impasse, no issue appears to me to arise on point c generally since although C has been imprisoned for nearly 30 years and is post-tariff this is said not to be of itself a justification for an oral hearing. This is not a case where there was a dispute on the evidence as to how C has developed over his time in custody and how his risk profile has improved so that an oral hearing was required to resolve such issues. The question was, rather, on the facts and expert evidence, whether the undisputed progress was sufficient in its judgment for downgrading.

76. The PSI at para. 4.7(c) does refer to the possibility of an impasse "which has existed for some time, for whatever reason" being a reason to hold an oral hearing since it is said that

> "it may be helpful to have a hearing in order to explore the case an seek to understand the reasons for, and potential solutions to, the impasse".

77. To the extent that it is submitted by Mr Rule that there was an impasse, since the appropriate course to reduce C's risk further required downgrading to Category B and that there was no solution suggested in either Decision 1 or 2 as available in Category A, nonetheless the PSI does not require an oral hearing only stating that "it may be helpful". Mr Rule overstated the terms of the PSI which do not require an oral hearing because of the existence of an impasse.

78. In the present case, attention to the facts is important since the available DSPD treatment pathway is one which C does not wish to engage with and which Ms Betts advised against as recorded in Section 7 of the PBR. Further, even were it the case that the only feasible approach were engaging with a TC under Category B, that cannot

itself be a solution if the CAT nonetheless concludes that the risk has not reduced to a level where downgrading is justified. While the PBR noted evidence regarding the TC recommendation and that "there is nothing further to be achieved in a category A prison", this was known to the CAT in reaching Decision 2 and is referred to in the fifth paragraph of that decision.

79. Moreover, I note from her report that, whilst Ms. Betts' recommendation is for C to progress to a TC in Category B and not to re-engage with the DSPD unit, she also reports in terms which do not suggest there is an impasse without recategorisation:

> "17.22 I recommend that Mr. Unwin remains within a closed custodial environment to continue addressing his outstanding treatment needs such as his conflict resolution, emotional regulation, perceiving himself as a victim, his use of threats, and having difficulty trusting others. I recommend that Mr. Unwin is not suitable to return to a group environment such as the Fens DSPD unit, as he reports treatment interfering trauma experiences, and fear of such environments which make him unlikely to engage or respond to treatment. Mr. Unwin may also benefit from one to one work with his Offender Supervisor to explore his use of threats, and find alternative prosocial means to meet the same needs."

80. Mr Kitson's Report does not consider an alternative to downgrading in his recommendations, only noting that remaining in Category A "is restricting his avenues for progression" but not that C has no options.

81. The PBR also focusses on what would be available in Category B and in my judgment, does not consider to any significant degree what would be possible if downgrading did not occur. Having repeated Ms Betts' view about a move to the DSPD pathway in Section 8, the PBR does not consider the position in Category A further and its indication of possible next steps only proceeds on the assumptions of recategorisation. There is no reference in terms to an impasse and the consideration of the position in Category A is limited, albeit that the primary option of DSPD is effectively ruled out. Moreover, there is no evidence that the existence or otherwise of an impasse would alter the risk assessment in the present case or that anything further was to be gained from an oral hearing.

82. In my judgment, the CAT was entitled to conclude that:

> "This recommendation in turn appears based on Mr Unwin's own fear or unwillingness to attend a PD unit (which is available in Category A), rather than an assessment that he no longer requires or is unsuitable for its treatment. For the reasons stated above, and in accordance with PSI 08/2013, it is satisfied these recommendations provide insufficient grounds for Mr Unwin's downgrading at this time. It considers in the meantime there is no evidence Mr Unwin is in an impasse, or that he cannot further address

his high outstanding risk within Category A."

83. In view of the terms of the PSI, and the facts of this case, I do not consider the refusal of an oral hearing gives rise to unfairness with regard to Decisions 1 and 2 since the issues raised did not go to the risk assessment and in my judgment in the light of the information already available there was no requirement for an oral hearing in order for there to be a fair consideration of C's review.

Fettering of discretion

84. Mr Rule also submits that the failure of the CAT to review the recategorisation was a fettering of discretion. I do not see that as distinct from the allegation that there was a failure to conduct an oral hearing. I do not see how Decision 2 amounted to a fetter on discretion in any event since it purported to be a review of Decision 1. The refusal of the CAT to change its position may or may not be a lawful one, but it does not appear to me to be a fettering of discretion but rather an exercise of discretion.

85. I therefore reject this ground.

Material errors of fact

86. The Grounds also allege (para. 5.18, reformulated in para 61 of C's skeleton argument) that there were material errors of fact in the Decisions, namely:

    (1) Decision 1 contained an important error - in suggesting that the C can only evidence a significant reduction in risk by engaging (for a second time) with a DSPD treatment pathway. The decision fails to have sufficient regard to the evidence that was contained in the reports and the subsequent oral evidence provided during the Parole Board hearing.

    (2) The Ds wrongly assumed that the C's risk has not been reduced to a level in which he could be managed in a TC. Witnesses at the parole hearing unanimously took a different view.

    (3) The Ds failed to consider the evidence of risk reduction provided by the successful completion of the PIPE. This evidence was thoroughly considered and accepted by the Parole Board.

    (4) The CAT decision is at odds with the Parole Board's view that the C has demonstrated risk reduction.

87. I do not read Decision 1 as suggesting that C should or could re-engage with a DSPD treatment pathway but that -

> "The Category A Team agrees with the overall findings that you have made some progress in developing your protective factor such as your adherence to medication, professionals care, living circumstances and external controls. It noted that your most appropriate treatment path would be PD services and your resistance to engage means that you will need to explore how you can address your personality traits sufficiently to evidence a significant reduction in your risk of similar reoffending, if unlawfully at large and not if in less secure conditions."

88. Decision 2 similarly acknowledges that

> "It notes the Parole Board's recommendations for Mr Unwin's progression are instead based on a view Mr Unwin could better address his high outstanding risk and treatment needs through a therapeutic community rather than through a PD unit. This recommendation in turn appears based on Mr Unwin's own fear or unwillingness to attend a PD unit (which is available in Category A), rather than an assessment that he no longer requires or is unsuitable for its treatment. For the reasons stated above, and in accordance with PSI 08/2013, it is satisfied these recommendations provide insufficient grounds for Mr Unwin's downgrading at this time. It considers in the meantime there is no evidence Mr Unwin is in an impasse, or that he cannot further address his high outstanding risk within Category A"

89. The reference to "own fear or unwillingness to attend a PD unit … rather than an assessment that he no longer requires or is unsuitable for its treatment" potentially raises a concern, in the light of Ms Betts' assessment that it would not be appropriate, accepted by the PBR. However, I have reached the conclusion that read fairly and as a whole Decision 2 did not err but was referring to how Ms Betts reached her conclusion on the basis of C's "negative experiences" explained in both her full report and in the DSPD Discharge Report of 1 November 2012, as was accepted in the PBR. The CAT did not, in my view, suggest that DSPD should be pursued by C. It accepted the LAP recommendation that-

> "Whilst the most appropriate treatment pathway remains a PD pathway, Mr Unwin's resistance to engage in this means he will need to explore how else he can address his personality traits sufficiently to reduce his risk and seek a place in a Cat B TC."

90. I do not read either Decision 1 or 2 as disputing the risk reduction set out in the PBR. What the CAT has concluded is not that there has not been a reduction in risk but that there has not been "a significant reduction in his risk of similar reoffending if unlawfully at large". The decision is not at odds with the PBR and the PB was careful to recognise its role was not to advise or determine recategorisation. There is nothing of substance in my judgment in allegations (3) and (4).

Irrationality

91. I do not consider that C has met the high threshold of demonstrating that the CAT's decisions were irrational. The CAT has applied the correct test to the question whether C should be downgraded from Category A set out in the PSI and has reached its decision fairly, having considered both the LAP recommendation and the PBR, which Mr Rule accepted had sufficiently summarised the evidence presented to the PB and which is undisputed. Its reasons appear to me to be sufficient to make clear the basis of its decision which is clearly based on an assessment of the risk of C's reoffending if unlawfully at large.

92. In the light of the Court of Appeal's judgment in ***Browne v Parole Board for England and Wales*** [2018] EWCA Civ 2024 at [51]-[53], albeit that it is concerned with challenge to a PB decision rather than to a CAT decision, I do not consider that there is any basis for departing from the usual *Wednesbury* standard in reviewing Decisions 1 and 2.

Conclusion

93. For the reasons I have set out in detail, I reject the grounds of challenge. Even had I found some basis of challenge substantiated, I would not have been willing to quash the decisions in view of the pending review, which means that the CAT can consider the relevant issues in the light of current circumstances.

94. The application for judicial review is hereby dismissed. The terms of the Court's order dismissing the application have been agreed.