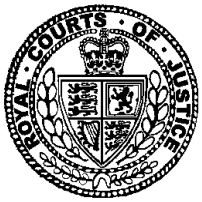

Neutral Citation Number: [2020] EWHC 1161 (Admin)

Case No: CO/3639/2019

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

Date: 15/05/2020

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

THE QUEEN on the application of JOHN SETON	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Mr Jason Elliott (instructed by VHS Fletchers) for the Claimant
Mr David Manknell (instructed by The Treasury Solicitor)) for the Defendant

Hearing dates: 16 April 2020

- -

Approved Judgment

Her Honour Judge Belcher :

1. The Claimant, John Seton, is a serving Category A prisoner at HMP Frankland, having been convicted of murder in 2008. His minimum tariff was set at 28 years 214 days and expires in 2038. He seeks judicial review of the decision of the Deputy Director of the Long Term and High Security Estate ("the Director") not to grant him an oral hearing of his Category A review. The review took place on 18 June 2019, but the decision was issued on 16 July 2019.

2. The Claimant does not challenge the decision not to downgrade him to Category B. Counsel are agreed that Section 31 (2A) Senior Courts Act 1981 has no application as it cannot be said whether an oral hearing would or would not have resulted in a progressive move, and further an oral hearing could have a knock-on effect in future categorisation reviews.

3. The Claimant challenges the decision not to grant him an oral hearing as being irrational and/or unlawful. The Secretary of State for Justice who is responsible for the Director and the Category A Review Team ("CART") disputes the claim and argues that the Director was entitled to reach the decision he did, and that it was a proper decision in the circumstances of this case.

4. References to the hearing bundle in this judgment will be by way of square brackets containing the relevant page number or numbers.

The CART System

5. Under the Prison Rules 1999, all prisoners within the prison estate are subject to categorisation. Category A is the highest category. The Claimant is eligible for an annual review of his Category A status. The policy governing those reviews is contained in a Prison Service Instruction: PSI 08/2013 ("the PSI"). Paragraph 2.1 of the PSI defines a Category A prisoner as "…..a prisoner whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible. Category A review decisions are not made at prison level but are made by CART or the DDC. The DDC is solely responsible for approving the downgrading of a confirmed Category A prisoner. The annual review entails consideration by a local advisory panel ("LAP") within the prison, which submits a recommendation about security category to CART. (PSI paragraph 4.1)

6. Prison staff must prepare reports for the prisoner's annual review, and such reports must be disclosed to the prisoner at least four weeks prior to the prison's LAP to allow representations to be submitted. Taking both the reports and any representations into account, the LAP must in turn make a recommendation on the prisoner's continued suitability for Category A (PSI paragraphs 4.14 and 4.15). The reports should be a comprehensive summary of the prisoner's behaviour and progress to date, that will enable an assessment of any reduction in the prisoner's level of risk (PSI paragraph 4.17).

The Facts

7. The relevant parts of the Claimant's Category A report (the Report") for the review are at [119 – 140]. Details of the index offence were summarised as follows:

> "Mr Seton and the victim were both drug dealers on a substantial scale. Jon Bartlett (Victim) supplied drugs to Mr Seton and according to documents recovered from the victim's home, John Seton was in debt to him by £24,000. Mr Bartlett arranged to meet Mr Seton on the 31 March 2006 expecting to be paid, but was instead met by Seton who shot him at point-blank range in the face, killing him instantly. Mr Seton escaped in a car he had purchased an hour and a half before the shooting, which was later found burnt out. He then fled to Holland where he was found using a false identity and passport. He had been involved in the supply of cannabis valued at approx. 11 million Euros and was given a custodial sentence in Holland. The Dutch police would not release him until evidence of his true identity was provided. He was then arrested under an international warrant and returned to the UK." [119]

The Claimant continues to maintain his innocence of the index offence.

8. Section 6 of the Report contains the current assessment of risk from the Claimant's Offender Manager, M Gartside, and is dated 23/1/18. That date is plainly an error and should be 23/1/19. Mr Gartside assessed the risk to the public as high due to the serious nature of the index offence which involved the discharge of a firearm. He additionally assessed high risk to the public due to Mr Seton's admission of his involvement in the drug industry [135]. Under the heading "Recommendations for progression" appears the following:

> "I acknowledge the good start Mr Seton has made on the PIPE unit and his continued efforts in integrating and forging good relationships with the staff and other pipe prisoners. Mr Seton showed persistence in achieving his transfer on to the PIPE unit but he has only been on the unit since 13/10/17. In addition, Mr Seton maintains his innocence therefore risk factors surrounding the offence may not have been fully explored; although I acknowledge that he has completed previous offending behaviour work.
>
> In my professional opinion I feel unable to recommend a downgrade at this time as I feel there needs to be a more substantial amount of time as a resident on the PIPE unit. This will afford Mr Seton more opportunity to consolidate and demonstrate any learning." [136]

9. Section 4 of the Report contains the current assessment of risk from Emma Walsh, Trainee Forensic Psychologist in the Psychology Department and is dated 12/02/19. Her summary and recommendations include the following:

> "It is my opinion that Mr Seton has made sufficient progress in order to be downgraded to a Category B prisoner. Ideally it would be beneficial for Mr Seton to complete work on high risk situations whilst still located on the PIPE unit, this will give him the opportunity to gain additional support in preparing for his move off the unit and be prepared for any imminent stressors (i.e. anxieties about being located on a main wing). It is important that this recommendation is considered alongside any security concerns and that any future transfers are considered careful (sic) due to concerns outlined within the report. A transfer to less secure conditions would provide Mr Seton with the opportunity to further evidence his ability to manage his risk and develop further his protective factors." [130]

10. Section 9 of the Report contains the LAP minutes and recommendations dated 05/04/19. The LAP recommended that Mr Seton be downgraded to Category B, adding:

> "The board noted the significant risk reduction Mr Seton has evidenced since his arrival on the PIPE unit, reports noted increased insight into his lifestyle and he has worked to explore his use of violence, risk factors and case formulations to a high standard and consistently applied them to his everyday life on the unit, which is documented within the reports. The board felt that Mr Seton has completed sufficient work to justify a downgrade recommendation where he can be further tested within less secure conditions." [139]

11. The Claimant's solicitors made representations to LAP dated 15 March 2019 [92 - 107]. They challenge the statement of the psychologist that Mr Seton has not engaged in risk reduction work during the reporting period pointing to individualised work completed with Miss Gemma Tock, Trainee Psychologist to further develop his insight [97]. They also point out [98] that Mr Seton has completed the further work on high risk situations which the Psychologist stated would be beneficial (See Paragraph 9 of this Judgment). I asked Mr Manknell whether the Defendant accepts that is accurate, and he confirmed that it is accurate. Similarly in relation to Mr Gartside's views that Mr Seton needed more time as a resident on the PIPE unit to afford him the opportunity to consolidate and demonstrate any learning, the Claimant's solicitors repeat that Mr Seton has undertaken consolidation work and further work that was identified since the preparation of the Gist, and that this is not documented in the reports, having been completed after the preparation of the reports [99]. At [106] they again make the point that they are concerned that the Gist is not fully completed as Mr Seton has also completed one to one sessions and consolidation work after completion of the Gist.

12. The Claimant's solicitors invite the Director to downgrade Mr Seton, but ask that if CART is not in agreement with that, there should be an oral hearing for the following reasons:

> "1. There is a significant dispute with regards recommendations. Miss Walsh, Trainee Forensic Psychologist, submits that Mr Seton has made sufficient progress in order to be downgraded to a Category B prisoner. Mr Seton has undertaken work on high risk situations since the preparation of her report. Mr Gartside Offender Manager is unable to recommend a downgrade at this time as in his opinion he feels that Mr Seton has to have more substantial amount of time as a resident on the PIPE Unit which will afford Mr Seton more opportunities to consolidate and demonstrate any learning. We submit that Mr Seton has been on the PIPE Unit now for 17 Months. He has completed all work within the PIPE Unit and since the preparation of the Gist he has completed six one to one individualised sessions with Psychology and has also consolidated and demonstrated his learning.
>
> 2. Mr Seton has now been categorised as category A for 13 years. He has been at HMP Frankland for six years. In relation to the Category A Reviews, he has never had an Oral Hearing. After 13 years we submit an Oral Hearing is necessary and justified.
>
> 3……..
>
> 4. Although Mr Seton maintains his innocence; this should not preclude him from being downgraded or an Oral Hearing being granted." [106 – 107]

13. The decision under challenge was issued on 16/7/19. It acknowledges the positive engagement set out in the reports and that Mr Seton has made progress addressing past behaviour, some of which have links with his present murder offence. It further acknowledges he makes good use of the regime in the PIPE unit and interacts well with others, and that the reports recommend he has made sufficient progress to progress to Category B. The recommendation made by LAP that Mr Seton be downgraded to category B is noted, as are the solicitors' representations. Under the heading "Reasons for Decision" appears the following:

> "The Director considered Mr Seton's offending showed he would pose a high level of risk if unlawfully at large, and that before his downgrading could be justified there must be clear and convincing evidence of a significant reduction in this risk.
>
> The Director recognised Mr Seton is settled in behaviour and has engaged in the Resolve programme. The reports of his engagement show however Mr Seton did not discuss the most serious aspects of his offending. Taking into account the extremely deliberate nature of Mr Seton's offending, and the additional risks suggested by Mr Seton's criminal background and subsequent offending abroad, he considered a lot more convincing evidence is needed that Mr Seton has fully explored his offending and significantly changed. He noted also the high

> level of Mr Seton's risk is reflected in his tariff. In the meantime, he considered Mr Seton's possible management in Category B provides insufficient grounds for his downgrading. He considered also there are no grounds justifying an oral hearing at this time in accordance with the criteria in PSI 08/2013.
>
> The director considered evidence of a significant reduction in Mr Seton's risk of similar reoffending if unlawfully at large is not yet shown. He is satisfied Mr Seton therefore must stay in Category A at this time." [110]

Those reasons plainly relate to the decision to maintain the Category A status. No reasons are given to support the conclusion that there are no grounds justifying an oral hearing.

14. In a letter before action dated 23 July 2019, the Claimant's solicitors wrote to CART asserting that the decision not to grant an oral hearing is irrational on the basis that it departed from the policy set out in Paragraphs 4.7 (b) and (c) of the PSI. The letter also asserts that there had been further impropriety by not providing reasons for departing from the policy. [111]

15. CART replied by letter dated 30 July 2019. Much of the letter deals with the categorisation decision. In relation to the oral hearing decision it states as follows:

> "…. the Director is fully entitled to reach his own decision on a prisoner's suitability for downgrading on rational grounds and in accordance with the criteria in PSI 08/2013. It considers there is no basis to claim the Director is bound to accept recommendations and reports, representations or by the LAP, whether or not these are in accordance with the correct criteria downgrading. It considers there is no basis to a claim the Director's decision to decline a recommendation for downgrading inevitably represents a significant dispute, and therefore provides grounds for an oral hearing.
>
> ……..
>
> The Category A team considers also there are no grounds for Mr Seton's review to be considered further through an oral hearing, in accordance with the criteria in PSI 08/2013. It considers first Mr Seton's reports were entirely sufficient for the purposes of his risk assessment and for the submission of effective written representations. It considers the available information on the extent of Mr Seton's progress (both in the Category A reports and elsewhere) was readily understandable and there are no grounds to show further verbal representations or a face-to-face interview with Mr Seton or any report writers are needed to understand the available information or to assess Mr Seton's level of progress. ……..

> The Category A team notes Mr Seton may disagree with the Director's decision but considers this does not represent a significant dispute of fact going directly to the issue of Mr Seton's risk justifying an oral hearing….
>
> The Category A team recognises Mr Seton has been in custody some years and has never had an oral hearing. It considers these facts however are insufficient grounds for an oral hearing without other supporting reasons…… 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…. It notes in any case Mr Seton is many years from tariff completion, and therefore no credible argument can be made his Category A status prevents his consideration for parole or release. As stated above it considers also the means for Mr Seton to show he has further addressed his risk are available to him within Category A. It considers there is no evidence he is in impasse. It considers there are no other issues relevant to Mr Seton's risk assessment and review that can be resolved or understood only through an oral hearing." [114 – 115]

The PSI on Oral Hearings

16. Paragraph 4.6 of the PSI gives general guidance to those who have to take oral hearing decisions in the CART context. It states:

> 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 the 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."

17. Paragraph 4.7 provides that 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. …..
>
> 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;
>
> c. ……. 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."

The Grounds

18. The Claimant's case is that the failure of the Director to grant an oral hearing was irrational and or unlawful. The case set out in Mr's Elliott's skeleton argument has developed somewhat from the Grounds on which permission was granted. However, Mr Manknell advised me that he was ready to deal with the points as raised in the skeleton. The way Mr Elliott puts it in his skeleton is as follows:

> "C's position is that – (a) both a psychologist and the LAP recommended a progressive move. D's own policy states that this is a factor in favour of grant of an oral hearing. **[PSI 08/2013, 4.7(b)]**. D's stance that there are no grounds justifying an oral hearing represents an abrogation of that policy. (b) D has not provided reasons (or adequate reasons) for disapplying this policy. (c) D's decision creates an impasse. (d) D's decision is predicated on maintenance of innocence to an extent that is capable of rendering the decision unlawful. (e) This was a case where the interests of procedural fairness demanded an oral hearing"

The skeleton then states that C's primary focus in argument will be (a), (b) and (e).

19. It is unsurprising that the argument focused on those points. In my judgment, the other two points, which formed a significant part of the original Grounds, were bound to fail. The evidence does not support their being an impasse. Whilst further offending courses may not be available to the Claimant in the Category A estate, it is

clear that there are opportunities to demonstrate risk reduction on the PIPE unit by consolidating earlier learning and using skills from earlier learning. This is made clear in the Offender Manager's report [136], the psychologist's report [127] and in an information document from psychology [141 -142].

20. Nor is there sufficient evidence that the Director's decision is predicated on maintenance of innocence to an extent that would be unlawful. The fact that the Claimant continues to maintain his innocence is clearly recognised, and the psychology report states that Mr Seton's stance towards the index offence is unlikely to change and therefore any future recommendations will need to take this into consideration [130]. Far from suggesting an impasse or that maintenance of innocence is preventing progression, that expressly recognises the need for future recommendations to be made in that context. There is ample authority that prisoner's progression cannot be prevented by his maintaining his innocence, and it is clear that all those involved in this case are well aware of that. The Director was entitled to take into account the fact that, whilst Mr Seton has addressed some of his previous offending, risk factors directly relating to the present and much more serious offence were necessarily excluded. That does not amount to a refusal to consider re-categorisation and/or an oral hearing based on maintenance of innocence. The Director is entitled to take into account all matters relating to risk and risk reduction when reaching his decision on the test he must apply, namely whether Mr Seton would pose a high level of risk if unlawfully at large. (see per Elias J in *R(Roberts) v Secretary of State for the Home Department* [2004] EWHC 679 (Admin) at paragraphs 36 -42, cited with approval by Sales LJ in *R (Patrick Hassett, Simon Price v the Secretary of State for Justice* [2017] EWCA Civ 331("*Hassett*").

21. I now turn to consider the challenge based on the lack of reasons, or adequate reasons for refusing the oral hearing. In his Grounds, whilst recognising there is no mandatory requirement to hold an oral hearing, Mr Elliott asserts that Paragraph 4.7(b) creates something akin to a presumption that an oral hearing will be granted and that it fell to the Director to rebut that presumption if an oral hearing was to be refused. In my judgment, that overstates the position, and Mr Elliott did not argue the matter in that way in his oral submissions. I propose, therefore, to address his oral submissions.

22. The Claimant's case is that there is a significant dispute on the expert materials, which therefore engages Paragraph 4.7(b) of the PSI, suggesting that an oral hearing may be appropriate. Mr Elliott submitted that the Claimant was entitled to expect to be given reasons as to why he was not being allowed an oral hearing and that the blanket assertion by the Defendant that the PSI was not engaged was insufficient for these purposes.

23. In response, Mr Manknell submitted that whilst the PSI expressly requires there to be detailed reasons for the substantive categorisation decision (Paragraph 4.32), there is no requirement in the PSI to give reasons for refusing to hold an oral hearing. In response to that point Mr Elliott pointed to Paragraph 4.6 of the PSI and the guidance that decision-makers must approach, **and be seen to approach** (emphasis added), the decision in relation to an oral hearing with an open mind. I accept that submission. Whilst there may not be an express requirement for reasons to be given, basic fairness requires reasons to be given, and without those reasons there is no prospect of the Director being seen to approach the decision in relation to an oral hearing with an

open mind. These do not need to be lengthy or necessarily detailed, but they should be sufficient that the prisoner can see that the issue has been considered and addressed.

24. In many instances where the court is judicially reviewing administrative decisions, a lack of reasons will result in the decision being quashed. However, Counsel are agreed that in a case such as this, the Court of Appeal has been consistently clear that whether fairness requires an oral hearing is a matter for the court, so that the issue on judicial review is whether the refusal of an oral hearing was wrong; not whether it was unreasonable or irrational (see for example the judgment of Gross LJ, in *Donald Mackay v Secretary of State for Justice* [2011] EWCA Civ 522 (" *Mackay*")). Accordingly, it is for this court to exercise its own assessment as to whether an oral hearing was necessary. In those circumstances, Mr Manknell submitted that the absence of reasons in this case does not matter.

25. Mr Elliott submitted that I should be careful of the possibility that the reasons set out in the CART letter of 23 July 2019 amount to ex-post facto justification. Whilst accepting that it is for me to judge whether there should have been an oral hearing, Mr Elliott submitted that in the absence of reasons, that role is made all the more difficult. I accept that submission. He further submitted that where the case appears to fall squarely within the policy, the absence of reasons should tell against the Defendant. I cannot accept that the absence of reasons of itself must tell against the Defendant. In practical terms that may be the result, but that is because of the submission I have accepted, namely that in the absence of reasons it is more difficult for me to balance all the relevant factors when deciding whether fairness requires that there should have been an oral hearing.

26. I turn, therefore, to the central dispute at the heart of this case. Mr Elliott submitted that there is a significant dispute on the expert materials. That dispute relates to the assessment of risk. On the one hand, the psychologist and the LAP recommended downgrading to Category B, whereas the Offender Manager felt unable to recommend downgrading. Mr Elliott points to the express example given in paragraph 4.7 (b) of the PSI of a situation where a dispute on the expert materials will be squarely in play, namely where the LAP, in combination with an independent psychologist, takes the view that downgrade is justified. Whilst accepting that a hearing is not mandatory, he points to the fact that Paragraph 4.7 lists a significant dispute on the expert materials as tending in favour of an oral hearing being appropriate.

27. He submitted that there is a dispute between the experts as to the assessment of risk which is the central issue in the Director's decision-making process. Some experts say that Mr Seton has reduced risk sufficiently, whereas the Director says he has not. Mr Elliott asked, "What could be more appropriate for an oral hearing so that the Director can hear why the psychologist and the LAP take the view of risk which they do?" He also pointed to the fact that the psychologist and the LAP are on the ground and have met the Claimant. He submitted they are in a better position to make the assessment than the Director who is isolated in London.

28. Further, Mr Elliott submitted that there was a clear issue as to whether the Offender Manager was fully informed as to the extent of work which Mr Seton had undertaken in reducing his risk. In particular, Mr Elliott submitted that we cannot know whether the Offender Manager's position might be different in the light of the further

individualised work undertaken by Mr Seton in the PIPE unit, which work was undertaken after completion of both the Offender Manager's report and the psychologist's report. There is no dispute that further work was undertaken. Mr Elliott submitted that insofar as the Claimant is aware, no enquiries were made by the Director as to whether this did constitute a gap in the information available to him.

29. Mr Manknell submitted that this is not a case where the Claimant can point to any assistance which the Director would get from an oral hearing. He submitted there is no dispute about what the Claimant has done or not done, for example in terms of work to address offending and/or risk factors, or behaviour on the PIPE Unit. He submitted that the issue here was one of judgment as to risk. Analysing the risk of a prisoner "if unlawfully at large" is an area in which the Director has a particular expertise.

30. In answer to a question from me as to whether an oral hearing would assist in explaining the differences of opinion as to risk between the Offender Manager on the one hand, and the psychologist and the LAP on the other, Mr Manknell submitted that there is no difference of opinion as such. He submitted that the psychologist's report accepts that the Claimant has not addressed the index offence (inevitably, as he maintains his innocence) and that her reports are caveated. He submitted this is not a case where the experts disagree. Rather, the Director considered the evidence to be insufficient to demonstrate a significant reduction in the Claimant's risk to the public if at large.

31. Mr Manknell referred in particular to the psychologist's statement that "it is important that this recommendation is considered alongside any security concerns…" (See extract in para 9 above). He also referred to paragraph 5.5 of her report in which she noted that her case formulation

> "…..should be treated with caution given that Mr Seton maintains innocence of the index offence. This case formulation is predominantly focused on Mr Seton's drug dealing lifestyle, however tentative links have been made to the index offence. In light of further evidence this case formulation should be revised" [128]

Mr Manknell submitted that there was no difference of opinion, and that the Director was entitled to exercise his judgment that the prisoner had not done enough to downgrade, even though the psychologist was of the opinion that he had. Mr Manknell further submitted that the psychologist's report is very clear as to what the Claimant can and cannot show and it was then a matter of judgment for the director as to whether that was enough.

32. I cannot accept the submission that there was no difference in opinion between the psychologist and the Offender Manager. Each reached totally different conclusions as to whether Mr Seton had sufficiently reduced his risk as to be suitable for recategorization. I recognise it was open to the Director to consider the caveats in the psychologist's report and to take those into account when considering what weight to give to her conclusions and what effect that had on his own Judgment as to risk, but I cannot accept that there is no dispute between the experts in this case.

33. Mr Elliott took me to three first instance decisions which he submitted have parallels with this case. Mr Manknell submitted that each first instance decision depends on its own particular facts, and that the starting point should be the principles contained in three Court of Appeal decisions. I shall consider the first instance decisions that Mr Elliott took me to, but I propose to start with the Court of Appeal decisions.

34. Mr Manknell first took me to *Mackay.* At Paragraph 28 of his judgment, Gross LJ stated as follows

> "Whether an oral hearing is required in an individual case will be fact specific. Given the rationale of procedural fairness, there is no requirement that exceptional circumstances should be demonstrated - there will be occasions when procedural fairness will require an oral hearing regardless of the absence of exceptional circumstances. But oral hearings are plainly not required in all cases; indeed, oral hearings will be few and far between. Advantages may be improved decision making, bringing CART into contact with those who have direct dealings with the offender and the offender himself; an oral hearing may also assist in the resolution of disputed issues. Conversely considerations of cost and efficiency may well tell against an oral hearing. There can be no single or even general rule, save, perhaps, for the recognition that oral hearings will be rare"

35. Mr Manknell then took me to the Court of Appeal decision in *R (Michael Downs) v Secretary of State for Justice* [2011] EWCA Civ 1422 ("*Downs*"). At paragraph 5, Aitkens LJ confirms that each case will depend on its facts, and that oral hearings are not the general rule and they will be rare. In *Downs* there was a difference of professional opinion between the two psychologists as to whether Mr Downs was sexually motivated to commit the crimes he committed. One psychologist (Ms Hewitt) considered there was sexual *motivation.* The other, Ms Wilson did not, although she accepted that there was a sexual *element* in the crimes Mr Downs had committed. The Court of Appeal upheld the decision of the judge at first instance that an oral hearing was not necessary to resolve that issue. It is clear from paragraph 45 of the judgment that CART had had Miss Wilson's report since May 2009 and there had been extensive correspondence between Ms Wilson, Ms Hewitt (the second psychologist) and the prison governor on the issues raised in Ms Wilson's report and that all of those issues were before the LAP and CART in April and June 2010, over a year after the original report.

36. At Paragraph 45, Aitkens LJ said

> "There was a dispute between Ms Wilson and Ms Hewitt on whether there was a sexual *motivation* behind the three offences. But, to my mind, that did not require an oral hearing to resolve because it was not a dispute that could be resolved with certainty. Ms Wilson took one view (which had not changed) on the suitability of Mr Downs further participation in the SOTP; Ms Hewitt took the opposite view. The two decisions of CART indicate that it had read and understood the

> Wilson report. I think that one must assume that CART was aware of the correspondence that had taken place between Ms Wilson, Governor Howard and Ms Hewitt. CART's task was to decide which view on the risk posed by Mr Downs and his suitability for further SOTP participation it accepted. It did not need an oral hearing to perform that process. …. Ultimately, CART had to exercise a judgment on whether an oral hearing would assist in resolving these issues and assist in better decision making. I cannot say that CART was wrong to decide against an oral hearing on these points where the views had been so well rehearsed, were so well known already and had not changed."

37. Mr Manknell submitted *Downs* raises the same issues as in this case. In *Downs* there was a clear difference between the psychologists who had entrenched and opposing views. The question was whether an oral hearing would have helped in resolving that. It would not. Mr Manknell submitted that the Director clearly recognised the different views in this case and ultimately, he had to exercise a judgment as to risk, and as to whether an oral hearing would assist. He submitted, therefore, that the mere fact of a difference of opinion as to risk between the Offender Manager, Mr Gartside, on the one hand and the psychologist and LAP on the other, did not require an oral hearing. It was simply a matter for the Director to exercise his own judgment as to risk, taking into account all relevant matters before him, including the different recommendations as to risk. He submitted this is not a question of resolving a dispute, rather a question of judgment as to which of the different opinions to accept. He submitted that on the facts of this case, there was nothing an oral hearing would assist with.

38. The third Court of Appeal decision that Mr Manknell took me to is *Hassett*. Mr Manknell relies on paragraphs 68 and 69 in the judgment of Sales LJ:

> "68. The question to be answered is whether Mr Hassett would present a risk to the public if he escaped from prison. Mr Matthews' report did not suggest that he would not; rather, it strongly tended to indicate that he would. That was also the view of the prison psychology service. On the relevant question, therefore, there was no real or significant dispute between the expert psychologists which might indicate either an oral hearing was required involving them, to test their respective expert opinions in an adversarial oral procedure, or that an oral hearing was required involving Mr Hassett. Mr Hassett had already had a fair opportunity to explain himself to both psychologists and could not realistically be expected to provide further assistance on the question being addressed.
>
> 69. I would add that even in a case where there is a significant difference of views between experts, it will often be unnecessary for the CART/Director to hold a hearing to allow them to ventilate their views orally. This might be so because, for example, there may be no real prospect that this would resolve the issue between them with sufficient certainty to

> affect the answer to be given by the CART/Director to the relevant question, and fairness does not require that the CART/Director should hold an oral hearing on the basis of a speculative possibility that that might happen: see *Downs* at [45]."

Reference to the facts in paragraph 30 of the judgment of Sales LJ shows that in significant respects Mr Matthews corroborated areas of concern and that Mr Matthews was far from saying that Mr Hassett would present no significant risk to the public if he escaped.

39. Mr Manknell submits that these three Court of Appeal decisions hold the key for the case I have to decide. He submitted there was no need for an oral hearing in this case, and that it was difficult to see how an oral hearing would assist. He submitted it was a matter of judgement for the Director, and he did not require an oral hearing. Rather he could make that judgment based on the full and clear reports before him. Mr Manknell submitted that the Director was plainly aware of the differences of opinion as to risk, but he was entitled to make his own judgment. He submitted that *Hassett* is authority for the proposition that no oral hearing is needed where there is a difference of opinion, as opposed to a difference of fact. Whilst that was undoubtedly the conclusion on the facts in that case, I cannot accept that as a proposition of law. Experts express opinions, and differences in those opinions are plainly capable of falling within paragraph 4.7(b) of the PSI. Whether an oral hearing is necessary must be decided on the facts of each particular case.

40. Mr Elliott accepted that as a matter of principle a speculative possibility of resolving an issue between the experts would not support the need for an oral hearing. He submitted that the Claimant's position in this case is not a speculative challenge. He submitted that in this case the area of dispute between the parties relates to the assessment of risk which is central to the issue of the Director's decision making process. This is a case where some experts say that the risk has been sufficiently reduced, others including the Director, say it has not.

41. I now turn to consider the first instance decisions that Mr Elliott referred me to. The first is *R (Keith Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin) ("*Rose*"). *Rose* is a CART case involving a challenge to a refusal of an oral hearing in connection with a categorisation review. Mr Rose was a Category A prisoner who denied he had committed the murder of which he had been convicted, but accepted guilt for other serious offences for which he had also been convicted. He was post tariff. The LAP recommended that Mr Rose be downgraded to category B. A psychologist's report produced for the Parole Board recommended that Mr Rose be downgraded to Category B. Whilst produced for the Parole Board, and therefore not directly addressing the question before the Director, the judge noted (at Paragraph 57(iii)) that the clear thrust of the psychological report was that Mr Rose had made good progress in relation to clinical and risk management factors.

42. In that case defence counsel submitted that there was no real and live dispute between the experts, and that even if there was, he relied on the Court of Appeal in *Hassett* that it will often be unnecessary to hold a hearing. The judge, Karen Steyn QC, accepted there was no significant difference of view between the experts and that the LAP recommendation for downgrading was consistent with the thrust of reports from both

the prison psychologist, an independent psychologist and the offender supervisor. In her judgment the consistency between all those experts rendered Mr Rose's case for an oral hearing all the stronger. She quashed the Defendant's decision to refuse to hold an oral hearing.

43. Mr Elliott submitted that the case before me is stronger than the case in *Rose*. In *Rose* the divergence of opinion was between the Director on the one hand and all other experts in the case who favoured downgrading. He submitted that Mr Seton's case is stronger in terms of needing an oral hearing in that there is a difference of opinion between the Offender Manager and the LAP/psychologist. Mr Elliott submitted that difference was important in the context of the solicitors' representations to CART raising concerns as to whether the materials before the Director were complete and, in particular, as to whether the Offender Manager was fully informed as to the extent of work undertaken by Mr Seton in reducing his risk.

44. Mr Manknell submitted that the case in *Rose* is very different. Mr Rose met "all save one" of the factors in the PSI tending in favour of an oral hearing (see judgment of Karen Steyn QC at paragraph 62). Unlike this case, Mr Rose was post tariff and there was an acknowledged impasse to which no solution was offered (there was accepted evidence that if Mr Rose was not downgraded, he was at an impasse and could not progress). There was also unanimity in favour of his downgrading, including the Offender Manager. Thus, in *Rose* the Director's judgment was contrary to all the expert opinions before him. In this case, the Director's judgment is consistent with the opinion of the Offender Manager.

45. The second case Mr Elliott relied upon is the decision of His Honour Judge Gosnell in *R (Edward Hopkins) v Secretary of State for Justice* [2019] EWHC 2151 (Admin) ("*Hopkins*"). In *Hopkin*s, following a Parole Board hearing, the panel did not recommend the Claimant's release but did recommend a transfer to open conditions. The Defendant did not act upon the recommendation but did agree to bring forward the Claimant's categorisation review. Thus, the Parole Board's recommendation of a transfer to open conditions was available to CART. For the CART review, the prison psychologist and the Offender Manager both recommended that he be re-categorised. However, the LAP did not support Mr Hopkins' downgrading. Mr Elliott referred me to paragraphs 29, 49 and 50 of the judgment:

> "29…. It was submitted that the central issue in this case was the extent to which the claimant had demonstrated a reduction in risk, notwithstanding his ongoing maintenance of innocence. The psychology reports were unanimous in confirming a significant reduction in risk. The decision-makers appear to have rejected the opinions of the psychologists as to risk assessment without attempting to hear either of them or the claimant to allow them to deal with any points which were troubling the decision-makers……
>
> 49. It is clear from the guidance that a difference of opinion between CART and either the Parole Board, the local advisory panel or an expert psychologist can all be considered *a significant dispute on the expert materials* where the dispute relates to the main issue of risk reduction……

> 50. … Where the CART panel have evidence from expert psychologists and the Parole Board of a significant reduction of risk it seems to me to be unwise to disagree with or dismiss that evidence without taking considerable care to examine the evidence fully and reach conclusions which are logically supportable."

His Honour Judge Gosnell found that there should been an oral hearing in that case.

46. Mr Elliott submitted that the present case has parallels with those paragraphs, and paragraph 50, in particular. He submitted there may have been reasons that the Director could have relied upon to refuse an oral hearing, but that is not sufficient to simply say that the PSI did not apply. Mr Manknell submitted that *Hopkins* is a very different case. Whilst His Honour Judge Gosnell did address the issue of a significant dispute on the expert materials, he also found that other factors in the PSI were present including that there was an impasse. Further the prisoner was well beyond tariff expiry. Those additional factors recognised in the PSI are not present in this case.

47. Finally, Mr Elliott relied upon the case of *R (Mark Harrison) v Secretary of State for Justice* [2019] EWHC 3214 (Admin) ("*Harrison*"). In particular, he referred me to paragraphs 56 and 57 of the judgment:

> "56. As the wording of paragraph 4.7 of PSI 08/2013 makes clear, [a significant dispute on the expert materials] will only be in play if there is "a real and live dispute on particular points of real importance". In this instance, the central issue on which there is said to be a dispute was the extent to which the claimant had achieved a reduction in the risk of him reoffending if he was at large; that was undoubtedly a matter of real importance.
>
> 57. Mr Manknell rightly accepts that the dispute in question may be between the various experts; or may be between the experts and the LAP (on the one hand) and the Director (on the other)."

The Judge concluded (in paragraph 72) that there were compelling reasons for an oral hearing in the light of the significant differences of views between the Director (on the one hand) and the prison psychologist and the LAP (on the other) regarding the central issue of risk reduction; and the impasse that resulted from the continuation of Mr Harrison's Category A status.

48. Mr Manknell submitted that *Harrison* is again a very different case to the case I have to consider. Not only was the issue of differences between the experts in play, but there was also the impasse. Mr Harrison was also 10 years post tariff, although that is not specifically mentioned in the judge's conclusions. It is right to note that the judge commented that *Harrison* was a case where the combination of factors pointed very strongly in favour of an oral hearing (Judgment: Paragraph 73)

Conclusions

49. I have firmly in mind the Court of Appeal guidance, including paragraph 69 in *Hassett* (set out in paragraph 38 above) where even in a case where there is a significant difference of viewing between experts, it will often be unnecessary for the CART/Director to hold a hearing to allow them to ventilate their views orally. I am mindful that the first instance decisions relied upon by Mr Elliott all involve a number of factors identified in the PSI as being factors that would tend in favour of an oral hearing. Whilst a multiplicity of factors is more likely to support the need for a hearing (as expressly acknowledged in Paragraph 4.6 of the PSI), it is obviously not the case that the presence of one factor only must of necessity mean that a hearing is not required. Each of those cases was a decision on its own facts. I must consider this case on its own facts.

50. Given that I have rejected the suggestion that there is an impasse in this case, the sole factor in play is the difference of opinion in the expert materials, but a difference on an important and central issue to the decision to be made, namely whether there was a sufficient reduction in risk to allow recategorisation to Category B. As already indicated, I reject Mr Manknell's submission that there is in fact no difference of opinion. Whilst the psychologist's report has certain caveats in it, notwithstanding those caveats she still felt able to recommend a move to Category B. The Director is, of course, entitled to decline a recommendation for downgrading on such grounds as suggested manageability in less secure conditions, or the availability of courses in less secure conditions which are not available in the Category A Estate. Whilst the psychologist states that a transfer to less secure conditions would provide Mr Seton with the opportunity to further evidence his ability to manage his risk and develop further his protective factors [130], that is a single sentence in a report running to 9 pages in which the issues of Mr Seton's risk are clearly and fully explored. Similarly, whilst the LAP comments that if downgraded Mr Seton can be further tested within less secure conditions [139], that is not the justification for their recommendation. The LAP expressly noted what it described as the significant risk reduction Mr Seton has evidenced since his arrival on the PIPE unit [139].

51. Is the difference in expert opinion as to Mr Seton's risk in this case such that it would be wrong not to hold an oral hearing? I accept that the Director is entitled to exercise his own judgment and that his judgment in this case accords with that of the Offender Manager's report. However, I have concerns as to whether the further work undertaken by Mr Seton after completion of the reports would impact on the risk assessments, in particular that of the Offender Manager. Mr Gartside's report, dated January 2019, referred to the need for a more substantial period of time as a resident in the PIPE unit. A further five months had elapsed before the review took place on 18 June 2019. By that time Mr Seton had been on the PIPE unit for 20 months. At the time of the submissions by Mr Seton's solicitors, he had been on the PIPE unit for 17 months, and they had expressly drawn attention to the further individualised work which he had undertaken. He had apparently undertaken the very work identified by the psychologist as work which it would be preferable for him to undertake in the PIPE unit before relocation (but which could be completed elsewhere if appropriate) [130].

52. I appreciate that a lapse in time is inevitable between the preparation of the various reports and the CART review, not least because the reports have to be prepared in

sufficient time that they can be disclosed to the prisoner to allow him to submit informed representations to the prison's LAP (Paragraph 4.20 PSI). That lapse in time, cannot, without more, mean that there needs to be further enquiry or other update before the Director can make his judgement as to risk. However, the Director was in possession of specific information that further work had been undertaken, but no enquiries were made as to the impact of that further work. Mr Gartside might have been of the view it made no difference, but it is equally possible that it might have altered his conclusion as to Mr Seton's risk. We simply do not know. The PSI contemplates that it may be possible to have a short hearing targeted at the really significant points in issue.

53. In my judgment this is a case where there should have been a short oral hearing targeted specifically at the issue of any change in risk assessment as a result of the further individualised work and the further passage of time spent on the PIPE unit. In my judgment there is a real and live dispute on a point of real importance to the Director's decision, namely the extent of any reduction in Mr Seton's risk. Paragraph 4.6 of the PSI points to "….the potential real advantage of a hearing …in aiding decision making…". In *MacKay* Gross LJ refers to the possible benefits of improved decision making and bringing CART into contact with those who have direct dealings with the offender (See Paragraph 34 above). Had the Director been presented with reports which were all in favour of re-categorisation, there would be a strong case for oral hearing if he was minded to reject all of those conclusions. The short oral hearing which I consider should have taken place in this case might have produced exactly that result. It might not, and in any event, the decision as to Categorisation may not have been different. Nevertheless, I have come to the conclusion that on the particular facts of this case, it was wrong for the Director to make a decision without a short hearing targeted specifically to that issue. In my judgment such a hearing would undoubtedly have aided the decision making process in this case.

54. It follows that I allow this application for judicial review, and I find that the Director's decision not to hold an oral hearing in this case was wrong, and unlawful.