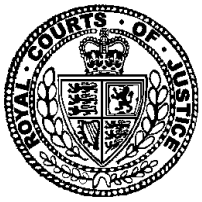

Neutral Citation Number: [2020] EWHC 2712 (Admin)

Case No: CO-5055-2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2020

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

R (on the application of Conroy Smith)	**Claimant**
- and -	
The Secretary of State for Justice	**Defendant**

- -
- -

Matthew Stanbury (instructed by **Swain & Co**) for the **Claimant**
John Jolliffe (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 7 October 2020

- -

Approved Judgment

Mr Justice Calver :

Factual background

1. At around 10pm on 30 August 2004 a street party was taking place near Kensal Green tube station, to coincide with the Notting Hill carnival. One of those present was Mark Subaran. He was approached by a group of ten men, including the Claimant, who accused him of showing them disrespect. A scuffle ensued and as the group of men left the scene a number of gun shots were fired by them at Mr. Subaran. He sustained two separate gunshot wounds to the neck and chest, causing him fatal injury.

2. On 12 December 2006 the Claimant, aged 29, was convicted of the murder of Mr. Subaran, and was sentenced to a mandatory life term for murder at the Central Criminal Court. His minimum term was fixed at 29 years and 14 days (30 years less remand time). That expires in 2035. To this day the Claimant denies the index offence.

3. The Claimant is a category A prisoner (formerly at HMP Long Lartin and now at HMP Whitemoor). Since his imprisonment, he has completed a number of accredited programmes and carried out other offence-related work in prison. In particular:

   (1) He completed the Thinking Skills Programme (TSP) in March 2011. This programme helps participants to develop their skills in areas of thinking linked with offending, to identify risk factors for their offending and to practise using their existing and new thinking skills to manage these risk factors. His post-programme report was positive;

   (2) He completed the Resolve programme, a medium intensity violence reduction programme in April 2014. His post-programme report was again positive;

   (3) He completed the Understanding and Handling Conflict course and someone to one work with a member of the Psychology department between 2015 and 2016 on his perspectives on violence whilst living in Jamaica;

   (4) He completed 5 individual one-to-one sessions on previous lifestyle factors with a member of the Psychology Department, Olivia McGregor, in January 2019;

   (5) He now acknowledges that he was living an anti-social lifestyle at the time of the offence, being part of anti-social group which would engage in violence and weapon use in a group context. As HM Prison & Probation Service state in their review of 13 August 2019, this is viewed as a positive shift in the Claimant's thinking.

4. As Mr. Easton (of the Defendant's Category A Review Team ("CART")) explains in his witness statement, if a prisoner is confirmed in Category A following conviction and sentencing they undergo formal reviews of their security category by either the Director of the Long Term and High Security Estate ("the Director") or the CART. These reviews are governed by Prison Service Instructions ("PSI") 08/2013. If the prisoner is, as here, confirmed in Category A at the first formal review, their subsequent reviews will be annual, based upon progress reports and a

recommendation from the holding prison's Local Advisory Panel ("LAP"). The first annual review in fact normally takes place two years after the first formal review. The LAP includes a range of relevant personnel from the prison and will be chaired by the governor or deputy governor. The LAP considers any expert reports and representations and recommends whether the prisoner should be downgraded or not, based upon the criteria in PSI 08/2013. It is then a matter for the Director as to whether to downgrade or not.

5. In the present case the following are agreed facts:

(1) The Claimant had a Category A review in 2014. He submitted reports and representations at that review. The reports included one from Dr Sian Watson, a psychologist, who concluded that the Claimant had addressed "many of the risk factors associated with the index offence" but that he would benefit from work on his use of weapons. It was for this reason that the Claimant completed the Understanding and Handling Conflict course and someone to one work with a member of the Psychology department between 2015 and 2016.

(2) A report was subsequently prepared by a forensic psychologist, Glenda Liell, for a further 2015 review of the Claimant's categorisation and she recommended that the Claimant should be downgraded, but he was not.

(3) In 2016 a further review took place and the Claimant submitted the report of Dr Elizabeth Fitzmaurice, dated 16 May 2016, and she also recommended that he be downgraded. The LAP also recommended that he be downgraded. On 16 September 2016 the Director refused to direct an oral hearing and refused to downgrade the Claimant. The Claimant made a claim for judicial review of that decision which was dismissed.

6. This Claim concerns a further review of the Claimant's categorisation for 2019. The LAP had before it three reports in particular in respect of the 2019 review:

(1) An undated report of Olivia McGregor, a Forensic Psychologist in training at HMP Long Lartin, supervised by Catherine Jones. Ms McGregor met the Claimant on 5 occasions between January and February 2019. In her recommendations she referred to his positive post programme reports to which I have referred, and also referred to the fact that he had moved from a position of denying any involvement in anti-social behaviours after having moved to the UK (beyond smoking cannabis) to acknowledging being part of an anti-social group who would engage in violence and weapon use in a group context. He also acknowledged that he would be present at drug-dealing activities. This was seen as a positive shift in the Claimant's acknowledgment that he had been living an anti-social lifestyle before the offence. She recommended that he be assessed for the Identity Matters programme to explore his violence within a group context and if suitable address any outstanding areas of risk. She referred to the fact that his security classification should not impede this recommendation as he could complete this course as a Category B prisoner.

(2) A report dated 30 April 2019 by Dr Caroline Oliver, Chartered Psychologist and Registered Forensic Psychologist, which it is agreed was *prepared at the request of the Director*. She also referred to the fact that the Claimant, since his last

review, is now acknowledging that he socialised within an anti-social environment, which represented some shift in his willingness to discuss violence-related lifestyle factors and negative peer influences. This, coupled with his positive engagement with the accredited programmes to which I have referred, and generally positive custodial behaviour suggested to her that the Claimant could now be tested in Category B conditions. This would enable him to re-build his family relationships (if located nearer to London where his partner and children live) and have access to courses to improve his vocational skills. She also recommended that if downgraded, he should engage in the Identity Matters programme to build upon the work with Ms McGregor, but (like Ms McGregor) she did not consider that he needed to do that programme first before being downgraded.

(3) An independent report dated 23 May 2019 by Professor David Crighton, a highly experienced Consultant Forensic Psychologist and Hon Professor of Psychology, was commissioned by the Claimant's solicitors. In completing his assessment he used the Historical and Clinical Risk framework in its 3rd revision (HCR-20) to inform his clinical judgments in relation to risks and needs. Professor Crighton referred to the fact that the Claimant currently presents with few areas of clinical risk as defined in HCR-20. He referred to the fact that the Claimant denies committing the index offence which makes assessment complicated but not impossible in relation to insight into mental disorder, violence risk and need for treatment. He concluded that in his opinion:

(a) there are no psychological grounds for the retention of category A status at this point;
(b) *there is evidence to suggest that the Claimant's risk of reoffending has significantly reduced*;
(c) the Claimant's attitudes have significantly changed and he has successfully engaged in a range of relevant work likely to have reduced risk.

(4) Importantly, so far as the Identity Matters course is concerned, Professor Crighton pointed out that this is an experimental intervention and he said that in his opinion there is no evidence of adequate quality to show that it is effective in reducing the risk of violence or other forms of offending, and there is no evidence to show additional impacts over and above the TSP and Resolve programmes. Accordingly there were no further psychological interventions (such as Identity Matters) that would be likely to further reduce risk at this point. *It follows that on this issue there was a dispute of substance between Professor Crighton and Dr Oliver*.

7. On 25 June 2019 the LAP met to consider its recommendation to the CART on the Claimant's categorisation. The LAP received and referred to all of the evidence described above, and took account of the fact that the Claimant continues to deny the index offence. It referred to the fact that the Claimant is now willing to discuss violence related lifestyle factors and previous negative peer influences. The LAP agreed that even though Mr. Smith would still need to engage with Identity Matters programme to build on the one-to-one work already started, this would not be a precursor to being downgraded. In conclusion, the LAP considered that the Claimant had done all that he can within high security conditions and could be managed as a Category B prisoner. It therefore recommended a downgrade to category B.

8. The matter then went before the Director of the Long Term and High Security Estate for his decision ("the Director"). He reviewed the case on 13 August 2019 and provided his decision on 11 September 2019. He considered all of the evidence described above and heard representations from the Claimant's solicitors. He took into account the LAP recommendation. His decision was that the Claimant's security category should remain as Category A. His sparse reasoning for the decision was contained in one paragraph as follows:

> "*The Director noted that Mr. Smith has engaged and is doing all that is asked of him, but considered that there was yet to be significant evidence of risk reduction. The director noted that Identity Matters had been recommended and that this could be completed within the High Security Estate"* [which in this context the parties agreed must be a reference to completion as a Category A prisoner].

9. The Director did not explain why he considered that there was yet to be significant evidence of risk reduction, despite the terms of the report of Professor Crighton in particular. Nor did he explain why he considered that the Identity Matters programme needed to be carried out by the Claimant (contrary to Professor Crighton's report) and why it needed to be carried out as a category A rather than as a category B prisoner.

10. By letter dated 25 September 2019 the Claimant's solicitors submitted representations requesting an oral hearing, stating that there was cogent evidence that the Claimant no longer presented a significant risk of re-offending in a similar way if unlawfully at large (relying in particular upon Professor Crighton's report) and noting in particular that PSI 08/2013 contemplates an oral hearing where the LAP, in combination with an independent psychologist, suggest that a downgrade is justified (as here). So far as Identity Matters is concerned, this could be done in a lower security category; it is not a high-intensity course and "*Mr. Smith has already covered this area largely within 1-to-1 work and psychological sessions, therefore any risk in this area has been significantly reduced already…. Offending behaviour programmes are not the only way to reduce risk…Gill v Secretary of State for Justice [2010] EWHC 364 (Admin)*." They also urged the CART "*to hear directly from Mr. Smith on his level of insight, which can only ever be best assessed in person*."

11. The request for an oral hearing came before the CART for decision on 15 October 2019. By a letter of that date it decided as follows ("the decision letter"):

> *"The CAT considers there is no impasse in [the Claimant's] progression as a clear pathway has been identified for him to address any outstanding issues and is available to him within high security conditions. It considers that the Claimant's reports were entirely suitable for risk assessment purposes and that the information was readily understandable and considers there is no basis to your claim that further verbal representations or a face to face interview with [the Claimant] was required to understand the available information…*
>
> *The Category A Team is satisfied that [the Director's] decision was completed entirely in accordance with the correct criteria for downgrading of a Category A, ie. that the prisoner must show convincing evidence that they have achieved a significant reduction in their risk of similar re-offending if unlawfully at large and not to be tested or if in less secure conditions. It considers there is no evidence in the meantime preventing Mr. Smith from making further progress to*

> *enable consideration for downgrading… It is satisfied that the Director is fully entitled to reach his own decision on a prisoner's suitability for downgrading on rational grounds or in accordance with PSI 08/2013. The Director was satisfied that Mr. Smith would be afforded the opportunity to further discuss his involvement in past group activities and use of associated violence by engaging with Identity matters intervention.*
>
> *The Category A Team is satisfied that the decision for [the Claimant] to stay in Category A at this time is rational. It considers that there are no grounds to amend or revisit [the Claimant's] review through an oral hearing ("the Decision")".*

12. By these proceedings, the Claimant seeks an order quashing this decision.

13. It is clear that both the Director and CART considered that, despite the view of all of the psychiatrists and the LAP to the contrary, the Claimant had not shown a significant reduction in his risk of similar re-offending if unlawfully at large, and that a, or possibly the, main reason for that, was because he could reduce that risk yet further by undertaking the Identity Matters programme, despite Professor Crighton's stated opinion in his report that to do so would not add anything to what had already been learned from the other programmes.

The Legal Framework/Background

14. By s.12 of the Prison Act 1952, a prisoner may lawfully be confined to such prison as the Secretary of State directs. The Secretary of State has the power to make rules for the classification of prisoners (s.47 of the Prison Act 1952), and the relevant rules in this case are the Prison Rules (SI 1999/728).

15. Rule 7 of the Prison Rules provides in particular that:

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

16. Adult male prisoners are classified by reference to four security categories, A to D. A Category A prisoner is one "*whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible*" (Prison Service Instruction ["PSI"] 08/2013, §2.1).

17. Immediately below Category A is Category B, which is for prisoners "*for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult*".

18. PSI 08/2013, entitled *The Review of Security Category – Category A/Restricted Status Prisoners*, was revised and re-issued on 10 June 2016. At §4.1 it provides for annual reviews of a confirmed Category A prisoner's security category, on the basis of progress reports from the prison. These reviews include consideration by a local

advisory panel within the prison, which should submit a recommendation to the Category A Review Team. If the local advisory panel recommends downgrading, the decision on the annual review will be taken by the Director rather than the Category A Review Team, as happened in this case.

19. At §4.2 the policy provides that before approving the downgrading of a confirmed Category A prisoner's security category, the Director:

> *"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."*

20. PSI 08/2013 gives guidance, at §§4.6-4.7, on the question whether an oral hearing should be held in respect of the annual review of a Category A prisoner's security categorisation, in these terms:

> *"4.6 The DDC High Security (or delegated authority) may grant an oral hearing of a Category A / Restricted Status prisoner's annual review. This will allow the prisoner or the prisoner's representatives to submit their representations verbally. In the light of the clarification by the Supreme Court in Osborn, Booth, Reilly of the principles applicable to determining whether an oral hearing should be held in the Parole Board context. The Courts have consistently recognised that the CART context is significantly different to the Parole Board context. In practical terms, those differences have led to the position in which oral hearings in the CART context have only very rarely been held. The differences remain; and continue to be important. However, this policy recognises that the Osborn principles are likely to be relevant in many cases in the CART context. The result will be that there will be more decisions to hold oral hearings than has been the position in the past. In these circumstances, this policy is intended to give guidance to those who have to take oral hearing decisions in the CART context.* ***Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing****. The process is of course not a mathematical one; but the more of such factors that are present in any case, the more likely it is that an oral hearing will be needed. Three overarching points are to be made at the outset:*
>
> ***First,*** *each case must be considered on its own particular facts – all of which should be weighed in making the oral hearing decision.*
>
> ***Secondly,*** *it is important that the oral hearing decision is approached in a balanced and appropriate way. The Supreme Court emphasised in Osborn that decision makers must*

approach, and be seen to approach, the decision with an open mind; must be alive to the potential, real advantage of a hearing both in aiding decision making and in recognition of the importance of the issues to the prisoner; should be aware that costs are not a conclusive argument against the holding of oral hearings; and should not make the grant of an oral hearing dependent on the prospects of success of a downgrade in categorisation.

Thirdly, *the oral hearing decision is not necessarily an all or nothing decision. In particular, there is scope for a flexible approach as to the issues on which an oral hearing might be appropriate.*

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

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

(b) Where there is a significant dispute on the expert materials. These will need to be considered with care in order to ascertain whether there is a real and live dispute on particular points of real importance to the decision. If so, a hearing might well be of assistance to deal with them. ***Examples of situations in which this factor will be squarely in play are where the LAP, in combination with an independent psychologist, takes the view that downgrade is justified****; or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds. More broadly, where the Parole Board, particularly following an oral hearing of its own, has expressed strongly-worded and positive views about a prisoner's risk levels, it may be appropriate to explore at a hearing what impact that should or might have on categorisation. It is emphasised again that oral hearings are not all or nothing – it may be appropriate to have a short hearing targeted at the really significant points in issue.*

(c) Where the lengths of time involved in a case are significant and/or the prisoner is post- tariff. It does not follow that just because a prisoner has been Category A for a significant time or is post tariff that an oral hearing would be appropriate. ***However, the longer the period as Category A, the more carefully the case will need to be looked at to see if the***

> ***categorisation continues to remain justified***. *It may also be that much more difficult to make a judgement about the extent to which they have developed over the period since their conviction based on an examination of the papers alone. The same applies where the prisoner is post-tariff, with the result that continued detention is justified on grounds of risk; and all the more so if he has spent a long time in prison post-tariff. There may be real advantage in such cases in seeing the prisoner face-to-face. Where there is an impasse which has existed for some time, for whatever reason, it may be helpful to have a hearing in order to explore the case and seek to understand the reasons for, and the potential solutions to, the impasse.*
>
> *(d)* ***Where the prisoner has never had an oral hearing before****; or has not had one for a prolonged period."* (emphasis added)

21. It is a matter for the court whether a fair procedure has been followed in the present case without affording the Claimant an oral hearing. The court's function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required: *R(Osborn) v Parole Board* UKSC 61 at [65] per Lord Reed. This is a procedural fairness challenge and the court must therefore determine for itself whether a fair procedure was followed in refusing an oral hearing. In *Mackay v Secretary of State for Justice (2011)* EWCA civ 522 at paragraph 28 Lord Justice Gross stated:

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

22. It is well established that a decision-maker must follow his own policy unless he has a good reason not to do so. This public law principle is grounded in fairness and, more broadly, the requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. It is also clear that the meaning of a policy is a question of law for the court to determine. See, for example, *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546 at [29]-[31] (per Lord Wilson JSC, with whom all members of the Court agreed); recently applied in R *(Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin) (Karen Steyn QC).

23. It follows in the present case that, as Mr. Stanbury submitted on behalf of the Claimant, CART ought therefore to have followed the policy set out in paragraphs 4.6 and 4.7 of PSI 08/2013, as there was no good reason not to do so. Indeed, both parties

tacitly assumed this by addressing their arguments at the hearing to the question of whether or not the factors referred to in paragraph 4.7 were present in the case of the Claimant and if so, what the consequence was of that fact.

24. I should add that I bear in mind, as Mr. Jolliffe for the Defendant urged in paragraph 13 of the Summary Grounds of Defence and orally, that it is important to distinguish between principles applicable to determining whether an oral hearing should take place in a Parole Board context and in the present context of CART reviews. As Sales LJ stated in *Hassett and Price v Secretary of State for Justice* [2017] EWCA Civ 331 [51(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 at [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."*

25. Consistently with this submission, Sales LJ further stated in *Hassett and Price:*

> *"61. Some of the factors highlighted by Lord Reed [in* Osborn*][1] 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."*

[1] The factors relevant to whether the Parole Board should grant a prisoner an oral hearing were set out by the Supreme Court in *Osborn v Parole Board* [2013] UKSC 61.

> *"69. I would add that even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/Director to hold a hearing to allow them [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]*."* (emphasis added)

26. I also bear in mind, as was also emphasised in *Hassett and Price* that:

(1) 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.

(2) Even in a case where there is a significant difference of view between experts, it will often be unnecessary for the CART/Director to hold a hearing to allow them 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.

(3) Where a prisoner refuses to accept responsibility for an offence of which he has been found guilty that is likely to have an effect on the relevant risk assessment made in relation to him for the purposes of a Category. Given that the danger must be presumed from the nature of the index offence, it is plainly a proper requirement that there should be cogent evidence of the diminution of risk if the safety of the public is to be secured.

27. Bringing these various strands of authority together, I summarise the relevant principles for the purposes of the present case as follows:

(1) The question which CART/the Director seeks to answer in a categorisation case such as the present is whether there is cogent or convincing evidence that the prisoner's risk of re-offending if unlawfully at large has *significantly reduced*, which might consist of cogent evidence showing that the prisoner has significantly changed his/her attitude towards his/her offending or has developed skills to help prevent similar offending; or, I would add, cogent uncontested expert psychological evidence to that effect.

(2) PSI 08/2013 provides policy guidelines regarding procedures for deciding and reviewing the appropriate escape risk classification of Category A prisoners by CART/the Director;

(3) CART should follow its own policy unless it has good reason not to do so;

(4) That guidance suggests factors of importance which may tend towards CART/the Director deciding to have an oral hearing, in particular as follows:

(a) Where important facts are in dispute, particularly facts which go directly to the issue of risk;

(b) Where the LAP, in combination with an independent psychologist, conclude that downgrade is justified but the Director/CART disagree. That is especially so where there is no psychological evidence to the contrary effect.

(c) Where there is a significant difference of opinion between experts (although this factor may be of little importance if, for example, there is no real prospect that an oral hearing would resolve the issue between them with sufficient certainty to affect the answer to be given by CART to the relevant question).

(d) The longer the period that the prisoner has been in category A, the more carefully the case will need to be looked at to see if categorisation continues to remain justified. A decision solely on the papers may be insufficiently fair;

(e) Where the prisoner has never had an oral hearing before.

(5) Denial of the index offence (in this case murder): Denial in itself does not indicate an increase in risk above that which would be present for a prisoner who admits the offence. Rather, the problem posed by denial is that it may be harder to form a proper assessment of the factors contributing to their offending and so there may be less certainty about the level of risk and the extent to which it has been reduced during their sentence: see PSO 4700, paragraphs 4.14.8, 4.14.13 and 4.14.14.

(6) The kind of decision made by the Parole Board is different from the kind of decision made by CART; whilst some of the factors highlighted by Lord Reed in *Osborn* will have some application in the context of decision making by CART, they will usually have considerably less force in that context.

(7) The cases in which an oral hearing is required before CART/The Director will be comparatively rare, although fairness will sometimes require an oral hearing depending upon the facts of the particular case. There is no test of exceptionality: per Cranston J in *R (on the application of H) v Secretary of State for Justice* [2008] EWHC 2590 (Admin) at [21].

(8) An oral hearing must be useful, in the sense that there is a real prospect or more than a speculative possibility that holding such a hearing might have a material influence on the outcome of the question which the CART has to answer (referred to in subparagraph (1) above).

(9) It is a matter for the court to determine whether a fair procedure has been followed in any particular case if the Claimant has not been afforded an oral hearing. The

court's function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.

Discussion

28. I fully accept that it will only be in a comparatively rare case that fairness will require an oral hearing before CART. However, I am in no doubt that this is one of those comparatively rare cases.

29. The Director was presented with the reports of three expert psychologists, including one very eminent one, Professor Crighton, each of whom separately recommended the downgrading of the Claimant from Category A to Category B. Professor Crighton expressly stated that the Claimant's risk of reoffending had significantly reduced. That recommendation was also made by the LAP. In other words, there was unanimity that the Claimant should be downgraded to category B. Those reports referred to the fact that the Claimant had, over an 8 year period, successfully completed all of the accredited programmes which he had been required to undertake. He then in 2019 completed 5 individual one to one sessions on his previous lifestyle factors with a member of the psychology department at HMP Long Lartin. This had resulted in a positive shift of his acknowledgment that he was living an anti-social lifestyle at the time of his offending. The completion of the programmes, the shift in his willingness to discuss violence-related lifestyle factors and negative peer-related influences and his generally positive custodial behaviour led these expert psychologists to recommend his downgrading from Category A to Category B.

30. Both Dr Oliver and Ms McGregor recommended that upon being downgraded, the Claimant should engage in the Identity Matters Programme to build on the work carried out by Ms McGregor. The view of Professor Crighton, in contrast, was that undertaking the Identity Matters programme was unnecessary, both because there was no adequate evidence to show that that programme was effective in reducing the risk of violence or other forms of offending but also because there was no evidence that that programme had additional effectiveness over and above the TSP and Resolve interventions which the Claimant had already successfully carried out.

31. Despite this strong body of opinion, the director refused to downgrade the Claimant, merely stating that there was yet to be significant evidence of risk reduction; and noting that Identity Matters had been recommended and that this could be completed within the High Security Estate, but failing to address the points made by Professor Crighton to the contrary. The Director did not explain *why* he took the view that there was yet to be significant evidence of risk reduction, despite the contents of the psychologists' reports.

32. When the request for an oral hearing came before CART, a little more flesh was put on the bare bones of this reasoning as follows:

    (1) The information contained in the reports was entirely suitable for the Claimant's risk assessment and no further oral representations were required. But if that were so, on the basis of what other material did the Director and CART reject that information?

(2) Further progress could be made to address any outstanding issues regarding the risk of reoffending through the Identity Matters programme. But again, this fails to explain why CART/the Director rejected the analysis of Professor Crighton as to the need (or lack thereof) for the Claimant to undertake such a programme; and it also fails to explain why CART/the Director rejected the analysis of Dr Oliver and Ms McGregor that in any event Identity Matters could be undertaken as a category B prisoner.

33. There is a further flaw in CART's reasoning which is this. It concluded that "*the decision for [the Claimant] to stay in category A at this time is rational. It considers that there are no grounds to amend or revisit [the Claimant's] review through an oral hearing*". But that was the wrong test. Its job was not to determine whether the Director's decision satisfied a rationality test; its job was to decide whether procedural fairness required an oral hearing as a matter of fact.

34. I am firmly of the view that in deciding not to hold an oral hearing, CART did not properly apply PSI 08/2013 and did not act fairly; and that procedural fairness demanded an oral hearing for the following reasons:

(1) Since neither the Director nor CART clearly explained *why* they were rejecting the recommendations of the three psychologists, as well as the LAP, it is necessary to have an oral hearing so that the Claimant can hear those reasons and address the issues that were troubling the Director/CART, and it is unfair not to allow him an opportunity to do so. In submission, Mr. Jolliffe, counsel for the Defendant, accepted that the Director decided that there was not a sufficiently *significant* reduction in the risk posed by the Claimant rather than there being no reduction at all. That is a value judgment but neither he nor CART have explained how he reached that judgment. An oral hearing will allow the basis for that judgment, the weighing of the relevant risk factors, to be established and explored.

(2) This is, moreover, not the first time that the Director/CART have disagreed with the LAP about the downgrading Claimant's categorisation. As Cranston J stated in *R(on the application of H) supra* at [23]:

> "*Next, on two occasions the local prison has recommended that the claimant should be re-categorised. As a consequence, there is an inconsistency between, on the one hand, the approach of the local prison and, on the other hand, that of the Director of High Security Prisons. I do not accept the claimant's submission that this results in an impasse. The matter is also different from that considered in the* ***Williams*** *decision, since the recommendation of a local prison on categorisation is not the same as a decision of the Parole Board. Nonetheless, this inconsistency supports the case for an oral hearing to explore it in greater depth. At the end of the day there may be no inconsistency but simply a difference of opinion, and for very good reasons, but it is as well that the matter be explored at an oral hearing."*

(3) Furthermore, the Policy Guidance itself (PSI 08/2013, paragraph 4.7(b)) states that in a case where there is a significant dispute on expert materials an oral hearing might well be necessary. Here, since all three psychologists *agree* on downgrading, the claim to an oral hearing is obviously stronger than it would be

in a case where there is a significant dispute on the expert materials. As HH Judge Belcher stated in *R (Seaton) v Secretary of State for Justice* [2020] EWHC 1161 (Admin) at [53] in granting judicial review of the director's decision not to hold an oral hearing: "*Had the Director been presented with reports which were all in favour of re-categorisation, there would be a strong case for an oral hearing if he was minded to reject all of those conclusions*."

(4) In fact, there *is* a dispute between Dr Oliver and Professor Crighton as to whether engagement in the Identity Matters programme is necessary (at all). This is an important factual dispute on a significant point in issue which fairness demands to be addressed at an oral hearing, as the prospect of the Claimant being able to undertake the Identity Matters course appears to have significantly influenced the outcome of the Director and CART's decision in this case. If undertaking this course is not necessary, or not necessary whilst the Claimant remains in Category A, then the case for downgrading the Claimant gains obvious strength. Indeed, Mr. Stanbury for the Claimant referred in this context to the observations of Cranston J in *Gill v Secretary of State for Justice* [2010] EWHC 364 at [80] that "*offending behaviour programmes are neither a necessary nor sufficient condition for release from prison. There are other recognised pathways to reduce re-offending and to achieve release*".

(5) Mr. Stanbury also persuasively argued that fairness demands an oral hearing in order fairly to resolve the important issue of whether the Identity Matters programme should be completed before downward categorisation can be considered. At an oral hearing, the experts can be asked questions such as: What is covered by the Identity matters programme? What is the benefit to the Claimant of completing it? Why should he not do it in category B? Is it available where he is going to be held (apparently it is not available at HMP Whitemoor)? What is the assessment process? Is the Claimant even likely to be held to be suitable? How intensive is it? How does it differ from Resolve or Thinking Skills, or TSP? Is there any preliminary evidence that it works? Is this designed for people like the Claimant? These are all relevant important questions to be answered and tested if the Claimant is to be refused downwards categorisation on the basis that he should first complete this programme in category A. An oral hearing is the best and fairest way to test these matters.

(6) Whilst perhaps a factor which is of somewhat less weight than the factors referred to in (1)-(5) above, I also consider that now that the Claimant has satisfactorily completed over an 8 year period the various programmes and psychological counselling sessions for which he has been assessed to be suitable, and particularly since the Director has not heard directly from the Claimant for the 14 years that he has been imprisoned as a Category A prisoner, it might make a significant difference to the outcome of the review for the Director to hear, face-to face, from the Claimant himself about his own attitude to the issue of why there is now a *significant* reduction in the risk of his reoffending.

(7) Looking at the matter holistically, in view of (i) the psychological evidence in favour of his de-categorisation and (ii) the recommendation of the LAP which is consistent with the psychological evidence, both of which conflict with the Director and CART's own view on this issue; and (iii) the fact that the Claimant has done all that has been asked of him over an 8 year period and that he has never

had an oral hearing, in my judgment it is unfair for the Director/CART to make a judgment adverse to the Claimant about the extent to which he has developed in terms of risk since his conviction, based purely on an examination of the papers alone. In these circumstances fairness requires an oral hearing: *Hassett* per Sales LJ at [61].

(8) I do recognise, as Mr. Jolliffe powerfully urged on behalf of the Defendant, that the Claimant's offence is the most serious (murder) and that he continues to deny that index offence, and that this may have led the Defendant to determine that the Claimant's risk of re-offending if unlawfully at large had not significantly reduced. The maintaining of this denial by the Claimant may mean that it is harder to form a proper assessment of the factors contributing to his offending, leading to the possibility that there may be less certainty about the level of his risk and whether it has significantly reduced or not. However, on the facts of this case this fact, whilst complicating the assessment, has not prevented the psychologists from making a proper assessment of the factors contributing to the Claimant's offending. Professor Crighton in particular expressly addresses this point in paragraph 5.22 and 5.32-5.33 of his report. Similarly, the mere fact that the index offence is one of murder does not disentitle the Claimant from having his case considered fairly on its own facts. In any event, I do not consider that this factor outweighs the other factors in (1)-(7) above, which factors strongly suggest that fairness dictates that an oral hearing is necessary in the case of the Claimant before the decision is taken as to whether or not to downgrade his categorisation from A to B.

35. For all these reasons, CART's decision dated 15 October 2019 to refuse the Claimant an oral hearing was unlawful and I allow this claim for judicial review.