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CO/802/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Before : Her Honour Judge Karen Walden-Smith, sitting as a Judge of the High Court

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Between :

THE KING on the application of THOMAS GREEN — **Claimant**

- and -

SECRETARY OF STATE FOR JUSTICE — **Defendant**

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MICHAEL BIMMLER (instructed by **YOUNGS LAW**) for the **Claimant**
WILL HAYS (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

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Approved Judgment

HHJ KAREN WALDEN-SMITH:

Introduction

1. The Claimant, Thomas Green, is a category A Prisoner. He was born on 17 June 1949 (and so is currently aged 73 years old). The life sentence for murder was imposed upon him on 29 March 2000 and the minimum term of the sentence (the tariff) expired on 12 February 2013.

2. The documentation indicates that the Claimant has a very lengthy history of criminal activity, including for firearms offences and, in his interview with the psychologist instructed by the Claimant for the Parole Board hearing, he told her that the life sentence was for a murder committed on 30 December 1998 when he shot the victim using a 12 bore sawn-off shotgun, striking him first in the lower abdomen and then at close range to the back of his head, killing him immediately and then burying him in a shallow grave in his back garden.

3. The Claimant challenges the Secretary of State for Justice's decision to maintain the Category A conditions, made after the annual review process on 27 October 2021 ("the First Decision"). On 19 November 2021, the decision to maintain the Category A conditions was communicated to the representatives of the Claimant.

4. A further decision was made on 26 January 2022 ("the Second Decision") to refuse the Claimant's request for the First Decision to be re-taken in light of new information that had been supplied by the Claimant, namely a Parole Board recommendation of 7 January 2022 for the Claimant's progression to Category D/open conditions.

The Grounds

5. The Claimant challenges the Defendant's First Decision to maintain the Claimant's Category A status:

   5.1 Ground 1: The Claimant alleges the Defendant has failed to comply with published policy – namely the Prison Service Instruction (PSI) 08/2013 on the basis that, it is said, there were multiple factors weighing in favour of an oral hearing in the Category A review for the Claimant;

   5.2 Ground 2: Procedural unfairness at common law by reason of the lack of oral hearing.

6. The Claimant had also sought permission to challenge the Second Decision on the basis of an alleged failure to apply the properly published policy, namely PSI 08/2013 in relation to the conditions of retaking the Category A review decision upon the receipt of post-decision representations; and that there was irrational reasoning in the refusal of the Claimant's post decision representations.

7. All four grounds were initially refused permission on the papers by Richard Clayton KC sitting as a Deputy High Court Judge. At the renewed oral permission hearing, David Lock KC sitting as a Deputy High Court Judge, granted permission to bring

judicial review proceedings with respect to the first two grounds, that is with respect to the First Decision.

8. I am grateful to both Mr Michael Bimmler, Counsel for the Claimant, and Mr Will Hays, Counsel for the Defendant, for their comprehensive written and oral submissions. Counsel had agreed between them a list of issues under each ground prior to the substantive hearing.

9. The central issue is whether the procedure for taking the categorisation decision was fair. The contention on the part of the Claimant is that, in the circumstances of this matter, the Defendant was required to hold an oral hearing prior to making the categorisation decision and that he was acting unlawfully in failing to do so. The Defendant's contention is that he was able to, and did, make a fair decision without needing to hold an oral hearing.

10. Under ground 1, the issues raised are (i) whether the Defendant was in breach of PSI 08/2013 and, if so, whether that vitiated the decision to continue the Claimant's categorisation as Category A; (ii) whether there was a breach of PSI 08/2013 because the Claimant had been serving a long time, was post-tariff and had never had an oral hearing; there was an impasse; or that there was a significant dispute on the expert's materials; (iii) if there was a breach, is it the kind of breach which vitiates the categorisation decision.

11. Under Ground 2, the issue was simply put as whether there was a failure to hold a hearing in breach of the common law duty of procedural fairness.

Factual Background

12. The Category A security categorization is reviewed annually. The process of review involves the collation of a dossier of reports, including from the Category A prisoner, which is then placed before a multi-disciplinary Local Advisory Panel for a recommendation, which is then referred to the Defendant for a decision which is made by the Category A Team of His Majesty's Prison and Probation Service ("HMPPS") or the Executive Director of the Directorate of Security.

13. The dossier of reports for the annual review for the Claimant in 2021 contained, amongst other documents, a description of the Claimant's index offence and previous convictions; observations of his keyworker; a psychological assessment by Ms Jessica Childs, a trainee forensic psychologist for HMPPS; a risk assessment by the Claimant's Prison Offender Manager in the Offender Management Unit; and a security report. Additionally, the Claimant's representatives instructed a forensic psychologist, Dr Kerry Beckley, to assess the Claimant for the purpose of his parole review proceedings. The report was disclosed to the Defendant for the purpose of his Category A review.

14. The Category A team of HMPPS made its decision on the Claimant's review on 27 October 2021, which decision was promulgated on 19 November 2021. The determination was that the Claimant would pose a high level of risk if unlawfully at large. The decision letter recognises his long period in custody and tariff completion and the intervention work the Claimant had completed, and the period of time spent in a PIPE unit, but that *"resulting assessments have however shown you have*

achieved limited progress and risk reduction through this work. This has been underlined by poor behaviour, including a violent altercation leading to your deselection from the PIPE unit, and aggression towards staff." The Category A team recognised that the behaviour of the Claimant *"has been good in the reporting period … you have interacted well with others and posed staff no disciplinary problems"* but that regime compliance alone, or absence of offence paralleling behaviour, provided insufficient evidence of a significant reduction in risk if unlawfully at large and that there was a need for "*clear and convincing evidence you have significantly addressed the risk factors shown by your offending"* there being no further work completed on offending over some years. The decision letter records that the Claimant's more recent behaviour had been more stable, calmer and problem free, but that his own representations and the private psychology report did not provide evidence that he had achieved significant reduction in his risk of similar reoffending if unlawfully at large. Before his downgrading could be justified there must be clear and convincing evidence of a significant reduction in the risk.

15. With respect to the representations made on the Claimant's behalf, consideration was given to whether an oral hearing was warranted. The fact that the Claimant had been in custody for some years and had never had an oral hearing were not alone considered to be sufficient grounds for an oral hearing, and there was no evidence that the Claimant was at an impasse as a clear pathway had been identified to enable further progress and consideration for downgrading. *"It considered there are no other issues relevant to your review that can be resolved only through an oral hearing"* in accordance with the PSI 08/2013 criteria.

16. The decision was maintained in pre-action correspondence in December 2021. On 7 January 2022, an independent panel of the Parole Board for England and Wales recommended the Claimant's transfer to open, Category D, prison conditions in his parole review. The determination of the Parole Board was communicated to the Category A Team who refused to reconsider the categorisation determination, but did agree to complete an accelerated Category A review.

17. The decision was made by the Executive Director of the Directorate of Security on 14 December 2022 not to convene an oral hearing and to continue the Claimant's categorisation as Category A.

18. The Defendant withdrew his original refusal of the Parole Board's recommendation, but refused the transfer to open conditions again on 9 June 2022.

The Policy Framework

19. The decision about categorisation is made pursuant to the provisions of Rule 7 of the Prison Rules 1999, which requires prisoners to be *"classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record, 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 according to rule 3."*

20. The Defendant's policy guiding decisions on Category A categorisation is "The Review of Security Strategy – Category A/Restricted Status Prisoners" PSI 08/2013. The policy makes clear that:

> *"Before approving a confirmed Category A/Restricted Status prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced, such as evidence that shows the prisoner has significantly changed their attitudes towards their offending or has developed skill to help prevent similar offending."*

21. The policy sets out, under the heading "Oral Hearings" that the DDC High Security (or delegated authority) may grant an oral hearing of a Category A/Restricted Status prisoner's review which will allow the prisoner or his representatives the opportunity to submit their representations orally. Reference is made to the decision of the Supreme Court in *Osborn,* which I will refer to below, and the principles applicable to determining whether an oral hearing should be held in the Parole Board context. The policy sets out that the courts have consistently recognised that the categorisation (CART) decisions are significantly different to decisions made in the Parole Board context and that *"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 Osborn's case principles are likely to be relevant in many cases in the CART context."*

22. Included as overarching points in the consideration of whether an oral hearing is needed, is that each case must be considered on its own particular facts – all of which should be weighed in making the oral hearing decision; and that the oral hearing decision is itself approached in a balanced and appropriate way: *"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…"*

23. The Claimant submits that some of the indicators set out in the policy are present in this matter and, as a consequence, the failure to convene an oral hearing is: under Ground 1 of this challenge, a breach of the policy, the effect of which is to vitiate the categorisation decision; and under Ground 2 of the challenge, that the categorisation decision is unlawful because the absence of an oral hearing is procedurally unfair at common law.

24. The relevant indicators are said by the Claimant to be as follows:

24.1 Where there is a significant dispute on the expert materials. These 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;

24.2 Where the length of time involved in a case are significant and/or the prisoner is post-tariff. In the policy, the fact that a prisoner has been Category A for a significant time or is post tariff suggests that an oral hearing would be appropriate, but the longer someone has been Category A, the more care needs to be taken as to whether the categorisation continues to remain justified and *"it may also be that much more difficult to make a judgment 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 and where there is an impasse which has existed for some time;

24.3 Where the prisoner has never had an oral hearing before.

25. The Claimant has not had an oral hearing, he is 10 years post-tariff and he has been categorised as a Category A prisoner for the entire time post-conviction.

Oral Hearings

26. The issue in this matter is fundamentally whether it was procedurally fair for the Defendant to make the determination to maintain the Category A categorisation of the Claimant, without first holding an oral hearing. It is an uncontroversial statement that any determination of an administrative power is to be exercised in a manner which is fair in all the circumstances: *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531. This may require an oral hearing to be undertaken prior to the determination being made.

27. In *R(Osborn) v Parole Board* [2013] UKSC 61, the Supreme Court set out relevant circumstances in which an oral hearing may be necessary in the Parole Board context *"whenever fairness to the prisoner requires such a hearing."* While it was impossible to define exhaustively the circumstances in which an oral hearing would be necessary, *"but such circumstances will often include the following…:*

"(a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

(b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner can be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.

(c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

(d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews.

27. What is highlighted in these examples is that the Parole Board will be considering whether it would not be able to make a "fair decision" without an oral hearing or would be unable to make a "fair assessment". It is for the decision maker to determine whether an oral hearing is needed in order to make a decision which is procedurally fair.

28. The framework of the categorisation hearings (CART) and Parole Board hearings is fundamentally different as set out by Sales LJ, as he then was, in *R (Hassett) v Secretary of State for Justice* [2017] 1 WLR 4750 which was a challenge to the Category A review process contained in PSI 08/2013. Lord Bridge set out in *Lloyd v McMahon* [1987] AC 625:

> *"What the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates"*

29. As is set out in *Hassett*, while the CART/director and the Parole Board all make decisions which have significant effects upon prisoners and their prospects for release, there are material distinctions between the CART/director and the Parole Board in relation to each inquiry regarding the requirement of fairness identified by Lord Bridge:

29.1 The Parole Board has been established as a judicial body independent of the Secretary of State; the requirements of fairness to be observed are high; on the other hand the CART/director are officials of the Secretary of State carrying out management functions in relation to prisons – they have other management functions which mean that in striking a fair balance between the public interest and the individual interests of prisoners it is reasonable to limit to some degree how elaborate the procedures need to be as a matter of fairness for their decision-making;

29.2 It is also appropriate to take into account the extent to which a prisoner has had a fair opportunity to put his case at other stages of the information-gathering processes within the system as a whole: the decision making by the CART/director is the internal management end-point of an elaborate internal process of gathering information about and interviewing a prisoner, whereas the Parole Board has to make its own decision independent of the prison management system;

29.3 The question which the Parole Board seeks to answer is whether a prisoner can 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; the far starker question for CART/director is 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;

29.4 The decisions made by the Parole Board are judicial determinations of rights, those made by the CART/director are administrative decisions with particular focus on ensuring the administration of prisons is carried out properly and effectively in the public interest.

30. Sales LJ in *Hassett* concluded that: *"The guidance given by the Supreme Court in Osborn's case was clearly fashioned in a manner specific to the Parole Board context and factors given particular weight in that context either do not apply at all or with the same force in the context of security categorisation decisions by the CART/director, because of the differences in context … The cases in which an oral hearing is required will be comparatively rare."*

31. Significantly, in my judgment, Sales LJ said this: *"…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 … there remain material differences between the decision-making context for the Parole Board and that for the CART/director, and those differences mean that the procedural requirements are different in the two cases."*

32. In *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport and anr* [2022] 1 WLR 3748, the Divisional Court set out how in acting fairly and consistently with the public, if a policy has been set out then that policy should be followed unless there is good reason not to do so. However, failure to follow a policy will not necessarily vitiate the decision made.

33. PSI 08/2013 refers to *Osborn* and that the *"Osborn principles are likely to be relevant"*, albeit that the CART context is materially different. Guidance is framed in terms that the decision maker *"may"* grant an oral hearing, not that an oral hearing will be granted if certain factors exist, and the policy is expressly stated to be for the purpose of giving *"guidance"* and providing factors which *"would tend to favour an oral hearing being appropriate"*. The provision of an oral hearing is not mandated; nor is it advised or recommended.

<u>Failure to hold an oral hearing contrary to policy/failure to engage with the considerations (Ground 1)</u>

34. This ground cannot succeed. PSI 08/2013 does not mandate for an oral hearing either generally, or in specific circumstances. The policy is expressed in terms that provide some guidance to the decision maker as to whether some assistance will be given to the decision maker by holding an oral hearing. In this matter regard was had to the policy as reference is made to the criteria in PSI 08/2013 within the decision, and the conclusion was reached that the representations made in the report of the psychologist instructed on behalf of the Claimant did not represent *"a significant alternative assessment warranting an oral hearing."* That was a determination the decision maker was perfectly entitled to make within the framework of PSI 08/2013. The decision maker also referred to the Claimant having been in custody for *"some years and have never had an oral hearing"*. The decision maker was plainly cognizant of the fact that the Claimant was post tariff and had spent a lengthy period in custody. These facts were in the documents available to the decision-maker. The decision maker also had regard to whether there was an impasse and determined that there was *"no evidence you are in an impasse, as a clear pathway has been identified to enable your further progress and consideration for downgrading."*

35. The decision maker concluded that there were no other issues that could be resolved only through an oral hearing and that was a determination the decision maker was entitled to make. It was not in breach of the policy set out in PSI 08/2013.

36. Further, the decision being made as to whether there should be an oral hearing or not does not bear upon the substantive decision to be made, namely whether there is convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced. The issue is whether an oral hearing was required in order for the decision maker to reach a fair conclusion on the substantive decision. The policy merely seeks to guide the decision maker in order to comply with the common law. Whether the decision was procedurally unfair at common law is the substance of Ground 2, and that is the issue the court needs to determine.

The lack of an oral hearing made the decision procedurally unfair at common law (Ground 2)

37. This ground also cannot succeed. It is a matter for the court to determine whether an oral hearing was required in the circumstances of this matter and, following the reasoning of the Court of Appeal in *Hassett*, there was no requirement for an oral hearing in this case. The Court is the ultimate arbiter of what is fair, it is not a matter tested by whether the determination of the decision maker not to hold an oral hearing is one which no reasonable tribunal could have reached. In determining whether it was fair not to hold an oral hearing the Court *"will give great weight to the tribunal's own view of what is fair …But in the last resort the court is the arbiter of what is fair":* per Lloyd LJ in *R v Panel on Take-Overs and Mergers, ex p Guinness*[1990] 1 QB 146.

38. The court has to assess whether, given the legal and administrative context of the CART decision, it was necessary for procedural fairness for the decision maker to have an oral hearing in order to determine whether there is *"convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced."*

39. The matters the Claimant relies upon are that he had not previously had an oral hearing; that he was post tariff by a number of years; that he was at an impasse; and that there is a dispute between the experts. All of these points were explored thoroughly in the course of oral submissions.

40. The Claimant asserted that there was an impasse on the basis that his psychologist, reporting in the context of the Parole Board hearing, had thought that there was little merit in pursuing a further period in the PIPE unit. The decision maker did not find evidence of that impasse. Dr Beckley, the Claimant's psychologist (and Chair of the Faculty of Forensic Clinical Psychology at the British Psychological Society), had opined that a further period of time in the PIPE environment would *"do little to prepare Mr Green for the challenges of resettlement"*. That, of course, is not the issue for the decision maker in the CART context and was an opinion relevant for the Parole Board decision. The test for determining whether there should be re-categorization is concerned with whether the risk of re-offending if unlawfully at large has significantly reduced. There was not an impasse in these circumstances, where a pathway had been identified for the Claimant to improve.

41. The Claimant relied most heavily on there being a dispute between the experts. There was, in my judgment, no significant dispute. The Claimant's expert considered

that the Claimant posed a risk of violence which was "medium" and that there was the *"possibility of a return to his old lifestyle were he to be released."* Ms Childs, the trainee psychologist at HMP Whitemoor, considered the risk to be "moderate". In the context of the report being written for the Parole Board Dr Beckley referred to possible scenarios if the Claimant were to disengage from professional supports and that recall would be instigated early on. In the context of re-categorization, the decision maker is considering whether risk of re-offending had significantly reduced if unlawfully at large, which would mean he would be without professional support, and recall would not be an option.

42. The conclusion that age and health did not reduce the Claimant's risk was not a substantial dispute with Dr Beckley's conclusion that age and health were *"likely to be factors which mitigate the likelihood of this to some degree"* in the context of a Parole Board hearing. There is nothing in the differences between the experts which required an oral hearing in order for the decision-maker to make a fair decision.

43. By the time of the decision, the Claimant had been a Category A prisoner for 21 ½ years and was approximately 8 ½ years post tariff. He had never had an oral hearing. While these are each considerations which may suggest that an oral hearing is required, none of them, either individually or cumulatively, mean that a oral hearing is necessary in order for a fair decision to be reached.

44. The fact that the decision not to recategorize the Claimant was made without an oral hearing, did not make the decision making process unfair in all the circumstances of this matter. There was nothing that required clarification through an oral hearing.

Conclusion

45. For the reasons set out herein, neither Ground 1 nor Ground 2 are made out and this judicial review is refused.