The King on the application of John Murcott v Secretary of State for Justice

No Substantial Judicial Treatment

Court
King's Bench Division (Administrative Court)

Judgment Date
25 March 2025

Case No: AC 2023 LON 003302

High Court of Justice King's Bench Division

[2025] EWHC 706 (Admin), 2025 WL 00904668

Before: Mr Justice Dexter Dias

Date: 25/03/25

Hearing dates: 10 October 2024 and 6 February 2025

Further evidence: 10 February 2025

(Judgment circulated in draft: 25 February 2025

Counsel suggestions: 3 March 2025)

Representation

Philip Rule KC (instructed by Chivers Solicitors) for the Claimant.
Tom Leary (instructed by Government Legal Department) for the Defendant.

Judgment

Mr Justice Dexter Dias :

1. This is the judgment of the court.

2. To assist the parties and the public to follow the main lines of the court's reasoning, the text is divided into 13 sections as set out in the table of contents above. Two annexes are also appended (Annex A. Procedural history; Annex B. Materials). The table is hyperlinked to aid swift navigation.

I. Introduction

3. This is a judicial review claim.

4. The issues force an exploration of the tensions and difficulties in maintaining standards of procedural fairness in the face of the gravest and most shocking facts.

5. The claimant was originally called John Heeley but changed his name to John Murcott. I intend to use the name Murcott for him. He is presently detained in HMP Wakefield as a Category A prisoner. He challenges two decisions of the Secretary of State for Justice (the " **impugned decisions** "). The first is to maintain his Category A status (19 July 2023, impugned decision 1). The second is a refusal to hold an oral hearing to determine categorisation (6 September 2023, impugned decision 2). John Murcott is imprisoned because he raped and then murdered a child.

6. On 18 July 1989 a nine-year-old girl called Annette Wade came home from school at 15:15 hours and told her parents that she wanted to meet friends at a local park. She cycled away from her house at 15:55 hours to head for the playing fields. At some point shortly after this, she was intercepted by the claimant. It is unclear exactly when, but at 17:15 hours, two schoolboys saw smoke rising from a hedgerow. A man, who was John Murcott, disappeared through the hedge near the Woodhouse Farm, Carleton, located between Birmingham and Worcester. The boys alerted the farmer Robert Aspden, who tried to extinguish the fire. In doing so, he realised there was a child's bicycle and a child's body alight. Annette Wade had been stabbed three times in the neck and once to the left side of her chest. Her body had been set alight using lighter fluid. Further medical examination revealed lacerations to the child's vagina consistent with forcible penile penetration. John Murcott, having committed other offences that will be detailed later, fled the country for the south of France and was arrested on his return. He went on trial at Liverpool Crown Court, where he denied that he had committed the offences, claiming to have been in France. It was untrue. Amongst other things, forensic evidence tied him to the crimes. On 15 May 1990, a jury unanimously convicted him of the rape and murder of Annette Wade. Kennedy J sentenced him to life imprisonment without any minimum recommendation, as was the prevailing approach at the time.

7. Permission to apply for judicial review was granted by Sweeting J on 17 May 2024 on a renewal application following a refusal on the papers by Mr Christopher Ockleton sitting as a Deputy High Court Judge on 16 February 2024. The case came on for trial before me in October 2024, with a further hearing date on 6 February 2025.

8. The claimant is represented by Philip Rule KC. The defendant is the Secretary of State for Justice, represented by Tom Leary of counsel. The court is grateful to counsel for their forthright and informed submissions.

9. I emphasise that the purpose of these proceedings is not to judge the adequacy of the claimant's punishment, but to assess the lawfulness of the state's decision-making during his progression through the prison system towards a potential release back into the community in the context of any continuing risk he may pose to the public generally and children in particular.

II. Brief chronology

10. There are several vital dates and the timeline can be confusing. Therefore, since frequent reference to these dates will be necessary, I set them out here to assist.

• 9 May 1959. Date of birth.

• 18 July 1989. Rape and murder offences.

• May 1990. Convicted at Liverpool Crown Court; sentenced to life imprisonment, then aged 31. Minimum term of 23 years later imposed.

• 10 August 1999. Category A review. No oral hearing. Denying guilt. No change in insight or attitudes.

• 16 September 1999. Detained under section 47 of the Mental Health Act. Transferred to Ashworth (secure) Hospital.

• 2003-2016. Hospital courses including CBT and Sexual Offender Treatment programme and maintenance group.

• 28 July 2012. Tariff expires.

• April 2013. Approved by (Ministry of Justice) Secretary of State for escorted community leave.

• November 2013. Transferred to medium security hospital setting (The Spinney Hospital).

• 2015. Escorted leave begins. Ultimately 100 community trips undertaken.

• 2018. Recommended for low security hospital setting by hospital treating team.

• 14 May 2021. Dr Grimes's psychiatric report.

• 22 July 2021. First-tier Tribunal (Mental Health) ("FTT") recommends transfer to low security hospital setting.

• 26 May 2022. Transferred back to prison estate (HMP Wakefield). Now aged 63.

• 19 July 2023. Categorisation review decision (sent out 17 August); Category A confirmed by Local Advisory Panel ("LAP"): Impugned decision 1.

• 21 August 2023. Claimant's solicitors request oral hearing.

• 6 September 2023. Defendant's refusal of hold oral hearing: Impugned decision 2.

• 12 October 2023. Parole Board hearing. The Panel expresses "surprise" being detained as Category A prisoner.

III. Impugned decisions

11. As noted, there are two closely connected impugned decisions. First, the Category A review decision made 19 July 2023 (not sent out until 17 August 2023; second, the refusal of an oral hearing made on 6 September 2023.

12. The Category A review decision, insofar as it is material, states:

> "The Director considered Mr Murcott's offending shows he would pose a high level of risk if unlawfully at large. He is satisfied that before Mr Murcott's downgrading can be justified there must be clear and convincing evidence of a significant reduction in this risk.
>
> The Director recognised that Mr Murcott has spent many years in prison and hospital since his conviction. He recognised also that Mr Murcott has engaged in relevant treatment. He noted the current reports are however clear that, despite this length of time and treatment, Mr Murcott has achieved very limited insight or progress addressing his offending, and still hold attitudes linked to his offending. Mr Murcott had also displayed offence-paralleling behaviours in hospital. He noted the reports show clearly that Mr Murcott has not significantly reduced the risk previously identified. and which resulted in his placement in Category A until his move to hospital in 1999.
>
> The Director acknowledged that Mr Murcott has recently complied with the regime. But he is satisfied]· this provides insufficient evidence Mr Murcott has significantly reduced his risk if unlawfully at large. He considered there is in the meantime no other evidence that Mr Murcott's escape could be made impossible in less secure conditions justifying his downgrading, such as significantly impaired health or mobility. He noted further assessments will now take place to determine a suitable pathway for Mr Murcott.
>
> The Director carefully noted Mr Murcott's representations. He confirmed that PSI 08/2013 (the guiding instruction for reviews of Category A prisoners) states that all prisoners previously held in Category A must return to Category A when received back into prison custody from psychiatric hospital. The PSI states that a full review of their suitability for continued placement in Category A must then take place. He confirmed that this review has been completed entirely in accordance with PSI 08/2013. This review has assessed the same issues as in all reviews of Category A prisoners: i.e. the risk posed by the prisoner should the prisoner be unlawfully at large (and not if in lower security or on supervised release or parole), based on the nature and circumstances of the offending; and the progress the prisoner may have achieved in reducing this risk. In completing this review the Director is responsible only for determining Mr Murcott's suitability for Category A, and not his suitability for prison release.
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> The Director considered the representations claiming that Mr Murcott should not be in prison, on such grounds as his mental health might deteriorate, or he would be in danger from others, have no relevance to this review. He noted in any event there is no evidence the predicted extreme effects cited in the representations have taken place since Mr Murcott's return to prison. He considered that decisions made by hospital authorities on Mr Murcott's suitability for outside visits while in their care could not determine this review. He considered the view of the Parole Board, which is responsible for deciding suitability for open conditions or parole release, and not closed prison categorisation, also could not determine this review. He considered there is no basis to the. suggestions in the representations that Mr Murcott's risk if unlawfully at large must inevitably have

> significantly reduced as a result of his length of time in prison and hospital, or that his return to Category A is invalid or unlawful.
>
> The Director considered evidence of a significant reduction in Mr Murcott's risk of similar reoffending if unlawfully at large is not yet shown. He is therefore satisfied Mr Murcott's downgrading cannot be justified and he must stay in Category A at this time."

13. The oral hearing refusal decision states, as relevant:

> "The Category A Team considers there are also no grounds justifying an oral hearing for this review, in accordance with the criteria in PSI 08/2013. It considers the available information was readily understandable and suitable for the submission of effective representations. It considers there are no grounds for an oral hearing to resolve or understand the available information. It is satisfied also that an oral hearing is not appropriate or necessary simply to enable further representations to be made on existing information, or as an appeal against a decision which you do not agree with."

IV. Grounds

14. Permission has been granted on five grounds. They are:

> **Ground 1** . Adherence and regard to / correct application of PSI 08/2013 (" **PSI** ") - Failure to hold an oral hearing
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> **Ground 2** . Common law fairness - Failure to hold an oral hearing
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> **Ground 3** . Failure to properly consider relevant material
>
> **Ground 4** . Wednesbury unreasonable
>
> **Ground 5** . Convention protections in decision-making and treatment (articles 8 and 14, European Convention on Human Rights ("ECHR")

15. The parties argued Ground 2 out of turn, taking it first, then followed the sequence after that. I adopt the same course.

V. Legal framework

16. Specific aspects of the applicable law are addressed as the grounds are discussed. However, the overarching legal framework is now set out to provide a general context.

17. Section 12 of the Prison Act 1952 empowers the Secretary of State to allocate prisoners to prison confinement. Section 47(1) provides that rules may be made for the classification of persons detained in prison. Rule 7 of the Prison Rules 1999 provides for prisoners to be classified in accordance with any directions of the Secretary of State.

18. The review of high security prisoners is governed by the policy set out in the PSI. This defines Category A prisoners as those "whose escape would be highly dangerous to the public, or to the police or to the security of the State, and for whom the aim must be to make escape impossible" (para. 2.1).

19. Review decisions are not made at prison level; they are made centrally by the Deputy Director of Custody High Security (" **DDC** ") on the advice of the Category A Review Team (" **CART** ") and after a recommendation by the LAP (PSI at para. 4.1). These arrangements effectively constitute and stand in the place of the defendant.

20. It is recognised by the court that the protection of article 8 of the ECHR is capable of being engaged in a categorisation decision of this type given the very stringent conditions imposed upon the individual. For example, a review of escape risk classification *within* category A status is a decision which engages Article 8 ECHR given the restrictions that attach to those placed in category A conditions in that classification (*R (Ali) v Director of High Security [2010] 2 All ER 82 at para 28* ; *R (Allen) v SSJ [2008] EWHC 3298 (Admin)* ; *R (Abdulla) and others v SSJ [2011] EWHC 3212 (Admin)* , Divisional Court).

21. A general principle of categorisation is stated at para 1.2 of the *Security Categorisation Policy Framework* , namely:

> "Security Categorisation is a risk management process, the purpose of which is to ensure that those sentenced to custody are assigned the lowest security category appropriate to managing their risk (…)."

22. PSI 08/2013 (revised on 10 June 2016) entitled ' *The Review of Security Category — Category A / Restricted Status Prisoners* ' aims to ensure that "security measures are applied lawfully, safely, fairly, proportionately and decently" [para 1.3].

23. For the decision to re-categorise from Category A status, the PSI states:

> "Before approving a confirmed Category A / Restricted Status prisoner's downgrading the DDC High Security (or delegated authority) must have convincing evidence that the prisoner's risk of re-offending if unlawfully at large has significantly reduced, such as evidence that shows the prisoner has significantly changed their attitudes towards their offending or has developed skills to help prevent similar offending." [4.2]

24. The PSI further provides that physical/mental ailments can also be relevant:

> "In deciding whether Category A is necessary, consideration may also need to be given to whether the stated aim of making escape impossible can be achieved for a particular prisoner in lower conditions of security, and that prisoner categorised accordingly. This will arise in a limited number of cases since escape potential will not normally affect the consideration of the appropriateness of Category A, because the definition is concerned with the prisoner's dangerousness if he did escape, not how likely he is to escape, and in any event it is not possible to foresee all the circumstances in which an escape may occur." [2.2] [11/p202]

(A previous policy that failed to make allowance for those whose escape risk was reduced by disability was held unlawful and quashed in those respects in *R (Pate) v Home Secretary [2002] EWHC 1018 (Admin)* . The unlikelihood of escape is relevant.)

25. Where a Category A prisoner was previously moved to hospital detention and is subsequently returned to the prison estate, the PSI provides that they *must* re-enter at Category A status:

> "All Category A / Restricted Status prisoners who have returned to prison custody following release to a psychiatric hospital or a prison outside England and Wales must be returned as a Category A / Restricted Status prisoner…" [3.10]

26. Such prisoners then have their Category A status reviewed. Pursuant to PSI para. 3.34, such reviews "will be completed using the annual review report forms at Annex B … Available psychiatric hospital assessments may also be used". The PSI further provides at para. 3.35 that the first formal review will be conducted "with an advisory panel including police advisers, a psychologist and staff from the Category A Team … The prisoner will be able to submit representations to this review …".

27. The review process it is expressed "will be completed using the annual review report forms at Annex B. Available psychiatric hospital assessments may also be used" [3.34]. An adverse decision can be retaken where there is new information presented that could materially affect the decision: [4.36].

28. A local advisory panel considers categorisation based on progress reports from the prison and submits a recommendation about security categorisation to the Category A Team for consideration: see PSI at para. 4.1.

29. The DDC "may grant an oral hearing of a Category A … prisoner's annual review", but "in practical terms … oral hearings in the CART context have only very rarely been held": see PSI at para. 4.6. There is guidance for the defendant's exercise of the decision-making under and in accordance with his policy. The relevant terms of the PSI can be found at paras 4.6 and 4.7:

"a. Following common law guidance and the policy "there will be more decisions to hold oral hearings than has been the position in the past". In the past they had been "very rarely held" [4.6]. That must change to achieve common law fairness in accordance with the courts' guidance.

b. Inevitably, the guidance involves identifying factors of importance, and in particular factors that would tend towards deciding to have an oral hearing [4.6].

c. 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 [4.6].

d. An overarching point is "each case must be considered on its own particular facts — all of which should be weighed in making the oral hearing decision" [4.6]

e. Further, "it is important that the oral hearing decision is approached in a balanced and appropriate way… 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" [4.6].

f. Additionally, "there is scope for a flexible approach as to the issues on which an oral hearing might be appropriate" [4.6].

g. Factors tending in favour include:

i. Important facts in dispute that go to risk. Evaluation of the credibility of a significant explanation or mitigation may be assisted by a hearing at which the prisoner can give his account [4.7(a)]

ii. Significant dispute on the expert materials. This is apt to include a situation "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". Likewise if a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds [4.7(b)]

iii. "Where the lengths of time involved in a case are significant and/or the prisoner is post-tariff. 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". [4.7(c)]

iv. "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". [4.7(c)]

v. "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". [4.7(c)]
>
> vi. "Where the prisoner has never had an oral hearing before; or has not had one for a prolonged period" [4.7(d)]."

30. That oral hearings will be comparatively rare "is not in itself a test to be applied" (*R (Harrison) v Secretary of State for Justice [2019] EWHC 3214 (Admin) at para 38*). Further, as set out in the category A categorisation case of *Mackay* (at para 28):

> "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."

31. Examples of circumstances that did require an oral hearing to achieve fairness (and/or the guidance factors in the PSI) include:

> • *R (Williams) v Secretary of State for Home Department [2002] 1 WLR 2264* , CA (where difference between Parole Board views and those of the Defendant).
>
> • *R (H) v Secretary of State for Justice [2008] EWHC 2590 (Admin)* (difference of views between local advisory panel and Category A Review Team. Cranston J found an oral hearing to be required, noting the consequences of the categorisation decision informing standard of procedural fairness whereby the person is able to put his case at an oral hearing).
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> • *R (Mackay) v Secretary of State for Justice [2011] EWCA Civ 522* (appeal to the Supreme Court was allowed by consent so that the result of the proceedings in the end was that an oral hearing was required on the facts there).
>
> • *R (Rose) v Secretary of State for Justice [2017] EWHC 1826 (Admin) (at para 62)* .
>
> • *R (Hopkins) v SSJ [2019] EWHC 2151 (Admin) at paras 50-51* (difference between Parole Board and psychology assessments and Defendant's assessment required oral hearing).
>
> • *R (Harrison) v Secretary of State for Justice [2019] EWHC 3214 (Admin) (at para 74)* .
>
> • *R (Seton) v Secretary of State for Justice [2020] EWHC 1161 (Admin) (at para 53)* .
>
> • *R (Conroy Smith) v SSJ [2020] EWHC 2712 (Admin) (at para 34)* .
>
> • *R (Farmer) v SSJ [2021] EWHC 3487 (Admin) (at para 24, and paras 27-29)* .

• *R (Zaman) v SSJ [2022] EWHC 188 (Admin) (at paras 46-61)* .

32. I have reviewed all these cases, an analysis that underscores the highly fact-contingent nature of the decisions. Whether in the individual case a hearing is required to achieve fairness is not a review of the decision taken by the defendant. It is thus a question of objective fairness, and not a *Wednesbury* reasonableness review. Sales LJ stated in *Hassett v Secretary of State for Justice [2017] 1 WLR 4750 at para 61* :

> "…However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/ director, if only in comparatively rare cases."

A Category A prisoner is entitled to a high degree of procedural fairness (*Mackay* at para 25; and see para 28). *Mackay* remains good law: *Hassett* at para 56.

33. In *R (Williams) v Secretary of State for Home Department [2002] 1 WLR 2264* , CA, Lord Justice Judge (as he then was) said:

> "… An oral hearing would have enabled the reasons for the contradictory views to be examined on behalf of the appellant and for the contents of any adverse reports to be directly addressed. In the final analysis the review team would, of course, have reached its own decision, but an oral hearing, and proper disclosure, would have ensured that the decision was the result of a better-informed process, and the conclusions, and the reasons for them, would then have been received with correspondingly greater confidence"

34. In *R (Shah) v Secretary of State for Justice [2024] EWHC 682 (Admin) at para 73* , Mrs Justice Hill DBE held that "the process is 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". She noted at para 51 that relevant matters to take into account, in determining whether an oral hearing was required, included that "none of the professionals who contributed reports to the dossier made a positive recommendation that the Claimant's categorisation should be downgraded" and "the LAP gave an unequivocal recommendation that he should remain Category A at this time".

35. The PSI explains at para. 4.2 that before downgrading a prisoner from Category A, the decision maker "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 reoffending."

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

37. This part of the policy recognises that the Defendant is required to consider whether there are any exceptional circumstances in a highly dangerous prisoner's case that would allow her to achieve the aim of making escape impossible in conditions of lower security (e.g. where a prisoner's physical disability makes it impossible for him to escape in any event): see *G v Secretary of State for the Home Department [2006] EWCA Civ 919 at para 13-15 and para 25* .

38. Prisoner categorisation is an area in which the DDC and the CART has significant expertise and experience. "In reaching his decisions on categorisation the Secretary of State has the benefit of the expertise of his department" (*R (Banfield) v Secretary of State for Justice [2007] EWHC 2605 (Admin) at para 29*).

39. In relation to the substance of recategorisation decisions, Fordham J summarised the key legal principles in *R (Steele) v Secretary of State for Justice [2021] EWHC 1768 (Admin) at paras 1-5* , including that there needs to be "cogent evidence of the diminution of risk" before a prisoner can have his categorisation downgraded.

VI. Ground 2: common law fairness

40. As indicated, I take this ground out of order since this was the way the parties wished to submit. It made good sense.

Rival arguments

41. **Claimant** . To conclude the claimant's case without any kind of oral hearing "no matter how targeted" does not meet the requirements of procedural fairness at common law and the failure to convene an oral hearing to fairly determine the correct categorisation is in all the circumstances unfair. The claimant relies upon the circumstances of his case and submits that in those specific circumstances considerations of fairness require an oral hearing. There is an important factual dispute in risk assessment as evident from the judicial assessments of the First Tier Tribunal and the Parole Board contrasted with those of the LAP and the defendant.

42. **Defendant** . As a matter of principle, there is no separate common law requirement for an oral hearing. The common law requirements of procedural fairness are reflected in the PSI, which the defendant properly applied. Common law principles of procedural fairness identified in the Parole Board context do not apply with the same force to Category A review decisions. Further, as a matter of instant fact, there were no important facts in dispute, a factor relevant for the policy argument and common law fairness. There was no significant dispute on the expert materials. The length of the claimant's detention in different settings, including being post-tariff, and not having a previous oral hearing, does not justify an oral hearing. It would add nothing of value.

Discussion: common law fairness

43. I divide my discussion of common law fairness into two chief parts (A) general principles and (B) the application of those precepts to the instant case. I begin with general principle and parse my consideration of the demands of fairness into 14 points.

A. General principles

44. **First** , there must be full recognition that the defendant's categorisation decision is ultimately an administrative one. It is important not to judicialise it (*Hassett* , para 60). The type of process one might expect in a court is not necessarily or habitually required for a fair administrative decision (*R v Secretary of State for Home Department ex p Venables [1998] AC 407* , 503C—D). Undoubtedly there are "material distinctions" between the CART/Director's (the defendant's) decision and that of the Parole Board, in that the Parole Board operates as an independent arms-length statutory body exercising judicial functions with a judge chairing the Panel - a materially different type of decision-making.

45. **Second** , although "administrative" in character, categorisation decisions arise through powers conferred by Parliament. The route is section 12 of the Prison Act 1952 which empowers the Secretary of State to allocate prisoners to prison confinement; section 47(1) thereof which provides for rules to be made for the classification of persons detained in prison; Rule 7 of the Prison Rules 1999 which provides for prisoners to be classified in accordance with any directions of the Secretary of State; and the PSI which sets out the defendant's policy for the review of high security prisoners.

46. **Third** , Parliamentary-derived administrative decisions must nevertheless be fairly made as clarified by Lord Bridge in *Lloyd v McMahon [1987] AC 625, 702-703 ("Lloyd v McMahon")* :

> "…when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

47. The idea finds expression in the often-cited speech of Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531 ("Doody")* at 560:

> "(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

48. **Fourth** , while the defendant here accepts that the PSI it is not presented as or purports to be an authoritative or exhaustive exegesis of what fairness requires at common law, it is "not liable to mislead officials into applying a lower standard of procedural protection than the law would require" (*Hassett* , para 66).

49. **Fifth** , wherever necessary the common law will and must supplement any legislative or policy requirements to ensure procedural fairness, a principle of considerable antiquity ("the justice of the common law will supply the omission of the legislature": *Cooper v Wandsworth Board of Works (1863) 143 ER 414, 420* per Byles J (" *Cooper v Wandsworth")).*

50. **Sixth** , the assessment of common law fairness is through a correctness test as stated by Hickinbottom LJ in *R (Help Refugees Ltd) v Secretary of State for the Home Department [2018] EWCA Civ 2098 at para 122* :

> "When procedural fairness is in question, the court's function is … to consider objectively whether there has been procedural unfairness."

51. This is a "hard-edged question" (*R v Monopolies & Mergers Commission, ex parte South Yorkshire Transport Ltd [1993] 1 WLR 23* , per Lord Mustill at 32D-F; and see *Osborn* at para 65). It is an objective assessment for the court whether the process adopted was overall procedurally fair. Such fairness is not judged on *Wednesbury* grounds ("beyond the range of responses open to a reasonable decision-maker" as expressed by Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith [1996] QB 517, 554*) and thus is materially and conceptually distinct from a review of the reasonableness of the process adopted by the defendant. The court's determination does not require "some fault on the part of the public authority concerned" (*R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812 at paras 75, 81*). The court's approach was explained by the Court of Appeal in *R (Clarke) v Secretary of State for Justice [2024] EWCA Civ 861 ("Clarke")* at para 111, and whether the defendant acted "unfairly" in not holding an oral hearing

> "depends on the evaluative assessments by the court about whether relevant factors are present in a particular case, and, if so, about the weight which the court should give to the factor or factors which is or are present. It is clear that no one factor must be given decisive weight."

52. **Seventh** , as is evident by the approach articulated in *Clarke* , this court must determine what factors are relevant and the weight the court should give them, and thus the requirements of fairness in any case are highly fact-specific (*Doody, ibid.* , proposition 3). There is, and can be, no universally applicable rule or standard (*Osborn* , para 80). This point is emphasised by Lord Bridge in *Lloyd v McMahon at 702* , where the content of the duty will vary with:

> "the character of the decision making body, the kind of decision it has to make and the statutory or other context in which it operates."

53. **Eighth** , the defendant's policy cannot comprehensively cover — or be reasonably expected to cover - the extensively wide variety of circumstances that may arise. It is only and avowedly limited to a formalisation of "guidance" that identifies "factors of importance" (PSI, para 4.6). As the PSI's executive summary states (para 1.1), the policy "sets out guidelines for the procedures for reviews of Category A / Restricted Status prisoners' security category".

54. **Nineth** , although this published policy should be followed, as a matter of good administration, it may be departed from with good reason (*R (Lumba & Mighty) v Secretary of State for the Home Department [2011] UKSC 12, para 26*). The common law, of course, has a far wider and more flexible remit and must be broad enough to meet the demands of all combinations of facts and will determine objectively what fairness requires as explained in *Cooper v Wandsworth.*

55. **Tenth** , the key question is reducible to whether the decision not to hold an oral hearing was "wrong" (*Mackay* , para 28).

56. **Eleventh** , as widely recognised by authority, Category A status is a significant impediment to release and progress towards it (*R v SSHD, ex parte Duggan [1994] 3 All ER 277* , 280H-J); and the "prospects of release on parole are nil" and therefore accordingly decisions about classification "call for a high degree of procedural fairness" (*Mackay,* para 25).

57. **Twelfth** , as the PSI makes plain, an oral hearing is not a binary event, with a full-blown "trial-like" hearing or nothing. It is possible to conduct a "short oral hearing targeted specifically at the issue of any change in risk assessment" (*Sefton* , para 52) or as the PSI puts it at para 4.7b: "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."

58. **Thirteenth** , Parole Board views about risk levels may be relevant. The PSI states at para 4.7(b):

> "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".

59. **Fourteenth** , while recognising the difference between Parole Board decisions and administrative decisions on security categorisation, a common consideration across both domains (although the weight is likely to differ) is the need for the affected person to avoid a sense of injustice. I find three grounds of support for this proposition. First, Lord Reed in *Osborn* itself at para 68, speaking of "important values" that are engaged in such decision-making:

> "The first was described by Lord Hoffmann (ibid) [*Secretary of State for the Home Department v AF (No* 3 *) [2010] 2 AC 269, para 72*] as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions."

60. I note that Lord Reed includes administrative decisions, which must include Category A decisions and that Fordham J in *R (Chiswick) v Secretary of State for the Home Department & Parole Board of England and Wales [2024] EWHC 1223 (Admin) at para 19* reiterated the sense of injustice point:

> "One virtue of asking whether there has been procedural unfairness is that it avoids any speculation about what the outcome would have been. When the common law identifies procedural unfairness, it is of vitiating materiality unless the outcome would inevitably have been the same. Another virtue is that procedural fairness recognises the values of: (i) the liability to result in better outcomes by ensuring that the decision-maker receives all relevant information and that it is properly tested; (ii) the avoidance of a sense of injustice that the person who is the subject of the decision will otherwise feel; and (iii) the rule of law (Osborn]§]§67-71)."

61. The second support can be found in the speech of Sales LJ in *Hassett* at para 61:

> "However, it deserves emphasis that fairness will sometimes require an oral hearing by the CART/ Director, if only in comparatively rare cases."

62. The third support comes from the terms of PSI itself state at para 4.6:

> "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** ". (emphasis provided)

63. Thus, the subjective position of the affected person is not irrelevant. However, the significance of any sense of ensuing grievance is whether it is objectively justified and not gratuitous. This is a matter I must explore.

B. Application to instant facts

64. I now apply these principles to the facts of the claimant's case and once more separate out the salient points in my analysis for the sake of clarity. There are 10 of them. It is vital, in accordance with *Clarke* , for this court to identify the factors relevant to the oral hearing decision, and I do so in the necessary detail.

65. **First** , the question, as I discern it, is whether the specific facts of this case require that the process leading to the administrative decision about the claimant's security categorisation should have included an oral hearing. Mr Leary realistically acknowledged that it is possible to import common law principles of fairness without overly judicialising the process.

66. **Second** , following the Court of Appeal in *Clarke* , I identify the factors in the claimant's case relevant to the oral hearing decision.

(1) At the point of making the impugned decision, the claimant has been detained in prison and restricted hospital settings for more than 33 years (since 1989) without ever having had an oral hearing to examine his security categorisation (the 1999 Category A review not being an oral hearing).
(2) He was in prison until 1999, when due to his mental health deterioration he was transferred to a high security hospital setting at Ashworth, but in November 2013 was transferred to a medium security hospital setting at The Spinney.
(3) At the point of his 1999 review, the claimant was denying his guilt. At the time of the impugned decision, he appears to have accepted it — a material and potentially significant change, and at times he has expressed shame and remorse.
(4) In 2018, his treating practitioners at The Spinney recommended that he be transferred to a low security hospital unit.
(5) The FTT considered his case carefully in 2021, where following an oral hearing and the receipt of detailed evidence, it suggested that he be transferred to low security hospital detention.
(6) In May 2022, the defendant made the decision that his mental health had stabilised sufficiently for him to be transferred to prison.
(7) Due to the mandated default categorisation under governing policy, he had to be categorised as Category A on return to the prison estate and therefore the intensification of his security classification was not as a result of a decision following a specific risk assessment.
(8) Therefore, at the time of the impugned decision, the claimant:

> o Had been detained in both prison and hospital settings for over 33 years (since arrest in 1989);
> o Had been post-tariff for almost 11 years (since 28 July 2012);
> o Had been in medium security settings for almost 10 years (since November 2013);
> o Had completed approximately 100 escorted community visits since 2015, endorsed by his Responsible Clinician and approved by the Ministry of Justice;
> o Had first been recommended for low security hospital detention by his treating practitioners in the medium security setting in 2018;
> o Had been recommended by the FTT in 2021 for a low security hospital setting;
> o Had never had an oral hearing to determine his security categorisation while in the prison estate;

o Was subject of a Parole Board observation in May 2023 that it was "surprising" that he was being detained as a Category A prisoner.

67. **Third** , on that last factor, the first expression of surprise by the Parole Board that predated the impugned decision is capable of being relevant. It is not as powerful a point at that stage as it subsequently became because it was not contained in a decision following a full hearing. Nevertheless, duly adjusted due to its stage in the Parole Board proceedings, it is of relevance. It is noteworthy that in its final decision following the first impugned decision, the Parole Board repeated its expression of surprise, while recognising the different (constitutionally mandated) roles of the LAP and the defendant as against its own distinct statutory remit.

68. **Fourth** , there is no specific requirement for there to be "exceptional" circumstances to justify an oral hearing (*Mackay* , para 28). However, I find that there are highly distinctive and probably rare circumstances in the claimant's case. Both counsel diligently researched the archives for previous cases in which the court considered whether an oral hearing was required after a very extended stay in a secure hospital setting. They found only one: *R (Fox) v Secretary of State Justice [2012] EWHC 2411 (Admin) ("Fox")* , a decision of HHJ Stewart QC (as he then was) sitting as a Judge of the High Court. However, the decision of the judge in that case turned on expert evidence and the point was not determined. *Fox* is materially distinguishable in any event as the claimant there had not been recommended for a low security setting and had not been entrusted with escorted leave in the community.

69. **Fifth** , one of the factors under the PSI is the length of time in Category A ("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", PSI, para 4.7). The paradox of the claimant's case is that in fact he had spent a decade in a medium security setting, albeit a hospital one — I do not simply read across from one detention setting to the other. He was categorised as Category A on his return to prison because that is the mandate of the governing policy. However, I judge that there must be a greater imperative to review Category A status if the individual has been accommodated for many years in a lower security setting, albeit in a different kind of detention. The rationale for the defaulting back to Category A categorisation make evident sense and has not been challenged in this application, nor plausibly could be. But to my mind that is not the end of the matter. It is necessary to think carefully about the implications of that policy default for a person like the claimant who has been subject to an extended period of lower security, particularly when he has been on numerous escorted visits in the community.

70. **Sixth** , if the question is posed whether it is reasonable for the default setting that is contrary to the claimant's experience for the previous decade to be confirmed without granting the person affected at least an opportunity to have an oral hearing, it strikes me as obviously unfair by any objective measure. It further seems irrational for there to be the initial imposition (unobjectionable) but then confirmation of a higher degree of security categorisation without the claimant having done anything, except having had his overall presentation *improve* to the extent that detention in a hospital is no longer deemed necessary, resulting in his return to prison. I reiterate that this is not a reasonableness review, but the evident irrationality of what has happened seems to me to be obviously relevant.

71. **Seventh** , given his years of being detained in a medium security setting and the recommendation of the FTT for lower security, the claimant justifiably feels a clear sense of injustice that his security classification has been confirmed as upgraded to the highest level after his overall presentational state has improved.

72. **Eighth** , this sense of grievance is reinforced by the fact that during his detention in the medium security setting he was permitted around 100 temporary community releases. The significance of this is that such exits from the prison, albeit escorted, must be approved by the Ministry of Justice. Further, the policy provided by the parties to the court is to be found in the defendant's Release on Temporary Licence (ROTL) Policy Framework (Re-issue Date: 3 October 2022; Implementation Date: 16th May 2019). I proceed as invited by counsel to assume that earlier policy documents were in substantially similar terms. Of particular relevance is section 5:

"5. Constraints Exclusions from ROTL and prisoner apprenticeships and other restrictions

5.1. The following must not be considered for any form of temporary release:

> # Category A offenders (adult males) or restricted status offenders (adult females/young offenders)"

73. Therefore, if the claimant were categorised as Category A, he would automatically be ineligible for such temporary releases and they took place on scores of occasions.

74. **Ninth** , and overall, this combination of factors seems to me to engage the comments of Lord Reed in *Osborn* and Lord Hoffmann in *AF* . I am clear that the reasonable informed observer (not that this is the precise test, rather than a useful sense- and cross-check as it introduces the element of objectivity) would find it unfair and unreasonable that despite the progress the claimant has made in medium security settings that his security categorisation has been confirmed at a significantly higher level without granting him an oral hearing to make his case and if necessary ask questions. This conclusion is supported by one of the "desired outcomes" of the defendant's approach to security categorisation being that categorisation decisions and "appropriate security measures" are "applied lawfully, safely, fairly, proportionately and decently" (PSI, para 1.3). Thus fairness is built into the structure of the defendant's approach, and avoidance of a genuine and justified sense of injustice must be implicit in that. Indeed, the policy recognises at PSI para 4.6:

> "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."

75. This must have application as a matter of common law fairness also.

76. **Tenth** , the oral hearing need not be a full-blown trial of the issue. It can be strictly focused. As Cranston J stated in *R (H) v Secretary of State for Justice [2008] EWHC 2590 (Admin) at para 75* , "An oral hearing does not necessarily imply the adversarial process." Thus there can be tight case management. I recognise that holding an oral hearing would involve greater expenditure and the use of limited resources, but I am clear that it is justified in this highly distinctive case and it would be unfair not to convene it. Further, one of the principles of the policy is that hearings should not be refused purely on grounds of cost (PSI, para 4.6).

C. Conclusion: Ground 2

77. The defendant makes several criticisms of the procedural conduct of the claimant, or more accurately of those who represented him. It is submitted that they could have appended the Parole Board minutes to their submissions to the LAP. They did not. Similarly, they could have asked the defendant to obtain them. Once more, they did not. Similar criticisms are made about Dr Grimes's report and the hospital records. However, as Mr Rule submits, the question for the court ultimately is one of fairness. Fairness as a hard-edged concept must be objectively determined by the court. Either the hearing-less process adopted by the defendant was fair or not. That fairness is at the heart of the defendant's policy is beyond argument as para 1.3 of the PSI makes plain ("fairly, proportionately and decently").

78. I have considered carefully all the factors relevant to the oral hearing decision, the range of relevance a matter for determination by this court as *Clarke* makes clear. I set them out above in subsection B of this part of the judgment. No one factor is decisive (ibid., para 111). But because of the cumulative effect of those factors, I find that the requirements of common law fairness in light of the highly distinctive and unusual facts of this case demand that the claimant should have been granted an oral hearing. One can legitimately interrogate the question in a number of ways, but the fact is that the claimant was over a decade post-tariff by the time of the impugned decisions and had not had an oral hearing ever despite over 30 years' detention in various settings. It was wrong for the defendant to confirm the claimant's default Category A categorisation without an oral hearing. I reach this conclusion on the granularity of this case, and not, I emphasise, because of any general or universal rule, and do not purport to enunciate one, which I doubt could ever be satisfactorily formulated. An oral hearing here was beyond desirable; it was necessary for the "attainment of fairness", as Lord Bridge put it in *Lloyd v McMahon* , and the avoidance of a justifiable sense of injustice on the part of the claimant. This is not a reasonableness review, but as Lord Reed says in *Osborn* itself at para 65, "The court must determine for itself whether a fair procedure was

followed" (confirmed in *Clarke*). I judge that it was not. I reach a different conclusion from the defendant on a hard-edge objective question, as part of my duty as an entirely independent judicial authority.

79. I should add that on Ground 2 the defendant does not seek to rely on section 31(2A) of the Senior Courts Act 1981 ("SCA 1981") and argue that that it is highly likely that the outcome for the claimant would not have been substantially different if an oral hearing was convened. The defendant would have the burden of proving the matter to the civil standard under the statutory test. I note that at the same time as eschewing a section 31(2A) application, the defendant submits "one of the many reasons there was no requirement for an oral hearing in this case was that it would be unlikely to make a real difference to the outcome." What cannot happen is for there to be a disguised section 31(2A) application. I do not understand this to be the defendant's approach. However, the submission about "no real difference" within the decision-making process has three difficulties.

80. First, that it was or was not clearly part of the impugned refusal decision that an oral hearing would make no difference. This question did not enter into the defendant's reasoning. This point bears the stamp, therefore, of an after-the-event rationalisation.

81. Second, and significantly to my mind, the submission does not address what is the essence of the failure: the resulting sense of injustice and the importance of the appearance of procedural fairness. An oral hearing would result in those material differences. The defendant's counsel was asked in terms more than once on what basis the defendant did not make a section 31(2A) application on Ground 2. It is no criticism of counsel, but he was not instructed to offer an explanation. It is very likely that the defendant has appreciated that if the court concludes that the process is objectively unfair, it is very difficult to pursue a section 31(2A) application effectively. Here the court has found that in the particular circumstances of this case, the process, objectively assessed, has resulted in a clear and justified sense of injustice and the appearance of unfairness. That is important. Even if the defendant is correct that an oral hearing is highly likely to have made no difference to the substantive outcome (categorisation decision), it would nevertheless have produced a material difference: provided the claimant with a sense that his case was being treated fairly and he was being granted an opportunity to appear before the LAP and it would appear a fair process. However, I deliberately refrain from prescribing what form such oral hearing should take. It can be tailored to the circumstances and certainly need not be a judicialised hearing with forensic formality.

82. Third, and crucially it seems to me, the submission that an oral hearing should be refused on the "no real difference" basis sits precariously with the explicit terms of the defendant's policy. This states at para 4.6:

> "it is important that the oral hearing decision is approached in a balanced and appropriate way… 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** " (emphasis provided)

83. I therefore place little weight on the "no real difference" submission in the context of a procedurally unfair decision that has produced an objectively justifiable sense of injustice. The importance of procedural fairness was commented on by Lord Steyn in his speech in *R v Secretary of State for the Home Department, ex parte Pierson [1998] AC 539* , where at 591F he said that "the rule of law enforces minimum standards of fairness, both substantive and procedural." Here the defendant's decision was procedurally and objectively unfair and the rule of law must "enforce" a fair as opposed to unfair process. The defendant's stance confuses the no difference to categorisation outcome with the consequences (non-categorisation outcomes) of a fair against unfair process in terms of sense of injustice and the appearance of fair process. In *R (Dobson) v Secretary of State for Justice [2023] EWHC 50 (Admin)* , Fordham J at para 55 cites *R (Grinham) v Parole Board [2020] EWHC 2140 (Admin)* , the judgment of Spencer J who says (para 53):

> "53. It is recognised in the authorities that the court has to caution itself against the suggestion that no prejudice has been caused to a claimant because the flawed decision would inevitably have been the same. For example, in R v Ealing Magistrates Court, ex p Fanneran *(1996) 160 JP 409* , a case

> concerning the Dangerous Dogs Act 1991 , Staughton LJ said: "The notion that when the rules of natural justice have not been observed one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold a conviction if natural justice had not been done.…". As it is put in De Smith's Judicial Review (8th Ed) at 8-070: "Natural justice is not always or entirely about the fact or substance of fairness. It … also has something to do with the appearance of fairness. In the hallowed phrase, justice must not only be done, it must also be seen to be done."

84. The significance of the instant case is that while I recognise entirely that the outcome of the categorisation decision is probably (even undoubtedly) the most important feature of the process, there are other outcomes that should not be ignored. Irrespective of categorisation outcome, an objectively unfair process that induces, justifiably, a sense of injustice in the affected person, no matter how grave his offending, and that appears to the external reasonable observer as evidently unfair, is something relevant to the collective commitment to standards of fairness — and wider implications, as examined immediately below. Fair process engages the rule of law considerations spoken to by Lord Steyn; a fair process being seen to be done is an "outcome" that should not be trivialised or ignored. Further, additional benefits are produced by making fair decisions as explicitly recognised within the body of the defendant's policy itself at paras 2.4-2.5:

> **"Procedural justice**
>
> 2.4 When people believe the process of applying rules (how a decision is made rather than what decision is made, and how they are treated during the process) is fair, it influences their views and behaviour — this is called 'procedural justice'. There is very robust evidence, from all around the world, showing that people are much more likely to respect and comply with rules and authority willingly when they believe the way the rules are applied is fair and just. This is true even if the outcomes of decisions are not in their favour or are inconvenient for them.
>
> 2.5 Research from HMPPS, and from prison services around the world, shows that when prisoners perceive authority to be used in a more procedurally just way, this is associated with significantly less misconduct and violence, better psychological health, lower rates of self-harm and attempted suicide, and lower rates of reoffending after release."

85. There are wider implications, therefore, of a fair decision-making process beyond the affected person's sense of justice or injustice. The documented connection in the research base (from "around the world") between fair process and lower rates of recidivism engages an obvious public interest. These are not trifles nor empty formalities. As Lord Reed noted in *Osborn* at para 2(ii), decision-making about oral hearings should be alive to "the importance of what is at stake".

86. Ground 2 succeeds.

VII. Ground 1 — policy

87. The claimant's pleaded case on Ground 1 is "Adherence and regard to / correct application of PSI 08/2013 - Failure to hold an oral hearing" (skeleton argument, para 46).

88. This is a procedural fairness challenge based on the defendant's policy rather than the common law. As the claimant recognises in his skeleton argument (para 46), there are "overlapping factual considerations". The claimant refers to the "six factors" identified in the policy "that would tend in favour of an oral hearing being appropriate" (PSI, para 4.7). Therefore,

the claimant's case on Ground 1 is very similar to that on Ground 2. The claimant also argued under this ground that there was an "impasse", one of the policy factors pointing towards an oral hearing.

89. The defendant submits that the policy was adhered to and there was no failure. There was no impasse. The relevant factors were considered and the claimant is making a disguised merits challenge.

A. Hospital records

90. One "further specific issue of failure" pleaded by the claimant (skeleton argument, para 50) is the failure to consider the hospital records. It is submitted that the defendant erred in her interpretation of Section 3 of the Annex B form. It is submitted that the form requires psychology or probation staff to "list any programmes that the prisoner has been nominated for, refused access to, attended or completed during sentence" and attach copies of any post-programme reports. There is no reason why this should be read as excluding programmes the claimant completed under the supervision of psychological staff at the secure hospital. It would be unfair not to consider these reports because he completed the programmes while in hospital detention and not prison. The defendant submits that the requirements of the policy and Annex B within it are clear: what is called for is a list of programmes in prison, not in other settings. There has been no failure to apply the policy by that non-mandated omission.

91. To my mind, there are two connected questions (1) whether hospital records as a category are capable of being relevant documents under the policy that should be considered; (2) whether the hospital records in this case should have been considered.

On (1):

92. As a preliminary matter, para 3.34 of the PSI provides:

> "The first formal reviews for Provisional Category A / Restricted Status prisoners received back into custody from a psychiatric hospital or a prison outside England and Wales will be completed using the annual review report forms at Annex B. Available psychiatric hospital assessments may also be used."

93. Therefore, it is clear from the policy that psychiatric hospital assessments "may" be used where available. May is not must. This is significant because there is explicit reference to assessments beyond the walls of the prison, albeit with reference to psychiatric assessment. Section 3 of the Annex B form is entitled "Offence-related work". The box below the headline states:

> **"Accredited Programmes and Other Offence-Related Work in Prison:**
>
> Please list any programmes that the prisoner has been nominated for, refused access to, attended or completed during sentence. Please also include refusals by the prisoner."

94. The defendant maintains that the duty under the policy is to "list" programmes "in prison". The programmes completed in hospital are not referred to in the Annex and thus not required. They are not, in any event, "offence-related work". I cannot agree. It is unsustainable to argue that the Adapted Sex Offender Treatment Programme the claimant participated in, along with the "maintenance" follow-up programme, are not related to his offending. The prison psychological report describes one of the hospital interventions in this way:

> "Intervention to explore sexual fantasies about young girls, attitudes that supported sexual violence against children and maladaptive beliefs about the role of sex as a form of coping, date unknown."

95. However, these programmes were not undertaken "in prison". They do not fall within the explicit requirements under the policy on a strict reading of the description for section 3 of the Annex B form. I cannot accept that is the end of the matter. I have on Ground 2 found that the policy, however, must be applied and interpreted fairly. For the fair application of the policy, obviously relevant material should be considered, irrespective of whether it falls within the express descriptive terms of the guidance. The "guidance" cannot possibly cover every conceivably item of relevant evidence explicitly. It would become unwieldy and disproportionate. The policy guides without being exhaustive; it helps and is not intended to hamstring. Obviously relevant material should be considered to achieve the aim of the policy which is fair decision-making. I find that that the extra-prison hospital records are capable as a category of being relevant. Whether on the facts they should have been considered is a different matter and as the policy also notes, the particular facts in any case are critical.

Conclusion on (1)

96. Therefore, I find that hospital records, notwithstanding the fact that they are not explicitly referred to in the policy, are capable as a category of being relevant material for consideration in categorisation decisions.

On (2):

97. However, one must retain strict focus on what Ground 1 avers: it is that the failure to obtain the records affects the decision not to hold an oral hearing. I cannot accept that hospital records must always be obtained no matter how old or how voluminous or no matter what the course entailed. The records must be relevant. One must carefully examine the relevance of the hospital records in the claimant's case. The Claimant arrived in prison having participated in the following whilst in hospital:

> • 2003-2004: A mental health awareness group;
>
> • 2004: Adapted Sex Offender Treatment programme, which included sessions on victim harm, understanding of risky future situations, and learning to self-monitor and prevent relapse;
>
> • 2010: Cognitive Behavioural Therapy for Psychosis Group;
>
> • 2010: Life Minus Violence Group;
>
> • 2012: Substance Free Future Support Group;
>
> • 2012: Adapted Thinking Minds Group;
>
> • 2012: Weekly sessions with a clinical psychologist;
>
> • 2012: The maintenance group for the Adapted Sex Offender Treatment programme;
>
> • 2012 to 2013: Psychological work to prepare for his 2014 move to medium security conditions, which involved 30 sessions covering sexual violence, sexual deviancy, intimacy deficits and problems with self-management;
>
> • 2013: One-to-one psychological interventions with a clinical psychologist;
>
> • 2013-2015: Mindfulness sessions;

• 2016: A substance misuse enhanced responsibility group;

• Date unknown: Sessions on recognition of victim empathy, self-monitoring and relapse prevention.

98. There is a reference to the hospital records in Ms Main's report. She says at para 5.4.4 that the claimant is:

> "likely to struggle in understanding and retaining information he is presented with, which is likely to Impact his ability to understand his risk factors. This is corroborated by previous reports from Mr Murcott's Hospital settings and also what he was able to discuss with me during interview for this report."

99. There is a further reference to the hospital by Ms Booth, the mental health nurse. She states that "Whilst in hospital Mr Murcott was unable to understand the information provided to consent for a formal IQ test." She does not clarify, however, the source of this "information." If there were anything of significance in the hospital post-programme report summaries, I have no doubt that it would have been identified and brought to the attention of this court. It has not been. I note in the final hearing bundle that the section entitled "Materials not found in the dossier" has three elements (a) Dr Grimes's report; (b) the FTT decision; (c) the *Parole Board* decision of 12 October 2023. Thus the claimant has not sought to provide the hospital course records or report summaries. It is clear that any material significance lying within these hospital records is purely conjectural and the claimant is inviting the court to speculate about material that the claimant has not put before the court when he had the opportunity to do so. Of significance is that the last of the hospital courses of which the date is known is in 2016. Subsequent to that, there has been a detailed psychiatric report by Dr Grimes and a full psychological assessment for the LAP review. To my mind, that more than meets the gap in the material which is the lack of hospital outcome reports.

100. Further, there is no reference to the hospital course summaries by Dr Grimes in his very detailed report. Dr Grimes did refer to the hospital records in his report and is clearly a thorough and diligent medical professional. If there was material of significance it is highly likely that he would have identified it. Equally, if these hospital records contained material of significance to the proper assessment of the claimant, it is puzzling that they have not been put before the FTT or the Parole Board on behalf of the claimant. There is no evidence that any of this has happened.

101. In summary on the hospital records:

(1) they are relatively antiquated historical records. The first course began in 2003. The last dated course is 2016. It should be remembered that the point of the courses was not to provide a focused assessment about risk if unlawfully at large (the question the defendant had to consider) but were instead interventions of varying lengths, in different settings. Temporally, these courses have in any event been superseded by a detailed psychiatric assessment by Dr Grimes in 2021 and a full psychological assessment for the LAP review;
(2) they have never been put before the Tribunal, Parole Board or this court, and thus placing any reliable weight on them is conjectural. The highpoint of the claimant's submission about the records is captured by the DSFG at para 37, where it is asserted that "it is plain there was some benefit, and some risk reduction, achieved through his participation in this work." However, Dr Grimes records in his report that:

> "On 11/06/2018, his Psychologist reported that it was identified that he had made little progress in past psychologist sessions, there were limitations to how well he responded to psychological treatment which was likely due to his cognitive deficits which impacted on his ability to understand complex concepts and also for him to retain any material covered. As a result, it was thought that it would be unhelpful at that point to identify further psychological treatment goals."

102. At no point has the claimant identified what the "risk reduction" achieved through hospital work was in concrete terms, or provided any evidential support for the assertion through any part of the records that deal with the claimant. The claim that these records would have materially affected the outcome is speculative.

103. Reliance is placed on the comments of the Parole Board in its decision that postdates the impugned decision. Accordingly, the DSFG states at para 48:

> "48. Although the Parole Board noted the views of professionals that the Claimant would pose a risk of harm in the community, it also "took account of possible risk reducing factors namely the fact of Mr Murcott's age as well as various medical conditions in particular his diabetes and a disability which requires the use of a walking stick."

104. The Parole Board, despite being in possession on the claimant's case of "a much more comprehensive dossier", does not in the extracts of its decision relied on by the claimant cite from any of the hospital course records. Indeed, in addressing the question of "possible risk reducing factors" it does not mention any successful hospital courses addressing risk, but physical and personal factors relating to the claimant's age and medical condition. It is surprising indeed if there was reliable and persuasive evidence in the hospital records to support the claimant's argument that it would not be cited by the Parole Board or indeed the claimant in his application to this court and the comprehensively fleshed out submissions to it advanced very ably on his behalf.

105. For completeness, I note that the "items at Tab 8 (i)-(iii)" that the claimant at para 55 of the DSFG directs the court to look at are Dr Grimes's report, the FTT decision and the *Parole Board* decision. The court is not directed to examine the hospital records as they have not been supplied or in any way summarised by the claimant. No explanation has been offered by the claimant for his failure to obtain these documents for the consideration of this court. In opening the claimant's submissions, counsel stated about the hospital courses that "A lot of these are similar to those the claimant would have taken in prison, but the records are not available to the defendant purely because of the institutional arrangements necessary because of his mental health and his disability." At no point does the claimant submit that they would be unavailable to the claimant himself if he wished to rely upon them. This has not happened.

106. Dr Grimes's report in 2021 builds on his earlier report on the claimant in 2018. He cites in the later report that he has used as a source of information the "Clinical Notes, held at The Spinney Hospital". This was the medium security setting where the claimant was detained from November 2013. Some of the course reports relied on by the claimant postdate 2013. There is no reference to any of these summaries in Dr Grimes's report. It seems unlikely if the summaries were of clear relevance to the progress of the claimant, his mental health, ideations and attitudes towards children and sexual offending, that it would not be referenced elsewhere in the claimant's clinical notes and into Dr Grimes's report.

107. Looking at the sequence of courses in hospital settings, the Adapted Sex Offender Treatment programme was in 2004. The maintenance programme for that programme was in 2012. Therefore the treatment programme and its maintenance finished before the claimant transferred to the medium security hospital at The Spinney. In the near-decade between transfer to medium security and the impugned decision, there is identified no specifically designated sexual offender or offences programme. The closest approximation may be the "sessions on recognition of victim empathy, self-monitoring and relapse prevention". However, there are at least two problems with this item. First, the date of the sessions is unknown. Second, it is unclear how many sessions there were.

Conclusion on (2)

108. I am not satisfied that the hospital records are relevant to the decision whether to hold an oral hearing, the essence of Ground 1. I find that:

(1) There is no or no sufficient evidential basis beyond mere speculation to hold that the records should have been obtained;
(2) There is a corresponding lack of evidential foundation that these records should have been considered;

(3) The failure to obtain the records did not in itself render the decision not to hold an oral hearing a misapplication of the policy;
(4) The failure is not a contributing relevant factor in assessing whether the policy was misapplied.

B. Impasse

109. I should add that the claimant made a further argument under the ground about the policy factor of "impasse". The POM noted at section 6 of the dossier (B179):

> "I have not had sight of post-programme reports for these interventions, though the Chartered Psychologist working with him stated that Mr Murcott struggled to retain Information or Identify thoughts, feelings or behaviours linked to his offending. When asked about this work in Interview, Mr Murcott was not able to recall what was covered during the programmes and couldn't even tell me whether it was focussed on sexual offending behaviour. This suggests that Mr Murcott may not have the capacity to develop sufficient interna I controls to offending meaning that external management through restrictions placed upon him will be required."

110. The psychological report of Ms Main notes at para 5.4.2:

> "Mr Murcott engaged with the Adapted Sex Offender Treatment Programme (ASOTP) In 2004 and reportedly found it difficult to understand and retain the learning from this. When asked about this during Interview for this report, he was unable to give a consistent recollection of his sexual Interests, maintaining that he did not find female children attractive. Mr Murcott stated that he had, what he considered to be, consensual sex, with what he termed "child prostitutes", because their mothers had approached him and asked if he would like to have sex with them. Mr Murcott has made statements In the past about finding the victim attractive and wanting to take her virginity however, during Interview for this report, he maintained that he did not ever think or say this. Mr Murcott also told his POM that he had sex with the victim's body after he had killed her, and when asked about this during the writing of this report, reported that his POM had made it up."

111. The LAP noted:

> "In order to evidence a significant reduction in risk, it is recommended that Mr Murcott undertake consolidation work with his case management team. It was also highlighted that there are outstanding treatment needs to explore around his sexual interest in children, sexual preoccupation, insight into offending and helping Mr Murcott to understand the link between childhood trauma and his offending."

112. I am not convinced that convening an oral hearing is the optimal solution to resolve the difficulties that the claimant lives with due to his impaired or limited cognitive functioning, said by the prison psychologist to be in the "borderline" range of ability. There are identified outstanding treatment needs that can be explored. I find that the situation resonates with that set out by the court in *R (Wilson) v Secretary of State for Justice [2022] EWHC 170 at para 20* where there are "ways forward which enabled the Claimant to 'show further evidence of insight and progress'."

113. I find that impasse is not made out. There are plainly identified routes of progression for the claimant, and it was unnecessary for there to be an oral hearing to resolve an impasse that did not exist.

C. Policy procedural fairness

114. Having dealt with the hospital records and impasse sub-issues, I return to the prime Ground 1 decision: whether overall, and considering the relevant factors, the refusal to hold an oral hearing is an unreasonable misapplication of the policy.

115. I can envisage theoretically that there may be circumstances where a decision is procedurally unfair under the common law but not under a published policy. Speculating on diverse hypothetical factual scenarios, while intellectually diverting, is of no practical assistance. More concretely, I remind myself what the Court of Appeal said *Hassett* at para 66 that the policy would not result in "a lower standard of procedural protection than the law would require". This must be additionally true because one of the vital objectives of the policy is to make decisions that are "fair"- explicitly stated. The court has found that the decision not to hold an oral hearing was unfair under the common law. Given the express policy objective of achieving fairness, it would be puzzling in the circumstances of the claimant's case if the same decision were "fair" under the policy and unfair at common law.

116. The route to understanding why the decision was unfair under the policy lies in examining the stipulated relevant factors in the "guidelines", and being reminded that the identified factors are not exhaustive and can never be. It was necessary to consider the pertinent factors in detail in the Ground 2 analysis and will little assist repeating that analysis here. It should be noted that the framing of the policy is that the six factors set out in the PSI "tend" to indicate an oral hearing is appropriate but should not be applied mechanistically or merely aggregated as an exercise in "mathematics" (PSI, para 4.6). Logically, a fair and non-mathematical (anti-aggregational) approach must allow for consideration of other factors, if relevant on the specific facts. It is the sedimentary accumulation of the weighty factors identified in Ground 2 that clearly called for an oral hearing under the policy and if some of these factors, because of the claimant's unique history and circumstances are not within those named in the policy, they should have been considered in any event. I itemised them in that analysis and once more refer back to them without needlessly fleshing them out in detail.

117. I find that no reasonable decision-maker properly applying the policy and genuinely responsive and alive to the particular facts of the claimant's case could have confirmed a higher security categorisation without first granting an oral hearing, given his many years in medium security settings, around 100 escorted leaves in the community authorised by the Ministry of Justice, the absence of known increase in his risk presentation, along with all the other identified Ground 2 factors. I proceed, I make plain, on the basis that an affected person's sense of justice — whatever they have done, and however serious - remains a relevant factor. I further conclude as a logical extension of that idea that avoiding a justifiable sense of injustice must also be part and parcel of the way in which the defendant's policy is applied and must inform without determining the process adopted in decision-making. It seems to me that all this is evident in a clear reading of the policy. As Sales LJ said in *Hassett* , it can be taken that there is no lower standard of procedural protection under the policy. Further, the policy in terms recognises that the "importance" of these decisions to the affected person. It would be a poor policy that ignored that. No one likes when a decision they placed great hope in is made against them. That is human nature. The key point is that the sense of injustice amounts, objectively viewed, to a genuine and rational one. The adjective genuine is vital. A reasonable and fair-minded observer told of the facts of this case would, I am completely satisfied, conclude that any person in the claimant's position would feel a genuine — I emphasise the word — sense of injustice on these facts at being denied an oral hearing. I cannot imagine that a rigidly inflexible and tone-deaf approach is what was envisaged by the carefully crafted contours of guidance offered in the PSI. The words of guidance are just that and should not be elevated to liturgical status or construed like words in a statute. As made clear by the Court of Appeal, guidance is not a "source of law" (*R (Khatun) v London Borough of Newham [2004] EWCA Civ 55 at para 47* , per Laws LJ).

D. Conclusion: Ground 1

118. I find that the defendant misapplied her policy. The distinctive facts of the claimant's case were not given fair, sufficient and proper consideration and the resulting decision was wrong and unreasonable. This is not a merits disagreement with the decision. Instead, the court's conclusion is that the decision not to hold an oral hearing exceeded the range of reasonable decisions. It was not reasonably open to the defendant. I understand that very few people will have the slightest sympathy for the claimant given the truly appalling crimes he has committed. But fairness demands an oral hearing here, not because of the claimant's offending, but despite it since it will avoid a genuine sense of injustice and takes seriously the stated policy commitment that decisions will be made in a way that is "fair".

119. Ground 1 succeeds.

VIII. Ground 3 — relevant material

Submissions

120. **Claimant** . The defendant failed to give proper consideration to relevant information (and/or to adhere to her policy as stated above) necessary in: a. failing to obtain and consider post-programme reports from accredited programme completion; and/or b. failing to consider the decision of the FFT (MH); and/or c. relating to the responsible clinical psychiatrist's, Dr Grimes's, assessment; and/or d. relating to the Claimant's poor physical health.

121. **Defendant** . None of the material is mandated to be considered under legislation and it was not unreasonable nor irrational for the defendant not to have considered it.

Discussion

122. I examine the four heads of evidence identified by the claimant in turn.

(1) Hospital post-programme reports

123. This matter was previously considered in detail as a matter of procedural fairness. The analysis needs no repetition. In very short summary (1) such reports are not mandated explicitly by the policy; (2) they are, however, capable of relevance as a category; (3) on the facts, they do not possess sufficient relevance to have required their consideration.

124. As to the "rationality" (unreasonableness) argument, at no point does the claimant indicate what the contents of the post-programme reports are. It is not in any evidenced or identified how they materially add to the body of knowledge before the LAP and the defendant beyond mere speculation. At the time of the first impugned decision, these reports were temporally stale, with the latest known date being in 2016, and thus seven years prior, with some going back approximately 20 years before the impugned decision. There is a substantial body of assessment that postdates these courses. These reports were not mentioned by FTT in its decision. There is no indication that they were provided to the FTT by the claimant, nor that the claimant suggested to the FTT that they be considered. They are not considered by Dr Grimes. The claimant did not provide them to the LAP. The claimant did not suggest that the LAP obtain them. Following the LAP decision, the claimant did not provide them to the defendant. The claimant did not suggest to the defendant that they be obtained prior to her categorisation decision. While the decision-making process must be fair and accurate, it must be administratively proportionate and manageable. It cannot be the case that the whole of the previous record base about the defendant be obtained and then reconsidered laboriously at each of the numerous administrative decisions necessitated by his continuing detention. By the time of the LAP decision, there was a psychiatric report from Dr Grimes (see next point) and a "full" psychological assessment of the claimant using recognised and validated risk assessment tools (OASys Sexual Reoffending Predictor and ARMADILO-S). These were far more current and relevant. I remain unconvinced how the report summary from the Adapted Sexual Offender Treatment programme that the claimant completed in 2004 retains its importance compared to the comprehensive psychiatric report of Dr Grimes in 2021 and the full psychological assessment in 2023. The same applies to the ASOT maintenance programme in 2012. The question for the defendant was whether there was convincing evidence of a reduction of risk (reoffending if unlawfully at large) in 2023 when her decision fell to be made. A hospital-delivered programme in 2012 is of limited relevance to that decision, let alone one in 2004, almost two decades previously. Of significance also is the fact that it was noted by the POM that the claimant had difficulty recollecting the programmes or what they achieved for him. This applied even to courses relating to sexual offending behaviour. The POM's observation about the sexual offending treatment programme and substance misuse interventions is recorded at para 6.4 of the dossier:

> "When asked about this work in interview, Mr Murcott was not able to recall what was covered during the programmes and couldn't even tell me whether it was focussed on sexual offending behaviour.

125. This provides little support for the value of obtaining these report summaries or their enduring impact on the claimant and effectiveness as of 2023. The claimant could not recall the bare outlines of what the courses covered or even if they addressed his risk of future sexual offending. The significance of the report summaries must be viewed in light of the prevailing information about the claimant's risk and a static analysis is unrealistic. The psychologist also noted that as at 2023, the Claimant was "unable to give a consistent recollection of his sexual interest", claimed to have had "consensual" sex with child prostitutes at the suggestion of their mothers, and had told the POM that he had sex with the victim's body after killing her. In similar vein, the POM stated that "despite many years in hospital and engagement in treatment, [the Claimant] has achieved little insight or risk reduction".

126. These details put the value of significantly earlier programmes into clear context and demonstrate their limited value to any meaningful assessment to the current risk at time of impugned decision.

(2) FTT decision

127. The FTT was not considering the same question as the defendant was obliged to. Its remit is fundamentally to consider discharge from hospital or continued detention in the secure setting. Further, the defendant is correct that the PSI does not in terms mandate the consideration of the FTT decision.

128. However, the FTT is a judge-chaired tribunal that considered the claimant's case in detail at an oral hearing and received both written and oral evidence from witnesses, including a psychiatrist. It was sufficiently close in time to the defendant's first impugned decision to possess clear relevance. It was of particular relevance because the Tribunal indicated that the claimant should be transferred to a low security unit. The duty on the defendant is to approach categorisation decisions with an "open mind" (PSI, para 4.6) and in a "balanced and appropriate way" (ibid.). It cannot be appropriate to inflexibly insist only on considering documents listed in Annex B. I judge such insistence to be neither balanced nor appropriate and indicative of inflexibility. The defendant's submission that "Nothing in the PSI 08/2013 suggests that Mental Health Tribunal decisions are relevant to categorisation assessments" is suggestive of an unduly restrictive rigidity of approach. The FTT was referred to by the claimant in representations. It would have been better if it had been provided by the claimant, but once it was raised and possessed clear potential relevance, it should in any event have been obtained by the defendant.

(3) Dr Grimes's report

129. For similar reasons, the psychiatric report of Dr Grimes was manifestly relevant. It was a detailed report on the mental health of the claimant. It was compiled by an experienced and duly qualified mental health expert. It should have been considered by the LAP and consequently by the defendant. It was insufficient for there to be scattered references to Dr Grimes's report in the dossier prepared for the defendant's decision. What was necessary was for the LAP to properly consider Dr Grimes's report and for the defendant to do so also. By failing to consider the report, the defendant adopted an approach that was not "balanced and appropriate". I am not persuaded by the defendant's submission that by the time of the impugned decision Dr Grimes's report was "two years' old and the Secretary of State had the benefit of an up-to-date psychological assessment in the Dossier". The psychological assessment was not a psychiatric assessment and insufficiently conveyed the important detail in Dr Grimes's report which I have read (in important parts re-read) in detail. Given the nature of the claimant's long mental health history, the comprehensive report of a duly qualified psychiatric expert was of clear value to the LAP and the defendant. The fact that it was completed in 2021, and thus two years before the impugned decision, did not render the report irrelevant.

(4) Claimant's physical health

130. I am less convinced about the failure to obtain further evidence of the claimant's physical health. The prime question for the defendant was risk if unlawfully at large. It is correct that the LAP stated at para 9.3:

> "the Panel questioned whether the most secure conditions were necessary to make escape impossible."

131. It also noted at para 9.2:

> "With regard to physical health, it is noted that Mr Murcott has poor mobility and has been referred to a Physiotherapist for a walking aid assessment."

132. As a result, the claimant submits that "there is no evidence proper consideration of the Claimant's poor physical health was undertaken by the Defendant who did not gather and consider the *evidence* concerning or demonstrating the Claimant's health and mobility are significantly impaired." I fail to detect a sufficient connection between the claimant's physical health and the risk he would pose if unlawfully at large to have required the defendant to "gather" further evidence. There was sufficient evidence about his physical health to properly assess the risk he posed if unlawfully at large. I accept the defendant's submission that in truth this is a complaint by the claimant that the defendant placed insufficient weight on the claimant's health. Further evidence of the claimant's physical health was of limited relevance to the categorisation decision. The LAP explicitly recognised the claimant's "poor mobility" and sufficient evidence was before the defendant about his physical condition to make an accurate assessment of his risk if unlawfully at large in the community. Indeed, in the claimant's representations dated 12 June 2023, there is no suggestion that the claimant's physical condition should lead to recategorisation. The defendant considered physical condition and concluded with justification that the claimant's health did not render escape from less secure conditions impossible. The claimant's complaint on this point is essentially a merits one.

Conclusion: Ground 3

133. **First** , I accept the defendant's submission that the question is whether it is "expressly or impliedly required by the legislation to take the particular consideration into account, or that, in the circumstances of the case, the matter was so obviously material that it was irrational [unreasonable] for the decision-maker not to have taken it into account" (*R (Wildfish Conservation) v Secretary of State for Environment, Food and Rural Affairs [2024] Env LR 15 at para 149*).

134. **Second** , I cannot find that statute mandates the defendant to take into account any of the missing material.

135. **Third** , I conclude that the hospital summary reports and further evidence about the claimant's health were not "so obviously material" that they should have been taken into account.

136. **Fourth** , obtaining the FTT's decision was not mandated by legislation or expressly under the policy. However, it was a matter of obvious and clear relevance that should have been obtained and considered. It is unreasonable (exceeding the generous ambit of conferred discretion) for the LAP and the defendant not to have considered it.

137. **Fifth** , Dr Grimes's report was not mandated by legislation. It was an "available" psychiatric assessment. It was known to the LAP and the defendant as it was referred to, for example, by the psychologist in the dossier. It should have been considered under the policy, but even if that is not the case, which I doubt, it is so obviously material that it was unreasonable in the recognised judicial review sense not to take it properly into account. The scattered references in the dossier provide an inadequate substitute for having the full report and considering the passages within it that, the court having carefully reviewed it, are obviously of relevance, some in the claimant's favour and some against.

138. **Sixth** , and overall, I find that the defendant (and indeed the LAP before that) failed to consider two important sources of relevant material: Dr Grimes's report and the FTT decision. It exceeded the range of reasonable discretion not to consider either.

139. Therefore, Ground 3 succeeds in part. I consider the section 31(2A) question when I consider relief.

IX. Ground 4 — reasonableness (Wednesbury)

Submissions

140. **Claimant** . The claimant styles this ground as a " *Wednesbury* " (unreasonableness) challenge, and his case is found at paras 57-61 of the skeleton argument. It is submitted that the defendant has failed to approach the review and evidence "in a *Wednesbury* reasonable way" and to reach a properly evidenced and explained decision, after due and sufficient inquiry. Further, the defendant has not met her duty to make sufficient inquiry (*Tameside* duty; *R (Shaffi) v SSJ [2011] EWHC 3113*

at para 39). In addition, the claimant contends that the defendant applied the wrong test or approach when rejecting that the matters pointed to "cannot determine" or are not "irresistible evidence of proof" he has achieved significant reduction in risk if unlawfully at large. The defendant's reasoning more generally fails to properly address the psychiatric evidence of risk reduction significantly since last being in Category A prison (including significantly changing his attitude towards his offending); the Tribunal's decision; work completed in hospital; or the claimant's poor physical health.

141. **Defendant** . The challenge is resisted on the basis that the defendant's decision was unimpeachable and the complaints in truth amount to mere merits arguments and should be rejected.

Discussion

142. The court is obliged to assess whether the impugned decision exceeds the generous ambit of reasonableness, and necessarily, as Lord Sumption observed in his speech in *Pham v Secretary of State for the Home Department [2015] UKSC 19 at para 107* , "It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case" since reasonableness, being a public law standard, is an objective measure. I recognise and accept that in this type of administrative decision, the defendant is granted a significant measure of latitude and discretion. But that in-built latitude is not limitless. I can deal with this ground more succinctly and do not repeat the detail of the previous analysis, which should be considered here as relevant.

143. To the extent that this ground adds any of further substance, it is a challenge to the overall reasonableness of the defendant's decision not to change the claimant's categorisation, or to confirm the default higher Category A classification. It is essential therefore to view the decision as a whole and I do.

144. I begin by underlining that I do not accept the submission that the defendant "applied the wrong test" about the decisions or views of other panels or bodies. It is an inaccurate characterisation as the defendant plainly never said that they were irrelevant because they were not determinative. As a bare proposition, her approach to the status of such other conclusions is legally accurate. For completeness, I add that I also have rejected the submission about the hospital records and the claimant's physical health.

145. But I take into account the failures in the process of decision-making already found. First, that there should have been an oral hearing and second that the defendant should have considered Dr Grimes's report and the decision of the FTT and therefore important evidence about the risk the claimant poses and attitudinal change was not before the defendant. I find that this is a sufficient basis to render the defendant's decision beyond the range of reasonable decisions as explained by Lord Bingham.

Conclusion: Ground 4

146. For reasons given, I am persuaded that the defendant's decision overall was unreasonable and exceeded the range of reasonable decisions open to the defendant. Once more, I consider the section 31(2A) question when I consider relief.

X. Ground 5 — Convention

Submissions

147. **Claimant** . The defendant's decision is a disproportionate interference with the claimant's article 8 ECHR rights and discriminates against him by reason of his disability contrary to article 14 ECHR. The focus appears to be primarily on the claimant's mental health disability (skeleton argument, para 67).

148. **Defendant** . Article 8 is not engaged by categorisation decisions. Further, there was no discrimination against the claimant on the grounds of disability for article 14 purposes. There is no credible basis to suppose that the claimant is unable to do the further work recommended by the LAP and the psychologist. In any event, the decision not to downgrade the claimant was clearly and objectively justified and proportionate given the risks posed by the claimant to the public, and to children in particular.

Discussion

149. I consider the article 8 and 14 challenges in turn.

Article 8

150. The claimant has not made clear how article 8 has been engaged, except that in all security categorisation decisions article 8 is engaged, which takes the matter little further. It is certainly the case that some categorisation decisions are capable of engaging article 8 (*R (Ali) v Director of High Security [2010] 2 All ER 82 at para 28* ; *R (Allen) v SSJ [2008] EWHC 3298 (Admin)* ; *R (Abdulla) and others v SSJ [2011] EWHC 3212 (Admin)* , Divisional Court). However, the cases cited by the claimant about Category A are distinguishable because they relate to particular and identifiable additional infringements of the detained person's private life, such as limitations on communications. Such further restrictions are absent in the instant case.

151. Even if despite these obstacles to the argument the court is obliged to consider an article 8 infringement, I reject the claimant's submission that the detention "conditions are not the least interference necessary and/or fail to strike a fair balance of competing interests, and impose an undue burden upon the Claimant" (DSFG para 101). One can interrogate the justification or proportionality of rights infringements in various ways. Using the four-part (four-"question") *Bank Mellat* - proportionality analysis (*Bank Mellat v HM Treasury (No. 2) [2013] UKSC 39* , per Lord Reed at para 74) and in summary: protecting children from serious sexual harm from the claimant is a legitimate aim (question 1); Category A detention is rationally connected to it in that it furthers that aim (question 2); it is the least possible interference with the risk posed by the claimant since Category B incarceration does not render escape impossible (question 3); and continuing Category A detention strikes the right and fair balance between the claimant's article 8 rights and those of children and the community or the public (question 4). It is thus necessary and proportionate in article 8 terms.

152. The obvious point about transfer to Category B status is that the defendant was justified in finding that the defendant's physical condition did not make his escape "impossible". This must then be linked with the risk of serious harm if unlawfully at large. In truth, the article 8 challenge operates as little more than a makeweight.

Article 14

153. As to article 14, there is no tenable link between the defendant's decision and the claimant's disability. Once more, a (four-question *Bank Mellat*) proportionality analysis demonstrates that it was a necessary and proportionate decision given the risk of serious harm the claimant poses to children if unlawfully at large.

154. The claimant points to the differential treatment between the claimant in hospital settings due to his mental health and an adult without mental health problems who has been historically detained in prison. I recognise that the express terms of the PSI speak of length of time in Category A and do not mention detention in hospital settings. I have concluded previously that it was necessary on fairness grounds for the defendant to have viewed the matter in the round and convened an oral hearing due to, inter alia, the combined length of detention in both types of secure settings (and other identified factors including the sense of injustice). I did not understand, however, the claimant's case to be that the policy requiring a returnee from hospital settings to be by default returned to Category A to be unlawful in itself. Certainly, I received no argument seeking to deem the policy itself unlawful, either in the claimant's skeleton argument or further argument at the hearing (including additional written submissions). Instead, the argument is put in this way:

> "It is discrimination (i) not to properly consider, or to effectively disregard, all the work completed in the hospital setting, when had the Claimant remained in prison the same work would be closely considered and reports used to enable him to show he has reduced risk through the work completed (non-equivalent treatment); and/or to (ii) disregard the impact of mental health illness being in remission or resolved upon risk, given the offending-behaviour's link to the schizophrenic mental illness (no proper consideration of disability); and/or (iii) to make no reasonable adjustment in risk assessment process to reflect the fact that mainstream programme work is unsuited to a person with learning disability (no proper consideration of other means to demonstrate risk reduction)." (DSFG para 104)

155. The claimant cites and relies on *R (Gill) v Secretary of State for Justice [2010] EWHC 364 (Admin) ("Gill")* . I remain unpersuaded that he is right to. *Gill* involved the failure of the Secretary of State to adapt or make sufficient arrangements to enable people with disabilities to participate in programmes relevant to earlier release. That is a very different situation.

Further, I reject the claimant's submission that the defendant "has not been able to provide a legitimate aim to *not take account of* the hospital-completed rehabilitation programmes" (original emphasis). I have examined and rejected the submission about the relevance of the hospital post-course reports.

156. In truth, this ground amounts to a reworking and alternative arguing of rejected elements of previous grounds. It is not soundly based. The essential difficulty for the claimant is that hospital courses reach back to many years earlier in the claimant's custodial history, some approximately 20 years before. I have been provided with no evidence of how they would materially assist in the assessment of risk if unlawfully at large when the impugned decision was made in 2023. It is not credibly sustainable that the failure to consider the records was "due to" or because of the claimant's mental illness. Even if it was, which I doubt, the more powerful consideration, whether in prison or hospital, is that these were by 2023 stale courses (some very stale), which the claimant had no recollection of addressing his sexual offending or sexual preoccupation with children, that were superseded by a comprehensively detailed psychiatric report dated 2021 and a full psychological assessment in 2023 specifically directed at the claimant's current risk if unlawfully at large in the community.

Conclusion: Ground 5

157. This ground lacks substance, is misconceived and is dismissed.

XI. Section 31

158. The defendant makes no section 31(2A) application on Grounds 1 and 2.

159. The defendant's case is that if either Ground 3 or 4 succeed as a matter of public law, the court should refuse relief under section 31(2A) of the SCA 1981 . This section provides:

> **"31 Application for judicial review.**
>
> (2A) The High Courtâ#"
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

160. I have considered the four areas of "missing evidence" the claimant relies on. The court has rejected the relevance of the hospital post-programme summaries and the gathering of further evidence about the claimant's physical condition or health. That leaves the evidence of Dr Grimes and the FTT decision. I have found that both should have been considered for a procedurally fair and reasonable decision to be made. But that is not the end of the matter. I must consider what impact their consideration would have had if properly taken into account. Accordingly, I consider the contents of each in turn, then take a wider view and examine both of these elements together. I shall call the question of what should have happened if the conduct complained of had not occurred "the counterfactual". This means that a targeted oral hearing was held and the FTT decision and the Grimes report were before the LAP and the defendant for the impugned decision.

Submissions

161. **Defendant** . Even if (which is denied) the defendant was rationally required to consider the matters alleged by the claimant and is found to have failed to do so, the outcome for the claimant is highly likely not have been substantially different if the conduct complained of had not occurred, given the unanimous recommendation of the psychologist, the POM and the LAP.

162. **Claimant** . The high bar required to meet the statutory has not been reached. There are too many uncertainties for the court to predict with any accuracy that it is "highly likely" that the outcome would not have been substantially different.

Approach to section 31

163. I make it plain that I proceed on the following basis:

(1) The defendant must establish that it is highly likely that the outcome for the claimant would not have been substantially different.
(2) Removing the negative, I further take the statutory test to mean that the outcome for the claimant would have been substantially the same.
(3) Highly likely is not the same as inevitable, but is a more demanding standard than a balance of probabilities.
(4) This statutory test is not a question of discretion but assessment.
(5) If the test is met on the evidence, the court must refuse relief, subject to exceptional circumstances set out in subsection (2B):
(6) It is not for the court to make a merits decision about categorisation, but to assess what the relevant decision-makers would have done - more precisely, are highly likely to have done - should the conduct complained of had not occurred.
On the facts, I take the statutory test to entail in the circumstances of this case that:

a. What should have happened is that the claimant was granted an appropriately focused oral hearing before the LAP, which included consideration of Dr Grimes's report and the FTT decision;
b. The defendant should have considered the LAP's decision following the properly convened oral hearing with both "missing" elements;
c. To be mandated by the statute to refuse relief, the court must conclude that it is highly likely that the LAP would have made the same categorisation recommendation after the failures above were made good;
d. Further, it must be highly likely that the defendant would also have reached the same categorisation decision following the LAP's decision after a properly conducted oral hearing.

164. I make it plain at the outset that if I conclude that if it is not highly likely that the LAP would reach the same recommendation, I find it impossible on these facts to conclude that it is highly likely that the defendant would reach the same categorisation decision in the teeth of recommendation by the LAP that the claimant should be decategorised. Therefore, I judge on these facts that the defendant must establish the high likelihood of substantially similar decisions by both the LAP and the defendant leading to a substantially similar outcome: the refusal of decategorisation.

165. I now turn to consider the substance of the two key omissions. I examine the contents of Dr Grimes's report in detail first before turning to the FTT's decision.

Dr Grimes

166. Dr Grimes's psychiatric report is dated 14 May 2021 and was put before the FTT. He also gave oral evidence to the Tribunal. His report is detailed, building on a psychiatric report he had earlier prepared in February 2018. It cites as one of its key sources the claimant's "Clinical Notes, held at the Spinney Hospital." The report was prepared after "multiple interviews" that Dr Grimes held with the claimant. Given the centrality of Dr Grimes's report and evidence to the claimant's case, it requires careful analysis. I extract passages of particular relevance.

Index offence

167. Dr Grimes reported about the claimant's account:

> "He denied speaking with the victim prior to the day of the offence and initially expressed uncertainty as to whether she had approached him or vice versa. He then said that he had initiated contact with her. Before he went to talk to her he stated that he had seen her on the park and thought that she was pretty and sexy and he had thoughts of having sex with her. He stated that he had missed out on having normal relationships due to being in prison. When he approached her he said he found her confident and was laughing and joking with her. He felt she had made him feel sexy and thought at the time that she was a 'dick tease'. He said he was having thoughts such as 'if I can't have a girlfriend I'll just take one, I'll just take sex.'

168. The claimant asked her if she had had sex before and he was sexually excited by the idea of having sex with a virgin. He stated that talking with the victim felt nice and that she had acted older than she looked. He recalled becoming angry with her when she wanted to leave to go home to her parents. He stated he did not want her to go as he liked her company and wanted to keep her. He stated he wanted to treat her as a prostitute. When she tried to leave he recalled saying, 'what we are going to do isn't going to take long' and that his full intention was to rape her at this point. He recalled thinking, 'I know what it is like to be the victim so I wonder what it is like to be the one doing it.' He told her next that he was going to have sex with her and threatened her with physical violence if she did not agree. He took her to his den …"

169. As Dr Grimes put it, the claimant then "proceeded to rape her". After the rape the claimant stated that he had briefly felt proud about taking her virginity and being sexually satisfied. He believed he may have said, "I can't let you go because you will tell your mum and I think I'm going to have to kill you." He stated he then stabbed her several times with a knife. He then burnt the body using lighter fluid. After setting the body alight he ran away from the scene and blocked the offence out of his mind and headed to France.

Further comments

170. Dr Grimes notes that "In 2002 he told his then RMO that he had been using prostitutes on a regular basis prior to the index offence, stating that the youngest was ten years old and it seemed that he had regularly been having sexual intercourse with young girls." Further that "His fantasy material seems to be inconsistent in his descriptions. In 1999 he stated that he had been having sexual fantasises at the time of the offence involving sexual intercourse with pre-pubescent girls. The claimant also reported that he had been harbouring similar thoughts since 1982. He said he had met the victim in the park the day before the offence, befriended her and at that time he was going to try and have sex with her. However, since that time he has denied any sexual attraction towards children but in the adapted sex offender treatment programme report he has reported sexual attraction to young girls.

171. It was felt that within recent sessions he provided an inconsistent account of sexual attraction towards children. He initially denied any such thoughts but when considered in more detail he reported having sexual thoughts about younger girls in the past. For example, he stated he had been aroused by the idea of the underage prostitute being underage, had reported being sexually attracted to the victim of the index offence and found the idea of having sex with a virgin arousing. However, he would also state that he had experienced these thoughts for the first time on the day of the offence and had not experienced them since. He reported such thoughts had stopped due to the enormity of his offence. Nevertheless, on other occasions he stated that he did not think it inherently wrong to find younger girls under the age of sixteen sexually attractive and felt it would be okay to talk to them as long as he did not attempt to have sex with them. He also appeared to sexualise female children at times within sessions, stating that there was nothing wrong with having sexual thoughts about these girls and that he had previously chatted with younger girls he had found sexually attractive. He reportedly remarked "some are really tasty pieces and they know".

Progress at Ashworth

172. Dr Grimes considered the claimant's progress at Ashworth:

> "Since admission to Ashworth his mental health difficulties have involved relapses and remissions and a partial response to anti-psychotic medication. His presentations have included not eating, believing that his RMO had interfered with his tariff, bizarre beliefs and ruminations concerning his family and background, fears about other patients, delusional bizarre writing, poor sleep and appearing ill at ease, becoming angry loud and agitated, writing letters with amorous and abusive content, demonstrating lack of insight regarding mental health problems, refusing medication, changing his name to hide his identity from his family, variations of mood and strange beliefs regarding his offence.
>
> Negative symptoms have also included flattened affect, social withdrawal, poor motivation, limited insight into his mental health difficulties and risks. He has also been prone to non-compliance with medication."

173. Dr Grimes was asked to comment on "Whether the patient is now suffering from a mental disorder and, if so, whether a diagnosis has been made, what the diagnosis is, and why?" His response was:

> "Mr Murcott has a well-documented diagnosis of paranoid Schizophrenia. There is very clearly documented evidence of him experiencing auditory and possibly visual hallucinations, experiencing paranoia and having grandiose delusional ideas. There have also been reports of markedly disinhibited sexual conduct.
>
> In addition, Mr Murcott's history, attitude and some of his more detailed risk assessments do suggest that he has co-morbid personality disorder of the anti-social type predominantly. However, this has not been formally diagnosed using well known psychometric tools. Mr Murcott's historical records suggest bizarre beliefs and behaviour dating back to when he was aged 12 years old which would suggest a very chronic illness of early onset."

174. Dr Grimes was then asked to consider, "Depending upon the statutory criteria, whether any mental disorder present is of a nature or degree to warrant, or make appropriate, liability to be detained in a hospital for assessment and/or medical treatment." He answered:

> "The nature of his index offence has been clearly documented and his records indicate that Mr Murcott had very clear grandiose delusions and he also experienced chronic auditory hallucinations that eventually led to a decision to transfer him to a high secure psychiatric facility.
>
> There are very clear examples in his records of him hearing voices calling him names and telling him to kill himself and other people. There are bizarre beliefs about religion, suicidal ideas and there were reports of him getting delusions of reference from the television during which he sees things related to his circumstances, like fire, vampires, witches and the murder of a young girl.
>
> As outlined before, Mr Murcott has a chronic mental disorder some aspects of which are of a relapsing/remitting nature.
>
> However, the nature of his illness remains a major factor that makes it appropriate for him to remain detained in hospital. He has a chronic illness which was difficult to treat in the past and there is a very high risk of relapse if he is not closely supervised. The sexual offending risk which has been

> presented in the past is also of a degree that would suggest that Mr Murcott's detention in hospital remains justified until it can be clearly stated that the risk has been eliminated. That cannot be stated at the present time."

175. The report turned to medical treatment and Dr Grimes was to examine "Details of any appropriate and available medical treatment prescribed, provided offered or planned for the patient's mental disorder." On this, Dr Grimes said:

> "The mainstay of Mr Murcott's treatment is Clozapine therapy which has helped to control his psychosis in a satisfactory fashion. Non-pharmacological aspects include the sexual offending work which has been extensively done at Ashworth Hospital. He is not deemed suitable to engage in formal psychological work at this time."

176. Dr Grimes was invited to comment on the current presentation of the claimant by providing "A summary of the patient's current progress, behaviour, capacity and insight." On this, Dr Grimes provided a detailed response:

> "He has very little insight into the risk he posed to others. He is very unrealistic regarding his future placement, frequently requesting to be transferred to a lock rehabilitation unit.
>
> On 11/06/2018, his Psychologist reported that it was identified that he had made little progress in past psychologist sessions, there were limitations to how well he responded to psychological treatment which was likely due to his cognitive deficits which impacted on his ability to understand complex concepts and also for him to retain any material covered. As a result, it was thought that it would be unhelpful at that point to identify further psychological treatment goals.
>
> On 07/03/2019 while on a trip to see his brother at HMP Frankland, he was observed by staff to be checking if staff were looking at him and then he was noted to look at a young girl through the window and move his head around to look through the back window, as the car drove past. On 26/03/2019, he was described as not being happy with this Ward Round, when asked about looking at a young girl when on his community trip to see his brother. He denied that this had occurred. Indeed, as stated by the prison trainee psychologist, he stated that people were "make things up", and he will not be "coerced into a confession".
>
> On 23/07/2019, he was discussing toiletries with the female Occupational Therapist. He was then described as taking hold of the OT's hand without her consent and when the OT staff attempted to pull away, he held onto her hand with both of his hands and tightened his grip. The OT staff reported assertively asking him to let go on two occasions, stating that she could feel that his grip was not loosening and he was just staring at her. He then let go on the third request. The OT staff reinforced boundaries by asking him not to take hold of her hand and he was described as just staring at her. On 16/08/2019, he was noted to be holding one of his fellow peer's arm, and refused to let go, despite staff asking him to do so. When questioned later in the day about his behaviour, he became defensive and avoided staff eye contact.
>
> On 10/04/2020, a female staff member came into the communal areas and said hello to him, stating that she had not seen him in a while, and asked him how he was doing. He then stated to the female staff member that she had changed, and when asked by the staff member what he meant by that, he responded, "You've got even more gorgeous". It was explained to him that this was an inappropriate way to speak to a member of staff and that he should not make further comments like this to staff. He was described as not seeming to understand why this was the case. However, he did apologise for his comment."

Responsible Clinician

177. Dr Grimes reviewed observations of the responsible clinician. Dr Grimes begins by noting the clinician said that "Mr Murcott mental state has been relatively settled over the review period. He has not displayed any psychotic symptoms." Dr Grimes then proceeded to relate more of the feedback:

> "His insight into his past risks is partial at best, but to his credit he has not engaged in any violent behaviour for many years. Given his cognitive deficits he would need external controls more so than internal controls to help him to continue manage his risks in the future. He has consistently voiced not wanting to return to prison, but he has very unrealistic views regarding his care pathway in the future.
>
> On 17/07/2020, he stated that he fancies a female member of staff and thought she was beautiful. Boundaries were reinforced. On 26/07/2020, he told a female member of staff to f**k her boyfriend off and to run away with him. Boundaries were reinforced.
>
> On 21/08/2020, a female staff member reported that she while in the communal area she turned around and he was noted to have had his trousers pants down exposing his private parts and smiling. She reported that when he observed that a fellow had seen him he quickly pulled his pants up. 09/09/2020, the alleged incident of him exposing himself to a female staff member was discussed with him. He denied exposing himself to the staff member stating that he was only adjusting his pants.
>
> On 28/04/2021, he was reported by the observing staff that he was observed looking at school children on the way back to The Spinney from his Community Leave."

Mental state examination

178. Dr Grimes moved onto the mental state examination:

> "Regarding Insight; he accepts that he has a mental disorder and that he requires medication but he has on occasions requested to have his medication reduced. He does not think he needs to remain in a medium secure facility and keeps asking to be discharged to a rehabilitation ward or back to the community to live independently. He minimises his past risk behaviours and the reasons for his index offence. In the past on occasions he has blamed the victim of the offence for his offending."

179. Dr Grimes was then asked about "The patient's understanding of, compliance with, and likely future willingness to accept any prescribed medication or comply with any appropriate medical treatment for mental disorder that is or might be made available." Dr Grimes's opinion was that:

> "Mr Murcott has partial understanding of his illness. He does recognise symptoms including hallucinations and delusions and has been compliant with medication while in hospital. How much this could be done in the community is still unclear. He does not have good insight into his illness and has been non-compliant in the past. He has also asked for a drug-free trial while at The Spinney,

> but after explanation, he agreed to continue with Clozapine. He has not been properly tested out on his ability to self medicate and it is highly questionable that he would be able to self-medicate in the community given his cognitive deficits. He is compliant with treatment as an inpatient, but it is more than likely that if he was to be in the community, compliance with treatment would be an issue."

180. Dr Grimes was then invited to address what appears to be a standard question (number 15), "Whether (in Section 2 cases) detention in hospital, or (in all other cases) the provision of medical treatment in hospital, is justified or necessary in the interests of the patient's health or safety, or for the protection of others." His response was:

> "His chronic psychosis is well controlled on his current medication and there appears to be improved insight which is still very limited. Considering the level of risk he presented, and also due to the fact that there is still some evidence of him making infrequent inappropriate comments to female staff and mostly denying these incidents when questioned by the MDT, the team is of the opinion that his detention is justified for his health, his safety as well as for the protection of others.
>
> There have been concerns in the past about his mental state deteriorating rapidly in a prison setting, considering his vulnerabilities. The team is still of the opinion that this remains the case."

181. The report then moved to the question of future risk on discharge. The question posed was, "Whether the patient, if discharged from hospital, would be likely to act in a manner dangerous to themselves or others." Dr Grimes stated:

> "If Mr Murcott is to be discharged from hospital he is unlikely/unable to comply with his medication. He would also be prone to relapse of his past drug misuse. Both factors would lead to a relapse of his mental disorder with a significant increase of his risk to self and to others. The risk of sexual offending to children would increase greatly. If prematurely discharged given the above discussion the author is of the opinion that he would likely end up acting in a manner dangerous towards himself and others."

182. The report moved to a conclusion with Dr Grimes being invited to provide, "Any recommendations to the tribunal, with reasons." He replied:

> "The team respectfully request that the Tribunal do not discharge Mr Murcott's at this time but to allow him to remain detained in hospital where effective and necessary treatment is available. Given his cognitive difficulties his risks to others are being manage contextually in a medium secure environment. The team is of the opinion that a possible step down to a long term low secure service is possible in the future (this would have to be agreed by his gate keepers) with any further progress being very gradual and carefully managed."

FTT decision

183. I now consider the decision of the FTT. This specialist mental health tribunal consisted of Mr Jason MacAdam (Judge), Dr Lisa C Blissitt (Medical Member) and Mrs Mary A Harley (Specialist Lay Member). The hearing was held remotely on

22 July 2021 resulting in the Bank providing a four-page decision. The reasons given for the Tribunal's decision run to 17 paragraphs that extend to just over two pages. As with Dr Grimes's report, given the importance placed on it by the claimant, I set out relevant passages in detail.

> "6. The tribunal see no merit in detailing the circumstances which are available in those reports save to say that this was a horrific offence and in isolation demonstrates historically that if not properly managed the patient when mentally unwell presents a high level of risk to others, female children in particular but not exclusively.
>
> 9. In 1999 the patient was accepted at Ashworth and whilst there had relapses and remissions with only a partial response to psychiatric medication. The patient for many years presented with positive and negative symptoms of psychosis and those who have cared for him have made links between the deterioration of his mental state, his denial of responsibility for his index offending and the patient's acceptance or denial of a sexual attraction to young females. To that end, Dr Grimes summary of the patient's previous hospital records details that on many occasions when presenting with symptoms of illness and when either denying responsibility or minimising his culpability regarding his index offending the patient has presented a risk of anti-social behaviour towards others including inappropriate sexual behaviour towards females.
>
> 10. The patient's medication regime has been varied over the course of many years. There are frequent entries within Dr Grimes's report to the patient being non-concordant and a subsequent decline in mental health occurring. Not until 2012 was there any indication from the patient that he had any insight regarding the nature of his illness and that he would comply with his Clozapine regime to attempt to control it.
>
> 11. Over the years much work has been undertaken to try to improve by psychological intervention, the patient's insight regarding his index offending and the risks he presents. The clinicians have concluded that because of the patient's cognitive deficits he does not understand his risk factors or how to employ risk management strategies. That being so, the patient's management in a community environment has had to be confined to escorted leave with male only escorts.
>
> 12. … we read in the reports and heard from Dr Grimes was that the patient's level of understanding regarding his mental illness remains very limited. The patient's responsible clinician and the nursing staff agree that without the structure and support provided by a hospital environment and specialist staff in particular, the patient would quickly become non-concordant whether in the community or within the prison estate. As stated in paragraph 9 above, Dr Grimes is of the opinion that the patient's history demonstrates that when non-concordant the patient's mental health rapidly declines, and his presentation of risk increases. The tribunal have considered the evidence relied upon by Dr Grimes in support of his conclusions and agree.
>
> 16. … We accept the responsible witnesses' evidence that a return to prison would be disastrous. … Clozapine is the only medication which has maintained to any degree the patient's mental health stability and requires precise and timely administration combined with appropriate monitoring. For this patient with his mental health difficulties this simply would not be possible outside a hospital environment and certainly not within the prison estate. We are quite satisfied from the evidence we have considered that if returned to prison it would only be but for a short period before the patient's mediation administration regime failed, his mental health relapsed, and he presented risk to himself and others.
>
> Accordingly, we agree with the professionals who have now cared for the patient for many years that because of his mental health disorder he should not return to the prison estate.
>
> 17. As detailed above, the risks that the patient presents are serious but because of his current hospital environment are well managed. Those risks, we agree can be manged in a less secure environment. We are aware that some weeks ago Dr Grimes requested that the patient be once again

> assessed by the Gatekeepers, no information was available as to the progress of that application, but we would support such an assessment being expedited and therefore make an informal statutory recommendation that he be assessed for transfer to a long term low secure unit."

Discussion of counterfactual

184. First, Dr Grimes. In oral argument, the claimant submitted that Dr Grimes refers in his report to "remorse, shame and guilt". This is correct insofar as it is material goes, but is not the complete picture, again reinforcing that the picture was mixed. What Dr Grimes said was:

> "He expressed significant remorse, shame and guilt regarding the index offence." (B91) This sentence comes in section 2 of the report. The section is entitled: **"Details of any index offence(s) and other relevant forensic history.** (taken from Dr Al-nufoury report)."

185. It is unclear whether the expressions of remorse, shame and guilt were made to Dr Grimes or the other doctor and when such sentiments were expressed and in what particular context. These expressions of remorse need to be viewed in the wider relevant context of the claimant's problematic behaviour in other respects, including his staring at children and lowering of his trousers in the presence of a female member of staff, as noted in Dr Grimes's report. Ultimately the question is one of risk. Sales LJ emphasised in *Hassett* at para 51:

> "it is a relevant factor that both Mr Hassett and Mr Price have had extensive discussions with and opportunities to impress a range of officials of the Secretary of State, including significant contact with prison psychology service teams. The decision-making by the CAT/Director is the internal management end-point of an elaborate internal process of gathering information about and interviewing a prisoner…"

186. The claimant here also has been granted the benefit of a full psychological assessment specifically prepared for the 2023 categorisation decision (see psychologist report, para 9.3). The categorisation review that the defendant conducted considered the level of the risk he would pose to the public and to children. That must rationally be assessed in the context of the claimant's index offending, a matter carefully examined by Dr Grimes. It was reasonable for the defendant to remain concerned about the claimant's inappropriate conduct towards females and children as evidenced in the materials before her. It was also entirely rational for the defendant to be alive to the risks consistently identified by the POM, the psychologist and the LAP, and the unanimity of their recommendations against decategorisation. The full psychological review of the claimant's case was recent and targeted. The three assessors (POM, psychologist, LAP (collectively)) disclose no ambiguity or material dissension about the need for the claimant to remain in Category A. It was rational and reasonable for the defendant to rely upon them. The concerns about the claimant's sexual preoccupations and his sexual attraction to female children are soundly based. The concerns about his level of insight about these sexual preoccupations is supported by his contradictory accounts of his sexual interests as noted by Dr Grimes.

187. The claimant's core case on Dr Grimes is found in his DSFG at para 90(b):

> "It is clear that Dr Grimes and the FTT (MH) **significantly differ in risk assessment from that the Defendant chooses to rely upon and make** . The reasons for, and bases for, the dispute need to be properly resolved or explored if fairness is to be achieved." (emphasis provided)

188. Here the court is considering the separate question of whether the statutory test under section 31(2A) has been established by the defendant. Once one properly and fairly examines the full contents of Dr Grimes's detailed report, as I have set out comprehensively above, the claimant's core submission about the divergence between Dr Grimes and the risk assessments the defendant relied on is unsustainable. Dr Grimes states in terms that the claimant's insight into past risk "is partial at best". For the claimant to manage his risks in future, Dr Grimes concluded that the claimant "would need external controls more so than internal controls". Should the claimant be unlawfully at large in the community, there would be no external controls on him. Therefore, it cannot be credibly argued but that Dr Grimes retains concerns about the risk the claimant would present in the community to the public and especially to children. Dr Grimes noted how the defendant was looking at a school-aged girl at a time when he had been entrusted with leave in the community and despite being escorted and therefore supervised. One must contrast that with an unsupervised claimant unlawfully at large in the community. The looking at children is something the claimant would not accept, despite being observed doing so by escorting staff. The claimant has a history of false denial. Dr Grimes notes how the claimant "minimises his past risk behaviours" and also the "reasons" for his raping and murdering a child. Indeed, the claimant has "on occasions" in the past, as noted by Dr Grimes, "blamed the victim of the offence for his offending". The claimant had told his previous RMO that he had regularly been having sexual intercourse with young girls, and therefore the sexual contact with the child victim was not a one-off act of child sexual contact. Sex activity with pre-pubescent girls features in what Dr Grimes calls the claimant's "fantasy material". At times the claimant has denied that he is attracted sexually to children. At other times, he admits it. Therefore, his attitude to one of the roots of his risk is inconsistent and contradictory. It is unsurprising that Dr Grimes recorded in his report that the claimant "has very little insight into the risk he posed to others". His behaviour could be intimidating and erratic, as evidenced by the July 2019 incident noted by Dr Grimes when the claimant grabbed a female member of staff's hand and would not let go even after being "assertively" asked. During his seizing of her hand, he continued to stare at her. Dr Grimes notes that there have "been reports of markedly disinhibited sexual conduct."

189. Dr Grimes notes that the claimant has "a well-documented diagnosis of paranoid Schizophrenia. There is very clearly documented evidence of him experiencing auditory and possibly visual hallucinations, experiencing paranoia and having grandiose delusional ideas." This is a "chronic mental disorder some aspects of which are of a relapsing/remitting nature." It is this illness and its recurring nature that leads Dr Grimes to the conclusion that the claimant should remain detained in hospital. Indeed, Dr Grimes believes that "there is a very high risk of relapse if he is not closely supervised." It must follow that if the claimant were unlawfully at large - and by definition not closely supervised - and very likely unmedicated, there would be, in Dr Grimes's words, a "very high risk of relapse." This must be combined with the more recent and scientifically valid diagnostic and dynamic risk assessments that identify the risk of serious harm to children as "high" with a medium risk of reoffending. Dr Grimes continues:

> "The sexual offending risk which has been presented in the past is also of a degree that would suggest that Mr Murcott's detention in hospital remains justified until it can be clearly stated that the risk has been eliminated. That cannot be stated at the present time."

190. I cannot see how this can be read as Dr Grimes providing supporting evidence that there is convincing evidence that the risk of the claimant reoffending and exposing children to serious harm if unlawfully at large has "significantly reduced". Under the PSI (para 4.2), this is what the defendant ultimately was considering.

191. The pertinent question is not fundamentally about risk of escape, a matter that was remarked on by the Parole Board in its post-decision comment, and indeed a matter mentioned by the LAP. It is vital to return strictly to the issue for the defendant: risk of reoffending if unlawfully at large, given that the claimant despite his health difficulties retains the capacity to escape. On balance, for the elements that do assist the claimant, the report of Dr Grimes overall does not assist the claimant on that question. Indeed, a fair and reasonable reading of Dr Grimes's report is that it materially supports the defendant's concerns about the claimant's risk. If his report had been before the defendant, while there is some material of assistance to the claimant, it is highly likely to have confirmed and supported the defendant's concerns about risk of serious harm if unlawfully in the community. I cannot think that if Dr Grimes had given evidence at an oral hearing that he would have moved from his

position about the risk to children that the claimant unlawfully at large would pose if "not closely supervised" as the claimant would not be. I cannot find the support for the claimant's case in Dr Grimes's report that he argues for. At an oral hearing, Dr Grimes would be bound to have regard to the updated psychologist assessment and diagnostic risk assessments via the OASys Sexual Reoffending Predictor tool and the ARMADILO-S on "Future Sexual Violence Risk". It must be remembered that the risk assessment which was before the defendant was that the claimant presents a "High" risk of serious harm to children if he is in the community with a medium risk of reoffending through sexually motivated "contact" offences. This is plainly consistent with the assessment of Dr Grimes when viewed as a whole. Further, the "current assessment of risk from the Psychology Department" is as follows:

> **"Assessment of Future Sexual Violence Risk using the OASys Sexual reoffending Predictor**
>
> • Mr Murcott has been assessed using the OASys Sexual reoffending Predictor (OSP) which is an actuarial risk assessment tool used to assess the likelihood of proven sexual reoffending for adult males. In Mr Murcott's case:
>
> • OSP/C predicts further offending for a sexual/sexually motivated contact offence. Mr Murcott has been assessed as **MEDIUM** on OSP/C."

192. This again is consistent with Dr Grimes's report. The claimant's submission about these more recent risk assessments fails to engage with the essential message they convey. The initial oral submission to the court was that the claimant's assessed risk is "not high". When pressed on this, counsel realistically recognised that it is "high in the community". The ARMADILO-S tool administered by Ms Main the (trainee) prison psychologist is directed at people with borderline or limited intellectual functioning. The diagnostic tool produced a conclusion summarised by Ms Main as the claimant presenting a "Moderate" risk of future sexual violence while in a "secure setting". Nine "critical" risk factors are identified, including "Sexual Deviance", "Sexual Preoccupation", "Substance Abuse" and "Mental Health". While there are protective factors, Ms Main makes the obvious point that the claimant is assessed while in a secure and supported environment. Should he be unlawfully at large, unsupervised and unsupported, it is a reasonable inference that his risk of future sexual violence is increased. Thus, the ARMADILO-S diagnostic tool is consistent with the general risk picture painted by the OASys and Dr Grimes.

193. I remind myself that the Category A test within the PSI is:

> **"Definition of Category A**
>
> 2.1 A Category A prisoner is a prisoner whose escape would be highly dangerous to the public"

194. There is a high risk of serious harm to children should the claimant be unlawfully at large in the community. It is this feature that the defendant had to anxiously consider: the risk, particularly to children, if the defendant were unlawfully at large. On the most updated risk assessment following a full psychological assessment, if the claimant were unlawfully at large, there is a medium risk of reoffending with sexually motivated contact offences against children with a high risk of serious harm to children should that happen. I find nothing in the report of Dr Grimes that differs from that analysis. Indeed, Dr Grimes's report is consistent with it. As Dr Grimes's report states in terms, if the claimant were "prematurely discharged", Dr Grimes is "of the opinion that he would likely end up acting in a manner dangerous towards himself and others".

195. I find that it is highly likely that if Dr Grimes's report and/or his testimony at an oral hearing were before the LAP and the defendant, the outcome would not be substantially different.

196. I turn to the FTT. There is nothing in the decision of the FTT that contradicts this characterisation of the risk that the claimant poses to children if unlawfully at large in the community. The FTT ultimately was considering a different question:

release or continued hospital detention — its statutory function. It is noteworthy that the FTT was against the claimant being returned to prison. It was concerned about his deterioration and the risk he would pose because of it. I have no doubt that if the question were posed to the FTT whether the claimant if unlawfully at large in the community, without structure and supervision, would pose a high risk of serious harm to children, the answer is obvious. He would.

197. I find that it is highly likely that if the FTT's decision were before the LAP and the defendant, the outcome would be substantially the same (not substantially different). The two restricted settings are different. Further, and critically, the risk posed by the claimant in a low security hospital setting is materially different to the risk he poses if unlawfully at large.

Conclusion: section 31(2A)

198. The case, I state without reservation, is not without complexity. There is sufficient material in Dr Grimes's report and the FTT's decision in favour of the claimant for these items to have been before the LAP and the defendant. This is why on a pure reasonableness analysis, the failure to consider them exceeded the permissible range. But one must then move on to the statutory test. To put it shortly, it asks the court to conjecture what the defendant is highly likely to have done if the identified errors or failures had not occurred. I emphasise that the court is not invited to step in and make its own decision. The test is not substitutionary. But in the circumstances of this case, the question is whether even equipped with Dr Grimes's report and/or testimony and the FTT decision the defendant is highly likely to have made substantially the same categorisation decision. I have little difficulty in concluding that the defendant would have confirmed the claimant's Category A status even with those two documents.

199. I add that following the part-heard hearing, the court received a statement filed on behalf of the defendant. It is from Steve Easton who is Head of Category A Reviews in the Directorate of Security at the Ministry of Justice and dated 10 February 2025. He considered both Dr Grimes's report and the FTT decision. His conclusion is that "they would have made no difference to the decision not to downgrade the Claimant." He proceeded to offer his analysis. I am bound to say that such after-the-event reasoning is rightly viewed with care, often scepticism, by the court. Stanley Burnton J (as he then was) observed in *R (Nash) v Chelsea College of Art and Design [2001] EWHC Admin 538 at para 34* that providing reasoning after a decision has been given should be treated with particular caution, since there is the obvious risk of self-serving ex post facto rationalisation. This precept was more recently applied by Chamberlain J in *Inclusion Housing CIC v Regulator of Social Housing [2020] EWHC 346* Admin at para 78, where he said:

> "Furthermore, reasons proffered after the commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge: *Nash* , [34(e)]."

200. I have reached my conclusion on section 31(2A) without placing any reliance of the evidence of Mr Easton. Therefore, considering my analysis of the two "missing" elements together (Dr Grimes and the FTT), I find that it is highly likely that the outcome (the defendant's decision) would not have been substantially different if these two areas of evidence that the claimant identified in his DSFG were before the LAP and subsequently before the defendant, whether directly or through the LAP decision. There is some material in the documents that assists the claimant, and that is why they should have been considered, but the balance is against him. What is of significance is that the "full" psychological assessment for the purposes of the LAP review was not taken in a vacuum. In the LAP minutes and recommendations (section 9 of the dossier before the defendant) it is stated:

> "A full psychological assessment has been undertaken to review the level of risk **in light of interventions undertaken in special hospital** ." (emphasis provided)

201. Thus the psychological assessment had the context and focus of recognition of interventions undertaken while in a hospital setting. I further note that the statutory test is not one of certainty of outcome, but is more than mere balance of

probabilities. Given the essential thrust of Dr Grimes's report and the FTT's concerns about deterioration, I cannot see overall material assistance in the claimant's favour. The converse is far more likely: that there would have been material confirmation of the risks that the claimant is likely to pose to children if unlawfully at large. Indeed, one of the conclusions of the LAP was along these lines:

> "It was recognised that the special hospitals and prison provide a secure environment with a structured medication regime. However, if this structure were not present, it is likely that Mr Murcott would become less consistent with his medication and likely that his mental health would destabilise. This may in turn make him more likely to want alcohol, thereby significantly increasing his risk of disinhibition and sexual offending."

202. Throughout the papers, there is a recognised mechanism operating in the claimant of substance abuse, mental health destabilisation, consequent disinhibition and sexual preoccupation with children. It is clear that the LAP did consider the unlawfully at large test and reached a conclusion that I find it is highly likely would be reached again by the LAP, even if in receipt of Dr Grimes's report and oral testimony, along with the FTT decision. The FTT concluded:

> "We are quite satisfied from the evidence we have considered that if returned to prison it would only be but for a short period before the patient's medication administration regime failed, his mental health relapsed, and he presented risk to himself and others."

203. This analysis can be transposed to the unlawfully at large situation where there would be no external control or restraint on the claimant, he would likely not be properly medicated, his mental health is likely to deteriorate and he would present a risk to "others", which means particularly children, the risk being of sexual contact offences with a high risk of serious harm. While I acknowledge the often-stated dangers in predicting what a decision-maker would do in a counterfactual situation, it seems to me that this case is very clear. The missing evidence overwhelmingly points to the defendant, armed with everything, having no hesitation — and for sound and rational reasons — confirming the claimant's categorisation status as Category A. I find therefore that the defendant has established the section 31(2A) test. That being the situation, I "must" refuse to grant relief on this basis. The court has no discretion. It is mandated by the legislature that the court refuse relief, subject to section 31(2B) ("(2B)"). I turn to this.

Subsection (2B)

204. Subsection (2B) provides:

> "(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

205. Counsel were given the opportunity to address the court on the (2B) test. The overall picture was summarised attractively by Mr Rule when he said the jurisprudence on the question is in a "nascent" state. Indeed, the section 31 provisions were only enacted in 2015. I have read the four additional authorities placed before me. They are:

- *R. (Silus Investments SA) v Hounslow LBC [2015] EWHC 358 (Admin)* , per Lang J

• *R (Good Law Project Ltd) v Secretary for Health and Social Care [2021] PTSR 1251 ("Good Law Project")* , per Chamberlain J

• *R (Cooper) v Secretary of State for Justice [2024] EWHC 1465 (Admin)* , per HHJ Siddique, sitting as a Deputy of this court

• *R (Clarke) v Secretary of State for Justice [2025] EWHC 190 (Admin)* , per Fordham J

206. The cases are avowedly highly fact-specific. In no case is there a definition of what constitutes "reasons of exceptional public interest", or what the factors for exceptionality might be. It seems to me that *Good Law Project* is a useful case to consider when a public interest that might be "exceptional" might arise. This was about the controversy about transparency in the public procurement of Covid-related PPE and other contracts. Even then, Chamberlain J noted at para 157 that the subsection might be

> "easy to apply in a case where the claimant is challenging an individual decision that affects him or her personally. They are more difficult to apply in a case such as the present, where a body such as the first claimant acting in the public interest challenges a repeated failure by a public body to comply with transparency obligations."

207. It is submitted on behalf of the claimant that a public interest that is exceptional arises in the claimant's case. It is important to be clear about the situation the court is considering. It is whether relief should be refused where (1) the defendant had not considered Dr Grimes's report and the FTT decision and (2) it is highly likely that the categorisation decision would have been the same even if the defendant had considered these documents. I cannot see how an "exceptional" public interest arises in such circumstances. Reducing the factual intricacies to their essentials, it comes to this: the defendant made an error in not considering certain documents, but even if she had considered these documents, it is highly likely that it would have made no material difference to her ultimate categorisation decision. Considerations of public interest that are *exceptional* do not arise in the circumstances of the claimant's case.

Conclusion: section 31(2B)

208. I cannot detect any "reasons of exceptional public interest" under section 31(2B) that would justify disregarding section 31(2A) . Therefore, under mandate from the statute, I must refuse relief on Grounds 3 and 4.

XII. Relief

209. I finally consider relief. I have found for the claimant on Grounds 1 and 2. It was unfair not to convene an oral hearing and the defendant has made no application under section 31(2A) in respect of either ground. There is no reason not to grant the relief sought by the claimant and every reason to make the order. Exercising the court's wide discretion, therefore, I make the mandatory order applied for, which is that the decision is retaken including the holding of an oral hearing. The outcome of the categorisation decision is entirely a matter for the defendant.

210. For the reasons given, I am mandated by statute to refuse to grant relief on Grounds 3 and 4.

XIII. Disposal

211. To assist, I gather together in one place the court's prime conclusions:

- **Ground 1** . Application for judicial review granted. Mandatory order granted.
- **Ground 2** . Application for judicial review granted. Mandatory order granted.
- **Ground 3** . Application for judicial review granted in part. Relief refused, section 31(2A) .
- **Ground 4** . Application for judicial review granted. Relief refused, section 31(2A) .
- **Ground 5** . Application for judicial review dismissed.

212. For those individuals who are not destined to spend the rest of their life in prison, the law mandates an obligation of reasonable progression (*Kaiyam v Secretary of State for Justice [2014] UKSC 66*) or at least no arbitrary block (*R* (*Brown) v Parole Board for Scotland [2017] UKSC 69*). Thus, reasonable routes for progress must be available and the evolving nature of the individual's risk must be carefully reviewed. In this context, it is important to be clear what this judgment decides and does not decide. The judgment says nothing about how long the claimant should remain in prison or other secure setting, or when, if ever, it would be safe for him to be released back into the community and not pose a material risk to children. These are questions for others. This judgment is strictly confined to examining the lawfulness of the process by which the defendant reached her impugned decision.

213. I direct counsel to draw up an order to reflect the terms of the judgment. Any further consequential applications to be filed at the same time.

Annex A

Procedural history

Date	Event
19 July 2023	Impugned decision 1
6 September 2023	Impugned decision 2
7 November 2023	Claim issued
11 December 2023	Acknowledgement of service
16 February 2024	Paper decision on permission (refusal)
17 May 2024	Oral renewal (permission granted)
30 May 2024	Set down for substantive hearing

19 June 2024	Detailed grounds of defence
20 September 2024	Claimant's skeleton argument
26 September 2024	Defendant's skeleton argument
10 October 2024	Substantive hearing
18 October 2024	Further written submissions from the parties
10 January 2025	Further skeleton arguments
6 February 2025	Part-heard hearing
10 February 2025	Further statement on behalf of the defendant

Annex B

Materials

Item	**Pages**
Hearing bundle	306
Authorities bundle	1038
Loose authority (*Fox*)	20
Claimant skeleton	25
Defendant skeleton	18
Claimant further written submissions	10
Defendant further written submissions	11
Further authorities bundle	82