Neutral Citation Number: **[2011] EWHC 1630 (Admin)**

Case No: CO/2728/2010

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/06/2011

Before:

MR JUSTICE WYN WILLIAMS

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Between:

THE QUEEN **(on the application of PAUL FLINDERS)**	Claimant
- and -	
THE DIRECTOR OF HIGH SECURITY	
- and –	First Defendant
SECRETARY OF STATE FOR JUSTICE	Second Defendant
- and –	Third Defendant
THE PAROLE BOARD	

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Philip Rule (instructed by **Wilkins Solicitors**) for the **Claimant**

David Manknell (instructed by **Treasury Solicitor**) for the **First & Second Defendants**

Matthew Slater (instructed by **Treasury Solicitor**) for the **Third Defendant**

Hearing dates: 13 – 14 April 2011

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Judgment

Mr Justice Wyn Williams:

Introduction

1. The Claimant is a prisoner. On 19 May 2003 he was sentenced to life imprisonment for the manslaughter of his neighbour, Ms Wendy Holmes. The Claimant stabbed Ms Holmes repeatedly; when her body was discovered she was seen lying in a crucifix position with a large number of wounds to her chest and abdomen and one wound to her lower face.

2. The Claimant has always said that he has no memory of the events immediately before and at the time of the killing. He accepts that some time before the killing he heard voices ordering him to kill the victim. He also accepts that some time before the killing he consumed a significant amount of alcohol. Otherwise, to repeat, he has no memory of the relevant events.

3. The Claimant was originally charged with murder. However, either upon the day that the Claimant was sentenced or shortly before that date the prosecution accepted his plea to manslaughter on the ground of diminished responsibility.

4. The Sentencing Judge was under an obligation to fix a minimum term that the Claimant should serve prior to being considered for release on parole. The judge fixed the term as 5 years less the time which had been spent on remand. The Claimant's minimum term expired on 17 May 2007.

5. Following his conviction the Claimant was categorized as a Category A prisoner. Between about July 2003 and 21 July 2009 the Claimant was held at HMP Frankland. During that period a number of categorisation reviews took place but throughout the whole of the period the Claimant remained a Category A prisoner.

6. In August 2005 the Third Defendant undertook its first review of the Claimant's case. That review took place before the minimum term imposed upon the Claimant had expired. On 14 May 2007 a further review by the Third Defendant was scheduled to take place. It is common ground that this

review was deferred at the request of the Claimant. On 20 November 2007 the deferred review took place. The review took the form of an oral hearing and the Claimant was represented by Counsel. The Third Defendant issued its decision on 4 January 2008; it concluded that it was unable to assess the risk which the Claimant then posed because it had not been provided with a relevant report by the Second Defendant.

7. As a consequence of this unsatisfactory state of affairs, the Claimant commenced proceedings by way of judicial review against the Second Defendant. The Third Defendant was named as an Interested Party. Those proceedings came on for hearing before Blair J on 28 November 2008. The Learned Judge upheld some of the Claimant's complaints. The relief granted took two forms. First, the judge granted a declaration in these terms:-

> "The Defendant's failure to provide the report requested by the Parole Board for its hearing on 20 November 2007 prevented the Board from assessing whether it continued to be necessary for the protection of the public that the Claimant should be confined and thereby breached the Claimant's rights under Article 5(4) ECHR".

Second, Blair J ordered the Defendant within a period of 3 months from the date of his order to prepare all such documents and reports as were necessary for a reference of the Claimant's case to the Third Defendant for an oral hearing.

8. On 21 July 2009 the Claimant was transferred from HMP Frankland to HMP Long Lartin. On 28 October 2009 the First Defendant reviewed the Claimant's categorisation. By letter dated 25 November 2009 the First Defendant notified the Claimant that he would remain a Category A prisoner.

9. On 16 December 2009 the Third Defendant reviewed the Claimant's case. The review was by way of oral hearing. The panel of the Third Defendant which conducted the review decided that the Claimant should not be released and it did not advise the Second Defendant to transfer the Claimant to open conditions. It communicated its decision by letter dated 31 December 2009.

10. These proceedings were issued on 24 February 2010. They raise a number of issues. First, the Claimant asserts that the First Defendant's decision of 28 October 2009 to retain the Claimant as a Category A prisoner (communicated by the letter of 25 November 2009) was unlawful; a number of grounds are advanced to support that submission. Second, the Claimant submits that the Third Defendant acted unlawfully in failing to convene a review of his case by way of oral hearing prior to 16 December 2009. Third, the Claimant alleges an unlawful failure on the part of the Second Defendant to provide appropriate material to the Third Defendant to enable the Third Defendant to conduct a lawful review of the Claimant's case prior to 16 December 2009. Fourth, the Claimant submits that the Third Defendant unlawfully failed to ensure that the Second Defendant provided such material so as to enable a hearing to take place prior to 16 December 2009. On 23 August 2010 HH Judge Michael Kaye QC, sitting as a Deputy High Court Judge, ordered a "rolled-up" hearing.

11. Such a hearing was shortly to take place when the First Defendant reviewed the Claimant's categorisation again. The review took place on 20 December 2010 and the First Defendant issued a decision upon the review by letter dated 21 January 2011. The First Defendant decided that the Claimant was to remain as a Category A prisoner.

12. On 8 February 2011 there was a hearing before Lindblom J. He permitted the Claimant to amend the claim so as to mount a challenge to that categorisation decision. A number of other directions were made by the Learned Judge. In due course the claim was amended and the Claimant now relies upon a number of grounds in support of his contention that the most recent categorisation decision should be quashed.

13. As will become apparent the claim as now constituted raises many wide ranging issues. As with all cases of this type, however, the relevant facts are crucial to at least some of the grounds of challenge. Accordingly, the next section of my judgment is a chronological recital of the important facts and events in this case.

14. As I have said, this claim has proceeded upon the basis of a “rolled-up” hearing. In relation to all grounds of claim I grant permission unless I indicate to the contrary during the course of this judgment.

15. For the sake of clarity all decisions which are subject to challenge in this case and which were communicated in writing to the Claimant or his representatives are referred to by the date of the document which communicated the decision in question.

The relevant facts

16. The Claimant had been an inmate at HMP Frankland for no more than a few months when he made the first of a number of applications to participate in courses known as ETS and CALM (the precise date was 19 October 2003). The acronym ETS stands for “Enhanced Thinking Skills”. CALM is the acronym for “Controlling Anger and Learning to Manage it”. No decision was made upon the Claimant's applications.

17. On 4 April 2004 the Claimant made another ETS application to no avail. He applied again on 18 October 2004. On this occasion an assessment was undertaken on or about 27 October 2004; it was concluded that the Claimant was unsuitable for ETS by reason of his schizophrenia. That view prevailed over the following months.

18. On 28 July 2005 the Claimant applied again for ETS. The documentary evidence suggests that an assessment of his suitability was to be undertaken; however, there is no evidence that his suitability was assessed before 30 January 2006 when the Claimant made yet another application for the course. Meanwhile, in August 2005 the Claimant’s first parole review took place.

19. It was also on 30 January 2006 that the Claimant first applied to participate in a course known as FOCUS. This course is concerned with offenders whose dependence upon alcohol is linked to their risk of re-offending. Shortly after this application was made the Claimant underwent some kind of assessment designed to detect substance misuse and then a CSMA (Comprehensive Substance Misuse Assessment).

20. During 2006 the Claimant was involved with the CARATs Team. CARATs stands for “Counselling, Assessment, Referral, Advice and Through care Service”. He began one-to-one work with a member of the Team and the Claimant showed great motivation.

21. On 26 June 2006 the Claimant applied for ETS once again. That same month he was referred for assessment for FOCUS. Initially he was assessed as being suitable for a detailed assessment for FOCUS in 2007 but subsequently the Claimant was assessed as being unsuitable. Apparently this was because the FOCUS programme was not suitable for his treatment needs.

22. In December 2006 the Claimant was assessed as unsuitable for ETS and the view was taken that since the completion of this course was a pre-requisite for participation in CALM, the Claimant was also unable to participate in that course.

23. Undeterred, the Claimant applied again for ETS; he was assessed as unsuitable on 1 February 2007 and again assessed as unsuitable for FOCUS on 8 February 2007. During 2007 the Claimant remained on the ETS database as being a person eligible to be re-assessed and he also remained on the waiting list to be assessed for CALM.

24. Parole reviews (referred to at paragraph 6 above) also took place in 2007. In its decision letter dated 4 January 2008 the Third Defendant records:-

> “10. You have, however, been unable to address your risk factors with any offending behaviour or other behaviour programmes due to being assessed as being unsuitable for all programmes considered relevant due to your lack of any appropriate psychiatric or psychological assessment. This has resulted in your being unable to be provided with any suitable offending behaviour or risk reduction work or to be able to be assessed as one whose risk is sufficiently reduced to allow you to be re-categorised as a Category B prisoner so as to be able to access a wider range of offending behaviour work.”

The decision letter continues:-

> "….At the deferred Parole Board review hearing on 20 November 2007, the panel was not provided with any psychiatric or psychological assessment, with no Education reports, with no report of any assessment for ETS, CALM or FOCUS programmes, with no explanation as to why you remained unsuitable for these programmes, with no assessment of what further risk reduction work you could undertake and with no indication of when any assessment or work to enable your risk to be assessed or reduced could or would be provided."

25. The Third Defendant was unable to assess the Claimant's risk on the basis of the information with which it was provided. In those circumstances it decided to advise the Second Defendant that it should provide various documents at and take certain steps before the next parole review. These documents and steps included:-

> "(1) An initial assessment or report from the psychology department to identify why you are unsuitable for ETS, CALM and FOCUS courses and for any other identified or relevant offending behaviour work which you should otherwise undertake;
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> (2) The initial psychological assessment should be provided to the psychiatrist who is to undertake the necessary psychiatric assessment should identify:
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> a)any mental health deficits;
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> b)the extent to which any psychological or psychiatric deficit is amenable to treatment;
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> c)any other relevant work which Mr Flinders could undertake in order to reduce his risk of harm to the public;

d)the appropriateness of Mr Flinders' detention in prison as opposed to his treatment in a hospital setting;

e)an assessment of his risk if Mr Flinders was to be transferred to a lower security category in the closed estate.

(3) An up to date report of Mr Flinders' learning style and educational standards and deficits and work which he should and could be provided with to reduce and relevant deficit.

(4) Up to date risk assessment from the lifer manager, prison staff, seconded probation officer and home probation officer."

26. On 8 February 2008 Ms Joanne Wood, a psychological assistant based at or involved with HMP Frankland, considered the Claimant's eligibility for ETS and FOCUS. In relation to ETS she wrote:-

"The OASys document has found that Mr Flinders did not have the risk or need to require this offending behaviour programme." (OASys stands for Offender Assessment System and is a risk analysis tool.)

So far as FOCUS was concerned she wrote:

"Initial assessment for the FOCUS programme found that Mr Flinders' level of alcohol use in the 12 months prior to his offence was low. Therefore the FOCUS programme is not appropriate for Mr Flinders' needs."

Ms Wood also noted that a WAIS assessment (Wechsler adult intelligence skill) was being completed by a member of the psychology department in order to determine Mr Flinders' learning style. That assessment was completed in February 2008.

27. In June 2008 the Claimant's categorisation was reviewed. This was the fifth time (at least) that the Claimant's category had been reviewed

following conviction. A decision was taken that he should remain a Category A prisoner. The Governor of HMP Frankland made a recommendation to that effect and one of the reasons given by the Governor for his recommendation was that the Claimant had yet to address his offending behaviour. In relation to this issue the Governor wrote:-

> "In all his time in prison Mr Flinders has yet to address his offending behaviour. This has been due to Mr Flinders not being suitable for any main stream programmes rather than to him being unwilling to participate. He is deemed not suitable due to his low IQ level. However staff are doing their very best to help progress Mr Flinders."

The Governor also wrote:-

> "Due to Mr Flinders' situation everyone who is involved with him is doing their best to progress him in the correct and most suitable way. We believe possible one-to-one with psychology could be a progressive way forward. However due to our resources this is unlikely to be carried out here at HMP Frankland. A psychological risk assessment is due to be completed in August and this may give us a better idea of how to progress Mr Flinders."

28. A detailed psychological assessment was undertaken and a report compiled on 27 August 2008. The author of the report, a trainee psychologist, Ms Lorraine Fraser, noted that the Claimant wanted to ensure that he had done all that he could so as to prevent re-offending and to that end he had applied to be assessed for ETS, CALM and FOCUS. Ms Fraser's understanding was that none of the programmes were appropriate for the Claimant and the reasons given were as follows:-

• "ETS – Mr Flinders' OASys score indicates that he does not meet the risk and need criteria. Mr Flinders' learning style (as identified by the WAIS assessment) also precludes him from being offered a place.

• FOCUS – Mr Flinders has not been offered a place as it was assessed that his alcohol consumption was not sufficiently severe for him to benefit from attending.

• CALM – a requirement for the CALM programme is that the ETS programme is completed prior to its engagement. This is not a realistic target given he does not meet the criteria for the ETS programme.

• Mr Flinders has also completed an assessment of his intellectual functioning in 2008 and it was identified that it would not be ethical or of clinical benefit for Mr Flinders to be offered a place on the above programmes because of his learning style."

Ms Fraser considered that the appropriate next steps were:-

• "To re-engage with the CARATs service to address Mr Flinders' alcohol use, particularly in relation to his reaction to stress;

• To engage with the mental health team to discuss how he can manage sources of stress upon release;

• To continue his compliance with the Mental Health Team in terms of his medication;

• To explore his offence in more detail, particularly offences leading up to them. This could be done possibly during the work with Mental Health Team and the CARATs service, as there is clearly a link between alcohol use, stress and offending. This could also be considered at an establishment where the Psychology Department is able to offer one to one work.

• To comply with all recommendations made for his release."

29. On 28 November 2008 Blair J gave judgment in the previous judicial review. On 22 December 2008 the Second Defendant notified the Third Defendant of the orders made in the proceedings (see paragraph 7 above). It may well be that the Third Defendant, as an Interested Party, had been served with the order of Blair J in any event. On 4 February 2009 the Second Defendant provided the Claimant's parole dossier to the Third Defendant.

30. On 11 February 2009 the Claimant was again assessed for FOCUS but he was considered to be unsuitable. On the same date he was assessed as suitable for CALM but almost immediately this assessment was re-visited since the Claimant had not completed ETS.

31. On 13 February 2009 the Claimant's parole dossier was put forward for inclusion in a process known as the Intensive Case Management (ICM) process. This process is described in documentary guidance issued by the Third Defendant (which guidance was included in the authorities' bundle). It is a process instigated by the Third Defendant to ensure that active case management occurs in relation to certain identified cases. If a case is included in the process a single member of the Third Defendant will review it and make directions or make a decision based upon the papers. On 20 February 2009 a single member of the Third Defendant reviewed the Claimant's case as part of the ICM process. He decided to make a decision on the papers; he declined to order the Claimant's release and he declined to recommend a move to open conditions. He issued a written decision which concluded:-

> "11. The risk to life and limb that you present is too great to enable the panel to direct release or recommend a move to open conditions. The panel was encouraged by your excellent prison behaviour, the fact your mental health is currently stable and the work you have done with CARATs to look at your use of alcohol."

> The single member had earlier noted in his decision that the Claimant's most recent OASys assessment had put him at a medium risk of reoffending and a medium risk of harm to the public. He had also noted that there was some evidence of risk reduction during the period of the sentence "but ongoing work and monitoring [was] still needed in order to reduce [the] risk to a level fit for it to be monitored in the community or open conditions."

32. On 19 March 2009 the Claimant's solicitors wrote to HMP Frankland seeking clarification about the courses that were available to him. They

wrote again on the same theme on 11 June 2009. On the same date they wrote to the Third Defendant querying whether an oral hearing of the Claimant's case had been fixed. It was not until 14 October 2009 that the Third Defendant notified the Claimant that the hearing would take place on 16 December 2009. The Claimant's transfer to HMP Long Lartin took place on 21 July 2009. By the time of his transfer there had been no substantive response to the request for information about courses for which the Claimant was eligible.

33. A review of the Claimant's categorisation was scheduled for the autumn of 2009. On 20 August 2009 the Claimant's solicitors made written representations to the effect that the Claimant should be downgraded. These representations were those which preceded that categorisation decision of October 2009. The representations included the following:-

> "a. Any lack of progress by Mr Flinders through the prison estate is not of his own devising, but is rather due to the fact that throughout his time in custody, there appears to have been considerable confusion regarding what courses he should/is able to undertake;
>
> b. Although it is clear his unsuitability for the enhanced thinking skills course is due to his risk level being too low, there appears to be a persistent belief that his unsuitability is due to his education level. This misconception is proving inexplicably difficult to overcome and may lead to the belief that his risk level is higher than is actually the case."
>
> The solicitors also relied upon the contents of a psychiatric report which had been prepared by Dr Pratish Thakkar. The report had been prepared in December 2008, no doubt in response to the request by the Third Defendant that a full psychiatric assessment take place before the next parole review. The doctor recommended that the Claimant be downgraded to a lower category suggesting that this would provide him with the opportunity to engage in

> further therapeutic work “like courses, community based programmes and employment opportunities”.

34. The categorisation review took place on 28 October and the First Defendant determined that the Claimant should remain as a Category A prisoner. In his letter of 25 November 2009 he wrote:-

> “The Director recognised the difficulties relating to Mr Flinders’ treatment needs, but considered that this could not be sufficient justification for his downgrading. He noted Mr Flinders had committed an extreme unprovoked attack of violence, yet no effective strategies had as yet been suggested to tackle or reduce that high level of risk shown by his actions, other than to avoid alcohol, take his medication, and be tested in less secure conditions.”

35. Shortly after this decision was made, on 16 December 2009, the Claimant's case was considered by the Third Defendant. By this time, the Claimant was under the care of the Prison In-Reach Team and one of its clinical managers, Elaine Howard, produced a short report for the panel and attended the hearing. She told the panel that the Claimant's mental health was stable and there was no need for treatment other than medication. The oral hearing was also attended by Ms Jenni Halliwell who had become the Claimant’s supervising probation officer on 15 August 2007. She told the panel that the Claimant's OASys score at HMP Frankland had been too low for him to be considered for the Thinking Skills Programme (TSP) (which had replaced ETS). She notified the panel that the Claimant was being reassessed with OASys and WAIS and that the psychology department at Long Lartin would consider the Claimant for TSP thereafter. She also notified the panel that the Claimant was being considered for one-to-one counselling and participation in CALM. Ms Halliwell’s view was that the Claimant presented no imminent risk of serious harm but that the risk would escalate if there was to be a relapse or return to alcohol abuse and she believed it to be essential to look in more detail at the Claimant's mental health issues in this context. Ms Halliwell did not recommend that the Claimant be transferred to open conditions.

36. The view of the panel, communicated in its decision of 31 December 2009, was that the Claimant should remain in closed conditions and that he should be subject to “a comprehensive forensic risk assessment” following which a risk management plan could be developed. This view was formed because “the panel [was] satisfied despite your compliance and your determination to lower your risk, that has not yet been achieved.”

37. During 2010 the Claimant underwent two OASys assessments (2 July 2010 and 6 December 2010). Almost immediately after the first OASys assessments he was assessed as unsuitable for CALM.

38. As is clear from this chronology of events the Claimant has made numerous attempts to participate in ETS, FOCUS and CALM. All his attempts have met with failure. The reasons why the Claimant has been considered unsuitable for ETS, in particular, have changed over time. Initially (in 2004/2005) the Claimant was thought to be unsuitable because he was suffering from schizophrenia. By 2008 the Claimant was thought to be unsuitable for ETS because his risk of future serious re-offending was considered too low. When Ms Fraser undertook her detailed psychological assessment in August 2008 she noted that the Claimant's “learning style” also rendered him ineligible for ETS.

39. In these proceedings the First and Second Defendants rely upon the witness statements of Dr Jo Bailey, the lead psychologist for the National Offender Management Service (a department under the remit of the Second Defendant). Dr Bailey has reviewed the information available about the Claimant in order to ascertain the reason why he has been considered unsuitable for ETS, FOCUS and CALM. Dr Bailey’s view is that the Claimant's unsuitability for all three courses stems from the fact that his ‘risk of re-conviction’ is too low.

40. As I understand it this assessment of risk is based upon a risk assessment tool called OGRS3. This risk assessment tool takes account of historical factors only. It does not take account of dynamic risk factors although, as Dr Bailey says, dynamic risk factors are vital in understanding why offending occurs, in targeting interventions and in measuring change over time.

41. Dr Bailey’s evidence also considers whether or not the Claimant has been precluded from ETS, FOCUS and CALM by reason of his “learning style or IQ”. According to Dr Bailey a person is required to have a minimum IQ of 80 for attendance on programmes such as ETS, FOCUS and CALM. However, this is a guide not an inflexible standard; an IQ under 80, on its own, is not necessarily a barrier to participation in such courses. An IQ of below 80 may make it harder for an offender to engage meaningfully but, to repeat, such an IQ is not a complete barrier to participation.

42. The Claimant has been assessed as having a full scale IQ of 80. Dr Bailey’s view, therefore, is that the Claimant's IQ, of itself, would not preclude his attendance on offender programmes.

43. Dr Bailey recognises the possibility that the phrase “learning style” has not been used as being synonymous with the expression IQ, although some of the documentation reads as though the two are used interchangeably. Indeed, she believes that, in part at least, the phrase “learning style” is a reference to observations over time about the Claimant's working memory. She considers that the Claimant may be a ‘kinaesthetic’ learner – that is someone who is “a hands on” learner who works best when doing something that shows results, such as group activities that require team work and investigative resources. If that is what is meant by the Claimant's learning style, says Dr Bailey, it would not preclude his participation in ETS, FOCUS or CALM.

Categorisation decisions

44. PSI 03/2010 became effective on 1 March 2010. Its purpose was to make clearer the process of categorising and reviewing the category of Category A and Restricted Status prisoners.

45. Under this PSI a Category A prisoner is defined as a prisoner whose escape would be highly dangerous to the public, or the police or the security of the state and for whom the aim is to make escape impossible. The PSI provides that the First Defendant is responsible for the categorisation and allocation of Category A prisoners. As is to be expected, however, the First Defendant is assisted in his task by a team of officials known as the Category

A Team or depending upon the precise function being performed the Category A Review Team.

46. All prisoners confirmed as meeting the criteria for Category A by the Category A Team are held as provisional Category A until the First Defendant determines their categorisation through a formal review. Pending that formal review the Category A Team will carry out reviews of the prisoner's Category A status.

47. Chapter 4 of the PSI sets out the procedure to be followed in respect of prisoners who have been confirmed as Category A prisoners after a first formal review. Paragraph 1 provides that each prisoner confirmed as Category A at a first formal review will have his security category reviewed annually "on the basis of progress reports from the prison" albeit that there will normally be a gap of two years between the first formal review and the next review. Annual reviews are completed either by the Category A Team or the First Defendant and an advisory panel. However, the First Defendant will always be solely responsible for approving the downgrading of a confirmed Category A prisoner.

48. The PSI sets out the test which the First Defendant must apply before approving the downgrading of a confirmed Category A prisoner. It is as follows:-

> "The Director must have convincing evidence the prisoner's risk of re-offending if unlawfully at large has significantly reduced."

The PSI goes on to say that this test may be satisfied by evidence from the prisoner's contact with others or participation in offending behaviour work "that shows the prisoner has significantly changed [his] attitudes towards [his] offending or has developed skills to help prevent similar offending."

49. Paragraph 2 of Chapter 4 of the PSI makes provision for oral hearings before a determination about categorisation is made. It reads:-

> "The Director can grant an oral hearing of Category A.…prisoner's annual review. This will allow the prisoner or the prisoner's

representatives to submit their representations to the Director verbally.

The Director will grant an oral hearing if there are exceptional circumstances that suggest the submission of oral representations is the fairest means of determining the prisoner's suitability for downgrading. The suitability and the format of an oral hearing will however remain at the Director's discretion."

50. In advance of a decision upon categorisation, staff at the prison in which the prisoner is held are responsible for preparing reports. The reports prepared "should produce a comprehensive summary of the prisoner's behaviour and progress to date that will enable an assessment of any reduction in the prisoner's level of risk."

51. Following preparation of the reports and subject to issues of confidentiality they are disclosed to the prisoner. He is given four weeks to submit representations of his own.

52. After the receipt of representations from the prisoner or the expiry of the time for making representations a local advisory panel (LAP) considers the material produced thus far. The LAP will include the prison governor or deputy governor and a range of appropriate staff. The LAP then recommends whether the prisoner should remain as Category A and records its recommendations. The reports, representations and the LAP's recommendation are sent to the Category A Team for a final decision to be made. If the LAP recommends that the prisoner's status should be downgraded, the Category A Team will refer the case to the First Defendant. He will then review the prisoner's security category having taken advice from an advisory panel. That panel usually includes police advisers, a psychologist and staff from the Category A Team.

53. The evidence in this case from Mr. Easton, a member of the Category A Review Team, explains that the First Defendant will normally consider a number of cases in which downgrading has been recommended by LAP during the course of a day devoted to such work. A decision on each will be taken at the time of consideration but there may be a delay of a few weeks

before each written decision is prepared. All the written decisions are then sent out at the same time. Inevitably, there is some delay between the date of the First Defendant's consideration of a prisoner’s categorisation and the date when the prisoner is notified in writing of the decision.

The decision of 21 January 2011

54. The process of gathering the information relevant to a decision about whether or not the Claimant’s categorisation should be maintained or downgraded began some months before December 2010. No complaint is made about the process. On 15 November 2010, the information which had been collated by that date was considered by LAP; the members of LAP recommended that the Claimant’s category should be downgraded to B. On 15 December 2010 the Claimant’s solicitors made detailed representations about why the Claimant’s categorisation should be downgraded; they also requested that if the First Defendant was minded to refuse to downgrade the Claimant he should first convene an oral hearing. Those representations were sent to the Category A Review Team. However, since LAP had recommended that the Claimant’s category should be downgraded the decision upon categorisation fell to be made by the First Defendant, advised by a panel.

55. The material which was considered by the First Defendant in advance of his decision was as follows:-

> “a) a post-sentence report upon the Applicant prepared by Ms Hilary Finch, a Probation Officer.
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> b) reports from prison officers at HMP Long Lartin.
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> c) the Claimant's previous convictions.
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> d) reports upon the “offence-related work” undertaken by the Claimant.

e) the report of a sentence planning meeting which took place on 27 September 2010.

f) results of drug tests.

g) a psychological report from Mr I Levy dated 22 July 2010.

h) security reports and information.

i) the LAP recommendation together with a list of those persons who were present at the meeting of the panel.

j) representations made by solicitors on behalf of the Claimant including a sentence planning and review report compiled by Ms Jenny Halliwell dated 21 November 2010."

56. The thrust of the detailed representations made on behalf of the Claimant was that he should be downgraded to category B. However, the representations ended with the following paragraph:-

> "We would ask that the panel do take into account the above representations and downgrade Mr Flinders. Should the panel not consider downgrading, we would ask that the matter be listed for an oral hearing on exceptional basis. Taking into account Mr Flinders' mental health and the lack of offender behaviour programmes available for Mr Flinders' needs we would request an oral hearing be permitted to address these concerns. Mr Flinders is past his tariff expiry and his progress has been significantly delayed by his detention within a high security prison. In accordance to R(H) v Secretary of State for Justice [2008], confirmed that an oral hearing was considered fair in reference to a life prisoner categorised as a Category A prisoner. We would refer the panel to the case of Smith and West in which it is stated "The Board's task is to also assess risk. It might well be greatly assisted in discharging the task by exposure to the prisoner or the questioning of those who dealt with him. It could often be very difficult to address effective representation without knowing the points which were troubling the decision-maker. "

57. The First Defendant refused the Claimant's request for an oral hearing. He also declined to downgrade the Claimant's categorisation. His reasoning upon the substantive decision (to maintain the Claimant as Category A) is to be found in the decision letter of 21 January 2011. However, there is also a short minute of what occurred on 20 December 2010 which is worth quoting in full.

> "10. Flinders
>
> The apparent impasse in the provision of treatment is recognised. But the full causes of his offending have yet to be fully established as have the means of permanently or convincingly preventing similar behaviour. The abuse of alcohol alone cannot provide a full explanation or excuse for his offending. Nor can the promise of future abstinence provide convincing evidence of a significant reduction in future risk. The threat of challenge because of lack of programmes must be endured. Remain category A."

58. The decision letter of 21 January 2011 contains a section given over exclusively to the reasons why the First Defendant decided to maintain the Claimant as a Category A prisoner. I quote:-

> "In considering Mr Flinders' security category, the Director took into account the serious nature of the present offence which involved Mr Flinders repeatedly stabbing his female victim to death in an apparently unprovoked attack, for reasons still essentially unknown, after consuming a relatively small amount of alcohol, and then had acted calmly and rationally afterwards.
>
> The Director noted that there were three key areas to consider in relation to Mr Flinders' case – his IQ, recall of the offences and mental health issues.
>
> The Director noted that the reports were ambiguous with regard to Mr Flinders' IQ – reports state that he was unsuitable for OBP's

in the sentence planning summary (27.09.2010), yet elsewhere reports state that Mr Flinders has been considered for TSP/CALM and possibly the HRP in the future. The Director noted that this needed clarification – was he learning disabled and below the selection IQ cut off for all OBP's or could he access some intervention with support?

The Director noted that Mr Flinders stated that he had little recall of his offending and this would impact on his ability to engage with offence FOCUSed work regardless of IQ issues.

The Director also noted the diagnosis of schizophrenia – diminished responsibility. The Director noted this was being well managed with medication and that a period of stability was being observed. However, the Director also noted that this did not equate to risk reduction as such, but rather management of risk through medication. The Director noted that failure to comply with medication would thus be likely to result in deterioration.

The Director recognised the dilemma about a treatment pathway, but noted that Mr Flinders had shown no evidence of the development of insight and an ability to manage his own risk that would be needed to evidence a reduction in risk.

The Defendant was minded not to accept the prison recommendation for downgrading as there was no clear evidence of progress in risk reduction. Noted an oral hearing was not necessitated in relation to Mr Flinders' case in the interests of fairness to address his mental health and the lack of offending behaviour programmes available to him. The Director also noted that removal of Mr Flinder's category A status would not necessarily open up treatment pathways given the issues addressed above.

> Given the gravity of the present offence which evidenced a propensity for extreme violence, and the lack at present of any evidence, through offence related work or otherwise, that the risk of Mr Flinders re-offending in a similar way if unlawfully at large had significantly diminished, the Director of High Security concluded that he must be regarded as potentially highly dangerous to the public and should therefore remain in Category A."

59. It is also worth repeating that section of the decision letter which notes "Category A comments". They read:-

> "His case was last reviewed by the Director on 28.10.09 as a 5 year referral. This decision is currently being JR'd. The Director noted that there were serious unanswered questions relating to his motivation for the offence and the diagnosis of alcohol-induced schizophrenia. Whilst the Director acknowledged the impasse relating to Mr Flinder's treatment needs, given the remit of the review process, this could not outweigh the fact that he had committed an horrific offence and as yet unexplained violence. The Director noted that no convincing strategies had been suggested to combat risk other than for Mr Flinders to avoid alcohol and take his medication, and could not countenance downgrading in the absence of any cogent evidence of diminished risk.
>
> It appears the prison have recommended downgrading because they cannot think of what to offer him. Nothing has changed since his last review.
>
> The grounds of the JR was that the decision was irrational and disproportionate and due to the Prison Service's failure to provide the means of demonstrating progress towards rehabilitation."

<u>The challenge to the decision of 21 January 2011</u>

60. I propose to deal first with the assertion that the First Defendant erred in law in failing to hold an oral hearing prior to determining whether to re-categorise the Claimant.

61. PSI 03/2010 contemplates that the First Defendant will grant an oral hearing "if there are exceptional circumstances that suggest the submission of oral representations is the fairest means of determining the prisoner's suitability for downgrading" (see paragraph 47 above).

62. In his letter of 21 January 2011 the First Defendant deals with the issue of whether there should be an oral hearing in one sentence:-

> "The Director noted an oral hearing was not necessitated in relation to Mr Flinders' case in the interests of fairness to address his mental health and the lack of offending behaviour programmes available to him."

63. At the hearing I was referred to a number of authorities which were relevant to the issue of whether the First Defendant should have convened an oral hearing prior to determining the Claimant's categorisation. The effect of those authorities seemed to me to have been encapsulated in passages of the judgment of Bean J in R (McLuckie and MacKay) v Secretary of State for Justice [2010] EWHC 2013(Admin). At paragraph 27 Bean J said this:-

> "27. There was no dispute between Counsel about the principles to be applied. The common law duty of procedural fairness may require the decision makers to hold an oral hearing. Such a hearing is not required in every case, and what fairness requires in a particular case is fact specific. It is for the court to decide what fairness requires, and the issue on judicial review is whether the refusal of an oral hearing was wrong, not whether it was unreasonable or irrational."

Bean J next considered, in detail, the decision in R (Williams) v Secretary of State for the Home Department [2002] 1 WLR 2264 and noted that Judge LJ (as he then was) had referred to a recognition that there were "exceptional

cases" which justified the grant of a request for an oral hearing. Bean J continued:-

> "30. Mr Southey [Counsel for McKay] submitted, and Mr Matthew Slater for the Secretary of State accepted, that the use of the adjective "exceptional" in this passage of Judge LJ's judgment reflects not a requirement to show exceptional circumstance, but rather an expectation that cases requiring an oral hearing will be few and far between: see per Keith J in R (Yusuf) v Secretary of State [2010] EWHC 1483(Admin) at paragraph 25."

64. On 12 May 2011 the Court of Appeal handed down judgment in an appeal from the decision of Bean J in the case of MacKay – see Donald Mackay v Secretary of State for Justice [2011] EWCA Civ 522. In paragraph 28 of his judgment Gross LJ set out the principles which are relevant to the present case.

> "28. Fourthly, the common law duty of procedural fairness will some times require CART [Category A Review Team] to convene an oral hearing when considering whether or not to downgrade a Category A prisoner. As Bean J rightly observed (at [27] of the Judgment), it is for the court to decide what fairness requires, so that the issue on judicial review is whether the refusal of an oral hearing was wrong; not whether it was unreasonable or irrational. Whether an oral hearing is required in an individual case will be fact specific. Given the rationale of procedural fairness, there is no requirement that exceptional circumstances should be demonstrated – there will be occasions when procedural fairness will require an oral hearing regardless of the absence of exceptional circumstances. But oral hearings are plainly not required in all cases; indeed, oral hearings will be few and far between. Advantages may be improved decision-making, bringing CART into contact with those who have direct dealings with the offender and the offender himself; an oral hearing may also assist in the resolution of disputed issues. Conversely, considerations of

cost and efficiency may well tell against an oral hearing. There can be no single or even general rule, save, perhaps, for the recognition that oral hearings will be rare. By way of brief amplification:

i) As to the common law duty of procedural fairness and the holding of an oral hearing, Lord Bingham of Cornhill said this in the distinct if not altogether unrelated context of the recall to prison of a prisoner on licence:

“35. The common law duty of procedural fairness does not…..require the board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board’s task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.”

R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350, at [35].

In helpful observations on this passage, Cranston J, in R (H) v Secretary of State for Justice [2008] EWHC 2590 (Admin), said this, at [21]:

“Lord Bingham’s statement of principle makes clear that common law standards of procedural fairness affecting an oral hearing are flexible, may change over time, and in general terms depend on the circumstances of the case. Clearly oral hearings are not required in all or even most cases, but importantly the context in which procedural fairness is being considered is determinative. There is no test of exceptionality. One considers the interests at stake and also the extent to which an oral hearing will guarantee better decision-making in terms of uncovering of facts, the resolution of issues, and the concerns of the decision-maker. Cost and efficiency must also be considered, often on the other side of the balance.”

Earlier in the same judgment, at [1], Cranston J had remarked on the “greater confidence” given by an oral hearing that the “relevant standards” had been properly applied; he also observed:

“It is clear that procedural fairness does not impose the straitjacket of a quasi-judicial process and more informal procedures than what one expects before the courts or even tribunals may be acceptable. An oral hearing does not necessarily imply the adversarial process.”

ii) By way of examples from the field of categorisation decisions, in Williams (supra), this Court held that an oral hearing was required. The Parole Board had made a clear recommendation in favour of the prisoner – a post-tariff discretionary life prisoner – but CART had decided to maintain his security classification. CART had available to it reports which had not been before the Parole Board and had declined to disclose the reports to the prisoner or his representatives, although the gist of those reports had been made available. In H (supra), Cranston J held that an oral hearing was required, in circumstances which included an inconsistency between the local prison review panel (which recommended downgrading the prisoner’s categorisation) and CART (which

decided in favour of maintaining his categorisation). For completeness, the Secretary of State appealed from the judgment of Cranston J but, by the time the case of H reached this Court, subsequent events had rendered the appeal academic: see, [2009] EWCA Civ 83.

iii) The impasse capable or arising when a prisoner continues to deny the commission of the offence/s in question has already been discussed. A potential impasse may also arise where a prisoner needs access to opportunities to demonstrate that he can be trusted in a lower category, as otherwise he will have an almost impossible task in persuading the Parole Board that he should be released; see: Roberts (supra), at [54] [neutral citation [2004] EWHC 679 (Admin). However, keeping him as a Category A prisoner may mean that he does not have access to such opportunities – and, for its part, CART (rather as it observed in the present case), with its own particular interest in the risk of escape, may be unwilling to risk downgrading the prisoner's security categorisation without prior evidence of significant reduction.

iv) Although the existence of an impasse or inconsistency (for example, between the Parole Board and CART) may increase the likelihood of an oral hearing being required, it should not be thought that the mere existence of an impasse or inconsistency means that an oral hearing will be warranted. Moreover, for my part, the Court should not be too ready to conclude that there is an impasse or even an inconsistency when there may be no more than a difference of view, perhaps for very good reasons: see, Cranston J, in H (supra), at [23]."

65. My task is to apply the principles elucidated above. Having done so I have reached the conclusion that fairness demanded that this one was of those rare cases when the First Defendant should have convened an oral hearing prior to determining whether or not to maintain or downgrade the Claimant's categorisation. It seems to me that the following factors, taken

cumulatively, point unequivocally to that conclusion. First, the Claimant had been a Category A prisoner throughout the period of his imprisonment. Second, his tariff period had expired in May 2007 – he had served approximately 3½ years longer than his tariff sentence. Third, the Claimant had been an exemplary prisoner. Fourth, the Claimant's mental illness was controlled and capable of being controlled while he remained in prison. Fifth, on any view, there were difficult issues to be addressed about whether the Claimant was eligible for offender courses. In the letter of 21 January 2011 the First Defendant openly acknowledged that the reports before him were ambiguous about the Claimant's IQ and whether the Claimant was eligible for courses. He acknowledged, too, that this issue needed clarification. What better way to seek clarification than by convening an oral hearing? Sixth, the psychological assessment available suggested that there had been some reduction in the risk of future violence. However, this view was put forward in terms which invited further exploration – see pages C230 to C232 of the Trial Bundles. Seventh, the LAP had recommended that he be downgraded. In its report the LAP identified the Claimant's main risk factor as being his mental health. However, it also recognised that the Claimant's health was stable. The LAP considered that if the Claimant's category was downgraded he could transfer to a medium secure unit where he could address his mental health issues further. Eighth, the recommendation that the Claimant be downgraded to category B was reiterated in a sentence planning and review report dated 21 November 2010. That report was compiled by Ms Jenni Halliwell. Her report is long and detailed but her views are encapsulated in that section of the report entitled "sentence plan recommendations".

> "In my view, a referral for counselling or psychological intervention to address his experiences of attachment and loss should be a priority. Furthermore, he should continue to engage with the mental health In-Reach Team and comply with his medication. Mr Flinders is currently completing English Entry Level 1 and should continue to engage with education and to maintain his employment. I understand that a re-categorisation Board has been recently held although no decision was made at

> the time of writing. In my view, it would be a positive step forward for Mr Flinders to be able to demonstrate his ability to self-manage in a lower category prison and I would support a move into Category B conditions. ”

Despite Ms Halliwell’s view that the process of determining the Claimant's categorisation had occurred it is clear that she was in error in that regard. The Claimant's case was considered on 20 December 2010 and her report was sent to the First Defendant together with the representations made by the Claimant’s solicitors.

66. As a consequence of my conclusion that the First Defendant should have convened an oral hearing prior to determining the Claimant's categorisation the decision which he made on 20 December 2010 and communicated on 21 January 2011 falls to be quashed unless I am satisfied that the holding of an oral hearing would have made no difference to the First Defendant’s decision. I am not so satisfied. There was at least a reasonable prospect, in my judgment, that information would have emerged at an oral hearing which might have persuaded the First Defendant to re-categorise the Claimant.

67. Additionally, however, Mr Rule submits that this decision falls to be quashed on other grounds. It is to these grounds which I now turn.

68. Mr Rule submits that the decision of 21 January 2011 was irrational or disproportionate on its merits. He made a number of submissions in support of that contention. They are as follows. First, there was a failure to give any or any adequate weight to the recommendation of the LAP; further, the First Defendant unfairly undermined the recommendation. Second, there was a failure to give any or any adequate weight to the assumption that risk had reduced given the stability of the Claimant's mental health within the prison setting. Third, there was a failure to regard the management of the Claimant's mental health as equating to a reduction in risk. Fourth, there was a wrongful and unsupportive assertion within the decision that the Claimant had not developed insight and an ability to manage his own risk. Fifth, there was a wrongful reliance upon the fact that the Claimant was not thought to be suitable for a programme known as the Healthy Relationships

Programme and/or a failure to investigate, properly, whether or not the Claimant was suitable for that course. Sixth, there was a wrongful failure to recognise or acknowledge that Category A status was continuing to prevent access to wider rehabilitation opportunities. Seventh, there was an unfair and improper reliance on the lack of recollection of the Claimant as to the circumstances of the offence. Last, there was a failure to take proper account of risk assessments performed by OASys assessment; the last assessment prior to the determination had indicated that the Claimant was a medium risk of causing harm but a low risk of re-conviction. By reason of these errors, submits Mr Rule, the First Defendant erred in law when he concluded that there was no evidence that the Claimant's risk of re-offending had significantly diminished and he was wrong to conclude that the Claimant met the test of being categorised at the highest level.

69. Mr Manknell submits that each of these criticisms amount to no more than a disagreement with the merits of the decision. He submits that the decision was both rational and proportionate (and therefore lawful). In paragraphs 12 to 30 of his Skeleton Argument he sets out the reasons why he submits that each of the criticisms described above have no foundation.

70. I do not propose to analyse, point by point, the submissions made by Mr Rule. I say that for these reasons. I have found that fairness demanded that there should have been an oral hearing prior to a decision. To my mind there is a degree of artificiality about analysing the reasonableness or rationality of a decision taken on the basis of written material but which should have been taken upon the basis of information which would have emerged during the course of an oral hearing as well as the written material. Setting aside that point, however, and assuming that I am wrong in my view that an oral hearing was necessary, the task of the First Defendant was to determine whether there was convincing evidence that the Claimant's risk of re-offending if unlawfully at large had been significantly reduced. This was, quintessentially, a matter of judgment for the First Defendant. He was entitled to determine what weight should be attached to the various factors which were relevant to that judgment. I have scrutinised the decision of the First Defendant with care and I cannot find that he has wrongly or unfairly

or irrationally attributed weight to certain factors over others or omitted to consider factors which were relevant to his decision.

71. I should address one point specifically. I do not attribute the view that "the prison have recommended downgrading because they cannot think of what to offer him" to the First Defendant. That was a comment made by the Category A Review Team, as I understand the format of the decision letter. There is no reason to suppose that this was the view of the First Defendant.

72. In a separate argument but, obviously, related closely to the allegation of irrationality Mr Rule submits that the First Defendant wrongly treated the offence of which the Claimant had been convicted as the offence of murder. In my judgment there is no warrant for any such conclusion. The decision letter, read as a whole, clearly recognises that the index offence was manslaughter; indeed it says so in terms. It is impossible, in my judgment, to read into the decision letter the notion that the First Defendant was proceeding as if the Claimant had been convicted of murder.

73. Mr Rule also submits that the decision on categorisation should be quashed because there was a failure to take account of a failure on the part of the prison authorities and/or the Second Defendant to perform an important public law duty. The public law duty in question is that which was elucidated in R (Falconer) v Secretary of State for Justice [2009] EWHC 2341 at paragraph 31 of the judgment. In that paragraph Pitchford J (as he then was) said this:-

> "31. The proposition of law on which ground 1 is founded is now well known, and is accepted on behalf of the Secretary of State. It would be a breach of the Secretary of State's public law duty to put beyond the prisoner the means of demonstrating progress towards rehabilitation while at the same time demanding such progress from the prisoner before granting him re-categorisation (see James & Others v Secretary of State for Justice [2009] UKHL 22)."

74. In many ways the factual history set out in detail above does not make happy reading. On any view, the Claimant has applied repeatedly to

participate in ETS, FOCUS and CALM. Each time his application has been rebuffed. The Claimant has shown his willingness, time and time again, to engage in whatever activity has been suggested to him so as to seek to demonstrate that the risk which he poses has diminished. When he has participated in one-to- one work he has shown his motivation to succeed. The reality seems to be that the Claimant is seen as a low priority for offender related programmes. The Second Defendant has been slow, sometimes very slow, to respond to the requests of the Third Defendant for information and specialised reports and assessments.

75. On each occasion that the Claimant has been refused participation upon a course (save on a few occasions mainly in the early years) the refusal has been explained. While the explanation for the refusal to permit the Claimant to participate in ETS has changed over time there is no suggestion that each decision was not made in good faith and there is a rational basis for each decision. In any event, the evidence of Dr Bailey demonstrates that even now there are pathways potentially available to the Claimant to demonstrate that the risk he poses has diminished substantially notwithstanding the fact that he is not eligible for TPS, FOCUS or CALM. I need not repeat those parts of her witness statement which described those pathways; for reference, however, they are to be found at paragraph 61 and following of her witness statement. This aspect is explained fully, also, in paragraphs 40 to 53 of Mr Manknell’s Skeleton Argument.

76. I have reached the conclusion, not without some hesitation, that the time is not yet ripe to say that the Second Defendant has breached the public law duty identified at paragraph 73 above. The Claimant has not been left “languishing” as Mr. Rule submits. That being so there can be no justified complaint that the First Defendant failed to consider this alleged breach when making his decision of 21 January 2011.

77. I am conscious, of course, that Mr. Rule makes a specific point that the Claimant has undergone no “one-to-one” therapeutic work notwithstanding that this has been suggested or recommended from time to time. Dr Bailey does not reject the possibility that this might occur in the future but she does not really explain why it has not happened already.

78. The issue of one-to-one therapeutic work was raised before Blair J in the previous judicial review. Indeed, Blair J thought that this was at the centre of the Claimant's complaints. There can be no doubt that the Claimant wishes such therapeutic work to take place and that he would be motivated to maximise the benefit to be derived from such work. However, providing such work or a programme of such work is, inevitably, resource intensive. I have been provided with no evidence which demonstrates that this is why no such work has been undertaken in the Claimant's case but, given the history of this case as a whole, I am prepared to infer that that is the most likely reason. That being so I cannot regard the failure to arrange one-to-one therapeutic work as a breach of duty on the part of the Second Defendant.

79. The Claimant also alleges that he has been the victim of disability discrimination. Essentially, the submission is made that the Claimant suffers from a disability, his low IQ, and this is being used as a basis for preventing him from accessing such courses as ETS, FOCUS and CALM. I do not propose to deal with this issue in any detail. I am satisfied that there is no basis upon which to conclude that the Claimant has suffered from discrimination. I say that for two principal reasons. First, this allegation was considered by Blair J in 2008. The Learned Judge rejected the notion that the Claimant had suffered discrimination on grounds of disability and the reality is that there has been no material change of circumstances since Blair J gave his judgment. Second, section 1 of the Disability Discrimination Act 1995 identifies a disabled person as someone who has a physical or mental impairment which has a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities. The alleged disability in this case is the Claimant's IQ. In my judgment, there is no evidential basis upon which to conclude that the Claimant's intellectual ability is such that it has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities. I would not grant permission on this ground of challenge.

The decision of 25 November 2009

80. Mr Manknell, on behalf of the First and Second Defendants, submits that the categorisation decision which was made on 25 November 2009 has been

overtaken by the decision made on 21 January 2011. He submits that whether or not the decision of 25 November 2009 was unlawful is now academic. He invites me to decline to adjudicate upon the lawfulness or otherwise of this decision.

81. Mr Rule does not agree that the decision notified on 25 November 2009 has been rendered academic. In paragraph 2 of his Skeleton Argument he sets out 4 reasons why that is so. First, he says there has been no relevant change in the circumstances between the two decisions; second, he submits that the reasoning deployed in both decisions is substantially the same; third, he says that each decision can be impugned because the First Defendant refused to hold an oral hearing in advance of both and fourth, he submits that each decision is susceptible to challenge on the basis of the repeated failures to provide any offending behaviour work or full risk assessment to the Claimant whilst simultaneously requiring that these should occur before accepting that it is appropriate to re-categorise the Claimant.

82. I am not persuaded that these points, either alone or taken together, justify Mr Rule's stance that the first decision has not been rendered academic by the second decision. In any event, of course, I have decided to quash the decision of 21 January 2011. On that account alone, no useful purpose would be served by my making detailed findings about the lawfulness or otherwise of a previous categorisation decision. I refuse permission to challenge the decision of 25 November 2009.

83. There is a discrete point which arises in relation to the categorisation review which took place on 28 October 2009. Mr. Rule points out, quite correctly, that this review took place approximately 16 months after the previous review which had occurred on or about 20 June 2008 whereas reviews are expected to take place annually. This delay, submits Mr Rule, was unlawful at common law and a breach of the Claimant's rights under Article 8 ECHR.

84. In my judgment Mr Manknell provides the answer to Mr Rule's submissions. The PSO then in force was PSO1010. Paragraphs 4.2 and 4.3 of Chapter 4 of the PSO allow for categorisation decisions to be delayed to link

in to other processes such as sentence planning reviews, parole reviews and offending behaviour work. I accept the submission of Mr Manknell that the plain intention of the PSO was to ensure that the decision upon categorisation was based on the most relevant evidence.

85. In the instant case the annual review in 2009 was due in July 2009 although it took place a little earlier. The categorisation review took place on 28 October. The delay of three or four months was linked to the following factors. First, the psychology report was not available until 13 July 2009 and time was needed to process the report. Second, the Claimant transferred to HMP Long Lartin on 21 July thereby necessitating further time for LAP at Long Lartin to make its recommendation and for an OASys assessment to be undertaken. The LAP recommendation was completed on 27 August 2009 and the OASys assessment was completed on 11 September 2009. Third, the Parole Board fixed a hearing date for 20 December 2009 on 14 October 2009. By 14 October 2009 a report of the In-Reach Mental Team at HMP Long Lartin was still outstanding and, indeed, such report remained outstanding at the time the categorisation decision was made.

86. In the light of this history, the Claimant has failed to prove any unlawful delay at common law or that such delay as occurred was in breach of his rights under Article 8 ECHR. For completeness, and in any event, I accept that the delay did not impede the Claimant's progress in any way.

<u>The alleged failure by the Second Defendant to provide relevant material to the Third Defendant</u>

87. Rule 6 of the Parole Board Rules 2004 provides as follows:-

> "1. Within 8 weeks of the case being listed, the Secretary of State shall serve on the board and, subject to paragraph (2), the prisoner or his representative –

a) the information specified in part A of Schedule 1 to these Rules.

b) the reports specified in paragraph B of that Schedule, and

c) such further information as the Secretary of State considers to be relevant to the case."

Paragraph 3 of Part B of Schedule to the Rules specifies as necessary reports:-

> "Current reports on the prisoner's risk factors, reduction in risk and performance and behaviour in prison, including views on suitability for release on licence as well as compliance with any sentence planned."

88. Part of the relief ordered by Blair J in the previous judicial review was an order that the Second Defendant should prepare all such documents and reports as were necessary for reference of the Claimant's case to the Third Defendant for an oral hearing within 3 months of 28 November 2008. It is common ground that the Second Defendant prepared a parole dossier and sent it to the Third Defendant within that time scale. Further, there is no complaint in the grounds that the dossier was, at the time, defective or inadequate in that it did not include reports addressing the issues specified in paragraph 3, Part B Schedule 1 to the Rules.

89. As I have said, the Third Defendant considered the Claimant's case as part of its ICM process. On 20 February 2009 a review of the Claimant's case took place by a single member of the Third Defendant. Perhaps not surprisingly, the Claimant was not content with the views of the single member and on 16 March 2009 he sought an oral hearing. The oral hearing was fixed, finally, in October 2009 and the hearing took place in December 2009.

90. No attempt was made, as I understand it, to update the reports prepared by the Second Defendant in January 2009 for the hearing which took place in December 2009. However, one further short report was prepared and provided; that was the report of Ms Elaine Howard – see paragraph 35 above.

91. Mr Rule makes the short point that reports prepared in late 2008/ January 2009 were not "current" reports within paragraph 3 Part B

Schedule 1 to the Parole Board Rules. Hence, his submission that the Second Defendant unlawfully failed to provide relevant material to the Third Defendant.

92. The panel of the Third Defendant which conducted the Claimant's parole review on 16 December 2009 made no complaint about the material with which it was provided. Further the Third Defendant made no request for updated reports. In those circumstances it is difficult to accept that there had been an unlawful failure to provide relevant material as Mr. Rule alleges.

93. In any event, care should be taken when interpreting a word such as "current" in the context of the Parole Rules. In my judgment, the word should not be given an inflexible meaning. It does not mean, for example, that there must necessarily be a very close connection in time between the compilation of the reports required by paragraph 3 and the date of the oral hearing. A report can be a current report within the paragraph even if made some time before the hearing provided it still provides a proper and reasonable appraisal of the prisoner's risk factors, reduction in risk and performance and behaviour in prison as at the time of the hearing.

94. One of the difficulties in this case is that the Claimant was transferred from HMP Frankland to HMP Long Lartin on 21 July 2009 i.e. after most of the reports upon him were prepared. I can envisage circumstances in which there would be relevant changes of circumstances which might need to be the subject of a specific report. In fact, as I have said, Ms Howard did produce a short report which gave details of her contact with the Claimant since his transfer to HMP Long Lartin. She also attended the oral hearing.

95. I have reached the conclusion that this aspect of the claim must fail.

The Claim against the Third Defendant

Delay

96. Approximately 25 months elapsed between the hearings convened by the Third Defendant in November 2007 and December 2009. In the normal

course of events that would be unexceptional. However, in his judgment in the previous judicial review Blair J said this:-

> “42. As to when that hearing [the next parole review] should take place, subject to practicalities, I think it should take place prior to the next automatic review in November 2009. I understand that also to be the view of the Parole Board as expressed in paragraph 15 of its decision letter of 4 January 2008. I will not, however, make a direction to that effect because I hope that the combination of what I have said in this judgment and the Parole Board’s views, will be sufficient. I will, however, make a declaration which reflects this judgment and will hear counsel as to the appropriate terms.”

The Learned Judge also directed the Second Defendant to prepare all such documents and reports as were necessary for a reference of the case to the Third Defendant for an oral hearing.

97. On or about 4 February 2009 the Second Defendant provided a parole dossier to the Third Defendant. In accordance with the procedures by then adopted by the Third Defendant the case was entered into its ICM process. On 20 February 2009 a single member of the Third Defendant declined to order the Claimant's release.

98. Within the specified time limit, the Claimant requested an oral hearing before a panel of the Third Defendant. He was entitled to such a hearing and, clearly, Blair J had contemplated that such a hearing would take place.

99. The Third Defendant decided that it was ready for an oral hearing on or about 1 April 2009. Despite that and despite the exhortation of Blair J (not to mention the previous history of this case) nothing appears to have been done until 14 October 2009 on which date an oral hearing was fixed to take place on 16 December 2009.

100. What transpired between 1 April 2009 and 14 October 2009 is wholly unexplained. The Third Defendant has adduced no evidence in this case.

101. Mr Rule submits that the delay between 1 April 2009 and 14 October 2009 must be regarded as wholly unjustified and a breach of the Claimant's right under Article 5(4) ECHR which provides:-

> "(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

102. Both in his skeleton argument and orally Mr Slater, on behalf of the Third Defendant, acknowledges that there was unjustified delay in convening an oral hearing and that the Third Defendant is in breach of the Claimant's rights under Article 5(4). Notwithstanding that acknowledgment, however, Mr Slater invites me to refuse permission to apply for judicial review.

103. The basis for that submission is the decision of Collins J in R (Betteridge) v Parole Board [2009] EWHC 1638 (Admin).

104. In Betteridge the issue was whether or not the prisoner's rights under article 5(4) had been breached by the Third Defendant on account of delay in convening an oral hearing. Significant evidence was placed before Collins J to show that while there might have been unjustified delay in the case of Mr Betteridge the Third Defendant had taken a number of measures with a view to eradicating the problem of delays or, at least, reducing substantially the problem of delays.

105. The actual decision in Betteridge was that there had been a breach of the prisoner's Article 5(4) rights on the grounds of delay. However, during the course of his judgment Collins J made the following observations:-

> "30. It is obvious that the measures put in place to alleviate the problem would not have immediate effect. The evidence before me, from a number of solicitors who have experience in dealing with these cases, makes it clear that the delays continue and the backlog has not improved, and indeed that latter point is made clear by evidence produced by the Secretary of State and by the

> Parole Board. But, as I say, one has to recognise that the changes cannot be expected to take place overnight. I do not doubt that the authorities will not appreciate the need to get on top of this problem and to ensure that the hearings that are required are provided and that the requirements of Article 5(4) are met. While, as I say, in the circumstances of this case, it does not particularly avail the Claimant because he will not have achieved release, there may well be cases where that is not the case, and I am glad to see that one of the measures put in place is a more flexible approach by the Board to consideration of cases which do need priority. Obviously, if it has been made clear, perhaps in a pre-tariff hearing, that a particular prisoner, once he has served his tariff, is a real candidate for immediate release, then the sooner that particular individual has a hearing the better.
>
> 31. In the light of what is being done, it is not now appropriate for any prisoner to take proceedings against the Parole Board alleging breaches of Article 5(4) unless there are very special circumstances, something has gone badly wrong despite the new arrangements in the prisoner's particular case. It will not be helpful, either to the prisoner or to the court, if claims are brought which in reality, because of the existing situation, are not likely to achieve any sensible redress and merely add to costs…..As I repeat, absence special circumstances, claims of this nature should now be discouraged……"

106. Despite the strictures of Collins J quite substantial numbers of cases still arise in which there is a complaint of unjustified delay in convening hearings which is said to render the Third Defendant in breach of a prisoner's rights under Article 5(4). Many of the decisions at first instance have found their way into the bundles of authorities with which I have been provided.

107. As will become apparent shortly, this is not a case in which I consider it appropriate to grant the Claimant specific relief in relation to the acknowledged breach of his rights under Article 5(4). I will explain why in a

moment. However, in the light of the history of this case and the fact that the delay which occurred is wholly unexplained I do not consider it appropriate to refuse permission. It is and was always appropriate that the issues surrounding the delay in this case should be ventilated at a full hearing.

108. What remedy should be afforded for the Third Defendant's acknowledged breach of Article 5(4)? Mr Slater submits that no specific relief should be granted. He submits that no useful purpose would be served by the grant of a declaration since, at least since the filing of his Skeleton Argument, the Third Defendant has acknowledged its breach. Further, the terms of this judgment, recording that acknowledgment, will sufficiently demonstrate that a breach has occurred.

109. Although Mr Rule did not concede that declaratory relief was unnecessary he advanced no potent arguments which persuade me that it is appropriate, now, to grant a declaration. The real battleground in relation to remedy is whether or not the Claimant should be awarded damages under section 8 Human Rights Act 1998.

110. I do not propose to quote from the numerous and growing number of authorities on the topic of when it is appropriate to award damages under section 8. It seems to me that certain principles are now established beyond any argument. They are set out accurately and succinctly in the form of 13 propositions in paragraph 8 of Mr Slater's Skeleton Argument. I do not propose to repeat all 13 propositions in this judgment; however, the following are of particular importance in this case. First, the phraseology of section 8(3) of the Human Rights Act 1998 requires that an award of damages is made only if the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. Second, where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. Third, the court will award monetary compensation only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found. Fourth, an important and sometimes decisive question in deciding whether

damages are to be awarded in a case where a delay in convening an oral hearing amounts to a breach of a prisoner's Article 5(4) rights is whether a hearing at a time which complied with Article 5(4) would have led to release. It is for the Claimant to prove that an earlier hearing would have led to release on balance of probability. Fifth, quite independently of whether damages are awarded on the ground that the Claimant has proved that an earlier hearing would have led to an earlier release, it may be permissible for the court to award damages for frustration and distress which was caused by the alleged delay. However, such frustration and distress must be "of such intensity that it would itself justify an award of compensation for non-pecuniary damage." Sixth, given the requirement that harm is shown to be of such intensity, specific evidence of harm will ordinarily be required although, as a matter of principle, and if the primary facts justify such a conclusion it is open to a court to infer that the prisoner has suffered frustration and distress.

111. The Claimant cannot establish that an earlier oral hearing would have led to his release. The plain fact is that there has been no realistic prospect, to date, that the Claimant would be released. To be fair, Mr Rule does not press an award of damages on this basis.

112. I am also satisfied that there is no proper basis for awarding damages to the Claimant on the ground that he has suffered distress and frustration on account of the delay. There is simply no cogent evidence which justifies the conclusion that he has suffered in that way. When this case was before Lindblom J on 8 February 2011 the Learned Judge directed that the Claimant should file a witness statement in which he was to address the issue of distress and frustration. The Claimant duly complied with the direction of the judge but his witness statement is virtually bereft of any detail which would permit the court to conclude that the delay in convening his parole hearing over some months in 2009 had any particular adverse effect upon him. I appreciate that the witness statement deals with Claimant's general frustration at his plight and, in particular, the distress and frustration relating to his failure to persuade the authorities that he should be re-categorised but, to repeat, there is no proper foundation from which it is permissible to infer that the delay in convening the parole

hearing had any additional adverse effect upon him which was sufficient to reach a level of intensity so as to justify an award of damages.

The Third Defendant's case management powers

113. Mr Rule submits that the panel of the Third Defendant which reviewed the Claimant's case at the oral hearing in December 2009 did not have before it all the reports which were necessary for it to conduct a review which was compliant with Article 5(4). He also submits that the Third Defendant has insufficient powers to compel the production of relevant reports and, therefore, it is not a "court" in the sense in which that word is used in Article 5(4).

114. I deal with this second point first. In R (Morales) v the Parole Board & Others [2011] EWHC 28 (Admin) Silber J grappled with the proposition that the lack of powers on the part of the Third Defendant to require the Secretary of State for Justice and the Staffordshire Probation Service to produce relevant materials in their possession meant that the Third Defendant did not satisfy the requirement of independence required by Article 5(4). He reviewed all the leading authorities and concluded:-

> "83. ….I consider that the board can be "independent" and that it can, and does, constitute a "court" within the meaning of Article 5(4) even though it cannot require the production of documents because:-

i)the power of the Board to make independent decisions of the kind specified in paragraph 61 of Weeks (supra) is quite enough to satisfy Article 5(4) of the ECHR.

ii)as Mr Vinall points out correctly, there is no reason why in principle every part of the process of the independent review of a detention decision must be the responsibility of a single body.

iii)nothing has been said or suggested in any case that the state is not free to assign procedural issues relating to a person's detention to different courts provided that the Board has the power to make independent decisions of the kind specified in paragraph 61 of Weeks (supra).

iv) there is no support in any case to which I have been referred or of which I have knowledge for the proposition advocated by Mr Gill but where a particular tribunal can determine the lawfulness of the detention of an individual but does not have jurisdiction to deal with a procedural issue, this means that it lacks independence and so cannot constitute a court for the purposes of Article 5(4). It is not unknown for a court not to have all powers to enforce its orders but to have to rely on another court to enforce them. After all a County Court Judge hearing a civil fraud claim is independent although the Claimant who requires a freezing injunction or a search order in support of his case must go to the High Court to obtain it (County Court Remedies) Regulations 1991 Reg.(3). Similarly Employment Tribunals are independent even though the awards of compensation they make can only be enforced by an application to the County Court: Employment Tribunal Act 1996 S.15."

115. In the ensuing section of his judgment Silber J demonstrated that the Third Defendant was empowered to obtain documents in relation to proceedings by using the machinery laid down in CPR Part 34.4. Finally, I should refer specifically to the concluding paragraph of the judgment:-

> "94. The Parole Board does satisfy the structural requirements of being "a court" for the purposes of Article 5(4) even though it lacks the power to impose sanctions for breach of its procedural directions."

116. The point taken by Mr Rule is a variant upon the point advanced before Silber J. However, it seems to me that Mr Rule's point is answered specifically by paragraph 93 of Silber J's judgment, a paragraph with which I concur.

117. I also take the view that CPR 34.4 could be used to seek to repair any damage caused in the very unlikely event that the Second Defendant refused or failed to act in accordance with a direction given by the Third Defendant. It would be open to the Third Defendant to ask a court to issue a witness summons against an appropriate person so as to compel that person's attendance at an oral hearing. At the hearing the person could be examined

about why the report in question had not been produced and, further, asked to provide oral information in substitution for a written report.

118. I am not persuaded that the fact that the Board has no “enforcement” powers in relation to its case management directions means that Article 5(4) is infringed.

119. I am also unpersuaded that the Third Defendant failed to ensure that it received all relevant information from the Second Defendant in relation to the hearing on 16 December 2009. In this context Mr Slater relies upon the following passages in Secretary of State for Justice v James [2009] UKHL 22. I take the passages verbatim from his skeleton argument:-

> “How that system works in practice in any given case is a matter for the Parole Board itself to determine. It is open to it to decide how much information it needs….” (Lord Hope at [21].
>
> “I accept that Article 5(4) requires the basic Rule 6 dossier to be made available: without this the Board simply cannot function. But I cannot accept that Article 5(4) requires anything more in the way of enabling the Board to form its judgment.” Lord Brown at [60])
>
> “Your Lordships were told that the Board is frequently threatened with Article 5(4) challenges unless it requires the Secretary of State to provide additional material. Yet it can only be an extreme case that the Administrative Court would be justified in interfering with the decision what, for present purposes, is the “court” vested with the decision whether to direct release, and therefore exclusively responsible for the procedures by which it will arrive at its decision.” (Lord Judge [134]).

120. In the light of those statements of principle it is very difficult to see how a challenge can be mounted when, as here, the Board received a dossier which was, apparently, comprehensive and heard oral evidence from Ms Howard and Ms Halliwell. There is nothing in the decision letter of 31

December 2009 which even begins to suggest that the Third Defendant's panel was in any way inhibited by a lack of information.

121. Having analysed the grounds of challenge relating to case management powers I am not persuaded even that they are truly arguable. Accordingly I refuse permission.

Conclusion

122. I propose to make a quashing order in respect of the categorisation decision of 21 January 2011. All other claims for relief against the First and/ or Second Defendants are dismissed.

123. I record the Third Defendant's acknowledgement that it breached the rights of the Claimant under Article 5(4) ECHR by reason of the delay in convening an oral hearing before a panel of the Third Defendant during the course of 2009. It is unnecessary, however, to grant a declaration in respect of this breach and I decline to make an award of damages under Section 8 Human Rights Act 1998. The other claims for relief against the Third Defendant are also dismissed.