



Neutral Citation Number: [2011] EWHC 3113 (Admin)

Case No: CO/12875/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2011

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

THE QUEEN
on the application of
QAISAR SHAFFI

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

Daniel Squires (instructed by Birnberg Peirce & Partners) for the Claimant
Paul Greatorex (instructed by the Treasury Solicitor) for the Defendant

Hearing date: 14 November 2011

Approved Judgment

Mr Justice Eady :

The nature of the claim

1. This is another case seeking to challenge by way of judicial review decisions made by the Director of High Security (“the Director”) in relation to the categorisation of a prisoner. The Claimant, Qaisar Shaffi, is currently a Category A prisoner held at HMP Long Lartin. On 18 October 2010 and 1 March 2011, the Director took decisions whereby he refused to re-categorise the Claimant, by downgrading him to Category B, and also refused to grant him an oral hearing. As is well known, Category A connotes a more restrictive regime and higher conditions of security. It has also been clear for many years that a Category A classification effectively reduces to nil a prisoner’s chances of release by the Parole Board in advance of his automatic release date.
2. It is thus obvious that a decision refusing re-categorisation will significantly affect, or may affect, the liberty of an individual prisoner. Accordingly, it is accepted that there is a need for a high standard of procedural fairness. The primary question in the case now before me is whether fairness requires, in all the circumstances, that the Claimant should be granted an oral hearing. That is a decision for the court to take independently: it is not simply a matter of reviewing the Director’s own decision in that respect: see e.g. *R (Mackay) v SSJ* [2011] EWCA Civ 552, at [28].
3. Judicial review proceedings were commenced on 15 December 2010 (being amended by consent on 8 March 2011). The relief claimed was identified as follows:
 - (i) a declaration that the Defendant’s decision of 18 October 2010 was unlawful;
 - (ii) an order quashing the Defendant’s decision of 18 October 2010;
 - (iii)(a) an order requiring the Defendant to re-categorise the Claimant to Category B;
 - (iii)(b) if (iii)(a) is rejected, an order requiring the Defendant to hold an oral hearing to determine the Claimant’s categorisation; and
 - (iv) costs.
4. In his oral submissions before me, on 14 November 2011, Mr Squires for the Claimant placed in the forefront of his argument the submission that this is an appropriate case for an oral hearing. With an appropriate sense of realism, he did not press for an order requiring the Director to re-categorise the Claimant forthwith. It is necessary, however, to recognise that oral hearings are rare or “exceptional”. In the authorities the description “few and far between” has sometimes been adopted. In fact, I am told that since 1 January 2006 there have only been two such hearings. Although some orders have been made, in other cases, on applications such as this, it seems that in the event matters have resolved themselves by other means.
5. Mr Squires has argued that in the present circumstances fairness points more firmly towards the need for an oral hearing than in some of those cases to which my attention was drawn where orders have been made.

6. The context of the hearing is that the Claimant's parole eligibility date occurs in February 2012. Reports are currently being prepared and some have been disclosed to the Claimant's advisers. It was for this reason that the Claimant applied, on 26 September 2011, for expedition of the hearing of his substantive judicial review claim. Singh J having granted that application on 14 October, the matter was listed in due course before me on 14 November. Mr Squires summarised the Claimant's grounds in the following way:

Ground 1: The Director refused to re-categorise the Claimant on the basis that further course work, aimed at risk reduction, and further assessments of the Claimant are required. No suitable course work is, however, available for the Claimant. That is the view of all those who have assessed him or are responsible for his sentence planning. It has recently been confirmed in reports prepared for the Claimant's Parole Board hearing and also at his Sentence Planning Review meeting in September 2011.

Ground 2: Inadequate reasons have been given for the Director's decision, in particular in relation to his rejection of unanimous expert evidence, all of which concluded that the Claimant's risk was low, and such that he ought to be re-categorised.

Ground 3: Fairness required the Director to accord the Claimant an oral hearing before making a decision on categorisation. In a number of recent cases, the courts have set out applicable factors that are likely to mean that an oral hearing is required in re-categorisation cases. These factors are all present in the Claimant's case. Indeed, it is said to be significantly stronger than others in which the court has held that the Director's refusal to hold a hearing was unlawful.

The background of the Claimant's offending

7. Before I turn to the statutory background against which the Director made his decisions, it is necessary to set out briefly the circumstances which led to the Claimant's arrest in 2004 and his conviction in 2007. The nature of his offence, and the extent to which the Claimant was directly involved, are matters which understandably lie at the heart of the Director's reasoning.
8. The Claimant is now aged 33 but the events which led to his imprisonment took place as long ago as March 2001, when he was a young man aged 22.
9. On 3 August 2004 he was arrested in the course of a long running and important investigation into a terrorist conspiracy. It seems that the principal moving spirit was the notorious Dhiren Barot. Eight people, including the Claimant, were charged with conspiracy to murder (Count 1 on the indictment) and conspiracy to cause explosions (Count 2). Some were charged also with less serious offences, which have no significance for present purposes.
10. The Crown alleged that these defendants were participants in a conspiracy, between January 2000 and the date of arrest in 2004, which had "scoped" potential targets, originally in the United States and latterly here in the United Kingdom. It was also

alleged that they had undertaken the planning for a terrorist attack in the United Kingdom.

11. So far as this Claimant is concerned, the Crown's case was that his involvement had been restricted to a period of a few weeks in March 2001. At that time, it was alleged that he accompanied Dhiren Barot on a short visit to the United States in order to act as "cover" while Barot sought out potential targets. Naturally, the extent and limitation of that role were explored by the sentencing judge, Butterfield J, in June 2007. It was not being suggested at that stage that the Claimant played any more significant or extensive role than that. It has not been alleged that he accompanied Barot in the course of any of his reconnaissance activities or that he did anything further once he had returned to England in March 2001. The Judge seems to have accepted that, although the Claimant knew the purpose of Barot's trip, he merely accompanied him because he was given the opportunity of a free holiday. This may seem a somewhat curious story, but the fact remains that no one has accused the Claimant of sharing any extremist ideology and, indeed, there has been no evidence of any such behaviour or motivation since his return to the United Kingdom more than ten years ago.
12. One of the curious features of this case is that Barot did not seem to know the Claimant well or to have had any particular reason to trust him. He had simply met him through a mobile phone company by which each of them was employed. It seems that in early 2001 the Claimant overheard Barot talking to someone else about a trip to New York and he expressed interest. Barot told him that he would pay for his trip and that he, the Claimant, could pay him back at a later stage.
13. Much emphasis has been placed on the Claimant's lifestyle at that time, which has been described as "hedonistic" and as centring on recreational drugs, alcohol, fashionable clothes, music and going to parties. It is not clear how this was all funded by a 22-year-old man employed by a mobile phone company. Be that as it may, this is the account which seems to have been accepted by the Crown and by the Judge in the course of his sentencing remarks. The Claimant has always maintained that it did not occur to him to question what Barot was up to, and that he did not know the purpose of his visit, although that is in stark contrast to the finding of the jury.
14. Barot himself had pleaded guilty to conspiracy to murder and was sentenced, originally, to life imprisonment with a minimum term of 40 years, albeit reduced to 30 years following an appeal.
15. Six of the other defendants pleaded guilty to conspiracy to cause explosions likely to endanger life, and they were sentenced by Butterfield J on 15 June 2007. He expressed the view that, with the passage of time, any danger posed by their release would diminish sufficiently to permit release on licence in due course. Accordingly, he rejected the option of imposing indeterminate sentences. The learned Judge did not, however, enter "not guilty" verdicts in respect of conspiracy to murder and he gave the reason that there was "abundant evidence" that those defendants had in fact been guilty of the more serious charge. Two of the men concerned were sentenced to 20 years imprisonment and the remaining four to 26 years, 22 years, 18 years and 15 years respectively.

16. This Claimant was the only one of the defendants to plead not guilty and, in the event, he was convicted of conspiracy to murder.
17. It is to be noted that, despite the plea of not guilty and his conviction on a more serious offence, the Claimant was nonetheless sentenced to 15 years (only).
18. Mr Squires quite rightly referred to the sentencing remarks in some detail because the extent of the Claimant's involvement in the conspiracy is highly material to the decisions which have had to be made about him in the prison service for the purposes of his sentence plan and also for the Director's decisions on categorisation. It is thus important that I should not lose sight of the learned Judge's conclusion that the Claimant had accompanied Barot to the United States in March 2001 "knowing that the purpose of the visit was to undertake reconnaissance of potential targets". The Judge approached the matter, consistently with the jury's verdict, on the basis that the Claimant knew perfectly well that he was "acting as cover" for Barot while he conducted his research.
19. It is right to record also the Judge's following observations, at [56] of the transcript:

"Having seen you give evidence over many hours, I concluded that you did not involve yourself with Barot or his plans principally out of any commitment to a Jihadi or extreme fundamentalist cause, although you may have had at that time sympathies in that direction. You assisted him because it was a way of getting a holiday in New York, which did indeed attract you, and in addition I take the view that you thought this sort of thing at that time was exciting.

You knew the purpose of the visit. You went knowing what was to happen and why you were to accompany Barot, and you played your part to enable him to conduct the reconnaissance that was required of him.

I accept, however, that after your return from the United States you played no further part in the preparation of the US plans and you were not involved in any way in the United Kingdom proposals ...

However, you contested the matter to verdict, and accordingly have deprived yourself of the mitigation of a plea of guilty and the consequent reduction in the length of sentence. Further, you have been convicted not of conspiracy to cause explosions but of conspiracy to murder, which makes your involvement, long ago though it was and short though it was, more serious. You played an important part in a major terrorist enterprise which was designed to cause terrible loss of life."
20. Equally, however, it is necessary to bear in mind that between March 2001 and his arrest in August 2004 the Claimant had spent over three years in this jurisdiction, at liberty, and there has been no suggestion that he was involved in any way in extremist or other criminal activity. Since his arrest, of course, he has been incarcerated and his

conduct and motivation can only be assessed by those who have the opportunity to observe him in that environment.

The Claimant's behaviour in prison

21. It is contended on his behalf that the Claimant has changed significantly since the offence was committed, more than ten years ago, although inevitably it is difficult to make an assessment in circumstances where over the last seven years his lifestyle has been dictated by the prison authorities. Nevertheless, it is true that he has married and devoted a significant amount of time to educating himself and planning his future. He intends to obtain employment on his release and to start a family. Moreover, there is no doubt that his record in prison has been exemplary and no one who has had access to him, or had responsibility for supervising him, has a bad word to say about him.
22. It is always difficult to assess what goes on inside a man's head and to what extent his beliefs or motivation might have changed. Any such assessment can only be made on the basis of observation and of taking into account what he himself has to say about it. It is thus relevant to consider what is contained in his witness statement dated 1 November of this year. It is true that, contrary to the Judge's conclusion and the verdict of the jury, the Claimant continues to deny that he was aware of the true purpose of the visit to the United States in 2001. Nonetheless, he claims to have reflected a good deal about what led to his joining Barot on that trip and as to how his life has changed. This is no doubt intended to throw light on the risk of his becoming involved in any similar criminal activity in the future. Obviously, the content of that statement was not available to the Director on either of the dates when he made the decisions now under challenge. Nonetheless, the contents clearly merit close consideration and, where appropriate, testing.
23. When reports were disclosed to the Claimant prior to the review by the Long Lartin Local Area Panel ("the LAP"), intended to take place on 28 July 2010, they were positive. It was recorded that he had always been polite to staff, complied with rules and regimes, and interacted well with both staff and fellow prisoners. There were no "negative entries" on his file. More importantly, perhaps, he had taken the opportunity to engage with every opportunity for course work, whether rehabilitative, educational, vocational or offence-related. He had managed to achieve a number of qualifications which would be relevant to his resettlement in due course.
24. There was no evidence that the Claimant mixed with extremist offenders or displayed any behaviour which might be thought to be connected or consistent with his involvement in the conspiracy. It is perhaps of particular significance that the prison security department expressed no concerns.
25. In view of the Director's decisions so far, it is of special significance that it was recorded on 8 February 2010, at a sentence planning meeting, that the Claimant had enquired whether there were available to him any offending behaviour programmes which he could complete, so as to demonstrate a reduction in risk. He was told there were none available. As a result of a suggestion at that meeting, the Claimant was referred to Monica Lloyd, who runs a team which works within the National Offender Management Service ("NOMS"). They have developed a method for assessing risk and intervening accordingly with extremist offenders. Ms Lloyd has, as I understand

it, considerable experience of making assessments on the Defendant's behalf of prisoners convicted of terrorist offences.

The psychological assessment of the Claimant by Ms Monica Lloyd

26. Ms Lloyd met the Claimant on three occasions in May 2010 and she prepared a report dated 21 June, which it appears she regards as being of continuing validity. The Claimant himself has also, in his witness statement of 1 November 2011, set out an account of the areas discussed at those meetings. Ms Lloyd's report was also very positive and her overall conclusion was expressed as follows:

"In these circumstances the level of current and future risk would seem to be very low and continuing Cat A status unnecessary. It would seem appropriate therefore to downgrade at this review."

As I have indicated, that recommendation was made some 18 months ago and, when given the opportunity, Ms Lloyd has indicated that she sees no reason to change it.

27. It is of interest that Ms Lloyd reported on the Claimant's engagement with education and other courses. At [113] of her report she observed:

"[The Claimant] is also keen to complete any intervention that is available for extremist offenders. He volunteered and completed the [Sycamore Tree Victim Awareness Programme] in Full Sutton. Although interventions for extremist offenders are now available in pilot form, [he] is not suitable. They address the typical vulnerabilities that underlie the adoption of an extremist identity and work towards clarifying values and goals that would support a different life. [He] does not have these vulnerabilities or political motivations and is not therefore a suitable candidate."

Other assessments of the Claimant while in prison

28. There are also positive comments from prison Imams who had engaged with the Claimant while he was in prison at Woodhill, Full Sutton and Long Lartin. They prepared written statements dated 23 April and 14 June 2010 respectively. The Imam at Long Lartin had officiated at the Claimant's marriage in 2006, which took place in Woodhill, and appears to have maintained relations with the Claimant's family. These reports were positive and found no evidence of any inclination towards extremist ideology.
29. When the LAP met at the end of July 2010, specifically to address the Claimant's categorisation, the recommendation was that he be downgraded to Category B. The Panel consisted of the Deputy Governor of Long Lartin (Mr Knight), the Head of Programmes/Psychology (Ms Myfanwy Ball), the Security Governor, the Public Protection Representative and the Head of Offender Management. The Panel concurred, in a decision dated 10 August 2010, with the risk assessment already made by Ms Lloyd and agreed that the Claimant should progress towards lower security conditions in order to work on release and resettlement plans.

30. It is important to note that reference was made in the Panel's decision to the Claimant's continued protestation of innocence and to his denial that he was aware of Barot's plans at the time he went with him to the United States. It was not simply ignored. Despite making reference to the jury's conclusion, which was obviously inconsistent with the Claimant's stance, the LAP came to the conclusion that he did not hold "criminogenic beliefs associated with extremism". They were prepared to accept that his motivation in March 2001 appeared to have been "opportunism in a young man with a thirst for experience and excitement". The Panel agreed that he had used his time in custody constructively and had positively engaged with the sentence planning process. It was noted that there was no evidence of substance abuse while in custody. Reference was made also to his having attended education and vocational courses with a view to improving options for employment in due course. The Panel repeated and adopted Ms Lloyd's risk assessment and recommendations.

The legal context of the Director's decisions

31. It is not disputed, of course, that the decision is ultimately for the Director to take. In making an assessment of whether he has arrived at a decision or decisions that can be characterised as "lawful", it is appropriate for the court to have in mind the statutory background. It is provided by s.12 of the Prison Act 1952 that the Secretary of State may direct the location in which prisoners are to be detained and their removal, during the period of sentence, from one prison to another. It is provided also, by s.47 of the Prison Act 1952, that he may make rules for the regulation and management of prisons and for the classification of detainees. The Prison Rules 1999 have been brought into effect accordingly. Rule 3 is concerned with the training and treatment of prisoners, the purpose of which is to encourage and assist them to lead a good and useful life. In the light of that, Rule 7 provides that prisoners shall be classified in accordance with any direction of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training, and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by Rule 3.
32. It is also necessary to take account of Prison Service Order 0900 ("PSO 0900"), which governs the categorisation of prisoners (and their re-categorisation). According to chapter 1, para 1.2.3, there is an obligation that every prisoner must be placed in the lowest category consistent with the needs of security and control. It is required, by para 1.2.1, that prisoners must be categorised objectively according to the likelihood that they will seek to escape and the risks that they would pose should they do so.
33. A Category A prisoner is defined, according to chapter 1, para 1.1.1, as one whose escape would be highly dangerous to the public or the police or the security of the state, no matter how unlikely that escape might be, and for whom the aim must be to make escape impossible. On the other hand, a Category B prisoner is one for whom the very highest conditions of security are not necessary, but for whom escape must nonetheless be made "very difficult".
34. The obligations of the Director when conducting reviews of Category A status were identified in the Prison Service Instruction 03/2010 ("PSI 03/2010"), which was relevant at the time:

“Before approving a confirmed Category A or Restricted Status prisoner’s downgrading the Director must have convincing evidence [that] the prisoner’s risk of re-offending if unlawfully at large has significantly reduced. This may be 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.”

35. It is required by PSI 03/2010 that the Director must review categorisation as soon as possible after the category has been confirmed following conviction. Thereafter, annual reviews are conducted, starting two years after the first review. The first review in relation to the Claimant was conducted in January 2008 and, accordingly, his decision of 18 October 2010 was the first annual review.
36. There is also provision in chapter 4, para 5 and following, for how reviews of categorisation are to be carried out. The first stage is that a report is prepared setting out a comprehensive summary of the prisoner’s behaviour and progress to date, that would enable an assessment to be made of any reduction in his level of risk. Such reports are provided to the prisoner who is then permitted to make representations. These would then be provided to the LAP which would make its recommendations. When re-categorisation is recommended, as in this case, the matter is referred to the Director, who is then to take the decision. Having taken it, he must provide “detailed reasons”: see chapter 4, paras 11 and 12.
37. As I have indicated, the issue of an oral hearing lies at the heart of Mr Squires’ submissions. These are expressly provided for in PSI 03/2010 at chapter 4, para 2:

“The Director can grant an oral hearing of Category A or Restricted Status 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.”

38. The phrase “exceptional circumstances” can obviously give rise to difficulty. It has sometimes been said, for example, that “exceptionality” is not reliable as a criterion for making decisions, since it is more suited to the statistical assessment of outcomes: see e.g. the observations in *Manchester City Council v Pinnock* [2010] UKSC 45 at [51] to [52]. In any event, however, in this context it was made clear by the Court of Appeal in *R (Mackay) v SSJ* [2011] EWCA Civ 552, at [28], that there will be occasions when procedural fairness requires an oral hearing “regardless of the absence of exceptional circumstances”. The test is whether, on the facts of the particular case, such a hearing is necessary for a fair disposal of the case. A classic instance would be where it might assist in the resolution of a factual dispute. The view was expressed by Lord Bingham in *R (Smith and West) v Parole Board* [2005] 1

WLR 350, at [35], that the requirement for an oral hearing has been applied hitherto on a somewhat “constricted” basis and that (specifically in the Parole Board context) they should be accorded more frequently. His Lordship continued:

“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.”

39. The Director has the heavy responsibility, when addressing the possibility of re-categorisation, of assessing current and future risk. This will require him to take into account not only the seriousness of the index offence but also any relevant evidence as to the current or future risk which a prisoner might pose. It is clear that any such decision must be rational and that the Director must “ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”: see e.g. *Secretary of State for Education v Tameside* [1977] AC 1014, 1065 *per* Lord Diplock. It is important also that sufficient reasons are given for any decision, so as to enable the prisoner to understand why any request of re-categorisation has been refused. That is expressly provided for in PSI 03/2010, chapter 4, para 12:

“The decision notification will include a summary of the information taken into account and detailed reasons for the Director’s decision.”

40. As I have already noted, it is important not to determine any question of re-categorisation purely by reference to the gravity of the index offence. This was a matter addressed by His Honour Judge Pelling QC in *R (Krstic) v SSJ* [2010] EWHC 2125 at [25], where the Director’s decision was criticised in the following terms:

“In my judgment the reality is that the Defendant failed to look beyond the gravity of the offence and ask himself the right question – which was whether the Claimant was highly dangerous at the date of the relevant decision – or answer it by a proper consideration of all the material facts and matters relevant to the determination of that issue bearing in mind the policy that every prisoner is to be placed in the lowest security Category consistent with the needs of security and control.”

That was a case on which Mr Squires placed considerable reliance as having, in his submission, a number of features in common with the present case. It concerned someone who had been convicted of genocide and crimes against humanity, in connection with events at Srebrenica in July 1995, when he had been deputy commander, and later commander, of the Drina Corps of the army of the Serb

Republic commanded by General Ratko Mladic. This series of atrocities had culminated in the systematic murder, over three days, of between 7,000 and 8,000 Muslim men and boys of military age. He had been convicted before the International Criminal Tribunal for the former Yugoslavia and was serving a sentence in the United Kingdom as a Category A prisoner.

41. The Director had concluded in that case that it would not be appropriate to re-categorise the claimant because there had not been any evidence of a significant change of circumstances. Judge Pelling referred to an earlier decision of Pitchford J (as he then was) in *R (Falconer) v SSJ* [2009] EWHC 2341 (Admin) at [31] and went on to make the following observations about the Director's decision at [24]:

“It was submitted on behalf of the Defendant that once it had been concluded from the circumstances of a prisoner's offending that he was highly dangerous, downgrading could only be justified by a demonstrated change of circumstances and that there was no evidence of a significant change in the Claimant's circumstances since the last review. There is an air of unreality about this analysis. It is common ground that the Claimant does not speak English. The Defendant maintains that the Claimant should make efforts to learn English utilising the spoken English courses available in prisons. Whilst such a proposition may be a tenable one in relation to a prisoner who has been convicted by an English court of offences committed by the prisoner while in England, potentially different issues arise in relation to prisoners who are foreign nationals who have been convicted and sentenced by an international tribunal in relation to offences committed outside England and Wales. A requirement that such a prisoner demonstrates significant change in the risk he poses by reference to his participation in courses run by the Defendant which however the prisoner is not able to participate in because he does not speak English is likely to give rise to an allegation of breach of public duty by the Defendant. Whether or not that is so does not arise in this case however because the primary point made by the Claimant is that there are no courses available that are relevant to the offences that he committed. This would appear to be accepted. Certainly no courses have been identified by the Defendant in either the decision letter or the reply to the pre-action protocol letter for that matter in the most recent sentence review where the only course identified was the English language course. That being so the Defendant could not rationally attempt to resolve the re-categorisation issue by reference to issues of this kind.”

One can surely make the more general point that it is unlikely to be a rational decision which requires a prisoner to demonstrate a change of circumstances by a particular means such as, for example, undergoing a course of instruction, which has simply not been available to him.

The Director's decision-making in the present case

42. It is clear from the Director's first decision in this case, on 18 October 2010, that he had refused to accept the recommendations of Ms Lloyd and the LAP that the Claimant should be re-categorised. Although it was not expressly referred to in his decision, he also refused the Claimant's request for an oral hearing. It seems that he particularly focussed, in doing so, upon the nature of the offence committed and the lack of clear evidence of change, such as would justify a conclusion that the risk posed by the Claimant (presumably of harm to the general public) had significantly reduced. That concern is, I hardly need state, entirely understandable. On the other hand, it is necessary to focus on the particular facts of the case, and to address the question of how such a diminution in risk *could* be demonstrated. What the Director said is to be found in the final two paragraphs of his decision:

“Given the Judge's comments, the Director considered that more in depth information was needed to show whether [the Claimant] had tackled the attitudes, personal weakness etc that led to his involvement, even peripherally in such a serious offence.

Given the gravity of the present offence and the lack at present of any cogent evidence, through offence related work or otherwise, that the risk of [the Claimant] re-offending in a similarly 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, police and the Security of the State.”

43. Following a pre-action letter of 18 November 2010, and the commencement of proceedings on 15 December, a reconsideration took place on 21 February of this year and the new decision was taken on 1 March. The result was the same. Re-categorisation was refused, as was the opportunity for an oral hearing.
44. The minutes of the meeting of 21 February were provided to the Claimant's solicitors. Particular importance was attached, quite understandably, to the “fundamental difference” between the assessment made of the Claimant within the prison and the characterisation of his role in the conspiracy to be found in the Judge's sentencing remarks.
45. In the letter of 1 March the Director echoed these concerns and expressed the view that Ms Lloyd and the LAP had “downplayed unduly” the Claimant's role in the 2001 conspiracy. He was of opinion that Ms Lloyd had approached the important question of risk reduction “too superficially”. He referred again to the assessment of the Claimant's involvement as reflected in the sentencing remarks and to the Claimant's lack of insight into the factors which had led him to become involved. There was a need to demonstrate by evidence “the development of strategies to counter them [i.e. “the factors”] in the future”. The Director went on, however, to make the following important observations; namely, first, that the Claimant was still “in the relatively early stages of a lengthy prison sentence” and, secondly, that “it was necessary and important ... for [him] to continue the work he is doing and for more time to be spent addressing the areas of concern”. Yet, so far as I could see from the evidence, the

only “work he is doing” related to acquiring various practical skills, such as hairdressing and computing.

46. In the light of the evidence before him at that stage, the Director was not satisfied that the risk of re-offending had significantly diminished and concluded, therefore, that the Claimant must be regarded as “potentially highly dangerous to the public and the security of the state”.
47. It is said that where a decision-maker chooses to disregard expert opinion, he or she should provide cogent reasons for doing so. Indeed, that is one criticism levelled at the Director in this case. On the other hand, it is sometimes possible to find cogent reasons on the face of an expert report where its reasoning is uninformative or defective. To the extent, therefore, that he was focussing upon the failure in Ms Lloyd’s report to address head on the Claimant’s involvement in a conspiracy to murder, the Director was giving a quite comprehensible reason for disagreeing with her.
48. It is of interest that Kenneth Parker J, although he granted permission to apply for judicial review on 20 April of this year, took the opportunity to enter the following reservation, which reflected the very concerns highlighted by the Director:

“Although I have granted permission, I have concern that the claim does not address what seems to me to be the central problem in this case. The Claimant was found guilty after trial of conspiracy to murder. It appears that he appealed against sentence, and I see nothing in the material before me to suggest that, even after a long passage of time, he has yet accepted that he played a significant in a plot to commit terrible terrorist offences. He did that, notwithstanding that, looking at his background, lifestyle and support, it would have appeared unlikely that he would behave in that way. It appears that ‘excitement’ played an important part in his decision. It must, therefore, be difficult to assess reduced risk, through, for example, offence related work, where the offender continues to deny his offence, and, therefore, is unable to address the factors that led him to act as he did. Surprisingly, I see nothing in the report of Ms Lloyd (psychologist) that deals with what seems to me to be a crucial dimension of this case.”

49. This case appears to exhibit some of the hallmarks of an impasse, which is not uncommon in situations of this kind. It is necessary for the Director to identify the criteria by which he could be satisfied of change. One of the problems has been, as Ms Lloyd pointed out, that there are no courses by which to address or assess the extent to which the Claimant could be said to have changed, or made progress, in such a way as to demonstrate convincingly a reduction of risk. As she made clear, he would be quite willing to engage with any such opportunity offered. One is only left, therefore, with the observation of his behaviour patterns and his social relationships, from which to make inferences, and the assurances contained in his own statement of 1 November 2011.

50. When the Defendant provided his detailed grounds of defence, on 26 May of this year, they suggested that there had been a significant development: confirmation had been received from the prison that a course had been arranged for the Claimant with a trained probation officer (known as the Priestley One to One Programme). According to the Claimant and his advisers, however, this does not seem to be the case. Moreover, in any event, there is no evidence that the so-called Priestley Programme would materially address the Director's concerns. Such information as is available tends to show that such courses, although no doubt tailored to a particular individual's needs, would be directed to preparing a prisoner to adjust to the outside world, rather than towards the understanding of offending, or providing the means to change character or motivation.
51. When the Claimant made enquiries as to the availability of courses appropriate for him, to which I have already referred, no one ever suggested that the Priestley course was in any way suitable for him. Nor has anyone else ever attributed to it, so far as I am aware, the significance which the Director now appears to attach to it. It is somewhat curious that in their letter of 5 August 2011 the Defendant's solicitors stated, in response to probing by those of the Claimant, that "it has not been, and is not being, said that [the Claimant] has to complete the [Priestley Programme] before he can be re-categorised from Category A".
52. The most recent prison assessment of the Claimant was dated 4 September 2011. It too was positive and described his conduct as "excellent". It described the Claimant as "fully co-operating" and recorded the fact that he had put himself forward for all and any courses available to help with his sentence and category status. Nevertheless, it was said that "at present he is either unsuitable or there are not courses for him to attend".
53. According to the Claimant's evidence, there were further hearings shortly thereafter. The following day, 5 September 2011, a probation officer called Marita Drever came to see the Claimant. He raised the subject of the Priestley Programme with her. She explained that she had received a telephone call from either the Director or from someone in his office, enquiring of her whether there were any more courses that the Claimant could undertake. She had responded that the only course she could think of was the Priestley Programme. When the Claimant informed her, however, that the Director had stated in May 2011 that he would be starting the course in June, Ms Drever expressed surprise.
54. On 6 September 2011 a Sentence Plan Meeting was held at Long Lartin. The Claimant again raised the subject of the Priestley Programme on that occasion, saying that he was not sure whether he was supposed to be doing the course or not. Ms Drever was chairing the meeting and replied that this programme was not being set as a target for his sentence progression. Another officer present made the observation that there was no point in the Claimant being required to undertake that course "just for the sake of it". Certainly, there is nothing on the face of the minutes of that meeting to suggest that anyone present thought Priestley either suitable for the Claimant personally or relevant to risk reduction. The minutes also recorded that the Claimant was willing to take *any* course that was recommended and, in particular, for the purpose of working on his offending behaviour.

55. The Claimant's probation officer Ms Ruth Mellor signed a report dated 2 September 2011 in which she made a number of points. She referred to the Claimant's positive attitude to all aspects of his sentence, and to the fact that all his wing and other reports had been positive. He was willing to engage with any interventions offered to him but, she stated, he was unsuitable for the programmes available in custody. Even though it was difficult to demonstrate reduction in risk by means of a structured and accredited programme, she observed that this was not in any way due to reluctance or refusal on the Claimant's part. She added that even if he were to admit involvement in a terrorist conspiracy, there was little that the prison could offer in the way of intervention.
56. This rather indicates that the Director's aspiration for further "work" to be done was one that could not, in practice, be implemented. If and in so far as the Director appeared to be under the impression, at the time of his 1 March letter, that the Claimant was already working on a course relevant to risk reduction, and that he needed to continue to do so, it would appear that he was under a misapprehension.
57. It is true that Ms Mellor commented that "there is one to one release work that can be offered at HMP Long Lartin to begin to prepare [the Claimant] for release". It is possible that she was referring to the Priestley Programme but, in any event, she clearly did not have in mind any kind of course or work relating to risk reduction.

A discussion of the evidence

58. There has, in my judgment, now been a situation of impasse for some months. On the one hand, the Director requires convincing evidence that there has been an appreciation on the Claimant's part as to the significance of his involvement in the 2001 conspiracy, and of a determination on his part to change and provide confirmation of risk reduction. On the other hand, the Claimant is willing to engage with whatever courses are relevant and available. Yet that opportunity has not materialised. It also appears, without exception, that those who have direct experience of the Claimant within the prison system have formed a positive impression of him and, in particular, to the effect that he presents a low risk of danger to society. Both the LAP and Ms Lloyd would favour, on the basis of their general experience and knowledge of the individual, a re-categorisation. It seems that it is only the Director who takes the opposite view.
59. The situation here, therefore, would seem to be distinguishable from that which arose in the case of *R (Mackay) v SSJ* [2011] EWCA Civ 522, where the Court of Appeal differed from the judge below in his conclusion that an oral hearing would be appropriate. In that instance, Gross LJ upon an examination of the available evidence came to the conclusion that the judge's decision rested upon one "single observation" to the effect that "the Panel felt that this [i.e. an oral hearing] may be a constructive move". Gross LJ went on to explain at [34] why he differed from the learned judge:

"To my mind, the sense of the Parole Board's decision, taken as a whole, was clear: there had been no significant reduction in the risk attaching to the Respondent. At the most, there was a tentative rider as to the benefits of downgrading the Respondent's security categorisation. I am unable to accept that this isolated rider provides any or sufficient foundation for

concluding that this case should be one of those few in which an oral hearing is required. ... Further and by contrast with *H [R(H) v SSJ [2008] EWHC 2590]*, there was no disagreement between the (local) Advisory Panel and CART; in this case, the Advisory Panel's conclusion (set out above) was unequivocal and adverse to the Respondent."

60. In the present case, there is no disagreement among those advising the Director or any conclusion, on the part of any of them, that is "unequivocal and adverse" to this Claimant. On the contrary, all the recommendations are positive.
61. There is no obvious way for the present impasse to be resolved save by recourse, perhaps, to an oral hearing at which the Claimant would have the opportunity to develop the case he set out in his witness statement of 1 November 2011 and to tailor his submissions to the concerns of the Director. It would also be possible for others, such as Ms Lloyd, to explain their position and to justify it, if necessary, under challenge.
62. I need to remember the public policy considerations which underlie an obligation, such as the Director has in the present circumstances, to give reasons to justify a particular decision. As Lord Brown explained, in the rather different context of the Town and Country Planning legislation, in *South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953*, at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

63. Transposing that reasoning process to the present situation, it seems to me fair to say that the Claimant in this case, and others who find themselves in a similar position, would be entitled, where there is a refusal of re-categorisation, to have the reasons explained sufficiently to enable anyone to know what has to be done (with a view to addressing the concerns of the decision-maker). In other words, this Claimant is entitled to know what more he can possibly do to satisfy the Director as to the elimination or reduction of the risks he poses. There are no courses available for him to take. He has such positive reports from all concerned in the prison environment that it is impossible to see what more he could do by way of improving his behaviour or his approach to social relationships. There is an impasse.
64. In these circumstances, there is in my view much to be said for granting the Claimant the opportunity of an oral hearing. Of course, it is recognised that this will not necessarily lead to re-categorisation. It would merely represent a further stage in the investigation process, so as to enable the Director to take a decision on a more informed basis. But there is at least some chance that the present impasse may be resolved. It is not so much, in this instance, that there is a factual dispute which needs to be resolved. Most importantly, it would give the Claimant an opportunity to address the specific concerns of the Director and to tailor his submissions to them. It would give the Director an opportunity to test the genuineness of the claims made in the witness statement of 1 November (which were not available to him at the times when his earlier decisions were made) and to make an assessment for himself of the Claimant's personality – which seems to have impressed all the others who have been called upon to express a view as to the risks he poses and as to the appropriateness of re-categorisation.
65. As I have said, there is nothing more that the Claimant can do by way of taking courses, or by way of changing his behaviour: the issue appears mostly to turn upon the genuineness of his own claims to have addressed his offending and of his determination to put it behind him. If made only in writing, those assurances are unlikely to have the impact of personal communication with him. It would thus seem that an oral hearing is the only opportunity for moving things on.

The case law on the need for oral hearings in re-categorisation cases

66. I pause at this point to address some of the principles which have been discussed in relation to oral hearings in the recent case law. As I have already noted, it is now accepted that it is for the court to decide whether or not the refusal of an oral hearing, in the light of the particular facts, was wrong. The judge's function is not confined merely to reviewing the decision in question. Furthermore, in the light of Lord Bingham's approach in the *Smith and West* case, discussed above, there is no requirement for a prisoner to establish "exceptional circumstances" as a distinct element. The use of this wording in PSI 03/2010 simply connotes a prediction that oral hearings will not often be required: see e.g. *R (Riley) v Governor of HMP Frankland* [2009] EWHC 3598 (Judge Pelling QC) at [20] and *R (H) v SSJ* [2008] EWHC 2590. In the latter case, Cranston J at [21] emphasised that common law standards of procedural fairness, in the context of the need for an oral hearing, are flexible and that, in general terms, they depend on the circumstances of the case. He summarised the position as follows:

“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 the 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.”

67. Earlier in the same judgment, at [1], his Lordship made the following observations:

“Procedural fairness sometimes demands an oral hearing. There can be greater confidence with an oral hearing that the relevant standards have been properly applied and that the facts on which the decision is based are accurate. The oral hearing also gives the person affected by the decision the opportunity to tailor the arguments to the concerns of the decision-maker. The interests at stake are such as to trump other factors in the balance such as cost and perhaps efficiency. 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.”

68. Although each case inevitably turns upon its own particular circumstances, it is sometimes instructive to have regard to decisions in other cases for the purpose of illustrating some of the factors which have led other judges to conclude that an oral hearing is required. The decision of Cranston J from which I have just cited, for example, was that an oral hearing was required in the context of a Category A prisoner, whose tariff had expired, and whose date of eventual release was likely to be adversely affected by any delay in moving him from Category A conditions. The learned Judge concluded, “Since the consequences of an adverse Category A decision are so serious, these two factors point in the direction of a particularly high standard of procedural fairness”. So too, in the present case, if the Claimant has a realistic prospect of release before 2014, that prospect is likely to be jeopardised by any impasse in the process of considering the issue of re-categorisation.
69. Another factor which may be significant is where there is a difference of view between the Director and the LAP, as to whether a prisoner is suitable for re-categorisation or release. This too played a part in the reasoning of Cranston J in the *H* case. He commented, at [24], that:

“The Category A Review Team may well benefit from the closer examination which an oral hearing could provide. After all, the local prison has responsibility for the care of the Claimant and its views on risk and its management are matters which might be better tested by way of an oral hearing.”

That reasoning seems to me to be of equal validity in the circumstances of the case which I am now considering.

70. My attention was also drawn to the decision of Nicol J in *R (Longmire) v SSJ* [2011] EWHC 1488. In that case, the learned Judge acknowledged that a disagreement between the LAP and the Director was one factor relevant to the issue of whether to hold an oral hearing, although not determinative: see e.g. his remarks at [26]. There was an additional factor, however, in that case which he explained at [32]:

“ ... In making his decision, it is for the Director to decide how much weight to attribute to the reports he receives and, in principle, he may take a robust view as to their value. However, the accusation that a professional psychologist was biased and that she and her colleagues had been deceived by the Claimant pulling the wool over their eyes were serious matters which in fairness to them and to the Claimant ought to have been ventilated at an oral hearing.”

In the present case, by contrast, it is fair to point out that the Director has not accused Ms Lloyd or members of the LAP of “bias” but, on the other hand, there is implicit criticism in the reasons he has provided; in the sense that he considers Ms Lloyd’s approach to have been “superficial” and he is clearly of the view that she has, in effect, brushed to one side the implications of the jury’s verdict and the sentencing judge’s remarks about this Claimant’s motivation. That criticism seems to me to be a powerful factor weighing in favour of an oral hearing, as it did to Nicol J in the *Longmire* case.

71. It has long been acknowledged that those faced with the task of assessing degrees of risk, or diminution of risk, are faced with a heavy burden and their decisions are sometimes made more difficult in cases where the prisoner concerned continues to be in denial about his criminality or the extent of it. Indeed, that is a common feature in relation to sex offenders. On the other hand, it was accepted by the Court of Appeal in *R (Oyston) v Parole Board*, unreported, 1 March 2000, that this factor should not by any means always be regarded as determinative. The more difficult a decision is to take, and the greater the complexity of the issues faced by the person responsible for making the decision, surely the more important it is to take full advantage of every means by which he or she may be properly informed. As Lord Diplock made clear long ago in the *Tameside* case, cited above, it is necessary for anyone in the position of the Director here to acquaint himself with the relevant information, so as to enable himself to answer “the right question” correctly.
72. As I have already noted, an oral hearing in the present case might very well enable the Director to understand more fully the case advanced by Ms Lloyd and by the LAP for the Claimant’s re-categorisation, and also an opportunity for the Claimant himself to understand more clearly the Director’s reasons for rejecting that course. He may thus be better enabled to address those concerns and to understand what more he has to do in order to demonstrate the required diminution of risk. Not only would the Director be likely to be better informed, but the procedure would be more likely to enable the high standard of fairness required to be achieved for the benefit of all concerned.

Conclusion

73. I am in a position to state my conclusions as follows. First, I am not persuaded that the Director can be said to have been irrational in his decisions so far, on the information available to him, that the risk posed by the Claimant has not been sufficiently diminished. That his concerns are rational is perhaps conveniently illustrated by the observations of Kenneth Parker J in granting permission.
74. Secondly, I am not satisfied that the reasons given by the Director so far are sufficiently clear, in particular, so as to enable the Claimant to understand what he has yet to do in order to demonstrate, contrary to the Director's impression, that the risk he poses has indeed been diminished. It seems to me that the fact that there are no courses available to the Claimant is a significant stumbling block. The Director seems also to have erred in concluding that the risk may be more effectively diminished by the Claimant's continuing the "work" that he had been doing hitherto. There was no apparent connection.
75. Thirdly, I conclude that this is one of those cases, albeit "few and far between", in which an oral hearing might very well be useful in providing further information, in removing misunderstandings, and in attempting to achieve the higher level of procedural fairness that is appropriate in cases of this kind.

