Neutral Citation Number: [2025] EWHC 128 (Admin)

Case No: AC-2024-000043

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**LEEDS DISTRICT REGISTRY**

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds,
LS1 3BG

Date: 24/01/2025

**Before** :

**MRS JUSTICE HILL DBE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE KING**<br>**(on the application of**<br>**DENNY DE SILVA)** | **Claimant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR JUSTICE** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Dan Squires KC and Tim James-Matthews** (instructed by **Birnberg Pierce**) for the **Claimant**
**James Strachan KC and Celia Rooney** (instructed by the **Government Legal Department**) for the **Defendant**)

Hearing dates: 20 and 21 November 2024
Further evidence and submissions: 27 and 29 November 2024, 2 and 4 December 2024

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 2:00pm on 24th January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE HILL

**Mrs Justice Hill:**

## Introduction

1. The Claimant is a Category B prisoner, serving a life sentence. He is currently located in the Separation Centre ("SC") at HMP Full Sutton. This is one of two small, specialist units, used to manage prisoners with risks associated with extremism and terrorism. By this claim the Claimant seeks judicial review of the decision communicated to him by letter dated 18 September 2023 that he would remain in the SC after an initial assessment period ("the Decision").

2. With permission of Fordham J, granted on 19 June 2024, the Claimant relies on a 52-page statement of facts and grounds. The Claimant advances seven discrete, but often overlapping, grounds of review. Several of the grounds incorporated distinct sub-grounds.

3. Decisions to locate prisoners in an SC are made on behalf of the Defendant by the Separation Centre Management Committee ("the SCMC"). A key element of the Claimant's claim is a challenge to the basis on which the SCMC makes its decisions, in particular the extent to which it needs to resolve factual disputes in the material said to justify location in an SC. It is understood that this is the first time the operation of SCs has been considered in a substantive judicial review claim.

4. The Claimant served witness statements from himself, as well as Gareth Peirce, Daniel Guedalla and Sally Middleton, his solicitors. He also relied on medical reports from Dr Juliet Cohen, an expert forensic physician, dated 14 December 2023 and 4 October 2024. The Defendant relied on a witness statement from Stephen Waldron dated 23 August 2024. Mr Waldron had been the Operational Lead for SCs from March 2020 to April 2023, before becoming the Operational Lead for Pathways to Progression and Specialist Populations with the Long Term and High Security Estate ("LTHSE") for HM Prison and Probation Service ("HMPPS").

5. Both parties were very ably represented by leading and junior counsel. I am very grateful to them all for their comprehensive yet focussed written and oral submissions in this complex case.

6. This judgment is structured in the following way, to reflect the parties' agreement as to the issues, and the order in which they should be approached:

> **The legal framework**: ([7]-[10] below);
>
> **The factual background**: ([11]-[29]);
>
> **Factual Issue 1**: What were the reasons for the selection of the Claimant for the SC? ([30]-[59]);
>
> **Factual Issue 2**: What was the factual basis for the Decision? ([60]-[92]);
>
> **Ground 4**: Was the SCMC's approach to the making of factual determinations unlawful in that it (a) was procedurally unfair (b) involved an unlawful failure to consider relevant considerations (c) involved a failure of the SCMC to discharge its *Tameside* duty and/or (d) was unreasonable? ([93]-[187])

**Ground 2**: The SCMC was not given, and did not consider, any formal reliability gradings for the intelligence contained in the Referral. Did this render the Decision unlawful? In particular did the SCMC fail to take account of relevant considerations and/or was the Decision *Tameside* irrational? ([188]-[197])

**Ground 5**: Was the Decision procedurally unfair because the SCMC did not hold an oral hearing and/or receive oral representations from the Claimant or his representatives? ([198]-[227])

**Ground 6**: Was the Claimant provided with adequate reasons for the Decision? ([228]-[240])

**Ground 1**: Was the Claimant provided with inadequate disclosure in respect of his selection for placement in the SC, such that the Decision was procedurally unfair and/or represented an unjustified departure from policy? ([241]-[258])

**Ground 3**: Did the comments of Professor Zainab Al-Attar during the 12 September 2023 meeting, that the Claimant was a "psychopath" and/or regarding a "personality disorder", render the Decision *Tameside* irrational and/or otherwise unreasonable? ([259]-[270])

**Ground 7**: Was the Decision incompatible with the Claimant's rights under Article 8 of the European Convention on Human Rights ("ECHR")? ([271]-[295]).

## The legal framework

7. Under the Prison Act 1952, s.47, the Secretary of State may make rules for, among other things, the "regulation and management" of prisons and for the "treatment" and "control" of prisoners. These rules are currently found in the Prison Rules 1999, as amended.

8. Rule 45 of the 1999 Rules makes provision for a prisoner to be removed entirely from association with other prisoners, commonly referred to as being placed in segregation.

9. Rule 46 makes provision for Close Supervision Centres ("CSCs"). These are for prisoners who have demonstrated or evidenced propensity to demonstrate violent and/or highly disruptive behaviour in custody. They are kept in small, highly specialised units or specially designated cells.

10. Rule 46A makes provision for SCs, in material part as follows:

> "(1) Where it appears desirable, on one or more of the grounds specified in paragraph (2), the Secretary of State may direct that a prisoner be placed in a separation centre within a prison.
>
> (2) The grounds referred to in paragraph (1) are—
>
> (a) the interests of national security;

> (b) to prevent the commission, preparation or instigation of an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in a prison or otherwise;
>
> (c) to prevent the dissemination of views or beliefs that might encourage or induce others to commit any such act or offence, whether in a prison or otherwise, or to protect or safeguard others from such views or beliefs, or
>
> (d) to prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.
>
> (3) A direction given under paragraph (1) must be reviewed every three months.
>
> (4) The Secretary of State may, at any time, revoke a direction given under paragraph (1) and direct that the prisoner be removed from the separation centre.
>
> (5) In exercising any discretion under this rule, the Secretary of State must take account of any known relevant medical considerations".

## The factual background

*(i): Separation Centres*

11. The Defendant's Separation Centre Policy Framework ("the SCPF") explains at paragraph 1.5 that SCs were established in 2017 within the LTHSE to allow for "greater separation and specialised management of terrorist or terrorist risk prisoners, who, irrespective of the type of ideology, present a level of risk that cannot be managed on a mainstream or alternative location".

12. It confirms at paragraph 1.6 that the purpose of SCs is to manage those prisoners who meet the criteria in Rule 46A safely. The smaller centre size and higher levels of staffing jointly provide "a highly supervised protective environment to prevent some of the risks that exist in a less restricted environment". This enables the provision of "individually tailored regimes that support the management of prisoners towards reducing the risks that led to their selection into the separation centre".

13. SCs were created as part of the response to the review of Islamist extremism in prisons, probation and youth justice led by Lord Acheson from 2015-2016. The review found that the threat from Islamist extremism (abbreviated to "IE" in the review) can manifest itself in prison in various ways, listed in paragraph 16 of the summary of the review's main findings (August 2016). These include:

> "Muslim gang culture and the consequent violence, drug trafficking and criminality inspired or directed by these groups;
>
> TACT offenders [those sentenced under the Terrorism Act 2000 and its successors] advocating support for Daesh and threats against staff and other prisoners;

> charismatic IE prisoners acting as self-styled 'emirs' and exerting a controlling and radicalising influence on the wider Muslim prison population…
>
> unsupervised collective worship, sometimes at Friday prayers including pressure on supervising staff to leave the room…[and]
>
> books and educational materials promoting extremist literature available in chaplaincy libraries or held by individual prisoners…".

14. The summary also noted at paragraph 33 that "illicit mobile phone technology" was "an area of inter-agency concern with relevance to IE". The review noted that much work was underway to deal with this challenge across the whole prison population, but it recommended that there should be "a particular focus on preventing the possession of mobile phones by TACT and IE prisoners".

15. There are two active SCs in England and Wales. Together, they have capacity for 16 prisoners. There are currently 15 prisoners located in SCs.

16. Prisoners who may be suitable for location in an SC are identified through multi-agency meetings used to oversee the management of an offender's terrorist risk. A referral form is completed. Various reports are obtained and annexed to the form. Part of the process involves an Intelligence Case Manager collating relevant intelligence about the prisoner and creating an appropriate gist thereof.

17. The referral form is considered at an SCMC meeting. Such meetings are attended by several specialists and professionals, but its decisions are made by at least two Core Decision Makers ("CDMs"). If the SCMC concludes that the referral should be accepted, the prisoner is transferred to an SC for a three-month assessment stage, during which the prisoner's suitability for the SC is reviewed. The SCMC commissions reports to assess whether continued location in the SC remains desirable, which are then reviewed at a further SCMC meeting. In accordance with Rule 46A(3), decisions to locate a prisoner in the SC are reviewed every three months.

*(ii): Outline of events in the Claimant's case*

18. On 10 February 2016, the Claimant was convicted of a gang-related murder at the Central Criminal Court. He was sentenced to life imprisonment with a minimum term of 27 years. There was no suggestion that the murder had any connection to terrorism or extremism.

19. While in prison, the Claimant has been placed in segregation several times, including at times for several months, for allegedly assaulting other prisoners and staff, the use of improvised weapons and the use of mobile phones.

20. In February 2021, the Claimant was found in possession of a mobile phone which contained extremist material. This led to him being investigated for suspected criminal offences.

21. On 17 August 2022 the Claimant was transferred to HMP Frankland.

22. On 9 December 2022, the Head of the Counter-Terrorism Unit at HMP Frankland began completing a form to refer the Claimant to the SC. This was an iterative process, the detail of which was set out in Mr Waldron's statement. The referral was completed on 31 May 2023.

23. On 13 June 2023, the SCMC met and decided to select the Claimant for assessment in the SC. On 20 June 2023 the Claimant was informed of the decision and transferred to the SC at HMP Frankland for the assessment stage.

24. On 7 July 2023, the Claimant pleaded guilty to (i) one count of conspiring to convey into prison articles contained within List B of the Prisons Act 1952 (namely, mobile telephones and components), contrary to the Criminal Law Act 1977, s.1; and (ii) two counts of disseminating a terrorist publication, intending the effect of his conduct to be a direct or indirect encouragement to terrorism, contrary to the Terrorism Act 2006, s.2(2)(a). His basis of plea, which was accepted, was to the effect that all the offending had taken place on or before 31 January 2021.

25. The referral form and the various reports that had been obtained about the Claimant were disclosed to him and he was invited to make representations. On 6 September 2023 he submitted very detailed representations through his solicitor.

26. On 12 September 2023, the SCMC met to consider the outcome of the assessment of the Claimant. The SCMC decided that the Claimant should be selected for the SC for a further period.

27. On 18 September 2023, the SCMC's decision was communicated to the Claimant. On 20 September 2023, a letter was sent to the Claimant's solicitors in response to his representations.

28. On 27 September 2023 the Claimant was sentenced to 30 months' imprisonment for the offences referred to at [24] above, to run consecutively to the minimum term of his life sentence.

29. On 28 September 2023 the Claimant was transferred to the SC at HMP Full Sutton. The Claimant's location in the SC has been reviewed every three months since September 2023 in accordance with Rule 46A(3) and it has been decided on each occasion that he should remain in the SC.

## Factual Issue 1: What is the significance of a decision to select a prisoner for an SC?

30. The Claimant contended that transfer to an SC has potentially devastating consequences for a prisoner, such that a decision to select a prisoner for an SC is highly significant. The Defendant disputed this analysis, arguing that location in an SC is materially similar to "mainstream" prison location, meaning that a decision of this kind is less significant.

31. This issue was directly relevant to the question of whether location on the SC interfered with the Claimant's Article 8 rights under Ground 7. It had a wider relevance to several of the other grounds because the greater the significance the decision, the higher the standard of procedural fairness the common law was likely to require. Determination of the issue required consideration of several of the features of the regime on an SC and

of the Claimant's experience of it. The Claimant, Ms Peirce, Dr Cohen and Mr Waldron provided relevant evidence on these topics. Mr Waldron appended to his statement a "master core day schedule" applicable to the HMP Full Sutton SC.

32. In my judgment the decision to select a prisoner for an SC is highly significant, for the following reasons.

*(i): Association with other prisoners*

33. A prisoner located in an SC can only associate with other prisoners in the SC (unless an individualised risk assessment precludes even that). An SC is a very small unit. The Explanatory Memorandum to the Prison (Amendment) Rules 2017, which introduced Rule 46A, indicated that it was intended that each SC would hold "no more than 12 individuals". The HMP Full Sutton SC consists of two floors of cells and a small yard. Initially the Claimant was one of seven prisoners on the SC and at the time of his witness statement was one of eight. By comparison, prisoners on mainstream location can associate with very many more prisoners. For example, when the Claimant was located "on the mains" at HMP Frankland, he was able to associate with around 120 prisoners on the same wing, and in particular 60 on the same "spur".

34. Mr Strachan KC rightly pointed out that prisoners on an SC can also associate with staff, but that is fundamentally different to associating with other prisoners, especially given the level of monitoring of the prisoners by staff in an SC described at [37]-[38] below.

35. The position of an SC prisoner in respect of association is similar to that of some prisoners located in a CSC under Rule 46. Although, unlike in an SC, the starting point in a CSC is that there is to be no association, an individualised risk assessment may allow a CSC prisoner to associate with a small number of other CSC prisoners. In contrast, prisoners placed in segregation under Rule 45 cannot associate with others at all.

36. I therefore accept Mr Squires KC's submission that detention in an SC can properly be characterised as "small group isolation".

*(ii): Supervision and monitoring*

37. Prisoners in an SC are subject to much more intrusive supervision and monitoring by staff than prisoners on mainstream location. This close supervision of the prisoners is inevitable given the nature and purpose of the SC regime: the Explanatory Memorandum made clear that the reason SCs contain small numbers of prisoners is to ensure "intensive intervention and management of individuals in high security conditions".

38. The Claimant told Dr Cohen that there are seven officers and one senior officer for the seven prisoners on the HMP Full Sutton SC. He said that while on the SC the prisoners are "watched all the time and subject to constant scrutiny"; that staff write down what they see the prisoners doing on a regular basis; and that prisoners are more closely supervised during visits from family members than on mainstream location.

*(iii): The daily regime*

39. Although the daily regime within SCs is delivered, so far as is practicable, to mirror that which would be available to a prisoner on mainstream location, there are some fundamental differences. SC prisoners cannot access the same education, activities and employment as mainstream prisoners because they are not allowed to associate with those prisoners. This means that although prisoners in the HMP Full Sutton SC can access the normal prison gym and library, they do so at specific, limited times to prevent them from mixing with mainstream prisoners. Otherwise, the education, activities and employment are provided within the SC itself. The range of options is more limited as a result of the smaller number of prisoners in the SC.

40. The Claimant provided detailed evidence about what these differences have meant for him in reality, in the SCs at both HMP Frankland and HMP Full Sutton.

41. In terms of education, formally taught mathematics, art and history courses were available on the HMP Frankland mainstream location and he was on the waiting list for a GCSE English course. However, the education sessions in the HMP Frankland SC consisted of doing a quiz or watching a documentary with a member of the education staff in a small room on the unit. At HMP Full Sutton, the Claimant has been accepted on to an Open University English and creative writing course and has completed one module. Otherwise, his evidence was that formal education programmes of the kind on mainstream location do not take place. Rather, prisoners are only permitted to use a computer on the unit, twice a week for an hour, for self-study. An education facilitator supervises them but does not provide any formal teaching.

42. As regards other activities, the Claimant's evidence was that the timetabled nutrition sessions did not occur: rather, on one occasion a member of staff brought some healthy eating leaflets to the unit and stayed for around 10 minutes, but has not returned. The cookery sessions only took place 5-6 times, and involved the prisoners on the SC being given a recipe and ingredients to cook on their own. The horticulture sessions on the SC involve the prisoner watering a few tomato plants alone, without any instruction.

43. In terms of employment, the Claimant explained that there are only three jobs available on the SC: two cleaning and one painting. That means that the majority of the SC prisoners are unemployed as there are insufficient jobs available.

44. The Claimant's evidence was that his access to visits was more limited on the HMP Full Sutton SC: there is greater supervision of visits and fewer facilities available for children who visit, such as his young daughter. He also said that while on the SC he is unable to apply for Accumulated Visits ("AVs"), which permit prisoners located a long way from their family to apply every 6 months to be moved temporarily nearer to home to see family on several visits close together over a month. He had been able to access AVs when on mainstream location.

45. He described practical difficulties in accessing healthcare while on the SC, in relation to which some of his complaints have been upheld including by the Prisons and Probation Ombudsman; and his inability to access peer support from other prisoners through the prison Listener service, which is available on mainstream location.

46. Finally, the Claimant's evidence was that "lockdowns" happen more regularly during the day on the SC than on mainstream location, meaning that any activities are cancelled.

*(iv): Time out of cell*

47. There is some evidence that SC prisoners have less time out of their cells than those on mainstream location.

48. Mr Waldron explained that SC prisoners who choose to participate in activities can expect to spend 6-7 hours a day outside their cells, subject to any regime closures or restrictions, which is largely the same as the position for mainstream prisoners.

49. However the Claimant's accounts were to the effect that the time out of cell described by Mr Waldron regularly does not occur in practice, because there are more unscheduled lockdowns on the SC than on mainstream location; that the additional lockdowns are due to staff shortages; and that he had been told that when lockdowns are required it is easier to lockdown the SC than a mainstream prison wing due to the smaller number of prisoners. This account appeared credible to me. The Claimant gave Dr Cohen an example of a day when the Claimant had been in his cell for 22½ hours, from 4.30 pm on the first day to 2.00 pm on the second.

*(v): Duration of SC placements and release*

50. Prisoners can be placed for very lengthy periods in an SC. Location in an SC is the subject of regular reviews, and each prisoner's case is determined on its own merits, but the evidence suggests that in reality it is hard to leave an SC: the Claimant has already spent more than 16 months there; others have been in the SC for six or seven years; and there was only evidence of two prisoners who had been de-selected for the SC due to engagement with the process, rather than, for example, reaching the end of their sentence.

51. Daniel Guedalla's evidence was also to the effect that location on an SC can impact on a prisoner's prospects of release, given the limited opportunities for constructive and stimulating activities and sentence progression and the nature of the risk that location in an SC is said to evidence: see further under [209]-[210] below.

*(vi): Potential psychological effects*

52. Research indicates that small group isolation regimes can produce serious and adverse psychological effects similar to solitary confinement: see the Istanbul Statement on the Use and Effects of Solitary Confinement (2007) and further international reports cited in Dr Cohen's 14 December 2023 report at [133]-[135]. In her 4 October 2024 report, Dr Cohen acknowledged that there is not exact equivalence between an SC and small group isolation but maintained that there are "similarities of concern" in the two environments. She identified, in particular, "the small unit environment with a small number of other prisoners, intensity of the monitoring, lack of privacy, deprivation of sufficient opportunities for open air exercise, of education and of meaningful activity, and sense of indefinite confinement" and the "limited range of human contact and monotony of the environment and activities": [103]-[105].

53. Dr Cohen concluded in her first report that the conditions on the SC have contributed to the Claimant's adverse mental health, which was "likely to become greater the longer he spends there": [130]-[131]. By the time of the 4 October 2024 report, there had been

a deterioration in the Claimant's mental health in terms of the severity of his anxiety and depression with new symptoms appearing and others worsening: [162].

54. The Defendant did not accept the admissibility and/or relevance of much of Dr Cohen's evidence. It was argued that her 14 December 2023 report was based on only a four-hour assessment by video link; that she appeared to accept much of the Claimant's account without challenge; and that comparisons between location on an SC and small group isolation settings in other countries such as Turkey were inappropriate.

55. Dr Cohen provided a persuasive rebuttal to these criticisms at [97]-[100] of the 4 October 2024 report: she explained that a four-hour video assessment was clinically appropriate and that had not simply accepted the Claimant's account, but had relied on her analysis of his responses, her observations and examination findings and other documents relating to the Claimant. She said she had found nothing to support any suggestion that he was fabricating the clinical findings. She also explained why the comparisons with other international studies were appropriate. These were all matters within her clinical expertise. The Defendant had made no application to cross-examine Dr Cohen or serve expert evidence of her own. For these reasons I accept Dr Cohen's evidence.

56. Gareth Peirce has represented many prisoners located in small group isolation units for lengthy periods. In her witness statement she described how within a relatively short space of time, the nature of the location was recognised as being likely to have a severe impact on their mental and physical health.

57. Ms Peirce also exhibited several expert reports from those cases which described the adverse psychological effects of small group isolation. In particular experts had been critical of the Special Secure Units in which certain prisoners were detained in small groups in the 1990's. In these units, association was limited to association with others held on the unit, there was no equivalent choice in respect of work or education as in the main prisons and there was a lack of access to open air and to a sense of distance, as well as to exercise other than in an enclosed and small yard. The regime on SCs therefore bears some similarity to those on the Special Secure Units.

58. The Defendant did not accept the relevance or admissibility of Ms Peirce's evidence on the basis that she was not an expert instructed in the usual way. That is right, but in my view, she was entitled to provide the court with examples from her general experience as a solicitor. Her evidence provided general contextual support for Dr Cohen's evidence.

*Conclusion on Factual Issue 1*

59. Factual Issue 1 is therefore determined in the Claimant's favour: the decision to select a prisoner for an SC is highly significant: the conditions of detention in an SC are materially different to those on mainstream location, and there are other potentially serious consequences of location in an SC, as detailed above.

**Factual Issue 2: What were the reasons for the selection of the Claimant for the SC?**

*The reasons for the Decision given in the 18 September 2023 letter*

60. This letter made clear that the legal basis for the Decision was Rule 46A(2)(c) and (d), as set out at [10] above. It gave the following reasons, which broadly reflect the statutory language:

> "It is assessed you pose a threat to good order and discipline if you were to remain in a non-SC location.
>
> It is also assessed that location in an SC will prevent the dissemination of your views or beliefs that might encourage or induce others to commit any such act or offence[1], whether in a prison or otherwise and will protect or safeguard others from such views or beliefs".

61. The letter set out the factual reasons for the Claimant's selection as follows:

> "You have shown the capability to negatively change prisoners' behaviour and attitudes towards staff in your presence. This ability has also been demonstrated during your assessment period in the SC. SCMC assess that the behaviours of concern included in your SC referral and seen in the assessment period create an environment in prison where extremism and extremism related behaviours can flourish.
>
> It is reported that you also have a history of violent assaults against non-Muslim prisoners and prison staff. In addition, following an investigation, in February 2023 you were charged with 2 CPS TACT offences and 1 Prison Act offence.
>
> SCMC believe that it is desirable for you to remain in the SC and that this decision is necessary, reasonable and proportionate".

62. The letter therefore indicates that the overarching reason for the Decision was the Claimant's "behaviours of concern", which had been identified in the SC referral and seen in the assessment period.

*The SC referral form*

*(i): Section 4*

63. The key part of the referral form is section 4, headed "Reasons for referral". The writer is directed to identify which of the four limbs in Rule 46A(2) are relied upon and to explain why the prisoner should be referred on the basis of these ground(s), taking account of any reasons which support or point away from referral. The writer is asked to provide specific details of (i) "ideology", namely how the prisoner's ideology contributes to the grounds for referral; (ii) "intent", meaning whether there is evidence of the prisoner's willingness to behave in a way relevant to the grounds; (iii) "influence", namely their "index of influence" within the prison or outside and how that contributes to the grounds; and (iv) "capability", that is whether they have the ability to behave in a way that contributes to the grounds.

[1] This wording replicates the language in Rule 46A(2)(c), but the "act or offence" is defined in Rule 46A(2)(b). It is "an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in a prison or otherwise", albeit that this was not made clear on the face of the letter.

64. Mr Waldron's evidence was that section 4 of the form in the Claimant's case was completed on 9 December 2022. It gave as the "headline" reason for referral of the Claimant "the risk [he] poses to the good order and discipline of the prison", noting that "[d]uring his time at HMP Frankland [he] has demonstrated his influence and ability to incite other Muslim prisoners". The Claimant had been at HMP Frankland since 17 August 2022.

65. Section 4 continued by giving the following examples of the Claimant's behaviour during this time, with numbering added for ease of reference:

> "[1] Following his arrival in the MPU [the segregation unit], the dynamics on the unit had a notable change and Muslim prisoners began to have a negative attitude towards staff. Whilst in the MPU it was observed that a Muslim prisoner was involved in heated arguments regarding religion with non-Muslim prisoners, this is something which had not been discussed prior to Mr DE SILVA's arrival. Another prisoner also began to request attendance at Friday prayers which is something they did not do previously. Another example being a Muslim prisoner had started to listen to Arabic music and his behaviour deteriorated towards staff, including an incident at height. The atmosphere in the MPU appeared to settle once Mr DE SILVA relocated to F wing [on 21 August 2022]. This pattern of causing disorder and attempting to influence others relates to ground d).
>
> [2] Since September 2022 Mr DE SILVA has had a negative influence over Muslim prisoners on F wing and it has been observed that he regularly attempts to oppose and intimidate staff while other prisoners are around.
>
> [3] During an incident at height involving a prisoner on the railings, it was noted that the prisoner continually moved back and forth from Mr DE SILVA's cell, relevant to ground d).
>
> [4] It is noted that Muslim prisoners have started to wear religious clothing on the wing which they had not done prior to Mr DE SILVA's arrival. Muslim prisoners who previously had good rapport with the staff have started to become distant and a prisoner has been observed walking past staff with his head down when in the presence of Mr DE SILVA. Mr DE SILVA's ability to influence religious views and behaviour is relevant to ground d).
>
> [5] Mr DE SILVA has been involved in challenges at Friday prayers showing disrespect towards the Imam and appears to influence other Muslim prisoners to submit complaints regarding religious services. Mr DE SILVA has stated he believes the prison and the Imam are "anti-Muslim". It appears that Mr DE SILVA is pushing Islam as a form of domination/intimidation, complaining about every element of change, including the Imam, so that Islam is practiced the way that he wants. This is another example of behaviour relating to ground d).

> [6] Mr DE SILVA was at the centre of a heated argument between Muslim and non-Muslim prisoners in the workshop. After this argument, it is reported that Mr DE SILVA was not happy with a Muslim prisoner for "speaking to and sitting with the Kuffs [non-Muslims]". It is noted that Mr DE SILVA has the influence over prisoners as to who they should associate with, relevant to ground c).
>
> [7] Mr DE SILVA regularly demonstrates 'them and us' thinking, making derogatory remarks towards prison staff, non-Muslim's [sic], and the UK government, relevant to ground c)".

66. Section 4 continued by referring to the following matters relating to the Claimant's conduct before he was located at HMP Frankland:

> "[8] It has recently been reported that since Mr DE SILVA left HMP Whitemoor, the stronghold from Muslim prisoners appears to have weakened [implying that he had had influence on the prisoners when he was there].
>
> [9] Previously at HMP Woodhill Mr DE SILVA was found in possession of two books which appear on the Inappropriate Materials list due to extremist content. This example highlights Mr DE SILVA's capability of gaining access to extremist material and relates to grounds b) and d).
>
> [10] Mr DE SILVA has a history of violent assaults against non-Muslim prisoners and prison staff. This pattern of violent behaviour relates to ground d).
>
> [11] Mr DE SILVA has links to criminal activity in custody and has been found in possession of a mobile phone in February 2021. There was a video of a beheading on the phone and it was seized by Counter Terrorism Police. Following investigation, on 28th February 2023 Mr DE SILVA was charged with CPS TACT offences and 1 Prison Act offence, relevant to relates to grounds b) and d)."

67. Mr Squires KC submitted that these "pre-Frankland" issues alone would not have justified the Claimant's referral to the SC in June 2023. There is force in that argument, because location in an SC is only appropriate for those prisoners who present a level of risk that cannot be managed on a mainstream or alternative location: see [11] above. Accordingly, if there had been no issues with the Claimant's behaviour while he was at Frankland, being managed on a mainstream or alternative location, it would have been difficult to contend that locating him in an SC was appropriate.

68. That said, the pre-Frankland issues provided an important context for the referral. Allegations [8] and [9], if proven, suggested a history of behaviour similar to that reported at HMP Frankland. Allegation [10] reflected the committing of criminal offences in prison, to which the Claimant later pleaded guilty, and which were directly relevant to the Rule 46A criteria.

69. The "CPS TACT offences" involved the Claimant having created a WhatsApp profile which indicated that he was a supporter of 'Islamic State' and having used an illicit

telephone to download and view terrorist propaganda material produced by Islamic State, including a video of a beheading. He had also disseminated a terrorist publication which glorifies Islamic State to one other prisoner ("B") albeit that he was sentenced on the basis that this amounted to indirect, not direct, encouragement to terrorism (i.e. that there was no evidence that he had actually radicalised B).

70. The "Prison Act" offence involved the Claimant having conspired with his sister to convey 'Zanco' (very small) mobile telephones and components into the prison in two separate occasions. It was later accepted that the telephones were not obtained for the purposes of the TACT offences, but there is nevertheless a significance to these actions, given the link identified in the Acheson review between illicit mobile phone technology and IE: see [14] above.

*(ii): Other sections*

71. As noted at [10] above, Rules 46A(2)(c) and (d) focus on the need to prevent the dissemination of views or beliefs related to terrorism offences; and to prevent political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison. On that basis, Mr Squires KC was right to contend that generalised allegations of poor behaviour in prison, absent any suggestion that they show influence over or ability to incite other prisoners, will not be sufficient to satisfy the R46A(2)(c) or (d) criteria.

72. However, in the Claimant's case, the reasons were not limited to such generalised allegations: for example section 3 of the form, which set out his behaviour in custody, stated that he "consistently pushed boundaries and attempted to create disorder, often using violence to get what he wants", suggesting the use of violence for the purposes of influencing others; and the writer of the referral had identified the fact that at least some of the assaults committed by the Claimant had been on "non-Muslim" prisoners as significant: see allegation [10] at [61] above.

73. Sections 6 and 7 of the referral form set out, respectively, the Claimant's transfer/location history and his adjudication history. Section 5 explained what alternative management options and strategies had been considered. It was noted that the Claimant had been located in segregation several times and on different wings in different prisons, but that "disruption moves have been attempted, with little impact on Mr DE SILVA's ability to destabilase [sic] a wing".

*(iii): The reports annexed to the form*

74. The Psychology Report and Health Report annexed to the form made clear, respectively, that there had been no psychological needs identified since the Claimant's transfer to HMP Frankland and no interventions or reports completed on him; and that although he had been diagnosed with anxiety by the GP at HMP Woodhill in July 2020, he was not currently open to the mental health team or receiving treatment.

75. The Security Intelligence Report ("SIR") consisted of gists of intelligence reports, organised into two sections: first, those which were considered would support the case for referral to the SC, and second, and those which would undermine the case for referral. In the Claimant's case the gists covered 22 August 2015 to 23 April 2023. The first section was 18½ pages long and the second was almost 3 pages long. In responding

to the SIR the Claimant's solicitor split the SIR into 151 numbered paragraphs, each of which contains more than one factual issue. That gives an indication of the volume of material in the SIR.

76. There was some disagreement between the parties as to the extent to which the SIR provided reasons for the referral over and above those set out in section 4 or merely a summary of the primary evidence to support those reasons. As noted at [63] above section 4 specifically directs the writer to identify "the reasons" for the referral and makes detailed provision for what must be included, by reference to the Rule 46A criteria.

77. However, the SIR is provided to the SCMC as an integral part of the referral form; and the Defendant's pleaded case was that the SCMC will consider "the body of available…intelligence…taken as a whole" and "the collective intelligence picture". Moreover, they did so in the Claimant's case to elicit "a pattern of conduct", specifically "a pattern of concerning behaviour", by him.

78. Accordingly, while the Defendant's system is structured in such a way as to bring a focus on section 4 of the referral form as setting out the reasons for the referral, the SCMC will also have regard to the SIR (and other reports) and can use its content to support the decision it makes.

*The Claimant's conduct during the assessment period*

79. Once the SCMC had decided on 13 June 2023 to locate the Claimant in the SC for assessment, a series of "post-separation" reports about the Claimant were obtained in accordance with the SCPF. These provided evidence about his conduct during the assessment period and other matters.

80. Dr Alice Bennett, Senior Registered Psychologist, prepared a Psychology Report dated 16 August 2023. She noted that according to the Digital Prison System ("DPS"), staff observations of the Claimant while on the SC had "mirrored that of the intelligence relating to behaviour on previous locations within the referral": the Claimant had "challenged processes and tested boundaries" and the dynamics on the SC changed when he was present.

81. Richard Vipond, a Probation Officer and the Prison Offender Manager ("POM") assigned to the Claimant prepared an Offender Manager's Report dated 16 August 2023. He described the Claimant's "unenviable record" of 20 negative entries on the DPS in a period of eight weeks since his arrival on the SC; the "reported negative effect on the unit since his arrival"; and the fact that he was recorded as being "intimidating, confrontational and challenging". Mr Vipond noted that several of the prisoners who would engage with staff daily and participate in key work sessions and polite conversations prior to the Claimant's arrival on the SC "distanced themselves from staff" while he was on the SC; but that "relationships with the wing staff returned to normal" when he was away from the SC.

82. In oral submissions Mr Strachan KC placed significant reliance on the comments Dr Bennett and Mr Vipond made about the Claimant's conduct during the assessment period. Some caution is needed, though, because there is no suggestion that either of

them had assessed his conduct themselves: rather, they were reporting what the SC staff had recorded on the DPS.

83. An updating SIR was also prepared, including gists of intelligence reports from 20 June 2023 to 6 August 2023. This was three pages long.

*The SCMC's assessment at the 12 September 2023 meeting*

84. Dr Bennett and Mr Vipond both attended the SCMC, together with a range of other professionals including the four CDMs.

85. Although correspondence makes clear that each member of the SCMC was sent a copy of the Claimant's representations, it is a notable feature of the verbatim record of the meeting that nowhere was reference made to the detailed representations the Claimant had made. Indeed, I have found that these were not considered by the SCMC, for the reasons given under Ground 4(i) below. Rather, the meeting proceeded on the basis that the Claimant had indeed behaved in the various ways alleged. The discussions at the meeting centred around what the drivers of his behaviour were and where he should be located within the prison estate.

86. As to the first of these issues, Dr Bennett had concluded in her report that the Claimant's behaviours did not seem to be "driven by an extremist ideology" but were more closely linked with his "anti-authoritarian attitudes". At the meeting she maintained her view that ideology was not the "primary driver" for the Claimant's behaviour. Similarly, Mr Vipond had concluded that the Claimant had not demonstrated that he held "extremist views or ideology": "to the contrary", his behaviour was considered to "mirror…that of a gang member" in that he could "galvanise" prisoners around him. At the meeting, he noted that the Claimant's religion "only came up when he came in the custodial arena" and described the Claimant as "an agitator and leader" who "can coerce people".

87. In terms of where the Claimant should be located, Dr Bennett's view was that that he was likely to continue to present with behaviours of concern "regardless of whether he was on main location or the SC" as he was likely to wish to "attain status in both locations". At the meeting she said "[w]herever he is, he will cause disruption, even in the segregation unit".

88. Dr Bennett had noted in her report that in light of his convictions for TACT offences, it was expected that the psychology professionals would conduct an extremist risk programme with the Claimant. Mr Vipond had opined that there was more likelihood of the Claimant completing this programme on main location. He had also observed that the Claimant "screen[ed] into" the Offender Personality Disorder Pathway and suggested that consideration be given to further psychological investigations.

89. In her report Dr Bennett did not support the Claimant being located on the SC. She expressed concern that such a location "would increase [the Claimant's] exposure to ideologically driven TACT offenders which could in turn impact on his future risk". Mr Vipond did not support the Claimant being located on the SC either, sharing this concern: he noted the "risk of increased exposure to those holding extreme and ideological views" on the SC. He also observed that "combining that with the negative and violent behaviour he has demonstrated previously in their community in custody

could have a significant impact on him and others". He maintained that the personality assessment pathway should be considered.

90. Other members of the SCMC expressed their views, including Professor Zainab Al-Attar, as discussed further under Grounds 6 and 3 below.

91. The SCMC concluded by a 3:1 majority that the Claimant should remain in the SC. The CDMs in favour of the decision concluded, respectively, that the Claimant had "mobilised into an extremist and an extremist enforcer in prison"; that his behaviour created "conditions…which allows other extremist behaviour to flourish"; and that it "enables an environment where extremism can flourish", such that the "driver" for the behaviour was "largely irrelevant". Mr Waldron was of the view that although "a strong case for separation" had been made, the Claimant could be adequately managed outside the SC, even though it had not been successful so far and may lead to significant periods of segregation.

*Conclusion on Factual Issue 2*

92. Accordingly, the reasons for the selection of the Claimant for the SC were his behaviours of concern as set out in the SC referral documentation and the post-separation reports; and the majority view of the SCMC that notwithstanding the written views of Dr Bennett and Mr Vipond, and their comments at the meeting, the Claimant should be located on the SC.

**Ground 4: Was the SCMC's approach to the making of factual determinations unlawful in that it (a) was procedurally unfair (b) involved an unlawful failure to consider relevant considerations (c) involved a failure of the SCMC to discharge its *Tameside* duty and/or (d) was unreasonable?**

93. By the time of the hearing the Claimant's submissions on this ground had distilled into the two distinct parts:

> Ground 4(i): Was the SCMC's approach unlawful because it failed to consider the Claimant's representations?
>
> Ground 4(ii): In any event, was the SCMC's approach to factual disputes unlawful?

Ground 4(i): Was the SCMC's approach unlawful because it failed to consider the Claimant's representations?

*Legal and policy provisions*

94. The right of a person to be heard before a draconian statutory power is exercised is "one of the oldest principles of…public law": *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [29]. It is an aspect of common law procedural fairness.

95. Procedurally fair decision-making is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. It recognises the importance of paying due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial

functions as well as the rule of law: *R (Osborn) v Parole Board* [2014] AC 1115 at [67]-[69] and [71].

96. The right to make representations in the context of segregation decisions under Rule 45 derives from (i) the seriousness of the consequences for the prisoner of a decision authorising segregation; (ii) the fact that authority is sought on the basis of information concerning the prisoner, and in particular concerning their conduct or the conduct of others towards them; (iii) the fact that the prisoner "may be able to answer allegations made…[or]…provide relevant information" and (iv) "the common law's insistence that administrative power should be exercised in a manner which is fair": *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [98].

97. The Supreme Court has recognised research indicating the significance of unfair procedures in prisons, in particular, in affecting prisoners' attitudes and their prospects of rehabilitation: *Osborn* at [70] and *Bourgass* at [97].

98. All these reasons underpin the right to make representations in the context of the SC. The SCPF recognises these principles. It makes clear at paragraph 3.47 that prisoners will have "recurring opportunities" to make representations throughout their placement in an SC. Paragraphs 3.49-3.58 make detailed provision for advance disclosure to be provided to prisoners, for them to be afforded reasonable timescales in which to make their representations (10 working days, though this can be extended) and for assistance to be offered to prisoners acting on their own behalf for whom making representations causes difficulties (such as those who cannot read or write or those with learning difficulties).

99. The SCPF provides, as one would expect, that the SCMC will consider the representations made: paragraph 3.27 states that at the selection stage the SCMC will consider "all relevant material that supports and does not support the referral. This includes…any prisoner's representations".

*The Claimant's representations in this case*

100. On 6 September 2023, the Claimant's legal representatives submitted written representations in response to disclosure of the documentation for the SCMC. His representations ran to 69 pages in total, comprising two documents. In the first, the Claimant responded to the 11 allegations in section 4 of the referral form. In the second, he responded to the SIR annexed to the referral form.

101. The Claimant contended that he could not respond to some of the allegations because insufficient detail had been provided, as is discussed under Ground 1 below. However, he had provided a substantive response to the majority of the allegations. He refuted many in their entirety, contending that the allegations were simply untrue, or related to another prisoner's conduct that was being mistakenly attributed to him. For example, he said that the alleged "Kuffs" issue was something about which he had no idea. In relation to others he argued that the allegations were based on an incomplete or misunderstood account of the facts which, if properly understood, related to conduct that could not justify referral to the SC. An example of this was his appropriate use of the complaints process to raise legitimate concerns about the officers playing their radios during prayers, in respect of which some of his complaints were upheld.

102. The Claimant did not respond to the updating SIR, for the reasons discussed at [172] below. On any view, though, the Claimant had provided very detailed representations that responded to the vast majority of the allegations against him.

*Submissions and analysis*

103. The Claimant advanced this aspect of Ground 4 in his Statement of Facts and Grounds at paragraph 61. He contended that the SCMC had failed to have regard to his representations at all. While the SCMC was obviously not required to accept his account, at a minimum, it was required to recognise that his representations had raised a factual dispute about the basis on which he had been referred to the SC (in fact, many such disputes) and to consider the alternative account he provided. He submitted that the SCMC had failed in both respects.

104. The Defendant responded to this aspect of Ground 4 by contending in her Detailed Grounds of Resistance at paragraph 7.4 that the SCMC had been "alive to" the disputed allegations of fact before it and that it was fanciful to suggest that every member of the SCMC ignored the Claimant's representations. Reliance was placed on paragraph 122 of Mr Waldron's statement to support the proposition that he was clear he had not done so.

105. However, paragraph 122 of Mr Waldron's statement dealt with another matter. Insofar as this was a typographical error it was never corrected by the Defendant. In fact, Mr Waldron's statement went no further than recording at paragraphs 118-119 that the Claimant had made the representations and what they covered. This statement was prepared many months after the SCMC and so does not provide direct support for the proposition that Mr Waldron considered the representations in advance of the SCMC. The Defendant served no witness statements from the three CDMs who voted in favour of the Claimant remaining in the SCMC.

106. The SCMC meeting note strongly suggests that the CDMs had not considered the Claimant's representations. I agree with Mr Squires KC that it is striking that the representations were not mentioned at all during the discussion. Even the existence of the factual disputes he had raised in his representations was not raised, despite the fact that at various points particular aspects of his alleged behaviour were discussed. Rather, as I have noted at [85] above, the meeting proceeded on the basis that the Claimant had indeed behaved in the various ways alleged.

107. The 18 September 2023 letter communicating the Decision did not refer to his representations at all, providing further support for the proposition that they had not been considered. The use of phrases referring to the Claimant's "capability to negatively change prisoners' behaviour and attitudes towards staff in [his] presence" and his "behaviours of concern" also makes it clear that the SCMC members had worked on the basis that the matters alleged against the Claimant in the referral documentation were correct.

108. The obvious inference from this evidence is that the Claimant's representations were not considered. That would be consistent with the SCMC's position, as advanced in the Defendant's Grounds, that it did not, and never does, seek to determine factual disputes.

109. Mr Strachan KC relied on the principle that the fact that a particular consideration is not referred to in a decision document does not mean that it has been ignored: see, for example, *Secretary of State for the Environment, Transport and the Regions v MJT Securities Ltd* [1998] 75 P & CR 188 at [198]. In my judgment this principle provides limited assistance here, given the lack of evidence that the substance of the representations had been considered and the positive evidence suggesting they had not.

110. The 20 September 2023 letter to the Claimant's solicitor did refer to the representations, and correctly identified what they contained, before asserting that nothing in them rendered the decision incorrect. However, there is no evidence that this letter had been seen or approved by the SCMC members: it is signed only with the job title of the signatory (the Operational Lead for SCs, Mr Waldron's previous role) and the person holding that post does not appear to have been present at the SCMC let alone a CDM.

*Conclusion on Ground 4(i)*

111. I therefore conclude that the SCMC members failed to consider the Claimant's representations. This was a failure to consider a material relevant consideration, in breach of the Defendant's policy as set out in the SCPF.

112. It also involved the SCMC breaching its *Tameside* duty, namely the duty on a public body to carry out a sufficient inquiry prior to making its decision, as recently considered in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 at [100]. This is because no reasonable decision-maker, considering factually contested allegations relevant to a risk assessment, could fail to enquire as to the account provided by the person affected by the decision.

113. Ground 4(i) is therefore upheld.

Ground 4(ii): In any event, was the SCMC's approach to factual disputes unlawful?

114. The SCMC met in both June and September 2023 to consider the Claimant's case. Its decision-making was iterative, as might be expected, given that in June, the SCMC had decided to refer the Claimant for the three-month assessment period; and in September it was reviewing the outcome of that assessment.

115. In the June meeting, there was some discussion about the factual basis for the referral and the alleged behaviours of concern by the Claimant. However, there was no identification of the fact that the Claimant might contest the account being given, nor attempt to resolve any anticipated disputes in the factual matrix being presented.

116. By the time of the September meeting, the SCMC had received the Claimant's representations. However, the Defendant accepted that at this meeting the SCMC made no attempt to determine any of the factual disputes before it, including those arising from the Claimant's representations.

117. The Defendant's position as set out in her Grounds was that the SCMC had acted entirely appropriately in this regard, because it is "no part" of the SCMC's role to make any factual determinations as it is "not a fact-finding body". Mr Waldron's evidence was that the SCMC "cannot and never does make any findings of fact".

118. The Claimant contended that this was an error of law. He argued that the Defendant's approach (a) was procedurally unfair; (b) involved an unlawful failure to consider relevant considerations; (c) involved a failure of the SCMC to discharge its *Tameside* duty; and/or (d) was unreasonable.

119. The Defendant advanced a more fluid position in her Skeleton Argument than that set out in her Grounds. She submitted that it was not suggested that factual disputes are entirely irrelevant or immaterial to the decision-making of the SCMC; nor that the SCMC was required to ignore issues of credibility or any competing account given by a prisoner in respect of the intelligence reports it had received. The existence of a factual dispute may be a relevant consideration to any particular decision being taken by the SCMC.

120. I understood the Defendant's final position to mean that the SCMC could choose to take into account a factual dispute, and perhaps even to determine it, but was not required to do so. Mr Strachan KC also advanced submissions to the effect that even if there is, generally, a duty on the SCMC to determine factual disputes, no such duty arose in this case.

*The key cases relied on by the parties*

121. The submissions under Ground 4(ii) revolved around the following four cases.

*(i): R (Bourgass) v Secretary of State for Justice* [2016] AC 384

122. *Bourgass* involved consideration of the manner in which two decisions to segregate prisoners under Rule 45 had been made, specifically whether there had been any unlawful delegation of the Secretary of State's decision-making responsibility to prison governors, other officials and the Segregation Review Board. The Supreme Court's findings on these issues were sufficient to dispose of the appeals. However, Lord Reed, with whom the other justices agreed, made certain observations on the requirements of procedural fairness in the context of segregation decisions.

123. In doing so, Lord Reed stated that decisions under Rule 45(2) "are not based on a determination of fact as to whether a particular event has occurred": they are "not disciplinary proceedings". Rather, they "involve a judgment as to the risk posed to the good order and discipline of the prison, and whether the particular situation could be equally or better addressed by other measures, such as transfer to another wing, closer supervision on normal location or transfer to another establishment": [92]. Put another way, the Secretary of State is "not determining what may or may not have happened, but is taking an operational decision concerning the management of risk": [100].

124. He later reiterated that decisions under Rule 45 are "unlikely to turn on the determination of disputed questions of fact". While there may be underlying contentious issues of fact, if Rule 45 is being applied correctly, its application will "not normally require the Secretary of State to resolve those issues one way or the other": [124]. The critical question is "whether the prisoner's continued segregation is justified having regard to all the relevant circumstances". The answer to the question "requires the exercise of judgment, having regard to information and advice from a variety of sources, including the governor, health care professionals and the prisoner himself": [125].

*(ii): R (Hassett) v Secretary of State for Justice* [2017] 1 WLR 4750

125. *Hassett* was a challenge to the decisions of the Category A Review Team ("CART") and the Deputy Director of Custody-High Security ("the Director") to maintain the categorisation of two long-term Category A prisoners, without conducting an oral hearing. The Court of Appeal dismissed the prisoners' appeals.

126. Sales LJ (as he then was), with whom Moylan and Black LJJ agreed, recognised that a Category A categorisation decision has the potential to affect the "conditions of detention" and a prisoner's "prospects of being granted parole" and has "significant implications both for the public interest and for the individual interests of the prisoner"; and that the decisions of both the Parole Board and the CART concern "questions of risk to the public": [2] and [4].

127. He reiterated the general principle that the requirements of procedural fairness depend on "the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates": [50], citing *Lloyd v McMahon* [1987] AC 625 and *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 at 560D-G. He also observed that "procedural standards of fairness in the common law have developed over time as circumstances and social expectations change": [52].

128. Sales LJ went on to highlight a number of important differences between the Parole Board and the CART/Director making categorisation decisions, as follows:

    (i) The Parole Board is a "judicial body independent of the Secretary of State and the prisons management organisation" whereas the CART/Director are "officials of the Secretary of State carrying out the management functions in relations to prisons": [51(i)];

    (ii) The Parole Board "has to make its own decision independent of the prison management system". In contrast the decision-making of the CART/Director is "the internal management end-point of an elaborate internal process of gathering information and interviewing a prisoner": [51(i)]; and

    (iii) The Parole Board's task is to determine whether a prisoner can safely be released and the possibilities for safe management in the community, a matter which is recognised as being "highly fact-sensitive…with a number of dimensions". It also engages the prisoner's right to liberty under Article 5, ECHR. However, the CART/Director seek to answer, "a far starker question", namely "what is the risk to the public interest if the prisoner escapes and is at large in society without any prospect of management in the community". Their decisions only concern the security measures that should be put in place while a prisoner's sentence continues, with the impact on his eventual release being an "indirect side-product" of their determinations; and Article 5 does not apply to their decision-making: [51(ii) and (iii)].

129. In light of these differences, Sales LJ endorsed a series of other cases in which it had been held that "it cannot be assumed that the same requirements always apply" as between the Parole Board and categorisation decisions; such that the guidance given by

Lord Reed *Osborn* as indicating when fairness requires an oral hearing of the Parole Board "cannot simply be transposed" to the context of decision-making by the CART/Director: [55]. Accordingly, he concluded that "some of the factors" highlighted in *Osborn* have "some application" in the context of decision-making by the CART/Director, but will "usually have considerably less force in that context": [56].

130. Sales LJ observed that the requirements of fairness to be observed by an independent judicial body adjudicating on aspects of the right to liberty are high, having regard to the need to promote confidence in the independence and impartiality of the judicial adjudicative process: [51(i)]. However, the CART/Director are not judges required to dedicate their full time and attention to categorisation decisions but have wider management responsibilities. Accordingly, in assessing whether fairness required an oral hearing for categorisation decisions "the courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence in a prison management function": [51](i) and [60].

131. His ultimate conclusion on the oral hearings issue was as follows:

> "…fairness will sometimes require an oral hearing by the CART/director, if only in comparatively rare cases": [61].

*(iii): R (Campaign Against Arms Trade) v Secretary of State for International Trade and others* [2019] 1 WLR 5765 ("*CAAT*")

132. *CAAT* was a challenge to the legality of the grant of export licenses for arms sales to Saudi Arabia by the Defendant. In order to decide whether to grant such licences, the Defendant was required to make a predictive evaluation of the risk of future violations of international humanitarian law ("IHL"). The Court of Appeal upheld *CAAT*'s argument that in order to do so rationally, the Defendant was required to determine whether or not there had been a pattern of historic violations: this was a "question which required to be faced" as it was a "relevant consideration when assessing whether there is a real risk of future violation": [138]-[139]. Without such an assessment of past facts, it was questionable how the Defendant could reach "a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities": [144].

133. The Court observed that even if that question "could not be answered with reasonable confidence in respect of every incident of concern", it "could properly be answered in respect of many such incidents" and "[a]t least the attempt had to be made": [138]. The Court also emphasised that it had borne fully in mind the complex and difficult nature of the decisions in question, the fact that this was an area particularly far within the responsibility and expertise of the executive branch and the need to accord considerable respect to the decision-maker. It had nevertheless concluded that it was irrational and therefore unlawful for the Defendant to proceed without determining the past violations question: [145].

*(iv): R (Pearce) v Parole Board and another* [2023] AC 807

134. *Pearce* was a challenge to the lawfulness of decision-making by the Parole Board when determining whether it is safe to release prisoners and/or recommend transfer to open conditions. The Parole Board followed guidance stating that where it was unable to

make a finding of fact in relation to an allegation against a prisoner, it should nevertheless assess the level of concern that attached to the unproven allegation and reach a judgment about the impact of this concern on the review. The Court of Appeal held that the guidance was unlawful, where it allowed the Board to take account of information that was not proven. The Supreme Court allowed the Defendant's appeal.

135. The Court observed that the assessment of the risk of future behaviour is an "inherently imprecise exercise" and that it is "not necessary to consider each allegation of past behaviour individually and decide whether it is established on the balance of probabilities". Depending on the legal context, the court can "assess risk by weighing up the possibility that an allegation or several allegations may be true having regard to the whole of the material before it": [65(iv)]. Accordingly, there is no general legal principle that in conducting its risk assessment, the Parole Board can only have regard to proven facts of past behaviour while excluding from consideration the possibility that unproven allegations might be true: [73].

136. However, the Supreme Court held that it did not follow that the Board should not seek to resolve disputed facts by making findings of fact on the balance of probabilities where it was reasonably practicable to do so: [74]. Rather, if an allegation of past conduct by a prisoner that had not been adjudicated upon could, if true, affect the Board's risk assessment, the Board's task, "so far as it can on the information which has been made available to it or which it is able to obtain" is to "explore the nature of that allegation and its surrounding circumstances in order to make such findings of fact as it can about either or both on the balance of probabilities". Such an approach was consistent with the public interest, the prisoner's interests and procedural fairness: [74].

137. The Court concluded that where the Parole Board is unable to make a factual determination as to the truth of an allegation on the balance of probabilities, such as where it does not have the relevant evidence, it is not under an obligation to do so: [76]. The Court gave further guidance on the approach to be taken in this scenario, summarised at [87(vi)] as follows:

> "…the Board, having regard to public safety, may take into account the allegation or allegations and give it or them such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true. But the Board must proceed with considerable caution in this exercise because of the consequences of its decision on the prisoner. Procedural fairness requires the Board to give the prisoner the opportunity to make submissions about how the Board ought to proceed. There may be circumstances where, because of the inadequacy of the information available to the Board, it concludes that it should not take account of an allegation at all. There may also be circumstances where the information is less than would be desired but the allegation causes sufficient concern as to risk that the Board treats it as relevant. Its assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality".

138. The Court's overall conclusion was that a failure to make findings of fact where it was reasonably practicable to do so or an irrational reliance on insubstantial allegations could be a ground of a successful public law challenge: [87(viii)].

*Submissions and analysis*

139. The submissions on this ground were wide-ranging and overlapped in particular, with those on Ground 5. The post-hearing submissions also bore on the issues within this ground. I address first the role of the SCMC in general; and then certain submissions advanced by the Defendant to suggest that even if the general issue was answered in favour of the Claimant, there was no duty on the SCMC to resolve factual issues in his case.

*(a): The role of the SCMC in relation to factual disputes in general*

*(i): The relevance of Bourgass*

140. Mr Strachan KC understandably placed significant reliance on *Bourgass* as clear Supreme Court authority for the proposition that segregation decisions are "unlikely to turn on the determination of disputed questions of fact" and will "not normally require the Secretary of State to resolve [contentious issues of fact] one way or the other": [124] above. The same must apply, he submitted, to decisions under Rule 46A which involve a much less intrusive interference with the prisoner's right to associate with others. He contended that this was a complete answer to Ground 4(ii).

141. However, in my judgment, Mr Squires KC was right to contend that some caution is needed with the application of the Court's observations in *Bourgass* to the Rule 46A scenario, for the following reasons.

142. *First*, the issue of how those making segregation decisions should approach disputes of fact that arise was not one of the issues argued before the Supreme Court. The observations made by Lord Reed were *obiter*, albeit on behalf of the full Court. In contrast, how the Parole Board should approach disputes of fact that arise was the central issue before the Supreme Court in *Pearce*, which is a more recent authority than *Bourgass*.

143. *Second*, the observations should not be over-stated. Lord Reed did not say that factual determinations can never be made in the segregation context. Rather, he said that they will not "normally" be made and that it is "unlikely" that they will be.

144. *Third*, although segregation decisions involve the removal of the right to associate, which Rule 46A decisions do not, the statutory framework supports Mr Squires' submission that periods of segregation tend to be shorter than periods of location in an SC[2]. By contrast, decisions to locate a prisoner in an SC are only reviewed every three months and the evidence referred to under Factual Issue 1 at [50] above suggests that many remain in an SC for years. On that basis there is a credible argument that a higher degree of procedural fairness, or at least the same degree of it, should be afforded to decisions under Rule 46A

[2] Rule 45(2) provides that no prisoner can be segregated for more than three days without the authority of the governor; and can only be extended for 14 days at a time. The governor must obtain leave from the Secretary of State if a prisoner is to be segregated for more than 42 days; and the Secretary of State may only authorise further segregation for 42 days at a time

*(ii): The relevance of CAAT*

145. Mr Squires KC argued that the SCMC was plainly engaged in an assessment of future risk, given the wording of Rule 46A(2). He submitted that it was not rational to assess future risk without at least attempting to determine whether the allegations of past conduct said to demonstrate that risk were made out, as the Court of Appeal had made clear in *CAAT*.

146. Mr Strachan KC identified a series of differences between this case and *CAAT*, to support the submission that *CAAT* was distinguishable and of no relevance to this case.

147. *First*, he argued that *CAAT* involved a wholly different, foreign policy, context to that in issue here. That is plainly correct.

148. *Second*, he observed that the Defendant in *CAAT* had in the past, formed a view about whether incidents in a country involved a breach of IHL but had stopped addressing this question and did make factual determinations in other contexts. In contrast, the SCMC has never had a practice of making factual determinations. All of those points are correct. However, the Defendant's past practice was not the sole basis on which the claim in *CAAT* succeeded: it also succeeded because of the need for rationality in the decision-making process, which the past practice exemplified: [140-143].

149. *Third*, he argued that *CAAT* involved a simpler set of factual disputes to those in issue here. I cannot accept this submission for the reasons given at [182] below.

150. *Fourth*, he contended that *CAAT* involved a very different kind of decision to that in issue here: it was a "binary assessment of compliance with an underlying legal and policy obligation" rather than "a multifactorial assessment".

151. In my judgment the exercises being conducted as between the two cases were inherently similar. Both involve an attempt to determine future risk based on past behaviour. In *CAAT*, the Defendant had to ask "whether there [was] a clear risk that the items to be licensed might be used in the commission of a serious violation of international humanitarian law": [37(i)]. This is closely analogous to the key question here, namely whether there was a risk of the Claimant behaving in the ways described in Rule 46A(2).

152. Further, in *CAAT*, (i) the exercise in question was "predictive and involve[d] the evaluation of risk and as to the future conduct of Saudi Arabia in a fluid and complex situation"; (ii) the information upon which any assessment had to be made was "complex and drawn from a wide variety of sources, including sensitive sources"; and (iii) the decision would be made in reliance on advice from those with specialist diplomatic and military knowledge": [94]. This resonates closely with breadth of material available to the SCMC and the multi-disciplinary, expert nature of its members.

153. I therefore accept that *CAAT* is *prima facie* relevant to Ground 4(ii) and of assistance to the Claimant's case on it.

*(iii) The relevance of Pearce and Hassett*

154. The Claimant's case is that the SCMC is not required to determine every contested factual allegation, or to do so pursuant to some fixed standard of proof, but it is required, so far as it can, on the information which has been made available to it or which it was able to obtain, to "explore the nature of that allegation and its surrounding circumstances in order to make such findings of fact as it can about either or both on the balance of probabilities", per *Pearce* at [74].

155. Mr Strachan KC contended that the general observations the Supreme Court made in *Pearce* about the assessment of risk of future behaviour not requiring proof of each specific allegation set out at [135] above clearly applied here. The SCMC is therefore entitled to weigh up the possibility that an allegation or several allegations may be true having regard to the whole of the material before it: *Pearce* at [65(iv)]. Its role is to "form a view of the [prisoner's] wider pattern of behaviour without making factual determinations".

156. However, where, as here, the "wider patterns of behaviour" are exactly what the prisoner disputes, the SCMC cannot rationally "form a view" of this issue without some assessment of the facts: otherwise, the SCMC will proceed on the basis of an assumption that disputed facts are true.

157. The Defendant's more fundamental position was that although the Supreme Court went on to find in *Pearce* that the Parole Board should seek to resolve material factual disputes on the balance of probabilities where it was reasonably practicable to do so, this position reflected the particular nature of the Parole Board and did not apply to the SCMC.

158. Mr Strachan KC relied on the fact that the SCMC is not a judicial body akin to the Parole Board. Rather, it is a multi-disciplinary, expert committee which makes operational decisions concerning the management of risk. In *Hassett* the Court of Appeal made clear that the standards applicable to the Parole Board cannot be directly applied to the segregation context (and, by extension, the Rule 46A context); and that attempts to "judicialise" prison management processes should be deprecated. For these reasons, the Court's findings in *Pearce* as to what fairness required in the Parole Board setting did not apply to the SC context.

159. However, in my judgment, Mr Squires KC's analysis of the interplay between these authorities is to be preferred, for the following reasons.

160. *First*, a decision under Rule 46A is akin to a segregation decision. Adopting the words of Sales LJ in *Hassett* at [51(i)], a decision under Rule 46A is made by "officials of the Secretary of State carrying out the management functions in relations to prisons". It is therefore correct, as a general principle, that the standards that apply to the Parole Board "cannot simply be transposed" to the Rule 46A context: *Hassett* at [55].

161. However, there is nothing in the Supreme Court's judgment in *Pearce* to suggest that the principle it enunciated was confined to judicial or quasi-judicial processes. Rather, it is a wider principle concerned with what constitutes rational decision-making where a body assessing future risk is confronted by allegations of past conduct that are disputed: where there are disputed "allegation[s] [which] could, if true, affect [a] risk assessment" fairness requires the decision-maker to "explore the nature of that

allegation and its surrounding circumstances in order to make such findings of fact as it can". Otherwise, the decision-maker could be making a decision on allegations which, had it directed its mind to the issue, it would have appreciated were untrue. That would not be a fair process, and that applies to non-judicial decision-makers such as the SCMC.

162. *Second*, that this is the correct analysis is supported by the approach to rational risk assessment set out by the Court of Appeal in *CAAT*. That case did not concern the Defendant acting as a quasi-judicial body, but certain factual findings of past conduct were still required in order for the Defendant to conduct a rational assessment of future risk.

163. *Third*, for these reasons, to apply the *Pearce* approach to the SCMC does not amount to an impermissible attempt to judicialise its process: rather it is a necessary step to make it fair and rational.

164. *Fourth*, this approach is supported by the case-law governing oral hearings in the categorisation context, including *Hassett*, detailed under Ground 5 below. They recognise that one factor pointing towards fairness requiring an oral hearing is where important facts are in dispute. The underlying premise of these cases is that decision-makers in the categorisation context confronted by disputes about past facts that are relevant to an assessment of future risk will need to grapple with the disputes: were it otherwise, there would be no suggestion that an oral hearing would be required so that the disputed facts could be assessed.

165. *Fifth*, I do not accept that any practical complexity in the exercise described in *Pearce* and *CAAT* removes the duty to conduct that exercise for the reasons set out at [181]-[186] below. It is also relevant that the imposition of this duty on the SCMC will only apply to a very small number of prisoners indeed, given the limited size of the SCs.

166. *Sixth*, as explained under Factual Issue 1, location in an SC can have very significant consequences for a prisoner in terms of the daily regime and other important matters. The Claimant's quarterly reviews of his location in the SC since the Decision emphasise the importance of procedural fairness in the initial location decision. This is because the review decisions are largely framed in terms of the extent to which the Claimant has addressed the behaviours of concern included in the SC referral. These matters are all relevant to the degree of procedural fairness required.

167. *Finally*, Daniel Guedalla's evidence underscored the significance of resolving factual disputes in this context. He described numerous cases in which he had been instructed where SIRs had been relied upon, which had been found to be unreliable and accorded little or no weight when properly interrogated by decision-makers. He also explained that in his experience it is not unusual for prisoners to be subject to allegations in numerous adverse reports, and thus acquire a reputation for being difficult, even if those reports when analysed are found to lack merit. While questioning whether Mr Guedalla's evidence was admissible, the Defendant did not dispute the proposition that some of the information in the Claimant's SC referral may have been unreliable.

*(b): The role of the SCMC in relation to factual disputes in this case*

168. The Defendant's submissions to the effect that even if the Claimant succeeded in the general point, there was no duty on the SCMC to resolve factual issues in his case, can be summarised by reference to two broad themes.

*(i): The extent and significance of the factual disputes in the Claimant's case*

169. Mr Squires KC contended that if the contents of the Claimant's representations were accepted in full by the SCMC, his location in the SC would not have been appropriate. There was force in this submission because even though the Claimant did not dispute his criminal convictions or adjudications, as explained at [67] above, location in the SC based on these matters alone would have been hard to justify.

170. While it is not possible or appropriate to determine what the SCMC's decision would have been if it had engaged with any or all of the factual disputes in the Claimant's case, it is sufficient for present purposes to observe that the representations raised a series of factual disputes about his alleged behaviours of concern.

171. During the hearing, Mr Strachan KC advanced what I considered to be an entirely new point to the effect that any factual disputes generated by the representations had in fact "evaporated" or become academic by the time of the SCMC meeting, such that the factual position before the SCMC was "undisputed" and there was "unanimity" as between the Claimant and the prison authorities as to his behaviours of concern. This was, he contended, because the Claimant had not responded to the updating SIR or those aspects of Dr Bennett or Mr Vipond's reports where his conduct during the assessment period had been described ("the post-separation conduct material": see [80]-[82] above). On that basis, the SCMC was entitled to infer that the Claimant agreed with those reports and accepted that he had behaved in the manner alleged in them; indeed, given that these reports "mirrored" the information on the first SIR, the SCMC could have inferred that the Claimant now agreed the content of that too.

172. Given the lateness of this point, Ms Middleton was permitted to provide evidence after the hearing and further legal submissions from both parties were provided. Ms Middleton's statement made clear that for a range of reasons she decided to focus the Claimant's September 2023 representations on responding to section 4 of the referral form, the initial SIR and the professional opinions of both Dr Bennett and Mr Vipond. She said that if there had been any oversight in not responding to the updating SIR, this was hers, and not the Claimant's.

173. Mr Strachan KC was right to observe in his post-hearing submissions that whatever the reasons were, the fact is that the SCMC did not have before them any representations from the Claimant responding to the updating SIR or the post-separation reports on his conduct.

174. However, in my judgment there is no evidence that this was interpreted by the SCMC as an acceptance by the Claimant of their contents. I have found under Ground 4(i) above that the SCMC did not consider the Claimant's representations at all. It follows that the SCMC members cannot have formed any view on what the representations did not contain, let alone drawn an inference against the Claimant for any gaps in them.

175. It is right that the post-separation conduct material broadly mirrored the content of the original SIR. The Claimant had set out detailed objections to the original SIR in his lengthy representations dated 6 September 2023. That was the deadline that had been set for him to provide representations, Ms Middleton having sought and secured an extension of time to provide them, in part due to their complexity.

176. Accordingly, if the SCMC had inferred from the Claimant's failure to respond to the post-separation conduct material that he accepted the contents of the initial SIR, this would have meant two things. *First,* that there had been a rapid, dramatic and unexplained change of position by the Claimant from the detailed representations he had provided on the very same day and on which he and his solicitor had clearly been working hard. *Second*, that his detailed representations were, effectively, to be disregarded and replaced with a simple admission to the facts in the original SIR. In my judgment this would have been an extraordinary inference to draw. Indeed, to draw this inference without further enquiry of the Claimant or his solicitor may well have been irrational and/or a breach of the *Tameside* duty.

177. Further, although this was not a point taken by Mr Squires KC, to import the civil litigation concept set out in CPR 16.5(5) (to the effect that if a Defendant fails to deal with an allegation, they are taken to admit it) to the SCMC process would well be said to unduly judicialise it.

178. For completeness I note the point made by Ms Middleton that if the SCMC had considered the updating SIR in detail, even in the absence of a specific response to it from the Claimant, the SCMC would have identified that the only really "new" issue raised in it related to religious headwear. This was something about which the Claimant had filed complaints, which staff from HMP Frankland present at the SCMC could have confirmed. The SCMC would therefore have known that far from the Claimant agreeing its contents, the updating SIR raised at least one further factual dispute.

179. I therefore find that the Claimant's representations raised a series of factual disputes that were directly relevant to the determination of whether any of the grounds in Rule 46A(2) were made out. If none of the grounds were satisfied, the SCMC would not have been able to conclude that the Claimant's location in an SC was "desirable" under Rule 46A(1). On that basis the factual disputes raised by the Claimant's representatives were both extensive in number and significant in content.

180. As noted at [119] above, the Defendant's position in her Skeleton Argument was that in certain cases factual disputes might be a relevant consideration for the SCMC. In light of the analysis above, this was plainly such a case.

*(ii): The practicality of the SCMC assessing the factual disputes in the Claimant's case*

181. Mr Strachan KC argued that it was impractical to envisage the SCMC determining all the factual disputes in the Claimant's case, given the sheer number of issues raised in the combination of section 4 and the SIR, together with the updating SIR. He contended that this was distinguishable from *CAAT*, where the Defendant was considering a discrete set of allegations of grave breaches of IHL on the part of Saudia Arabia; and *Pearce*, where the decision-makers were looking at a small number of allegations about serious criminal conduct.

182. I cannot accept this submission. In *CAAT*, there were at least 251 incidents under consideration: [67]. In fact, the case proceeded on the basis that resolving the factual disputes would have been "particularly complex" given that they involved "active and ongoing military operations" with "facts emerging as a conflict continued". In many instances there was no information from the importing state. There were also inherent difficulties in a non-party to a conflict in reaching a reliable view on breaches of international humanitarian law by another sovereign state: [127]-[128]. In *Pearce*, there were a much smaller number of allegations (8), but these were of serious criminal conduct on various dates between 1994 and 2004, many years before the Parole Board was meeting in May 2019: [20] and [22].

183. If anything, as Mr Squires KC highlighted, the issues here would have been easier to assess than in *CAAT* and *Pearce*: they were all relatively recent; and they all involved behaviours said to have occurred within prison, meaning that the details could relatively easily be investigated. This was especially so given that staff from HMP Frankland, where the majority of the behaviours of concern in section 4 of the referral form were said to have occurred, attended the SCMC.

184. Mr Strachan KC argued that the Claimant had failed to select which of the disputes the SCMC should focus on. However, an argument of this kind was rejected by the Court of Appeal in *CAAT*: [129] and [142]-[145]. In any event, as Mr Squires KC pointed out, if the Claimant was required to select which issues should be determined by the SCMC there was an obvious answer: the SCMC could focus on the allegations that formed the reasons for the referral in section 4 of the referral form. The Defendant's scheme was structured so as to bring a focus to this part of the documentation: see [78] above. Indeed, the SCMC would have been entitled to concentrate just on the seven allegations that related to the Claimant's time at HMP Frankland, not least because he did not dispute the basis of his criminal convictions or adjudications which featured heavily in the remaining four.

185. Moreover, despite the complexities of the factual context of both *CAAT* and *Pearce*, it was held that there was a duty to assess the relevant disputes in the manner set out above. Notably, the Supreme Court provided detailed guidance in *Pearce* on the approach to allegations on which insufficient information is available to make an actual determination: see [137] above.

186. Accordingly, I do not consider that any difficulty the SCMC would face in investigating the factual issues in the Claimant's case removed the duty on them to do so.

*Conclusion on Ground 4(ii)*

187. For these reasons, I conclude, as a matter of general principle, that the approach to factual disputes set out in *CAAT* and *Pearce* should be adopted by the SCMC. There were no specific features of the Claimant's case justifying the SCMC in not following that approach. Accordingly Ground 4(ii) succeeds.

**Ground 2: The SCMC was not given, and did not consider, any formal reliability gradings for the intelligence contained in the Referral. Did this render the Decision unlawful? In**

**particular, did the SCMC fail to take account of relevant considerations and/or was the Decision *Tameside* irrational?**

188. Under the Defendant's Intelligence Collection, Analysis and Dissemination Policy Framework, intelligence is graded using a "5x5x5" evaluation process. This reflects the reliability of the source of the intelligence, which may be "(A) Always Reliable", "(B) Mostly reliable", "(the Claimant) Sometimes Reliable", "(D) Unreliable", or "(E) Untested Source". It also involves an evaluation of the information in the intelligence, which may be "(1) Known to be true without reservation", "(2) Known personally to the source but not to the officer", "(3) Not known personally to source but corroborated", "(4) Cannot be judged", or "(5) Suspected to be false".

189. The SCMC was provided with the gists of the intelligence reports in the SIR and the updating SIR but was not provided with the reliability gradings for any of the reports; and the SCMC did not attempt to obtain them.

190. The Claimant contended that this rendered the SCMCs decision unlawful. If, for example, many, or even all, of the allegations against the Claimant were regarded as "unreliable" and/or "suspected to be false", that was "obviously material" to the SCMC's assessment of whether the Claimant had "demonstrated his influence and ability to incite…Muslim prisoners". This meant that the reliability gradings were a material consideration and that the SCMC was under a *Tameside* duty to take reasonable steps to obtain them: see, on the respective principles, *R (Hurst) v London North District Coroner* [2007] 2 AC 189 [57]-[58] and *Plantagenet Alliance Ltd* at [100].

191. The Claimant relied on allegation [5] as an illustration of the flaw in the Defendant's approach. This was to the effect that the Claimant had said that HMP Frankland Imam was "anti-Muslim". He contended in his representations that that he had never said "anything remotely similar" to this and that the allegation was "fabricated". If the source that provided the intelligence was regarded as "unreliable" by prison authorities and/or that the intelligence itself was "suspected to be false", this was obviously relevant to the decision the SCMC had to make.

192. Moreover, one of the purposes of the Intelligence Collection, Analysis and Dissemination Policy Framework is to ensure a "consistent" approach to the analysis of intelligence. This, the Claimant argued, supported the need to disclose the reliability gradings to the SCMC.

193. However, as Mr Waldron explained there are good policy reasons for the Defendant's practice of not disclosing the reliability gradings to the SCMC. The gradings are sensitive; and there is a need to protect prison intelligence sources and intelligence tactics. This means that under Appendix 6.1 to the Policy Framework referred to at [188] above, the gradings are generally not shared within HMPPS. Nor are they generally disclosed to other agencies, criminal courts, the Parole Board or offenders or their next of kin or legal representatives, where it is not in the public interest to do so. That is so even where the decision-maker is tasked with fact finding: such as a judge conducting a criminal sentencing exercise or the Parole Board making its recommendations.

194. Moreover, the SCMC is an expert body whose members are well aware of the issues that can arise with the reliability of prison intelligence. Accordingly, as Mr Waldron explained, intelligence reports will be given an appropriate amount of caution by the SCMC. In the Claimant's case the SCMC was also given broad indications of the reliability of much of the intelligence reports to the extent possible without disclosing the formal gradings: the referral form made clear where information was uncorroborated or where allegations were unproven by the use of language such as "may have", "reportedly", "it was strongly reported that", and "uncorroborated reporting".

195. In light of all these factors, I do not consider that it can be said that no rational decision-maker body in the SCMC's position would have proceeded without the reliability gradings: in my judgment given the factors set out above the SCMC was able to lawfully carry out its role without them, even when allowance is made for my finding under Ground 4(ii) that their role included the assessment of factual disputes. That criminal courts can safely conduct fact finding without the gradings illustrates that to do so is not unlawful.

196. In my judgment the same applies to the alternative argument advanced by Mr Squires KC in oral submissions, to the effect that the SCMC should have been provided with a summary which included more generic "low", "medium" or "high" ratings for each item of intelligence. Summaries of this kind are provided to the Parole Board in lieu of the reliability gradings, in accordance with Appendix 6.1.

197. In those circumstances I do not accept that the SCMC failed to take into account relevant considerations or acted in breach of its *Tameside* duty in the manner contended by Ground 2. It therefore fails.

**Ground 5: Was the Decision procedurally unfair because the SCMC did not hold an oral hearing and/or receive oral representations from the Claimant or his representatives?**

*The legal principles*

198. Fairness can sometimes require that the CART/Director conducts an oral hearing before making a categorisation decision, albeit in "comparatively rare cases": *Hassett* at [61]; see also *R (MacKay) v Secretary of State for Justice* [2011] EWCA Civ 522. Saini J has held that the same applies to decisions made about a prisoner's escape risk classification: *R (Gunn) v Secretary of State for Justice* [2024] EWHC 686 at [55]-[59].

199. The question of whether an oral hearing is required is fact specific; and the test is ultimately whether "[an oral] hearing is necessary for [the] fair disposal" of the case: *R (Khyam) v Secretary of State for Justice* [2023] EWHC 160 at [50] and [54]. However, the case-law recognises a number of factors that point towards an oral hearing being required.

200. One such factor is where "facts which appear to be important are in dispute": *Osborn* at [85]. An oral hearing can "assist in the resolution of disputed issues": *MacKay* at [28]. This is because an oral hearing "provides a better opportunity for disputed facts with a material bearing on the categorisation decision to be assessed in a fair way", because "material disputed facts can be better assessed…by hearing from the key people involved, giving an opportunity to ask them questions and hearing from the

[prisoner] himself": *R (Zaman) v Secretary of State for Justice* [2022] EWHC 188 at [54] and [56].

201. Another factor is where there is a significant dispute on the expert evidence. In *Hassett*, Sales LJ held that fairness will sometimes require an oral hearing:

> "In particular, if in asking the question whether upon escape the prisoner would represent a risk to the public the CART/director, having read all the reports, were left in significant doubt on a matter on which the prisoner's own attitude might make a critical difference, the impact upon him of a decision to maintain him in Category A would be so marked that fairness would be likely to require an oral hearing": [61]

202. Similarly, in *R (Rose) v Secretary of State for Justice* [2017] EWHC 1826 at [59] the fact that the decision-maker disagreed with the unanimous conclusion of the experts made the case for an oral hearing "all the stronger".

203. The procedure for determining whether an oral hearing is necessary in the categorisation context is set out in Prison Service Instruction 08/2013, the material aspects of which are set out in *Zaman* at [31].

*Applicability of the legal principles to the SCMC's decision making*

204. The Defendant argued that the legal principles set out above did not extend to the SCMC context. Reliance was placed on the differences between the Parole Board and the CART/Director which led the Court of Appeal in *Hassett* (see [128] above) to conclude that the requirements of procedural fairness are considerably less stringent in the context of categorisation decisions. Mr Strachan KC submitted that the position applies *a fortiori* to separation decisions made by the SCMC: like the CART, the SCMC is not a judicial body; it does not making binding (or any) factual determinations; its decisions do not engage a prisoner's right to liberty or under Article 5; and location in an SC does not have the same ramifications for a prisoner's prospects of release as a Category A decision. He reiterated the need to avoid seeking to judicialise the SCMC process as emphasised by *Hassett* at [60].

205. I cannot accept this submission for these reasons.

206. *First*, while the SCMC is not a judicial body, for the reasons given under Ground 4(ii), it should, in appropriate cases, and on appropriate evidence, make certain factual determinations.

207. *Second*, the SCMC's decisions do not directly engage prisoners' Article 5 rights, but the evidence shows that, like categorisation decisions, they have an impact on the prospects of release.

208. The Court of Appeal has accepted that the prospects of a Category A prisoner being released on licence are effectively "nil": because it is "wholly improbable" that the Parole Board would recommend the release of a category A prisoner": *MacKay* at [25]; citing *R v Secretary of State for the Home Department ex p Duggan* [1994] 3 All ER 277. In my judgment the same principle applies to prisoners located in SCs. It is wholly

improbable that the Parole Board would recommend the release of a prisoner who presents a level of risk that cannot be managed on a mainstream or alternative location, because the Board would be unable properly to conclude that such a risk could be managed in the community.

209. Mr Guedalla's evidence corroborated this point. Having been extensively involved with SC prisoners, and worked with others who are, he is not aware of a single case in which the Parole Board has ordered the release of a prisoner from an SC since the SCs were opened in 2017. His understanding is that only two SC prisoners have been considered by the Parole Board and both were refused release. He quoted a case from September 2024 in which the Defendant had opposed release of a prisoner from an SC for precisely this reason: she had argued that "the fact that it has not proved possible to manage [his] risk in the general population of a prison is highly material to the question of [whether he] can be safely released on licence". The Parole Board accepted this argument, expressly refusing release of a prisoner because he had not been "tested" in a less restrictive regime than the SC.

210. While Mr Waldron contended that the implications for release from location in an SC are "far less clear" than is the case for Category A prisoners, he did not contradict the picture presented by Mr Guedalla.

211. *Third*, oral hearings may be required in relation to categorisation decisions because they are decisions of importance to prisoners which significantly affect the conditions in which they are kept inside prison. The same applies *a fortiori* to decisions to locate a prisoner in an SC: not only does such a decision significantly impact on the conditions in which the prisoner is kept, but those conditions are more restrictive than those applied to Category A prisoners, for the reasons given above under Factual Issue 1.

212. *Fourth*, the processes used by the CART/Director and the SCMC are similar. Mr Strachan KC argued that decisions of the SCMC are distinguishable from those of the CART/Director because they are made after a specific three-month assessment period, during which the Claimant not only has the opportunity to make representations, but will meet with a range of relevant professionals, who attend the SCMC, for the purpose of assessing the prisoner's suitability for separation. However, this does not appear fundamentally different from the decision-making process of the CART/Director described by the Court of Appeal in *Hassett* at [51(i)] as "the internal management end-point of an elaborate internal process of gathering information and interviewing a prisoner" and detailed further in Mr Waldron's statement.

213. I therefore accept the Claimant's submission that the principles in the categorisation cases are applicable to the SCMC. In principle, therefore, the SCMC should hold an oral hearing when fairness requires it.

*Whether fairness required an oral hearing in the Claimant's case*

214. The Claimant contended that, applying the principles set out above, fairness required the holding of an oral hearing in the Claimant's case for three reasons.

215. *First*, there were significant and material factual disputes in terms of the Claimant's alleged behaviours of concern. If, following further enquiries, the SCMC concluded it

could not resolve the factual disputes on the papers, fairness required that the Claimant have an opportunity to be heard at an oral hearing. An oral hearing would have allowed the SCMC to observe the Claimant directly and test the case against him properly through questioning. This would have been valuable as none of the CDMs had previously met the Claimant. It would also have allowed the SCMC's own factual assumptions to be tested by the Claimant's representative.

216. The Defendant contended that an oral hearing was not required and/or would not have assisted the SCMC in the Claimant's case, because the SCMC was not determining factual issues, for the same reasons as were advanced under Ground 4(ii). The Claimant not only availed himself of the opportunity to make extensive written representations, but also met and engaged with both Dr Bennett and Mr Vipond before they compiled their reports. Moreover, the core issues in the case were not such that an oral hearing would have assisted in their resolution.

217. In my judgment it was part of the SCMC's role to assess the factual disputes raised by the Claimant's case in accordance with the approach set out in *Pearce* and *CATT* for the reasons given under Ground 4(ii). It cannot properly be said that an oral hearing would not have assisted the resolution of these disputes. The case-law has repeatedly recognised that this is one such benefit of an oral hearing: see [200] above.

218. In *Zaman* Henshaw J acknowledged that "not all questions of disputed fact will prove capable of resolution at an oral hearing", and that categorisation decisions "do not necessary[il]y require hard-edged factual findings to be made", but nevertheless concluded that fairness required an oral hearing: [56]. He did so on the basis of much less stark and significant factual disputes than are present here: [49]-[56].

219. The core issues in the case included the question of whether or not the Claimant's behaviour was motivated by ideology and if so, what that meant for his proposed location on the SC. However, they also included the prior question of whether the Claimant had behaved as alleged or not.

220. It is correct that a relevant factor in respect of whether an oral hearing is required is the extent to which the prisoner has had a fair opportunity to put his case at other stages of the information gathering process "within the system as a whole", including earlier discussions with relevant prison officials e.g. psychologists: [51(i)]. However, here, the primary method by which the Claimant had sought to "put" his case was his detailed representations, and they had generated the disputes referred to above.

221. In oral submissions Mr Strachan KC contended that an oral hearing would have served no purpose because there were no longer any factual disputes by the time of the SCMC meeting. I have rejected that submission for the reasons given at [169]-[178] above.

222. *Second*, Ms Squires KC argued that there was a significant and material dispute between the expert opinions expressed by Dr Bennett and Mr Vipond, and the views of the majority of the SCMC. Such a dispute militates in favour of an oral hearing as *Rose* exemplifies: see [202] above.

223. I accept this submission. As noted above, the reports of neither Dr Bennett nor Mr Vipond supported the Claimant being located on the SC. The majority of the SCMC took a different view. While each case turns on its own facts, this scenario is comparable

to that in *Rose*. There, the thrust of the evidence and the LAP recommendation favoured downgrading the Claimant from Category A. The fact that the Director was minded to depart from this evidence was one factor in favour of an oral hearing: the Claimant should have been given the opportunity to address the points that were troubling the Director: *Rose* at [62].

224. *Third*, the notes of the SCMC meetings make clear that this was an unusual and difficult case: it was described as "not a straightforward referral", "difficult", "not an easy decision" and a situation in which there was "evidence to undermine the referral". The complexity is illustrated by the fact that both Dr Bennett and Mr Vipond, and one of the four CDMs (Mr Waldron) did not think that the Claimant was suitable for the SC.

225. The Defendant submitted that the aspect of the Claimant's case which made it particularly "difficult" was that it required the SCMC to grapple with whether the purpose of any relevant conduct must be ideological under the relevant parts of Rule 46A, or whether it was sufficient that it had the effect of encouraging terrorism activities or allowing them to flourish. That issue required the input of the SCMC's expert panel members; but it did not require oral (as opposed to written) submissions from the Claimant himself. The issue is one of principle, and not in reality dependent on the Claimant's factual position as to whether his conduct was motivated by ideology.

226. While it is right that the ultimate decision as to location in the SC was one that required expert input, I accept Mr Squires KC's submission that a case such as this which is difficult is one in which more detailed input was likely to improve the quality of the SCMC's decision-making. In addition to the question of whether his conduct was motivated by ideology an oral hearing would have enabled the Claimant's representatives to have tested the various propositions being advanced in relation to the impact of the finding on ideology. Procedurally fair decision-making is liable to result in better decisions: see [95] above.

227. For these reasons I conclude that fairness did require an oral hearing in the Claimant's case. Ground 5 therefore succeeds.

## Ground 6: Was the Claimant provided with adequate reasons for the Decision?

228. The parties agreed that the Defendant was required to provide reasons for the Decision which allowed the Claimant to understand what conclusions were reached on the "principal important controversial issues": *South Bucks v Porter* [2004] 1 WLR 1953 at [36]. The Claimant contended that the reasons given failed this test for two reasons.

### Ground 6(i): Reasons in relation to the Claimant's representations

229. The Claimant argued that the SCMC had not explained why his representations had not been accepted, if that was indeed the case. This argument was "parasitic" on Ground 4, as it involved the same dispute between the parties as to whether, if the Claimant's account had been accepted, there would have been any basis for locating him in the SC.

230. For the reasons given in relation to Ground 4(ii) above, there was a duty on the SCMC to address the factual disputes raised by the Claimant's representations in the ways described in *Pearce* and *CAAT*. Even if, as I have found under Ground 4(ii), the SCMC was not required to determine every factual dispute, it was required to explain to the

Claimant what view it had formed of his representations and how that related to the Decision. This they failed to do, leaving the Claimant unable to understand what conclusions had been reached on his representations, which were plainly "important controversial issues".

Ground 6(ii): Reasons in relation to the views of Dr Bennett and Mr Vipond

231. The Claimant also argued that the Defendant failed adequately to explain why the SCMC had departed from the expert reports of Dr Bennett and Mr Vipond. It may be that the Defendant implicitly rejected the experts' views; but the 18 September 2023 decision letter did not address the issue; and it is not possible to discern the reasons from the 12 December 2023 meeting note.

232. Accordingly, the Claimant submitted that his case was comparable to *R (Wells) v Parole Board* [2019] EWHC 2710. There, Saini J held that the Parole Board had given inadequate reasons for refusing to release a prisoner despite relevant psychologists and offender managers recommending his release. Saini J applied the principle that while expert evidence does not need to be accepted "a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal". Saini J applied *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377 at 381B-D, per Henry LJ; and observed that the duty to give reasons is "heightened" when the decision-maker is faced with expert evidence which it appears "implicitly at least, to be rejecting": [40]. On the facts of *Wells*, the Parole Board had failed properly to "explain…why…[the expert] evidence was being rejected": [41].

233. The Defendant did not accept that the standards set by *Flannery* apply in this context as they relate to the reasons given by judicial bodies such as the Parole Board, again reiterating the concern to avoid judicialising its process.

234. In my judgment even if the *Flannery* standard applies to the SCMC context, it was met, when the 18 September 2023 letter and the 12 September 2023 meeting note are read together.

235. The meeting note makes clear how the SCMC approached the evidence of Dr Bennett and Mr Vipond, as the discussions between the SCMC members and the two experts is set out verbatim.

236. Dr Bennett spent some time explaining to the SCMC her rationale for concluding that the Claimant's behaviour was not ideologically driven. She observed that it was "hard to talk" about the Claimant going back on to mainstream location if he was not selected for the SC because he came from the segregation unit. By the end of the discussion at the SCMC she did not appear to express a firm view that location in the SC was inappropriate: rather she opined that wherever the Claimant was located he would cause disruption.

237. Mr Vipond also described the Claimant as one who coerced people from a gang background, irrespective of his ideology. He was clearer than Dr Bennett in maintaining his view that the SC was not the best place for the Claimant. As noted above he had raised the possibility of the Offender Personality Disorder Pathway.

238. The reasons given by the three CDMS who favoured the Claimants location in the SC as set out at the end of the meeting note make clear that they all concluded that irrespective of the ideology or drivers of the Claimant's behaviour, his location in the SC was appropriate. This was because, as the 18 September 2023 letter explained, the SCMC had concluded that his behaviour created "an environment in the prison where extremism and extremism related behaviours can flourish".

239. The meeting note makes clear that the views of Professor Professor Zainab Al-Attar were significant in the decision-making process for the reasons given under Ground 3 below. She expressed views to the effect that Offender Personality Disorder Pathway was not appropriate. She also addressed the suggestion that the Claimant should not be placed in an SC because he might become more radicalised. She said she was "not sure we could make him worse"; and that while it was a "difficult" decision, the Claimant "at his worst" would be only able to influence a smaller number of other people if he was located in an SC.

240. For these reasons Ground 6(i) succeeds but Ground 6(ii) fails.

**Ground 1: Was the Claimant provided with inadequate disclosure in respect of his selection for placement in the SC, such that the Decision was procedurally unfair and/or represented an unjustified departure from policy?**

241. In *Bourgass*, the Supreme Court recognised that a prisoner's right to make representations in the context of segregation decisions is "largely valueless" without advance disclosure: the prisoner must "know…the substance of the case being advanced in sufficient detail to enable him to respond…what is required is genuine and meaningful disclosure of the reasons why authorisation is sought": [100].

242. However, "fairness does not require the disclosure of information which could compromise the safety of an informant, the integrity of prison security or other overriding interests". In such situations, it is sufficient to inform the prisoner "in more or less general terms of the gist of the reasons for seeking the authority of the Secretary of State": [103].

243. These general principles are reflected in paragraph 3.50 of the SCPF, which provides that "[s]ufficient information must be disclosed to the prisoner to explain the rationale of the decision and to permit the prisoner to make meaningful representations". Reference is then made to situations where more limited disclosure is permitted, of the kind considered in *Bourgass* at [103].

244. The Claimant contended that the Defendant had breached these obligations in his case in two respects.

Ground 1(i): Insufficiently particularised allegations

245. As noted at [76]-[78] above, the reasons for the referral to the SC are set out in section 4 of the referral form, but this needs to be read in conjunction with the SIR to which the SCMC will have regard. It was therefore important that the Claimant made representations on both parts of the material, as he did. The same applies to the reports annexed to the referral form and the post-separation reports.

246. The Claimant initially contended that the Defendant's process was unfair because section 4 did not identify in respect of each allegation which part of the SIR was said to support it. By the time of the hearing his position had modified and he accepted that for many of the allegations, this exercise was possible. However, for some of the allegations he argued that there was no basis in the SIR for them and/or that they were vaguely worded for him to provide any meaningful response to them.

247. It is important to recall that the Defendant had disclosed to the Claimant all the evidence that the SCMC was provided with, albeit that "disclosure of the primary evidence on which the [prison's] concerns are based" will not "normally" be required: *Bourgass* at [100]. Mr Strachan KC was right to contend, that in order to determine whether the Claimant knew the substance of the case being advanced in sufficient detail to enable him to respond, it was necessary to look at all the material disclosed to him. Again, the need to be careful not to imposing unduly stringent standards liable to judicialise the SCMC's process must be borne in mind.

248. Mr Squires KC took issue with allegation [1] which related to "changed dynamics" on the MPU at HMP Frankland; and the similar allegation [4] which included the suggestion that "prisoners who previously had good rapport with the staff have started to become distant" since the Claimant's arrival on F wing (see 65] above). He argued that these allegations were simply too vague for the Claimant to respond to: no details were given of what the Claimant had done to change the dynamics of the MPU or which prisoners' relationships with staff on F wing had deteriorated. More importantly, no indication was given of how it was said the Claimant was responsible for either of these developments, if they had occurred.

249. It is always going to be difficult for a prisoner to respond to allegations of this kind, because by definition they are unlikely to know what the dynamics of a unit or the prisoner/staff relationships within it were like before they arrived or what they are like after they have left. Further, with allegations of this kind there is always the possibility that any such change is unrelated to the prisoner being considered for referral, beyond a coincidence of timing. It is necessary for the Defendant to give some indication of what the prisoner is said to have done.

250. However, in my judgment, when read as a whole, the information disclosed to the Claimant was adequate. In respect of allegation [1], the clear implication is that the Claimant was believed to have caused or contributed to other prisoners becoming involved in arguments about religion with non-Muslim prisoners, requesting attendance at Friday prayers or starting to listen to Arabic music. In respect of allegation [4], the reasonable inference is that the Claimant's behaviour at HMP Frankland, as otherwise described in section 4, was said to have led to a worsening of the relationship some prisoners had with the staff. This amounted to the "substance of the matters" within allegation [1] and was sufficient to meet the *Bourgass* test.

251. Allegation [2] was to the effect that since September 2022 the Claimant had had a "negative influence over Muslim prisoners on F wing" and that "it had been observed that he regularly attempts to oppose and intimidate staff while other prisoners are around". Mr Squires KC argued that the Defendant had failed to identify a single incident in the many that the Claimant had been on F wing that supported this allegation, such that the Claimant could not properly respond.

252. I cannot accept this submission. The relevant part of the SIR (internal pp.35-36) included plenty of material which provided potential support for allegation [2]: for example, it was reported that the Claimant "may be one of the two leaders" on F wing; that prisoners had begun referring to each other as "brothers" after he arrived; that there had been several incidents during Friday prayers including one where he had led prisoners in shouting "Allahu Akbar" and appeared to be "attempting to incite disorder against staff"; that he had challenged staff more than once in a voice loud enough for others to hear; that he was encouraging other prisoners to submit complaints about faith matters; and that he had a poor attitude towards operational staff, talking over them and refusing to engage in eye contact in a perceived attempt to intimidate them.

253. Allegation [7] was to the effect that the Claimant "regularly demonstrates 'them and us' thinking, making derogatory remarks towards prison staff, non-Muslim's [sic], and the UK government". The SIR included material supporting the suggestion of 'them and us' thinking, including those aspects summarised in the preceding paragraph. Mr Squires KC is right that the SIR does not, as far as I can see, provide any specifics of derogatory remarks towards prison staff, non-Muslims or the UK government. However, there was evidence of him regularly challenging staff (see above under allegation [2]); as well as evidence of him being critical of a Muslim prisoner for associating with non-Muslims (which could be interpreted as an indirect comment *about* non-Muslims). There was also evidence of the Claimant expressing strong opinions about Remembrance Day, the death of HM The Queen and of cases where "BAME individuals have been killed by law enforcement". It is likely that these comments are what was being referred to as comments about "the UK government".

254. For these reasons Ground 1(i) is dismissed

Ground 1(ii): Non-disclosure of intelligence reliability gradings

255. The Claimant submitted that the failure to disclose the reliability gradings for the intelligence to him amounted to inadequate disclosure: for the reasons developed under Ground 2 above, these gradings were essential to a proper evaluation of the intelligence and thus to his ability to challenge the adverse assessment of him made on the basis of the intelligence. He relied on Daniel Guedalla's evidence that reliability gradings had been provided to his prisoner clients, or to him personally on the giving of an undertaking, in other SC cases as well as Parole Board cases and categorisation reviews.

256. Whatever may have happened voluntarily in the other cases to which Mr Guedalla referred, I am not persuaded that fairness required the disclosure of the reliability gradings to the Claimant here. As noted above the Defendant had disclosed to the Claimant a summary of all of the "primary evidence on which the…concerns [were] based", even though *Bourgass* at [100] makes clear that this is not "normally" required to ensure fairness in this context. It follows that fairness did not require disclosure of further material, namely the reliability gradings, to better inform the Claimant's assessment of this primary evidence.

257. There were also sound policy reasons for the non-disclosure of the reliability gradings as explained at [193] above.

258. Accordingly Ground 1(ii) fails.

**Ground 3: Did the comments of Professor Zainab Al-Attar during the 12 September 2023 meeting, that the Claimant was a "psychopath" and/or regarding a "personality disorder", render the Decision *Tameside* irrational and/or otherwise unreasonable?**

259. During the 12 September 2023 meeting, Professor Al-Attar commented that the Claimant had "turned into a psychopath"; and that he was "not willing to acknowledge [that] he has a personality disorder". Professor Al-Attar is a forensic psychologist and Extremism Strategy and Interventions Advisor in the Defendant's LTHSE. She was a member of the SCMC, though not one of the four CDMs involved in the Claimant's case.

260. There has never been any suggestion that the Claimant meets the diagnostic criteria to be properly described as either a psychopath or having a personality disorder, nor has he undergone a psychological assessment to investigate whether either of these descriptions is appropriate.

261. The Defendant accepted that Professor Al-Attar's comments were misplaced, inappropriate and should never have been made, but contended that they did not vitiate the SCMC's decision as the Claimant argued. They were "off the cuff", "passing" remarks, made in the professor's capacity as Extremism Strategy and Interventions Advisor and not as a forensic psychologist. The other members of the SCMC knew that she had not personally assessed the Claimant or prepared any medical report on him and so would not interpret her comments as constituting any kind of diagnosis. Her description of the Claimant as a psychopath would be understood by the CDMs as a "shorthand for the heinous crimes he had committed"; and the reference to the Claimant having a personality disorder had been taken entirely out of context.

262. I accept the Defendant's submission that it is important to interpret the meeting note realistically and not seek to construe it as if it were a statute: see, for example, *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at [33].

263. Having done so, it is clear that Professor Al-Attar played a key role in the discussions. She intervened shortly after Dr Bennett had presented her psychology assessment report on the Claimant, before another psychologist, Ms Marsh, spoke. When she did so, she expressed her views on the motivations for the Claimant's behaviour, from childhood through to his time in prison. She returned to this theme throughout the meeting. In those circumstances while I accept Mr Waldron's evidence that he did not consider that Professor Al-Attar was providing any formal clinical assessment of the Claimant, I consider it artificial to assume that the other members of the SCMC would disregard the comments she made because she was not attending the SCMC in the capacity of a psychologist who had assessed him.

264. Professor Al-Attar intervened after all the assessment reports had been presented and Mr Waldron sought to draw them together, saying "all the assessment reports indicate…that [the Claimant] should not be selected for the SC, on the basis that it is the incorrect location for him and because of the impact he is having" and raised the issue of the "potential pathways" for the Claimant. This was a key part of the meeting. It was at this point that Professor Al-Attar acknowledged how difficult the decision was, described Dr Bennett and Mr Vipond as having been "very kind" and then said:

> "…meanwhile while we assess [the Claimant's] threat he has turned into a psychopath, he hates other people and is desensitised to violence, in a dominant violent group. He may not be motivated by ideology but neither are half the terrorist population…we cannot really justify having someone like that not separated, unless he is suitable for the CSC, he epitomises the very problem SCs are trying to manage".

265. Professor Al-Attar expressed her view that the Claimant could be "at his worst" and "able to influence lots of other people" on mainstream location. Mr Waldron indicated that "no one is suggesting he go back to the mains" and that the Claimant needed "a smaller specialist unit". She then said the following about the Claimant:

> "…someone who is not willing to acknowledge he has a personality disorder will not be accepted on Westgate [a specialist unit for prisoners with personality disorders]. lots of approaches have been attempted. He is too invested in the extremist peer group".

266. Relatively shortly thereafter the CDMs moved to make their decision.

267. It is therefore clear that the comments complained of were made by Professor Al-Attar at important stages of the meeting. Moreover, they were made in the context of the central issues the SCMC had to decide, namely the motivations for the Claimant's behaviour, whether he was a suitable candidate for the SC if those motivations were not ideological and whether there was a more suitable location for him.

268. Mr Squires KC submitted that Professor Al-Attar was the only psychologist at the SCMC who spoke in favour of the Claimant remaining in the SC. That does not seem entirely accurate as Ms Marsh said she was also "struggling to see why we would not keep him [in the SC]". However, Ms Marsh did not speak again, and it is clear that Professor Al-Attar's views were given significant weight, as might be expected given her senior role. Indeed, one of the CDMs ("KC") specifically gave as part of her rationale for concluding that the Claimant should remain in the SC that Professor Al-Attar had "eloquently argued" for this position notwithstanding the written reports from the other psychologist, Dr Bennett, and Mr Vipond, which did not support the Claimant's location in the SC.

269. Moreover, the Defendant relied on the SCMC having accepted Professor Al-Attar's views in defending Ground 6(ii). There is no basis in the evidence from which it can safely be concluded that the SCMC accepted some parts of her views, but disregarded the inappropriate comments. That is especially the case given that the Defendant did not serve witness evidence from any of the other two CDMs who supported the Claimant's continued location in the SC. It is not therefore possible to elicit any definitive understanding of the impact of her comments on them.

270. In those circumstances I accept the Claimant's submission that it cannot safely be said that Professor Al-Attar's inappropriate comments did not infect the SCMC's decision. In my judgment, they rendered it *Tameside* irrational and/or otherwise unreasonable. Ground 3 therefore succeeds.

## **Ground 7: Was the Decision incompatible with the Claimant's rights under Article 8 ECHR?**

271. Article 8 ECHR, incorporated into domestic law via the Human Rights Act 1998, Schedule 1, provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

*Engagement of Article 8*

*(i): Legal principles*

272. Article 8 includes "to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and the fulfilment of one's own personality". This concept "extends to the sphere of imprisonment", such that "removal from association…constitutes an interference with [a prisoner's] right to privacy": *McFeely v United Kingdom* (1981) 3 EHRR 161 at [82]. Locating a prisoner in a unit which imposes restrictions going beyond those "ordinarily consequent" on prison life and discipline during lawful detention may amount to an interference with the prisoner's Article 8(1) rights: see the authorities cited in *R (Syed) v Secretary of State for Justice* [2019] EWCA Civ 367 at [49]-[50].

273. Accordingly, interferences with detainees' Article 8 rights have been found by (i) removal from association/segregation of adult prisoners (*Shahid v Scottish Ministers* [2016] AC 429 and *R (Dennehy) v Secretary of State for Justice* [2016] EWHC 1219 (Admin)); (ii) removal from association under the rules applicable to young offender institutions (*R (AB) v Secretary of State for Justice* [2019] EWCA Civ 9); and (iii) transfer to a central Managing Challenging Behaviour Strategy Unit ("MCBS Unit") (*Syed*).

274. In *Syed*, Article 8 was found to be engaged by reference to the context in which the transfer to the unit took place, the nature of the restrictions imposed, their duration and the effects on the prisoner: [51].

275. In *AB*, at [158]-[159], the Court of Appeal endorsed the analysis in *Dennehy* by Singh J (as he then was) of the speeches of the House of Lords in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148; and his finding that in *Shahid*, the Supreme Court had accepted that Article 8 is, in principle, engaged by periods of seclusion in prison. This was based on the decision of the European Court of Human Rights in *Munjaz v UK* (App No 2913/06), 17 July 2012. *Munjaz* involved seclusion in a mental health hospital.

276. In *Munjaz v UK* at [80] the Court held that:

> "…the compulsory seclusion of the applicant interfered with his physical and psychological integrity and even a minor such interference must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will [*Storck v. Germany*, no. 61603/00, ECHR 2005-V at [143]]. Moreover, the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted, greater scrutiny be given to measures which remove the little personal autonomy that is left" [emphasis added].

*(ii): Submissions and analysis*

277. Mr Strachan KC rightly accepted in oral submissions that *Munjaz* sets a "low bar" for the engagement of Article 8 in this context. He nevertheless contended that the conditions in the cases referred to at [273] above were far more restrictive than those in the SC, such that Article 8 was not engaged. I cannot accept this argument, for the following reasons.

278. *First*, although *Munjaz*, *Shahid*, *Dennehy* and *AB* involved periods of seclusion or segregation, complete seclusion or segregation from others is not necessary for the engagement of Article 8. The Defendant's argument to similar effect was rejected in *Syed*: [59] and [60]. Moreover, *Munjaz* did not involve complete isolation: rather, during each of the four periods of seclusion at issue, on all but one day, the applicant was allowed periods of association either with staff or other patients, ranging from five minutes to over eight hours: *Munjaz v UK* at [7].

279. *Second*, as explained under Factual Issue 1 above, the SC regime imposes extensive restrictions and limitations on prisoners which go beyond those "ordinarily consequent" upon imprisonment; and have a significant impact on the Claimant's ability to establish and develop relationships with other prisoners.

280. *Third*, application of the *Syed* factors set out at [274] above provides support for the proposition that Article 8 was engaged. The context in which the transfer of the Claimant to the SC took place was a detailed assessment process, within a framework by which the Claimant's location would not be reviewed for several months. The restrictions imposed are extensive as noted in the preceding paragraph. They have already been in place for over a year in the Claimant's case and evidence suggests that many prisoners remain in SCs for lengthy periods of time. There is also persuasive evidence that location on the SC has had adverse effects on the Claimant's mental health.

281. *Fourth*, the unchallenged findings of Lewis J in *Syed* indicate marked similarities with the facts of this case. Lewis J found that the context in which the Claimant was placed on the unit was that restrictions were "considered necessary to control the risk [he] presented" which "required him to be placed in the [MCBS Unit] with a small number of other prisoners". As to the regime, the Claimant in *Syed* was permitted association with other prisoners on the MCBS unit, daily exercise, time outside his cell for domestic chores and some opportunity to participate in activities outside the unit, namely the prison library, without other prisoners present: [13], [46] and [47]. All of these features are reflected in the regime on the SC.

282. The Defendant argued that an important distinction was that in *Syed*, the Claimant was often locked in his cell without association for 20¾-21½ hours a day ([47]). As noted at [49] above, the Claimant has referred to at least one occasion when he was locked in his cell without association for 22½ hours; and has described a regime in which the expected time out of his cell of 6-7 hours a day out of his cell is regularly not achieved on the Full Sutton SC. I am not therefore persuaded that this distinction is as clear cut as the Defendant contended.

283. Moreover the duration of the restrictions in place in Syed was around 4½ months by the time of the hearing before Lewis J ([12]) whereas the restrictions on the Claimant in this case caused by his location in the SC have been in operation for a much longer period.

284. Further, the totality of the conditions in the SC impacts on the Claimant's psychological integrity as explained under Factual Issue 1 above. This is an additional reason why Article 8 was engaged: see, by analogy, *Metropolitan Police Commissioner v Bary* [2022] EWHC 405 at [63].

285. Accordingly, the Claimant's location on the SC interferes with and thus engages his Article 8 rights.

*Breach of Article 8*

286. The Claimant has shown that the decision of the SCMC was unlawful in the manner alleged by Grounds 4(i) and 4(ii), 5, 3 and 6(i).

287. The Defendant contended that there was a distinction to be drawn between substantive and procedural unfairness for this purpose, and that the Claimant's allegations of procedural unfairness did not in themselves mean that the Decision was not "in accordance with law" for the purposes of Article 8(2).

288. I cannot accept this argument. In *AB*, there had been admitted breaches of the Rules with respect to the Claimant's educational provision and oversight of his removal from association. The Court of Appeal expressed its concern about the "breaches of various Rules" and the fact that there was a delay in a Multi-Disciplinary Meeting (a meeting partly concerned with reviewing the Claimant's treatment) taking place [37(2)] and [147]-[148]. The Court held that these failings meant that the interference with the Claimant's Article 8 right was not in accordance with the law: [161]. No distinction appears to have been drawn between substantive and procedural failings for this purpose.

289. Accordingly, the Claimant's location in the SC was not in accordance with the law for the purposes of Article 8(2).

290. I do not consider that it is necessary or appropriate for me to reach a conclusion on the Claimant's further argument that his location in the SC was unnecessary and disproportionate under Article 8(2).

291. In future, the SCMC will need to show that any further decision to locate the Claimant on the SC is proportionate in that (i) its objective is sufficiently important to justify the limitation of a fundamental right; (ii) it is rationally connected to the objective;

(iii) a less intrusive measure could not have been used; and (iv) having regard to those matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [20] and [74].

292. In terms of element (iii) of the *Bank Mellat* test, whether the Claimant can be detained in the mainstream prison population (with enhanced use of segregation if needed) and whether he could be located in the CSC are likely to be relevant.

293. As to element (iv), the SCMC will no doubt consider the competing public interests which location in the SC seeks to protect, including the interest in public safety, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights and freedoms of others.

294. The SCMC will also need to take into account any "known relevant medical considerations" about the Claimant under Rule 46A(5). Those include the Claimant's pre-existing conditions of anxiety, depression and PTSD, which Dr Cohen's opines have been compounded and increased by his location on the SC.

295. For these reasons Ground 7 succeeds.

## Conclusion

296. Accordingly, for all these reasons, the Claimant's claim succeeds in respect of Ground 4(i), 4(ii), 5, 3, 6(i) and 7. These errors vitiated the Decision. The parties have agreed a timetable for further submissions with respect to relief.

297. I reiterate my thanks to all the legal representatives for their considerable assistance.