Neutral Citation Number: [2024] EWHC 3200 (Admin)

Case No: AC-2024-LON-002803

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2024

Before :

TOM LITTLE KC
sitting as a Deputy High Court Judge

- -

Between :

The King	**Claimant**
(on the application of Alan Matthew Daulby)	
- and -	
The Parole Board for England and Wales	**Defendant**
-and-	
The Secretary of State for Justice	**Interested Party**

- -

Mr Carl Buckley (instructed by **Kasar & Co Solicitors**) for the **Claimant**

Nobody appearing for the Defendant

Nobody appearing for the Interested Party

Hearing dates: 11 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE SHELDON

Tom Little KC sitting as Deputy High Court Judge:

Introduction

1. This is a claim for judicial review brought by Alan Matthew Daulby ["the Claimant"] against a decision of the Parole Board for England and Wales ["the Defendant"] refusing the Claimant's request for an oral hearing to determine if he should be released from custody.

Procedural background

2. This claim was issued on 20th August 2024. The Defendant filed an Acknowledgment of Service on 29th August 2024 indicating that they did not intend to make submissions. On 30th August 2024 the Interested Party served a letter indicting that she also did not intend to make submissions.

3. Permission was granted on the papers by 4th October 2024.

4. Given the stance taken by the Defendant and the Interested Party the only written and oral submissions before me were those made on behalf of the Claimant.

5. During the course of the hearing I was referred to both an Authorities Bundle and a 661 page Hearing Bundle ["HB"] both of which I had read in advance. Much of that HB contained the Defendant's dossier on the Claimant which was considered as part of the decision(s) under review.

Factual background

6. The Claimant was born on 24th June 1965. He is therefore 39 years of age. He is a serving prisoner at HMP Onley. He was convicted of an offence of murder by a Provincial Court in Alicante, Spain. That offence was committed on 21st May 2009. The Claimant stabbed his former partner more than 50 times in what the Spanish Court regarded as being a premeditated attack. The victim had ended the relationship with the Claimant shortly before. Following the murder the Claimant attempted to hide the body and then to dispose of it. The Defendant's dossier in respect of the Claimant includes the judgment of the Provincial Court of Alicante (**HB p190 – 193**). This document contains an outline of the underlying facts.

7. The Claimant was sentenced in Spain to a 19 year determinate sentence on 20th July 2012. He was 27 years of age at that point. The dossier also includes the Spanish equivalent of sentencing remarks (**HB p194 - 209**). He was subsequently transferred a couple of years later to the United Kingdom from Spain to serve the remainder of his sentence in custody here. His sentence expiry date is 27th July 2026. Before he moved to Spain he had a number of convictions for a range of relatively minor criminal offences including possession of class 'C' controlled drugs and for breach of court orders.

8. On 28th October 2020 the Claimant was automatically released on licence to an Approved Premises. However, his licence was revoked on 18th December 2020 and he was recalled to custody the following day. The Claimant has remained in custody ever

since. A reason for the recall was that the Claimant had begun to stalk someone with whom he had been in relationship before he moved to Spain in 2004. It should be noted that there is also a suggestion in the documentation that the Claimant stalked the victim in Spain after the relationship had ended and before he murdered her. There is also evidence consistent with the Claimant becoming involved in drug dealing whilst on licence in 2020.

9. Following his recall on 27th July 2021 a Member Case Assessment ["MCA"] was conducted by the Defendant in respect of the Claimant and a direction was given for an oral hearing. That MCA decision (**HB p275 – 281**) contains a detailed analysis of the issues. It concluded by stating:

> *"Having applied the principles set out in the case of Osborne, Booth & Reiley [2013] UKSC 61 and in fairness to Mr Daulby, the panel finds that it is necessary that at an oral hearing the panel should be able to explore Mr Daulby's history, the index offence, his period on licence, the events leading up to his recall, his current motivation, his behaviour in custody and any progress made in relation to his risk factors together with his likely compliance with supervision and licence conditions and make its own informed assessment of risk and then the proposed plan for the management of that risk for if Mr Daulby were to be released into the community."*

10. The Claimant's oral hearing took place on 10th February 2022. The Defendant's decision following that oral hearing, which was to refuse to direct the release of the Claimant, runs to 58 paragraphs **(HB p394 – 405)**. It is detailed and it makes certain findings which are important in respect of the reasons for the revocation of the licence. The assessment of current risk in that decision and its conclusion were in the following terms:

> *"(49) you are assessed as very high risk of serious harm to known adults and future partners. The panel considers your risk to be at least high, but bearing in mind that you are not currently in a relationship the element of imminence regarded as necessary for a very high risk assessment may not be there. Dr Farreny put it well: the risk is unpredictable, because we know so little about what caused the index offence. On the other hand, the threats you issued to Skyla and your decision to contact your ex-partner are indications that your risk may indeed be very high. Your RSR is assessed as low, your OGRS3, OGP and OVP scores are all medium, and the SARA is high. The panel was particularly concerned by the latter, which relates to spousal assault, and agreed that, until you have completed appropriate work to address your offending behaviour, your risk of violence within relationships should be regarded as high.*
>
> ……..
>
> *(52) The panel is satisfied that there were deliberate breaches of your licence in respect of the mobile phones. The panel is further*

satisfied that you returned to drinking alcohol, gradual at the stage where you were recalled, and your behaviour when you had been drinking (phoning your ex-partner, the confrontation with the member of staff) means that your behaviour on licence was deteriorating and becoming unpredictable and worrying.

(53) As mentioned above, the panel does not accept your explanation for the Skyla text conversation. As it is noted, even on your account it contains strong indications that you felt no remorse for your offence of murder, and were perfectly prepared to use that offence to back up a threat, whether seriously meant or not. In fact, the panel is satisfied that the threats were seriously meant.

(54) The panel has thought carefully about inferences it can properly draw from that conversation. At the very least it shows you involved in some sort of criminal activity with Skyla. The COMS said that Skyla was a known drug user and drug dealer: if your account of her living on the streets and begging is correct, it would seem that she would be a low level dealer at most. You described her as a thief and a handler of stolen goods. In the circumstances the panel concludes that this was a conversation about some sort of illegal enterprise involving you and Skyla.

(55) The panel therefore went on to consider if it could properly come to a conclusion on the evidence about the nature of that criminal enterprise. Your CRM said that the conversation read to her as if it involves dealing in drugs. The panel, each member of whom have had experience of cases involving drug dealing and the interpretation of text messages between those concerned in them, agrees. This certainly reads like a conversation about a drug deal, and a drug deal which has gone wrong. Skyla got a slap. You threatened her.

(56) The panel is, on consideration of all the evidence satisfied on the balance of probabilities that you were involved in drug dealing while on licence.

(57) This last conclusion would not strictly be necessary for the panel to come to its decision. There is a solid basis for the decision without it. The panel's conclusion is that your risk is not manageable in the community, that you do not pass the test for release and the panel does not direct your re-release.

(58) It is likely that the Parole Board will consider your case again before your sentence ends. Any future panel will look closely at the interventions you have undertaken to help you deal with your traits of personality disorder and thereafter, if the approach is that recommended by Dr Farreny and the

> *Community Offender Managers in this case, any programmes to help with your use of violent behaviour. In any event a future panel is likely to look closely at whether you have developed any greater understanding of your index offence and the triggers that led to it."*

11. On 27th February 2023 the Claimant's legal representatives made a written application to the Defendant for his release. That was refused on the papers by the Defendant on 27th April 2023 with detailed reasons **(HB p469 – 479)** being given which included:

> "*In relation to sentence planning, unfortunately Mr Daulby has not completed any further work as recommended. He claims that he has already completed therapeutic interventions whilst incarcerated in Spain and is unwilling to repeat such work. Unfortunately, there is no evidence of this work being completed and, in any event, this work predates Mr Daulby's recall. During the review period Mr Daulby has been offered the opportunity to engage with the Midlands Interventions Therapeutic Service (MITS) which is facilitated at HMP Onley. Mr Daulby has stated that he is unwilling to engage with this service ……*
>
> *The panel has very carefully considered all of the information before it, including the legal representations provided (26 April 2023).*
>
> *The panel noted that although Mr Daulby disputes the circumstances of his recall, he has already had an oral hearing, post recall in 2022, and at that time was afforded an opportunity to provide his account …. The panel does not consider that it would be unfair to Mr Dalby to conclude his case on the papers.*
>
> *At the time of Mr Daulby's last review sentence plan objectives were proposed and recommendations as to next steps made. Since then, Mr Daulby has not completed any further core risk reduction work. He has refused to engage with the MIT service, or engage with other therapeutic input."*

12. There was then a request dated 3rd May 2023 by the Claimant's legal representatives for an oral hearing.

13. On 5th May 2023 the request for an oral hearing was refused by the Defendant. Reasons were given **(HB p467 – 468).** In so far as is material the decision stated:

> *"The decision letter takes into account the representations submitted available prior to the hearing, notes the Osborn ruling was taken into account and that the panel has provided a full explanation as to why an oral hearing has not been considered necessary. Mr Daulby's case had been previously reviewed within an oral hearing on 10/02/22 the conclusions from which were that there was a need for core work to be completed to address his concerning risk profile (OASys indicated him to*

> *represent a 'very high' risk of causing serious harm to known adults and future partners, the 2022 panel agreed such risk was at least 'high'). brackets and after taking forever that witnesses that review conclude no release and highlighted the needed for outstanding core work to be completed.*
>
> *The recently prepared negative decision noted that there had been no change or risk reduction reflected within OASys, and whilst appreciating that Mr Daulby disputed the circumstances of his recall, the panel quite rightly pointed out this was a matter that was considered by the 2022 panel (the appropriateness of recall is a matter only reviewed within the first review after recall and is not a matter to be reviewed again by the next panel), The 2023 panel emphasises in the conclusion that consideration had been given to all evidence received, including his legal representations, but found it possible to complete a risk assessment on the papers as there had been no evidence of any core risk reduction work having been completed over the review period, hence Mr Daulby's risk profile remained unaddressed and concerningly high."*

14. There was no public law challenge by the Claimant to the decision of 5th May 2023 not to direct an oral hearing.

15. It is the events in 2024, but considered in their procedural sequence and context set out above, that are at the heart of this claim.

16. On 4th April 2024 the Claimant's solicitors sent written representations to the Defendant **(HB p43 – 61)**. Those representations were detailed (18 pages) and were submitted in support of the Claimant's application for release or alternatively for an oral hearing.

17. Those representations along with a dossier were considered by the Defendant as part of the Annual Review. An MCA conducted on the papers decided on 9th May 2024 ["the 9th May decision"] that there would be no direction for release and that an oral hearing was not required (**HB p63 - 72**). The relevant part of this decision states (with emphasis added):

> *"**The panel has considered the principles set out in the case of Osborn, Booth & Reiley [2013] UKSC 61 concerning oral hearings**. It did not find that there are any reasons for an oral hearing. Therefore an oral hearing is declined. However, if Mr Daulby believes that his case should proceed to an all hearing he is invited to submit further representations to the Parole Board within 28 days of receipt of this decision.*
>
> *Mr Daulby's case was considered at an oral hearing in 2022. That panel made findings in relation to the circumstances of the recall which this panel accepts. It is not necessary for the circumstances to be revisited with oral evidence. That panel also*

concluded that he had outstanding core risk factors. Since then, Mr Daulby has not completed any intervention that would focus on his use of violence so there has been no significant change and this panel came to the view that it was appropriate to conclude this review on the papers.

Mr Daulby's case was considered by a panel of the Parole Board on 27/4/23 and this panel adopts their analysis of offending and risk factors, including it in this letter in italics.

……

Prior to the last review column Mr Derby was offered the opportunity to engage with the Midlands Interventions Therapeutic Service but declined. Professionals recommended that he be transferred to a PIPE and be considered for Kaizen. The 2023 panel concluded that Mr Daulby had outstanding core risk reduction work to complete and did not direct release.

In a recent meeting with his Community Offender Manager, Mr Daulby said that he was grateful for the recall which is a change in his previous view. However, he could not explain the reason for the change ……..

Mr Daulby has completed the Sycamore Tree Programme during this review period and has said that he will now complete any programme work required off him. However he is yet to engage with the programme team. A PIPE unit and Kaizen remained the recommended treatment pathway.

Mr Daulby's custodial behaviour continues to be good and he remains on the enhanced regime. He's not received any adjudications or negative entries. He is working as a wing cleaner.

Mr Daulby's OGRS score places him in a group with a medium risk of reoffending. A recent OASys assessed him as having a medium risk of general reoffending, medium risk of violent offending, a medium risk of serious harm to children and staff and a very high risk of serious harm to the public and known adults. The SARA indicates a high risk of intimate partner violence. The RSR indicates a low risk of further serious offending. Based on his offending history, the panel agreed with these assessments with the exception of the RSR which it is considered underestimated his risk given that he is yet to address his core risk factors.

Mr Daulby is yet to complete any intensive intervention in relation to violence. The panel did not agree with his

assessment that the Sycamore Tree Programme was sufficient to address the risk factors that underpin his use of violence."

18. In respect of the analysis of the manageability of risk posed by the Claimant in the future the decision stated:

> *"The Community Offender Manager does not recommend release and has concerns that Mr Daulby's stated intent to engage in the community may be superficial.*
>
> *.....*
>
> *Whilst Mr Daulby has outstanding core risk factors, the panel found it difficult to envisage a risk management plan that would be likely to be effective in managing his risks."*

19. The decision concluded in the following terms:

> *"Mr Daulby is yet to address his use of violence through any accredited interventions. Although it is positive that he has completed the Sycamore Tree Programme in this review period, that is not a suitable alternative to Kaizen. The panel concluded that Mr Daulby continues to have outstanding core risk factors and would present a higher risk of intimate partner violence in the community. This led it to conclude that Mr Daulby's risks could not be safely managed in the community. It concluded that he needed to remain in prison for the protection of the public and did not direct release."*

20. On 10th June 2024 the Claimant's solicitors submitted written representations to the Defendant in support of him being released or for there to be an oral hearing **(HB p 73 - 83).** Those representations were 11 pages long. They referred to a number of decisions including *Osborn, Somers* and *McKilligan* (see below).

21. On 15th June 2024 an MCA member of the Defendant considered the request for an oral hearing and in particular the representations made on behalf of the Claimant and the decision of 9th May 2024 and a very lengthy dossier. The request was denied ["the 15th June decision"]. In so far as is relevant the 15th June decision states:

> *"Mr Daulby's case was considered on the papers on 9 May 2024 with no direction for release. The MCA panel considered the fairness principles outlined in Osborn, Booth and Reiley [2013] UKSC 61 but concluded that there was core risk reduction work outstanding which needs to be completed prior to release.*
>
> *The representations dated 10 June 2024 request an oral hearing on the basis that in refusing to grant the application for an oral hearing, the MCA member focused on the potential outcome of the hearing, rather than on what fairness demands and therefore the above principles ……*

The duty member has carefully considered this request. The GC member has concluded that normal hearing is not required. This is because:

- *The MCA panel clearly considered the principles set out in the case of Osborn, Booth & Reiley [2013] UKSC 61 concerning oral hearings and concluded that there was sufficient evidence on the papers to undertake an assessment of risk.*

- *An oral hearing is not required to consider the facts of the case. They are clearly laid out in the MCA decision. Mr Daulby's account of the circumstances of the recall has clearly been taken into account within the decision and the appropriateness of the recall was determined at normal hearing in February 2022.*

- *Reports in the dossier indicate that Mr Dolby has not undertaken any work during his sentence to reduce his risk since recall. He is currently assessed as a very high risk of serious harm to the public and to known adults, and he is yet to address the factors underpinning his violent behaviour. The recommendations that further risk reduction work is still required and not only contained in the PRA from June 2021 but also the more recent assessments of the COM. The MCA panel appropriately relied upon this as evidence that further work is required before he can be safely managed in the community on the basis that it was clear that there are outstanding areas of risk linked to the index offence. This is the MCA panel's independent view which does not require oral evidence to be considered*

- *The MCA decision had the benefits of considering previous legal representations dated 4 April 2024. The legal representations dated 10 June 24 do not raise any additional issues which cause the duty member to put the paper decision into serious question."*

Grounds of review

22. The sole ground of challenge is one of procedural unfairness in not directing that there be an oral hearing. The Claimant has variously complained about both the decision of 9th May 2024 (see paragraph 17 – 19 above) and the decision of 15th June 2024 (see paragraph 21 above). The decision under review is that of 15th June 2024 (as set out in section 3 of the Claim Form and referred to in the Claimant's Skeleton Argument as 'the impugned decision'). However, to the extent that it refers to and is bound up in the

decision of 9th May 2024 then any assessment of alleged procedural unfairness cannot be looked at in a vacuum from what preceded it.

Legal framework

23. The Claimant's licence was revoked by the Interested Party pursuant to section 254 of the Criminal Justice Act 2003 ["CJA"].

24. In this case, as set out above, there had already been two reviews by the Defendant. Accordingly the relevant statutory provision is section 256A of the CJA which provides for a further review and in so far as is relevant (with emphasis added):

> *"**256A Further review***
>
> *(1) This section applies to a person if—*
>
> *(a) there has been a previous reference of the person's case to the Board under section 255C(4) or this section, and*
>
> *(b) the person has not been released.*
>
> *(1A) The Secretary of State must refer the person's case back to the Board not later than the first anniversary of the most recent determination by the Board not to release the person (the "review date").*
>
> *(1B) Subsection (1A) does not apply where the review date is 13 months or less before the date on which the person is required to be released by the Secretary of State*
>
> *(2) The Secretary of State may, at any time before the review date, refer the person's case to the Board.*
>
> *(3) The Board may at any time recommend to the Secretary of State that the person's case be referred under subsection (2).*
>
> ***(4) <u>The Board must not give a direction for a person's release on a reference under subsection (1A) or (2) unless the Board is satisfied that it is not necessary for the protection of the public that the person should remain in prison.</u>***
>
> *(5) Where on a reference under subsection (1A) or (2) the Board directs a person's release on licence under this Chapter, the Secretary of State must give effect to the direction."*

25. Rules 19 and 20 of the Parole Board Rules 2019 provide so far as is relevant:

> *"**Consideration on the papers***

19.—*(1) Where a panel is appointed under rule 5(1) to consider the release of a prisoner, the panel must decide on the papers either that—*

(a) the prisoner is suitable for release;

(b) the prisoner is unsuitable for release, or

(c) the case should be directed to an oral hearing.

.....

(3) Where a panel makes a decision that the case should be directed to an oral hearing under this rule, the panel may at the same time make any directions relating to the oral hearing.

....

(6) Any decision made under paragraph (1)(b) is provisional.

.....

(8) The panel's decision or advice must include the reasons for that decision or advice.

Procedure after a provisional decision on the papers

20.—*(1) Where a panel appointed under rule 5(1) has made a decision that a prisoner is unsuitable for release under rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing to determine the case.*

*(2) A prisoner who makes an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of receipt of the decision or advic**e** under rule 19(8).*

(3) If no application has been served by the prisoner under paragraph (2) after the expiry of the period specified by that paragraph, a provisional decision made under rule 19(1)(b)—

(a) remains provisional if it is eligible for reconsideration under rule 28, and becomes final if no application for reconsideration is received within the period specified by that rule, or

(b) becomes final if it is not eligible for reconsideration under rule 28.

. . . . . .

> *(5) If an application is served in accordance with paragraph (2), the decision about whether the case should be determined at an oral hearing must be taken by a member of the Board who—*
>
> *(a) is a duty member, and*
>
> *(b) was not part of the constituted panel appointed under rule 5(1) who made the provisional decision.*
>
> *(6) If the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, a provisional decision under rule 19(1)(b)—*
>
> *(a) remains provisional if it is eligible for reconsideration under rule 28 and becomes final if no application for reconsideration is received within the period specified by that rule, or*
>
> *(b) becomes final if it is not eligible for reconsideration under rule 28.*
>
> *……"*

26. The relevant principles in so far as a decision of the Defendant not to hold an oral hearing are well-established.

27. In *R (Osborn and others) v The Parole Board* [2013] UKSC 61; [2014] A.C. 1115 the Supreme Court considered the interplay between the principles of procedural fairness and when and whether an oral hearing should be directed for a prisoner. The judgment of Lord Reed clearly sets out the position in the following way [§2]:

> *"It may be helpful to summarise at the outset the conclusions which I have reached:*
>
> *(i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5.4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.*
>
> *(ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following.*
>
> *(a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any*

tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

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

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

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

(iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

(iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

(v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.

(vi) When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived

> *of his freedom, albeit conditional. When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.*
>
> *(vii) The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.*
>
> *(viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.*
>
> *(ix) The board's decision, for the purposes of this guidance, is not concerned to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.*
>
> *(x) Paper decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong: what he has to persuade the board is that an oral hearing is appropriate.*
>
> *(xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.*
>
> *(xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5.4 as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5.4 in relation to procedural fairness.*
>
> *(xiii) A breach of the requirements of procedural fairness under article 5.4 will not normally result in an award of damages under section 8 of the Human Rights Act 1998 unless the prisoner has suffered a consequent deprivation of liberty."*

28. From paragraph 80 of the judgment onwards Lord Reed sets out, to the extent possible, further guidance on the circumstances in which fairness will require an oral hearing. Most pertinent is the following [§§ 80 – 83, 85, 86, 88]:

"The circumstances in which fairness requires an oral hearing

What fairness requires of the board depends on the circumstances. As these can vary greatly from one case to another, it is impossible to lay down rules of universal application. The court can however give some general guidance.

Generally, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and, as was said in West [2005] 1 WLR 350, the importance of what is at stake. The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide. It is presumably because of the possibility of such assistance that the board must hold an oral hearing under rule 11(2)(a) in any case where an indeterminate sentence prisoner appears to the single member panel to be potentially suitable for release or for a transfer to open conditions. The assumption must be that an oral hearing has the potential to make a difference. But that potential may also exist in other cases.

The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional: a factor on which Lord Bingham placed emphasis in West

……..

In accordance with the guidance provided in West, an oral hearing is required when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted.

An oral hearing is also necessary when for other reasons the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by the board (including its members with expertise in psychology or

> *psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist.*
>
> *.....*
>
> *Whether a prisoner's right to a fair hearing requires the holding of an oral hearing does not depend on his establishing that his application for release or transfer stands any particular chance of success: that approach would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success, and thus involves circular reasoning."*

29. Two further authorities relied upon by the Claimant are *R (oao Somers) v The Parole Board of England and Wales* [2023] EWHC 2962 (Admin); [2024] A.C.D. 2 and *R (oao McKilligan) v The Parole Board of England and Wales* [2024] EWHC 336 (Admin); [2024] A.C.D. 33. They involve an application of the *Osborn* principles to the individual decisions of the Defendant in other cases. I have considered both of those authorities with care but have concluded that they are, no more and no less than, an application of the *Osborn* principles of procedural fairness to their facts. They make clear, as *Osborn* does, that the likely outcome or a focus on likely outcome of an oral hearing is not a permissible consideration for the Defendant in deciding whether to hold an oral hearing. However, these two authorities do not in my judgement establish any further or new principle beyond *Osborn*. It is also to be noted that they both, unlike the claim before me, involved non-determinate sentences imposed on prisoners.

Submissions

30. The Claimant's written and oral submissions can be summarised succinctly. Fairness here required an oral hearing. That is because there were matters that needed to be raised at such a hearing. It is submitted that there were factual disputes in relation to his recall to prison which remain relevant in respect of questions of risk and re-release and that it was wrong to discount the Claimant's position on that issue. It is also submitted that there were other relevant issues with factual disputes such as the level of risk and its manageability, the availability of the Offending Behaviour Work in custody, the absence of an up-to-date psychologist's report and that the dossier contained (unspecified) factual errors.

31. The Claimant maintains that in the absence of an oral hearing the Defendant could not properly or fairly make an independent assessment of the level of risk and the means by which it was managed. Further that a face to face encounter with the Defendant was necessary in order for him to put his case effectively and/or to test the views of those who have dealt with him. It was further submitted that the decision not to hold an oral hearing focused on the likely outcome of that hearing rather than on the question of (un)fairness. Lastly it is submitted that the decision of 9th May 2024 (and therefore not the challenged decision of 15th June 2024) contained a misdirection by stating that there had been *"no significant change"* as to the level of risk.

Discussion

32. This is not a rationality challenge to the decision of 15th June 2024, but solely a challenge against the Defendant on the basis of procedural unfairness. That requires me to ask myself whether, on the facts, a fair procedure to the Claimant was followed here or not.

33. The decision under review is that of 15th June 2024 but, as I have already indicated, it cannot be looked at in isolation from the decision making that went immediately before it and the representations that were made on behalf of the Claimant. Nor in my opinion can the procedure followed be looked at in a total vacuum from the fact that an oral hearing had taken place in 2022 and where important findings of fact had been made.

34. It is for the Claimant to establish, on a balance of probabilities, that procedural fairness required a different procedure (i.e. an oral hearing). It is not sufficient for the Claimant to establish that a different procedure would have been better or fairer for him. In reality he must establish that the procedure was unfair (*Regina v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 , *Smith v Scottish Ministers* [2021] CSOH 83).

35. The starting point is that in accordance with the relevant Parole Board Rule there was no automatic requirement for an oral hearing. Whilst there may, on the authorities, be a pre-disposition for an oral hearing in the case of a non-determinate sentence especially someone who has served their minimum term there is no such pre-disposition in a determinate case. The distinction between the two types of sentence has a relevance to the fairness of the procedure operated. Article 5(4) of the ECHR is not applicable in a determinate sentence case (see *R (oao Whiston) v Secretary of State for Justice* [2014] UKSC 39).

36. That is not to say that oral hearings are not required in many determinate sentence cases following recall – they plainly are. The question is whether one was required on these facts and at this time and in light of the material that there was in respect of the risk posed by the Claimant. As I observed in the course of oral argument whilst it is not permissible to refuse to hold an oral hearing on the ground of the inevitability of the outcome (even where that outcome may be predicated in part on an assessment of risk), the assessment of risk itself is a legitimate factor to take into account bearing in mind the statutory test for release (see paragraph 24 above). Had the murder been committed in this jurisdiction a mandatory life sentence would have been imposed on the Claimant. That is not a reason not to hold an oral hearing in this case but it is important not to disregard the inherent risk here and the need for the core risk factors to be addressed given the severity of the underlying offence. Any question of procedural fairness cannot be looked at without a detailed understanding of the facts, the material before the Defendant and the risks. The Claimant was released as a determinate prisoner automatically in 2020 long before the expiry of his sentence.

37. Having considered this matter with care and reviewing very carefully the reasons given by the Defendant I am not satisfied that procedural fairness required there to be an oral hearing in this case at this time. My reasons for that conclusion are as follows:

    a) It was not necessary for an oral hearing to be held in order to establish whether the Defendant had sufficient information about the Claimant. The Defendant

considered the very detailed representations that were made on his behalf and the voluminous dossier.

b) It is clear that the Defendant in making the challenged decision considered *Osborn*. That is not an answer in itself to a procedural fairness challenge but there is nothing in the decision itself which leads me to conclude that it was decided in a way that was inconsistent with *Osborn.*

c) The issue of the merits of the revocation of his licence (which featured heavily in the Claimant's written representations) had already been addressed at an oral hearing in 2022. Counsel for the Claimant accepted during the hearing before me that in those circumstances the Defendant was entitled to proceed on the basis of the earlier determination and it was not open to the Claimant to seek to reopen and reargue that issue and those facts now. An oral hearing was therefore not required to ventilate those issues and I do not accept the argument that somehow those facts could or should be reopened for the purposes of assessing risk.

d) There is nothing on the face of the 15th June decision to indicate that it was or may have been illegitimately outcome focussed. The suggestion that it was is, no more than, speculative.

e) The importance of there being an ongoing need for the core risk factors to be addressed before release was a manifestation of the Defendant's concern about risk. An oral hearing could not properly have been thought to be capable of advancing that issue at this stage beyond the points made in writing. Further the absence of an updated Psychologist's Report has to be considered in light of the limited and recent engagement by the Claimant. The reality is that it was premature to obtain a further Psychologist's Report.

f) The circumstances of this case are somewhat removed from those of *Osborn* himself (who was the only determinate prisoner considered by the Supreme Court in that case). In *Osborn* the decision under review was that there would be no oral hearing following his recall. That is very different from what happened to the Claimant, who had just such an oral hearing following his recall. I also note the matters referred to by Lord Reed at paragraph 98 of the judgment in *Osborn* which are further indications of the important differences and distinctions to the position of the Claimant.

g) No tenable grounds were advanced or were foreseeable as to why a face to face encounter was necessary to put the Claimant's case at an oral hearing. It was properly put in writing and in detail and I cannot see any proper basis to conclude that there was any need to ask any witnesses any questions at this stage. The Claimant had only made limited recent steps in relation to risk. Had he undertaken or been part way through the Kaizen Offender Behaviour Programme then it may have been different – but he was not. I have concluded that the Claimant participated in the process by way of full written submissions made on his behalf. Any additional oral participation by him personally or through solicitors would not have usefully contributed to the decision on the central issue at this stage. Complaints about the availability of Offender

Behaviour Work has to be looked at in the context of the Claimant's lack of engagement and did not mean that procedural fairness required an oral hearing.

h) I do not accept that the Defendant misdirected itself in the 9th May 2024 decision. Ignoring for a moment that that is not part of the impugned decision, the observation that *"there has been no significant change"* has to be considered in its context namely the fact that the Claimant has not completed any of the necessary intervention that would be relevant to his outstanding core risk factors. It was not intended to reflect any form of gloss on the test for release or articulation of the test. Moreover the word significant is well understood to mean more than minimal and it is difficult to see how this could be regarded as a misdirection. Even if I am wrong about that, it was not part of the impugned decision.

i) The unsubstantiated and unparticularised allegations of mistakes in the dossier do not assist the Claimant. I have considered the dossier with care and cannot see any mistakes were made that were material to the decision not to hold an oral hearing.

38. Standing back and considering the position overall I am not satisfied that the Claimant has established that the procedure undertaken by the Defendant in relation to the consideration of his release and the failure to hold an open hearing was unfair or inconsistent with the principles set out in *Osborn*. Accordingly the claim is dismissed. It is to be hoped that the Claimant will have made further progress in respect of addressing his core risk factors. If that occurs then the necessity for an oral hearing next year would become more apparent.