Neutral Citation Number: [2025] EWHC 190 (Admin)

Case No: AC-2024- LON-002140

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

Friday, 31st January 2025

Before:
FORDHAM J

- -

Between:

THE KING (on the application of DAVID CLARKE)	**Claimant**
- and -	
PAROLE BOARD FOR ENGLAND AND WALES	**Defendant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Interested Party**

- -
- -

Stuart Withers (instructed by Broudie Jackson Canter) for the **Claimant**
The **Defendant** and **Interested Party** did not appear and were not represented

- -

Hearing date: 16.1.25
Draft judgment: 20.1.25

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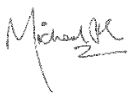
Approved Judgment



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FORDHAM J

This Judgment was handed down remotely at 10am on Friday 31st January 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

FORDHAM J:

Introduction

1. The single issue for me to decide was encapsulated by Mr Withers for the Claimant in these ten words:

> ***Did fairness require an oral hearing in the Claimant's case?***

The authoritative guidance is found in R (Osborn) v Parole Board [2013] UKSC 61 [2014] AC 1115. This is the relevant legal obligation (Osborn §2(ii)):

> ***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.***

The Board rightly says in its standard template document, attached in the present case as an Annex to its first-stage decision (13.2.24):

> ***Any request for an oral hearing will be considered by the Board, and where fairness requires it, an oral hearing will be granted.***

The Board is an independent judicial entity which has made its decision on what fairness requires. That is an objective, "hard-edged" question for the judicial review court to decide for itself (Osborn §65), on the materials which were available to the Board, and illuminated by the Board's reasons insofar as the judicial review court finds them persuasive. In this claim, the Board and the Secretary of State for Justice ("SSJ") have adopted neutral positions.

Context

2. The Claimant was sentenced on 23.2.05 aged 29 to life imprisonment for the murder of James Conroy, with a tariff of 20 years less time served, giving rise to a tariff expiry date of 23.6.24. On a first (pre-tariff) review in 2022, the Board conducted an oral hearing (on 26.10.22), having adjourned on 8.2.22 to allow the Claimant's representatives to file a report (17.3.22) of an Independent Psychiatrist ("IP" Eve Hepburn). The Claimant was at that time at HMP Coldingley. At the 2022 hearing the Board heard from the Claimant, his advocate (Robin Hill), Ms Hepburn, the Prison Psychologist ("PP" Paul Cairney) and the Prison Offender Manager ("POM" Rachel O'Donnell). Ms O'Donnell had produced a POM Report dated 27.9.22 and Mr Cairney a PP Report (16.12.21) including a psychology risk assessment. The fact of the 2022 oral hearing achieved "seeing" the prisoner to assess how he had "developed over the period since [his] conviction" (Osborn §87); and engages the observation that factors favouring oral hearings will not "necessarily apply on every occasion" on which the Board conducts a review (Osborn §112). In its pre-tariff review decision (24.11.22) the Board recorded that there were some positives, with the Claimant having progressed over the last 2 years, but decided against recommending transfer to open conditions. The decision recorded that PP Cairney considered that the best way forward was through a Personality Disorder Pathway ("PDP"), whereas IP Hepburn saw other ways forward. In notifying that outcome (4.1.23) the SSJ told the Claimant that "to allow sufficient time for you to complete further work required to reduce your risk and demonstrate your progress your review period is set at your on-tariff review which is June 2024".

3. The June 2024 target month for consideration by the Board was designed to coincide with the tariff expiry (23.6.24), after an on-tariff review targeted to start in October 2023. Mr Withers says that since an on-tariff review is designed as the first decision to govern post-tariff custody, Article 5(4) ECHR should apply, at least to the issue of deciding the issue of release or continued incarceration. On that basis he invokes the Osborn §112 observation about oral hearings "in most cases", which stands as the apparent source of Foster J's inferred presumption in R (Somers) v Parole Board [2023] EWHC 1160 (Admin) at §55 (after §25). Nothing turns on whether that is right.

4. The SSJ's formal Referral for the on-tariff review (9.23) asked the Board to consider the appropriateness of a release-direction or transfer-recommendation; to give disclosable "full reasons" for any decision; and to identify any continuing areas of risk that need to be addressed; but the Board was not being asked to comment on any specific treatment needs or offending behaviour work required.

5. The Claimant's representatives made a request for an oral hearing (2.1.24). A Panel member made a reasoned first-stage decision pursuant to rule 19 of the Parole Board Rules 2019/1038, deciding "on the papers" that the Claimant is neither suitable for release or transfer to open conditions, and declining to direct an oral hearing. The Claimant's representatives made a rule 20(1) application for an oral hearing (23.2.24) supported by typed representations from the Claimant himself (23.2.24) and five letters of support from prison staff regarding his behaviour (7.3.24). A different Panel member made a second-stage decision pursuant to rule 20(5) that the case should not be determined at an oral hearing, with the consequence that the reasoned first-stage decision went from being provisional to being final pursuant to rule 20(6).

6. The Claimant had been transferred to HMP Aylesbury on 12.5.23, after which he was referred to the PDP and then screened onto the PDP on 5.7.23. That is recorded in a Community Offender Manager Report ("COM" Heather Brearley) dated 20.11.23. A POM Report (Katy Tripcony) dated 10.11.23 says "whilst he screens in, they are unable to allocate him a worker at this time" and "I am hopeful that Mr Clarke will choose to engage when the times comes". A PP Note (Aliye Emirali) dated 10.8.23 appears not to have appreciated the fact of the screening-in to PDP (5.7.23), instead expressing optimism that screening-in would take place. The Emirali PP Note said "once engaging with this service, it is suggested that [the Claimant] would require a minimum of one year before" a further PP "risk assessment is completed". The Emirali PP Note references the Cairney PP Report (16.12.21) having considered PDP as the best way forward. It says "conversations with COM [Brearley] and POM [Tripcony] concur" and describes "a clear understanding of Mr Clarke's identified work outstanding that is aimed at reducing his serious risk of harm", recommending engagement with Aylesbury PDP Service. The Brearley COM Report (20.11.23) says transfer and release are not supported by COM Brearley given the "core risk reduction work outstanding for completion". The Tripcony POM Report (10.11.23) says the Claimant has "agreed to work with [PDP] when he is able to", but "has not been able to engage in any offending behaviour work or address any sentence plans objective".

7. It was in light of these materials that the adverse first-stage paper decision (13.2.24) recorded that there were core outstanding treatment needs, with "an identified [PDP]", and "no support for progression or release with core outstanding treatment needs apparent"; and the adverse second-stage paper decision (15.3.24) recorded that "there are

outstanding treatment needs, including engaging with [PDP]". This outstanding PDP work is the first strong theme in the two adverse decisions.

8. The second strong theme in the adverse decisions relates to the Claimant's "concerning behaviour". The Tripcony POM Report (10.11.23) is laden with references to the Claimant being under the influence, failing drugs tests, refusing to attend meetings, having negative entries, having an adverse Security Report with a single entry (17.10.23), having an ongoing adjudication, and refusing prison food. An updated Security Report (L. Rogers) dated 7.11.23, included in the dossier, has six entries relating to the Claimant's behaviour, each assessed as carrying a HIGH likelihood that the event occurred. The first-stage paper decision contains repeated references – in four different paragraphs – to the Claimant's concerning behaviour.

9. There is an apparent link between the two themes. The reference in the Tripcony POM Report to PDP being "unable to allocate [the Claimant] a worker at this time" is immediately followed in the same paragraph by a number of points: that PDP is "currently working to capacity"; that it is "a voluntary service that Mr Clarke has previously refused"; and that there are "several other concerns" which are "linked to his drugs use and his food refusal that could hinder his engagement". Further, POM Tripcony says in her "conclusion" that the Claimant has not been able to engage in any offending behaviour work or address any sentence plans objectives "due to [his] presentation, his own reluctance to walk, and his on-going battle with the prison around his food".

The Outcome-Utility Approach to Oral Hearings

10. If the governing principle, for when fairness requires an oral hearing, entailed the prisoner identifying a realistic prospect of their succeeding after the oral hearing with the "outcome" of a release-direction (s.28(5)(b) of the Crime (Sentences) Act 1997) or transfer-recommendation (s.239 of the Criminal Justice Act 2003), the Claimant could not succeed. The Board's adverse first-stage and second-stage reasons would stand as a persuasive basis for refusing the oral hearing. The adverse first-stage decision (13.2.24) refused the oral hearing, explaining that "release or progression seems unlikely at the present time". The adverse second-stage decision (15.3.24) refuses the application for an oral hearing, emphasising that given the uncompleted outstanding treatment targets, an oral hearing would be "premature", language indicative of a decision "clearly focused on the possible outcome of an oral hearing": see R (McKilligan) v Parole Board [2024] EWHC 336 (Admin) at §37.

11. This is a familiar ethos. The Outcome-Utility approach to oral hearings held sway until October 2013, when the Supreme Court decided Osborn. Prior to that, the Board had "criteria for granting an oral hearing", involving "a realistic chance of release or open conditions" (Osborn §40). In Osborn itself, Langstaff J in the High Court endorsed a focus on "realistic likelihood of immediate release or transfer to open conditions" (§42); Carnwath LJ in the Court of Appeal focused on the "practical possibility" of an oral hearing changing the position about the need "to remain in custody" (§42). Osborn went to the Supreme Court so that Outcome-Utility could be tested. Treasury Counsel argued for a prerequisite that "the oral hearing might affect the outcome"; that "there is no need to hold an oral hearing if the prisoner has no prospect of a progressive move"; that "whether fairness requires an oral" was in principle approached "by considering the utility of such a hearing"; and that "disputes about the prisoner's management in custody or in respect of other issues, the resolution of which could lay the ground for future parole

reviews, but which do not affect the Board's decision in the pending review, are irrelevant when deciding whether an oral hearing is required": see the argument at [2014] AC 1115 at 1128G, 1130F-1131A. All of which would have been curtains for the Claimant in these proceedings if it were the law.

Osborn-Elevation

12. But it is not. The Outcome-Utility approach is what the Supreme Court in Osborn rejected as unduly narrow, on 9 October 2013. It was exposed as wrong. The elevated thinking as to what fairness required involved a two-dimensional shift.

Practical-Scope

13. The first dimension was about the relevant practical scope and effect of what the Board is doing in a parole review. That is not limited to the "outcome" as to directed-release and recommended-transfer. There are two points. First, the Referral (Osborn §32) requests "full reasons" for any decision, and to include "any continuing areas of risk that need to be addressed". The Board has to give "full reasons" whether and why it remains necessary for the protection of the public that the prisoner be confined (release); and whether and why the prisoner has not made sufficient progress in addressing and reducing risk (transfer). Although the Referral says the Board is "not being asked to comment on" any specific treatment needs or offending behaviour work required, in practice the Board may comment and it may be "difficult for it to avoid doing so, if it is to give reasons" (§32). Second, the contents of the first-stage paper decision "may in practice have a significant impact on the prisoner's future management in prison or on future reviews" (§§2ii(d), 84, 96). So, the scope of what in practice is being "decided" extends beyond the "outcome". This Practical-Scope dimension is clearly seen in Osborn at §§84 and 96:

> ***84. [T]he issues which are considered by the Board are not in practice confined to the question whether the prisoner should or should not be released or transferred… [T]he statutory directions given to the board require it to consider numerous matters. The Board's findings in relation to these matters may in practice affect the prisoner's future progress in prison, for example in relation to the courses which he is required to undertake and his future reviews. The Board may also be asked specifically to advise the Secretary of State on matters affecting the prisoner. For example, when post-tariff indeterminate sentence prisoners are referred to the board, it is generally asked to advise on the continuing areas of risk that need to be addressed. In such cases, the fair disposal of issues of that kind may require an oral hearing even if the question whether the prisoner should be released or transferred does not…***
>
> ***96. [S]ince the effect of the refusal of an oral hearing is that the provisional decision becomes final, it follows that an oral hearing should be granted in any case where it would be unfair to the prisoner for that to happen. For example, if the representations made in support of the prisoner's request for an oral hearing raise issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner's future management in prison or on his future reviews, such as reports of poor behaviour or recommendations that particular courses should be undertaken to reduce risk, it will usually follow that an oral hearing should be allowed for that reason alone, even if there is no doubt that the prisoner should remain in custody or in closed conditions.***

Participatory-Justice

14. The second dimension concerned the true ethos of fairness, which extends beyond improved decision-making and engages participatory justice, human dignity and the rule

of law. There was "no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions" (Osborn §67). But that did not mean the underlying rationale of procedural fairness was Outcome-Utility (§§66-67). The broader value and rationale was about procedural justice for the person affected, whether or not it would improve the quality of the decision-making. The purpose of a fair hearing was not to improve the chances of the decision-maker reaching the right decision (or God would not have needed in fairness to hear Adam's defence). There are the important values of procedural justice (§68), including respect and dignity on the part of persons whose rights are significantly affected by decisions to be able to participate in the procedure by which the decision is made provided they have something to say which is relevant to "the decision" (which must include Practical-Scope), described as respecting dignity by allowing people to explain themselves (§68) alongside the value of the rule of law that when decision makers listen to persons who have something relevant to say that promotes congruence in the actions of decision-makers in the law governing their actions (§71). This Participatory-Justice dimension is clearly seen in Osborn at §§67-68 and 71:

> ***67. There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested… [H]owever … the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.***
>
> ***68. The first [has been] described … as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written (How Law Protects Dignity [2012] CLJ 200, 210): "Applying a norm to a human individual … involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves"…***
>
> ***71. The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions …***

General Points

15. Alongside this two-dimensional elevation from the narrower focus on Outcome-Utility, came Lord Reed's guidance in Osborn. There were general points: about the benefit of the doubt in favour of an oral hearing (§2xi); about the importance of avoiding a predisposition to favour the official account of events or official assessment of risk over the case advanced by the prisoner (§§2vii, 90); about the focus on the specific facts and implications of the individual case (§§2i, 81); that factors favouring oral hearings will not "necessarily apply on every occasion" on which the Board conducts a review (§112); and that where the Board is deciding post-tariff incarceration an oral hearing will "in most cases be necessary" (§112).

Warnings

16. There were warnings. One, about the circularity of requiring a prisoner to establish prospects of success to deny the very oral hearing by which they may do so (§88). Another, about the need to cease a practice (§89):

> ***In so far as the Board's practice is to require that a realistic prospect of success be demonstrated, as a precondition of the grant of an oral hearing, that practice should therefore cease.***

Illustrative Aspects

17. Then there was a whole non-exhaustive list of aspects of a Parole Board review which may support an oral hearing: to make a proper and fair independent assessment of risk and of the means by which it should be managed and addressed (§2iib) which may benefit from the closer examination which an oral hearing can provide (§§2iia, 86); where facts which appear to be important are in dispute (§§2iia, 85); where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility (§§2iia, 85); where the characteristics of the prisoner can best be judged by seeing or questioning them in person (§§2iib, 86); where a judgment needs to be made of the extent to which a prisoner has developed over a lengthy period since conviction (§87); where a psychological assessment produced by the SSJ is disputed on tenable grounds (§§2iib, 86); where the Board may be materially assisted by hearing evidence from a psychologist or psychiatrist (§§2iib, 86); where it is maintained on tenable grounds that a face-to-face encounter with the board is necessary to enable the prisoner or the prisoner's representatives to put their case effectively (§§2iic, 82); where it is maintained on tenable grounds that the questioning of those who have dealt with the prisoner is necessary in order to test their views (§§2iic, 82).

Legal Irrelevancy?

18. Mr Withers drew my attention to Somers §46 which says: "the likelihood of a release is not relevant when assessing whether or not to hold an oral hearing". In R (Garmson) v Parole Board [2024] EWHC 1106 (Admin) (at §39i) that passage is recorded as having been part of Foster J's decision. Mr Withers accepts that Somers §46 was in fact recording part of the prisoner's argument, pointing out that Somers §47 recorded a general acceptance of the argument. I do not read Osborn as saying that the likelihood of making a difference to outcome is a legal irrelevancy, which the Board could never reasonably decide to take into account. Nor do I read Somers or Garmson as turning on such an idea. The key takeaway from Osborn is that the prospect as to outcome (directed-release or recommended-transfer) is not the test for whether fairness requires an oral hearing. I do not think that makes the prospect of contributing to better decision-making as to outcome legally irrelevant. Especially since the prospect of an oral hearing leading to better decision-making is one of the undoubted virtues of procedural fairness (Osborn §67). I think it must, for example, be open to a prisoner to say that an oral hearing stands to make a difference to outcome; and it must be open to the Board to decide whether that is right, or not right. What the Board cannot do is ask whether it stands to make a difference to outcome, decide that it does not, and refuse an oral hearing for that reason without further enquiry. Lord Reed did not say the Board had to cease having any regard to prospect of success. Instead, he said he had to cease requiring a realistic prospect of success to be demonstrated as a precondition of the grant of an oral hearing (§89).

The Claimant's Non-Points

19. Mr Withers recognised two main factors which are capable of supporting the conclusion that fairness required an oral hearing in this case. He rightly recognised that other suggested features could not materially assist in fairness terms. One feature was completed courses. The solicitors' representations (23.2.24) recorded that the Claimant disputed a reference in the first-stage decision to lack of progress in the last 2 years and wanted to refer to the risk reduction work he had completed. The Claimant's typed representations (23.2.24) said the dossier told the Panel that he had made no progress in "the two years since" the pre-tariff review hearing, whereas he had completed 8 courses in those 2 years. There is nothing in this. The first-stage decision does not refer to lack of progress in the last 2 years. The Board was fully aware of the work undertaken and evidenced. None of it postdates the previous Board decision of November 2022. Another feature was diagnosis. The suggestion was made that the Claimant wanted at an oral hearing to contest his diagnosis of a personality disorder. The diagnosis is professionally documented back to 2017. It was endorsed by IP Hepburn in March 2022. A third feature is the confusion about screening-in. There was reference made to an awaited screening in to the pathways service, which is referred to in the Emirali PP Note and recorded in the first-stage decision which became final when the oral hearing application was subsequently refused. The Brearley COM Report (20.11.23) documents the screening-in (5.7.23). None of these points can – in my judgment – go anywhere, so far as whether fairness required an oral hearing is concerned. Mr Withers realistically recognised that.

Behaviour

20. I agree with Mr Withers that this factor means fairness required an oral hearing. This is one of two strong themes (§8 above) in the first-stage decision which became final by virtue of the second-stage refusal of the application for an oral hearing. The representations made in support of the prisoner's application requesting an oral hearing (23.2.24) raised issues which placed in question this content of the provisional decision. There has been no denial in the second-stage decision, or from the SSJ in these proceedings, that this is content which may in practice have a significant impact on the Claimant's future management in prison and/or his future reviews, as reports of poor behaviour on which the Board was relying in the on-tariff review decision. This fits squarely with Osborn §96 (§13 above).

> ***if the representations made in support of the prisoner's request for an oral hearing raise issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner's future management in prison or on his future reviews, such as reports of poor behaviour … it will usually follow that an oral hearing should be allowed for that reason alone, even if there is no doubt that the prisoner should remain in custody or in closed conditions.***

21. I add this. The Rogers Security Report (7.11.23) set out six events assessed as having a HIGH likelihood of having occurred. The first-stage decision – which became final by the second-stage refusal of an oral hearing – made four separate references to the Claimant's concerning behaviour including positive drugs tests refusing to work and not attending meetings; drugs use; ongoing concerning behaviour. These were being relied on as being relevant in the assessment of risk. The reasons for the second stage decision do not provide me with a persuasive answer to this. The SSJ has not said there is one. Facts relating to the behaviour were disputed. The fact of that dispute was recorded in the second-stage decision. There were repeated adverse references to "concerning

behaviour" in the paper decision which was to become final, based on the Tripcony POM Report (21.11.23) and linked to the Rogers Security Report (7.11.23). The only point made was that there were outstanding treatment needs and until completion of those targets it was "premature" to hold an oral hearing. That was another way of saying there was no doubt that the Claimant should remain in custody and in closed conditions. That is not legally irrelevant. But it is not an answer to why – in light of Practical-Scope and Participatory-Justice – the Claimant should not be allowed to make his case as to his behaviour at an oral hearing. Getting the picture straight as to behaviour – one way or the other – is not "premature". The Claimant has not made bare factual denials in a vacuum. He was able to put forward no fewer than five positive statements from members of prison staff, supporting him on the question of his non-attendances at work and professional meetings being attributable to health. There is one failure of a mandatory drug test at Aylesbury on 8 September 2023 which the Claimant expressly accepts. An incident on 6 November 2023 where paper found in his cell was believed to have the drug Spice on it was heard on 8 November 2023 and testing was directed. The Tripcony POM Report (10.11.23) does not in all respects match the Rogers Security Report (7.11.23) in the dossier, which added 5 further incidents to a single-entry Security Report (17.10.23) and they are striking: threats to staff on 29.10.23; acts unacceptable aggressive behaviour on 17.7.23; shouting and being argumentative on 18.7.23 (both 7.23 incidents said to have been recorded on body worn camera). All of which is the context in which considerations of Procedural-Justice arise.

Alternative Progression in the Context of Delayed Accessibility

22. Mr Withers has persuaded me that this second factor also means fairness required an oral hearing. It relates to the theme of outstanding PDP work (§7 above), and specifically is concerned with delay in accessing the PDP. The formidable difficulty which the Claimant faced is this. The Emirali PP Note, linked to the Cairney PP report (16.12.21), identified PDP as the best way forward. It referenced concurrence by COM Brearley and POM Tripcony. This was consistent with the Brearley COM Report and Tripcony POM Report. However, it is important to elevate above Outcome-Utility. There are three points. First, there had been no progress as at February 2024, notwithstanding the screening-in recorded as 5.7.23 (missed in the Emirali PP Note). Nobody was giving a practical timeframe for commencing on the PDP. This was supposed to be work to inform the next parole review. Twelve months would be needed from the start of the PDP. Was the consensus that the Claimant should wait, indefinitely? Or was there to be any recognition of a viable alternative? Secondly, there was the prospect that this was or may be linked to the supposed concerning behaviour (§9 above), which would be a reason for getting that clear and recorded, as well as being a reinforcing reason for looking into the whole question of conduct. Thirdly, the Emirali PP Note, the Brearley COM Report and the Tripcony POM Report were not in fact the complete picture. The suggestion of alternative routes to progress was not an assertion in a vacuum. There was the Hepburn IP report (17.3.22) which had contemplated alternative ways forward to the PDP, as the Board's decision (24.11.22) expressly recorded. The Board's pre-tariff review decision had not contained an expressed preference for PDP. And yet the provisional first-stage decision now did – it recorded PDP as the way forward – without an oral hearing. This fits squarely with Osborn §96:

> ***if the representations made in support of the prisoner's request for an oral hearing raise issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner's future management in prison or on his future reviews, such***

> ***as … recommendations that particular courses should be undertaken to reduce risk, it will usually follow that an oral hearing should be allowed for that reason alone, even if there is no doubt that the prisoner should remain in custody or in closed conditions.***

23. I add this. The Claimant's solicitors in their representations referred to the lack of progress, the contested behavioural points, and said this about the Hepburn IP report:

> ***The dossier is consistent in which it provides a Prison Psychologist Report and Independent Psychologist Report completed at the Pre-Tariff Review which recommended a PD Pathway. The Independent Psychologist referred to Mr Clarke needing to introspect and self-evaluate and that being proactive could result in progress without the reliance on formal pathway programmes.***

This was a picture which the Board could consider, in its consideration, assessment and full reasons. It could examine the ongoing delay and reasons for it. It could grapple with whether PDP was the only way forward, whatever the delay. This would not get a directed-release or a recommended-transfer, but that is Outcome-Utility. All of which is the context in which considerations of Procedural-Justice arise.

Conclusion

24. This claim succeeds. This case is a textbook example of how, if the test for an oral hearing were the Outcome-Utility approach favoured by the High Court and Court of Appeal in Osborn, this claim would have to fail. Applying Osborn-Elevation, I have reached the conclusion that there were matters relevant to the Practical-Scope of a reasoned decision in a broader way, having a practical ongoing impact, where Participatory-Justice called for a further oral hearing, notwithstanding that an oral hearing had been provided at the pre-tariff review two years earlier. The claim succeeds, because I have taken a different view as a judicial authority on a hard-edged objective question than the one at which the board as a judicial authority arrived. As to the Court's Order, I said in the draft judgment, circulated to the parties, that I would grant the claim for judicial review "and give appropriate relief to secure that an oral hearing can now be convened". The Claimant's representatives have sought an order that "the Defendant shall hold an oral hearing in the Claimant's case as soon as is reasonably practicable". The Court has been told that the Board and the SSJ have "no representations" about the form of Order sought, including as to the phrase "as soon as is reasonably practicable". I am satisfied that "reasonably" and "practicable" sufficiently communicate that there will be appropriate latitude for the Board in now dealing with this case. I will make an Order in the terms sought. Finally, I record that the Claimant's representatives did not in the event pursue a previously foreshadowed possible application for costs against the Board.