

R. (on the application of AA) v Parole Board for England and Wales

 No Substantial Judicial Treatment

Court
King's Bench Division (Administrative Court)

2025 WL 01199351

Neutral Citation Number: [2025] EWHC 997 (Admin)

Case No: AC-2024-BHM-000213

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

Birmingham Civil Justice Centre

Bull Street, Birmingham B4 6DS

Date: 23 April 2025

Before :

HHJ RICHARD WILLIAMS

(sitting as a Judge of the High Court)

Between:

THE KING on the application of AA	Claimant	
- and -	Defendant	
PAROLE BOARD FOR ENGLAND AND WALES		
- and -		

SECRETARY OF STATE FOR JUSTICE	
	Interested Party

Stuart Withers (instructed by Bhatia Best Solicitors) for the **Claimant**

The **Defendant** and **Interested Party** were not in attendance and were not represented

Hearing date: 11 March 2025

(draft judgment sent to the Claimant's legal representatives by email dated 16 April 2025)

JUDGMENT

This judgment was delivered in public but reporting restrictions are in force. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the Claimants' victims be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

HHJ Richard Williams:

Introduction

1. The Claimant is a determinate sentenced prisoner. He is convicted of sexual offences against his own family members. His victims enjoy lifetime anonymity pursuant to the Sexual Offences (Amendment) Act 1992.
2. On 9 April 2015, the Claimant received an 18-year sentence.
3. On 4 August 2023, the Claimant was conditionally released on licence.
4. On 11 January 2024, the Claimant's mobile phone was examined by the police. It was alleged that there was evidence of the Claimant having accessed pornography of a similar nature to his index offence.
5. On 30 January 2024, the Claimant's mobile phone was re-examined by the police. It was alleged that the Claimant's mobile phone browser history had been wiped.
6. On 7 February 2024, the Claimant attended a polygraph test. It was alleged that the Claimant told the examiner that he had watched a significant amount of pornography of a similar nature to his index offence.
7. On 9 February 2024, the Interested Party revoked the Claimant's licence and returned him to custody following the allegations that the Claimant was sexually pre-occupied, had looked at pornography, and had deleted his mobile phone browsing history in contravention of his licence conditions.
8. As the Claimant was not automatically released 28 days after his recall, the Interested Party referred the case to the Defendant as required by s.255C(4) of the [Criminal Justice Act 2003](#) ("**the 2003 Act**") so that the Defendant could consider whether it was necessary for the protection of the public that the Claimant should remain in prison pursuant to s.255C(4A) of the 2003 Act.
9. On 29 April 2024, pursuant to Rule 19 of the [Parole Board Rules 2019](#) (as amended) ("**the 2019 Rules**"), the Defendant provisionally decided on the papers not to direct the Claimant's release ("**the Provisional Decision**").
10. On 2 May 2024, pursuant to Rule 20 of the 2019 Rules, the Claimant's solicitors applied for an oral hearing to challenge the allegations made against him.

11. On 23 May 2024, the Defendant refused the application for an oral hearing as the Claimant's mobile phone was awaiting a full forensic analysis by the police, and so it was premature to direct an oral hearing.

12. As a result of the Decision not to direct an oral hearing, the Provisional Decision not to release the Claimant became a final decision pursuant to Rule 20(6) of the 2019 Rules.

13. On 22 August 2024, the Claimant issued this claim for judicial review seeking to challenge the Defendant's decision not to grant an oral hearing ("**the Decision**").

14. On 11 August 2024, HHJ Worster granted the Claimant permission to bring the claim. The sole issue in this case concerns whether fairness required the Defendant to grant the Claimant an oral hearing.

Further background

15. The Recall Report dated 8 February 2024 recorded the circumstances and behaviours leading to the Claimant's recall as follows:

"[The Claimant] has disclosed that he has engaged in behaviours that increase the likelihood of offending and imminence of serious harm towards members of the public, including female adults and children.

On 11.01.2024, [his] phone was examined by the Police and there was evidence of him accessing You Tube. The content of this was manga/anime style with titles of ' Girl forced to have sex with a stranger', ' sex with your step-daughter' and ' I just want a peek'.

On 30.01.2024, again the phoned was examined. On this occasion the phone had been totally wiped. There was a privacy wall installed, incognito was on the phone and several other wiping applications. West Midlands Police seized the phone for further examination and the forensic team agreed that the phone should be sent for a full download.

The Police have confirmed that within the privacy wall there is evidence of recently used tabs and internet history that evidences the use of multiple dating websites. The sites have been used on multiple occasions.

On 07.02.2024, [he] attended and engaged in a polygraph test whereby following a negative response to alcohol which is assessed as an acute risk factor and relationships, he disclosed to the following to the examiner,

- he had watched over 100 videos of sexual scene between Step Father and Step Daughter

Since moving on from the Approved Premises he has accessed 'pornography between step father and step daughter', as yet to be identified as abusive images of children.

He has watched scenes that depicts teenagers having sex, another depicts a female child returning home from boarding school to meet her step dad and proceeds to convince him to start a sexual relationship with her. He has watched Japanese cartoon pornography depicting lesbian school girls. He disclosed that all the material arouses him and watches it for around 30 minutes

per day. He states he does not watch 'full' pornography as he believes this will ultimately lead him to viewing indecent images. He commented 'it will be a miracle if I make it through the licence'.

He leaves approximately 15% of his sexual thoughts out of his discussion with his probation officer as they are about children.

He is masturbating to distract himself from sexual thoughts when they become too 'bad'. The thoughts are of 'wanting to find a child to have sex with'.

He has also fantasised sexually about professional women, naming specific professionals.

All of these thoughts and behaviours appear to have escalated since the control measures from residence at the Approved Premises have been removed. These evidence a high level of sexual pre-occupation and distorted thinking that are offence paralleling. His thinking has shifted from intrusive thoughts to influencing his behaviour evidenced by him seeking contact with persons via dating websites. He has failed to share any of this information with his probation officer indicating a level of disguised compliance.

.....

There is a clear escalation in the risk of serious harm evidenced within this report, coupled with the information received from ... Police on 8 February 2024 that confirms that [the Claimant] has indeed been using multiple dating websites. [The Claimant] has gone to such measures to deceive his Probation Practitioner and Police Offender Manager that he has downloaded multiple 'Apps' on his mobile device to delete the content of his searches. As such, a full and forensic search of his phone is currently underway."

16. The Post Recall Risk Management Report dated 28 February 2024 recorded that the Claimant denied the allegations leading to his recall:

"On Thursday 22nd February 2024, the reasons for recall were reiterated to [the Claimant] during interview. [He] described feeling let down and considers his recall to custody as unfair. He went on to say he didn't understand what he was doing when he cleared all of the history on his mobile telephone. He stated, he saw two options on the mobile telephone 'delete' and 'clear all', he selected 'clear all' without understanding that this would remove all of the data. [He] stated he wasn't confident in using a smart telephone, due to being in custody for a long period of time and that his concept of a smart phone was limited. He denies any wrongdoing or ill intent and disagrees with the recall."

17. The reasoning, findings, recommendations and conclusions of the Provisional Decision included:

"He was released on 4 August 2023 and his licence was revoked on 9 February 2024. He disclosed offence-related thinking and there was evidence of significant and increasing sexual preoccupation. His phone was inspected and found to have software on it that deleted his usage history. It has been taken for a full examination. He maintains that it was inadvertent but the information provided suggests that a privacy wall was installed, as were several other wiping applications and the browser was in incognito mode.

The panel found the recall to have been appropriate based on his escalating risk of serious harm as a result of sexual preoccupation and searching for online content, which indicates that his risk factors were active. He has made admissions of actively thinking about finding a child to engage in sexual activity with, and fantasising about sex with professional women.

.....

The panel was concerned about the evidence of sexual preoccupation and indulgence in sexual interests while he was in the community. External controls and the work he has previously completed were not sufficient to prevent an escalation in his risk factors as a result of sexual preoccupation.

.....

Although he has completed a high intensity intervention in custody, his search history while on licence indicates that risk factors in relation to sexual preoccupation and sexual interests remain active.

There is an ongoing investigation while his electronic devices are being examined and while that is taking place, a release decision or referral to an oral hearing cannot be justified.

The panel recommended that he be assessed for work to address his sexual interests while he is in custody and the public is protected. It encouraged those managing him in prison to have him assessed for the Healthy Sex Programme.

Until the investigation has concluded and there is evidence of work having been completed to address his sexual interests, which might improve his compliance with licence conditions, the panel considered that his risks could not be safely managed in the community.

The panel was therefore satisfied that for the protection of the public it remains necessary for him to continue to be confined. His release has not been directed.”

18. By letter dated 2 May 2024, the Claimant’s solicitors requested an oral hearing for the following reasons:

“It is our submission that this case necessitates an oral hearing in order for a full and proper risk assessment to be undertaken. Significant weight has been placed by the MCA member in coming to a negative decision regarding the alleged sexual preoccupation and behaviour posed in the evidence by [the Claimant] whilst on licence. [He] denies much of the information within the Part A report and up until our video link on 2nd May had not been made privy to the reasons for his recall.

[He] was very clear in his instructions to us that he denies the following:

[1.] That he was accessing YouTube to view content of Manga/Anime style with titles of "Girl forced to have sex with stranger", "Sex with your stepdaughter", and "I just want a peek".

[2.] That there was any privacy wall installed on his mobile device and denies any knowledge that the phone was in 'incognito mode'. He denies that he has ever downloaded any applications relating to deleting or wiping history on his mobile phone. In relation to this matter, whilst West Midlands Police may be interrogating the phone, there is no evidence of an outstanding investigation with the Police and certainly when [he] was arrested on his recall, he was neither arrested or interviewed for any offence.

[3.] That he was accessing dating websites and contacting females on those websites. [He] states that he did not have any account with the dating website and therefore did not commence any relationships, nor was he seeking out relationships on dating websites.

[4.] That he had watched over one hundred videos of sexual scenes between stepfather and stepdaughter.

[5.] That he ever had any abusive images of children on his phone.

[6.] He denies watching any of the material listed on page 31/32 regarding the type of pornography that was allegedly being viewed.

[7.] He denies that he was watching material for thirty minutes a day and did not masturbate frequently at all (he accepts masturbating once or twice in the community).

[8.] That he ever said, "it would a miracle if he makes it through his licence".

[9.] He denies ever having any thoughts of "wanting to find a child to have sex with".

[10.] That he was in a developing relationship or that he was misusing alcohol.

[He] therefore denies his recall in its entirety and certainly denies that there was any evidence of sexual preoccupation or distorted thinking.....

.....

[He] also denies that he was demonstrating a disguised level of compliance with the Probation Service and states that during all of his supervision sessions he was open with the Probation Service and openly discussed anything that was asked during those meetings.

Whilst it is referenced that West Midlands Police are interrogating [his] device, there is not currently any evidence that material on that phone was illegal or inappropriate. Bearing in mind [he] has now been back in custody for two months, one would have expected that further investigative work by the Police, should it be necessary, would have been undertaken by now. It remains the case that [he] has not been interviewed in relation to any allegation, whether that be breaching a Sexual Harm Prevention Order or any new offences. It must also be held that the basis of an outstanding allegation would **not** prohibit a panel from questioning [him] in relation to these matters, nor should it preclude the case

being directed to an oral hearing (*Pearce v The Parole Board*).

.....

Ultimately, the relevant caselaw encapsulating whether or not an oral hearing would be necessary is *Osborn and Others -v- Parole Board* [2013]. The matter for the Court is purely a question of fairness to the prisoner and in our submission, concluding this case on the papers given the disputed facts raised by [the Claimant] are paramount and that in the interests of fairness to him, an oral hearing should be granted. The issues that are disputed by [him] are central to the risk assessment and the risk of harm which is presented, and are direct issues of fact which should be explored in contested evidence at an oral hearing. This is in order to determine the credibility of the information raised by the Probation Service, but also having regard to [his] right to participate and effectively put his case forward to the Parole Board.

.....

There is a significance to the fact that the Panel member has recommended a further programme to be completed in custody. This is something which in practice would have a significant impact on the future management of [the Claimant], particularly whilst in custody and on future reviews. Bearing in mind this recommendation by the Parole Board member was not supported evidentially within the written evidence, and if went unchallenged on this review, would remain attached to [his] Sentence Plan, most likely, for the foreseeable future without that issue ever having been tested.....

The MCA member also stated that a referral to an oral hearing could not be justified whilst devices are being examined. This is simply unfair and an irrational conclusion to come to. Cases regularly get referred to an oral hearing when individuals are either under investigation, awaiting a Court date or indeed awaiting a trial date. What we have in this case is simply a matter of Police investigating a device without any further evidence that criminal wrongdoing has been undertaken and [the Claimant] hasn't even been interviewed by the Police and so it is a very loose term to say that there is a pending investigation when simply we are awaiting the outcome of a device search. This is information in any event which can be directed by the Parole Board to be updated in the interim period between now and an oral hearing date. In any event it is not the only element of the recall that is in dispute by [the Claimant]. *Pearce* makes references to cases such as these where there may be outstanding investigations but that in itself does not prevent the Parole Board from asking questions about that investigation, nor does it prevent them from making necessary enquiries for the purpose of their risk assessment. An oral hearing should not therefore be refused on that basis.

19. The stated reasons for the Decision were:

“The Duty Member carefully considered the request. The last update from the probation services indicates that ‘*West Midlands Police have confiscated [the Claimant’s] mobile device and have sent it off for a full forensic analysis. The Probation Service are awaiting the outcome.*’ This analysis is crucial to further explore the extent to which [the Claimant] was in breach of licence conditions and/or his SHPO. It is necessary to await the outcome of the analysis before the matter is explored at an oral hearing. There are no timescales for this analysis to be undertaken and the Duty Member notes from experience that this may take a lengthy period. It is therefore not appropriate to direct an oral hearing whilst the outcome is awaited. It is premature to direct an oral hearing to explore the recall, direct a PRA [Psychological Risk Assessment] or take further evidence to inform the risk assessment.

In line with Parole Board guidance, it is appropriate to conclude a case on the papers in these circumstances, irrespective of [the Claimant’s] acceptance of the recall allegations. The Secretary of State is able to refer the case back to the Parole Board for a further review once the outcome of the police investigation is known.

The Duty Member concludes that the legal representations do not materially affect the position, taking the provisional MCA decision into account. For the reasons above, the Duty Member concludes that an oral hearing is not required and it therefore declines the request.

The paper decision is therefore final, and the current review is now concluded in accordance with the Parole Board Rules.”

20. On 24 December 2024, the Interested Party advised the Court that the Police investigation into the Claimant’s mobile phone had been “dropped”.

Relevant rules and guidance

21. The Defendant’s ‘Guidance on Allegations’, which was issued post the decision in *R(Pearce) v Parole Board [2023] AC 807*, provided:

“Key Principles

.....

[2.3] Assessments of risk must be evidence-based. Parole decisions are based on making an assessment of risk of what might happen in the future; if someone might have acted in a certain way in the past then there may be a risk that they might to so again in the future. This lies at the heart of why the Parole Board can take allegations into account.

[2.4] A panel’s consideration of allegations is subject to the overriding requirement that the panel acts fairly.....

[2.5] The prisoner must have a fair opportunity to contest the allegation This may be achieved through oral evidence, written submissions, or in interview with a Community Offender Manager (COM), depending on what is fair in the case.

.....

[2.13] The standard of proof that must be met before a panel finds a fact proved is to the civil standard, namely the balance of probabilities. For a fact to be proved, a panel must be satisfied on the information available that it is more likely than not that the fact occurred. This is a lower standard of proof than that applied in the criminal courts which requires proof beyond reasonable doubt before something is proved as a fact.

.....

[2.15] Panels should record in their reasons what, if any, findings of fact have been made.

.....

Determining whether an allegation is potentially relevant

[4.1] Panels should first decide whether an allegation is relevant to the issues it must determine. An allegation is relevant when, if found to be true, it could affect the panel's risk assessment.

[4.2] If an allegation is relevant to a panel's consideration of risk, then the panel must always investigate the allegation(s) and make a finding of fact where they are able to do so..., unless they choose to disregard a potentially relevant allegation

.....

Disregarding potentially relevant allegations

...

[5.3] For example, a prisoner who has been convicted of recently assaulting several other prisoners additionally faces an allegation that they assaulted yet another prisoner. If the recent convictions lead the panel to the conclusion that the statutory test for release is not met, there would be little purpose in the panel inquiring into the allegation of another assault since it will not make a material difference to the overall outcome of the review.

....

Making a finding of fact regarding an allegation

Overview

[6.1] Panels must always investigate a potentially relevant allegation(s) and make a finding of fact(s) where they are able to do so, unless they choose to disregard the allegation (see section 5).

[6.3] A panel will only be in a position to make a finding of fact when:

- It has a reasonably sufficient body of information on which it can properly make a finding of fact on the balance of probabilities; and

- The prisoner has had the opportunity to test and/or make submissions about the information.

.....

On-going police investigations or court proceedings

[8.2] Allegations in the form of police/Crown Prosecution Service ('CPS') charges when the investigation/prosecution is still on-going remain allegations.

[8.3] Although panels should exercise caution when the allegation in question is subject to an on-going police investigation or court proceedings, panels can make a finding of fact (where the key principles and criteria in this guidance are satisfied) on the allegation in question. This is particularly important because the Parole Board has a duty under Article 5(4) of the European Convention on Human Rights to provide a speedy review.

.....”

22. The 2019 Rules provided:

“Appointment of panels

[5] (1) ...

.....

(4) For any application made for reconsideration of a provisional decision under rule 28, the Board chair must appoint one or more members of the Board to constitute an assessment panel to consider the application.

.....

Case management and directions

[6.]—(1) A panel chair or duty member may be appointed in accordance with rule 4 to carry out case management functions and may at any time make, vary or revoke a direction.

(2) The panel chair or duty member appointed under paragraph (1) may make any direction necessary in the interests of justice, to effectively manage the case or for such other purpose as the panel chair or duty member considers appropriate.

(3) Such directions may in particular relate to— (a) the timetable for the proceedings; (b) the service of information or a report; (c) the submission of evidence; (d) the attendance of a witness or observer; (e) holding a case management conference.

(4) A direction given under this rule may not relate to withholding information or reports; such directions are governed by rule 17.

(5) A party or third party who is subject to a direction may apply in writing for a direction to be given, varied or revoked.

(6) An application under paragraph (5) must— (a) specify any direction or variation sought and the reasons for the direction or variation, and (b) be served on the other party, and any third party (if applicable).

(7) Where a third party makes an application under paragraph (5), the Board must serve the application on the parties under paragraph (6)(b).

(8) Where a party, or third party, has applied for a direction to be given, varied or revoked under paragraph (5), either party or the third party (if applicable) may— (a) make written representations about the application; (b) where the panel chair or duty member thinks it necessary, make oral submissions at a case management conference held under rule 7.

(9) The power to give, vary or revoke directions may be exercised in the absence of the parties.

(10) The Board must serve on the parties, and third party (if applicable), any directions given, varied or revoked as soon as practicable.

(11) The panel chair or duty member may adjourn or defer the proceedings to obtain further information or for such other purpose as they consider appropriate.

(12) Where the panel chair who is conducting an oral hearing adjourns or defers proceedings under paragraph (11) without a further hearing date being fixed, they must give the parties at least 3 weeks' notice of the date, time and place of the resumed hearing (unless the parties agree to shorter notice).

(13) Any decision to adjourn or defer an oral hearing must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the date of that decision.

(14) Where a prisoner's case has previously been referred to the Board, in making any decision under this rule to adjourn or defer proceedings, the panel chair or duty member must take into account the date of the decision of that prisoner's previous review.

.....”

23. The Decision was taken by a single Parole Board member pursuant to r.5(4) of the 2019 Rules under the procedure known as a Member Case Assessment (“MCA”).

24. The Defendant's guidance on ‘Adjournments & Deferrals’ provided:

“[3.8] There are three stages at which an adjournment or deferral may be necessary:

- At MCA panel stage: pre-listing, after the parole review has begun but before a decision has been made to conclude on the papers or direct to an oral hearing. It may not be possible on the basis of available evidence to decide immediately one of these outcomes. In such cases, MCA members can adjourn the case to themselves or if this not possible, defer the case to a fresh panel. Adjourned cases will be retained by the MCA member and a date must be set to reconsider the case. Deferred cases will be reviewed by a fresh MCA panel. Please see section 4 below for further information on adjourning / deferring at the MCA panel stage.

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At MCA panel stage

4.1 If more information is required before determining a case, the MCA member can adjourn or defer to ensure a fair review.....

.....

Examples of when an adjournment or deferral at MCA stage would not normally be appropriate:

- When the prisoner is subject to a police investigation / criminal proceeding and the outcome is still awaited and is unlikely to be received within four months. Where the development appears relevant to risk it is more appropriate to conclude the case on the papers to avoid lengthy delays to the prisoner's review. PPCS will have the option to re-refer the case if there is a significant change in circumstances i.e. the conclusion of outstanding charges.

....”

Case law

25. The key authority in relation to whether fairness requires an oral hearing in these particular circumstances is *R(Osborn) v Parole Board [2014] AC 1115*. Mr Osborn was, like the Claimant in the present case, a recalled determinate sentence prisoner. Lord Reed, with whom the other justices agreed, summarised as follows when an oral hearing is required:

[2]

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 upon 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 confined 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 correctly characterised as a right of appeal. In order to justify the holding of 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."

26. Further, Lord Reed held (at para [65]) that this court must determine for itself whether a fair procedure was followed rather than merely undertake a review of the reasonableness of the Decision.

27. Mr Withers, on behalf of the Claimant, relied heavily upon the principles identified in **Osborn**. Mr Withers also referred to several authorities dealing with the application of those principles and where the court has held that fairness required an oral hearing where one had not been held. Those authorities were:

- i) *R(Stubbs) v Parole Board [2021] EWHC 605 (Admin)*, where allegations in a parole dossier were disputed by the prisoner. It was held that the refusal of an oral hearing denied the claimant the opportunity to make an effective challenge to those allegations, which would have been relevant to the assessment of risk. The decision of the Parole Board to not grant an oral hearing was quashed.
- ii) *R(Dich and Murphy) v Parole Board and Secretary of State for Justice [2023] EWHC 945 (Admin)*, where the decision of the Parole Board refusing to direct an oral hearing was quashed because there were significant factual issues in dispute.
- iii) *R(Somers) v Parole Board [2023] EWHC 1160 (Admin)*, where the decision of the Parole Board to not grant an oral hearing to a prisoner serving a life sentence was quashed because an inadequately evidenced allegation made against the claimant, coupled with the claimant's denial of the allegation, required close scrutiny at an oral hearing.
- iv) *R(Wylie) v Parole Board [2024] EWHC 52*, where it was held that the refusal of the Parole Board to grant an oral hearing was procedurally unfair, notwithstanding that a police investigation remained live, but was shortly to be concluded. Procedural fairness required an oral hearing, or at least an adjournment to clarify matters.
- v) *R(McKilligan) v Parole Board [2024] EWHC 336 (Admin)*, where it was held that a decision of the Parole Board to not grant an oral hearing on the grounds of prematurity failed to address the correct issues as identified in **Osborn** by focussing on the potential outcome of an oral hearing.

Submissions

28. It was argued on behalf of the Claimant that multiple of the **Osborn** principles were engaged in the present case such that objectively assessed the Claimant ought fairly to have been granted an oral hearing. They included:

- i) There was an important dispute on the facts, insofar as the Claimant denied the bulk of the allegations made against him; moreover, insofar as the Claimant had made any admissions, there were explanations and mitigations (in particular relating to his technological illiteracy and lack of experience) which required to be heard orally.
- ii) The Claimant had a manifest legitimate interest in participating in the parole process and inform the Defendant's panel himself of the progress he had made in the community in terms of rehabilitation and compliance with his licence conditions. To deny him this opportunity on the basis of unproven allegations was unfair.
- iii) The Defendant needs to be mindful that where its decisions include "comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required", which will have a significant impact on the prisoner's management in prison and on future reviews, as is the case with the present advice for the Claimant to engage with the Healthy Sex Programme, the same requirements of fairness and the need for an opportunity to make representations arises.

iv) The Defendant's duty member who refused the oral hearing application, instead of considering the **Osborn** criteria, focussed on what was deemed to be the 'prematurity' of the oral hearing (due to the ongoing police examination of the mobile phone), a concept not recognised in the authorities. As to this:

a) Where the Defendant concludes a parole review on the papers without directing release, it has (by definition) made an express finding that the protection of the public requires the prisoner's continued detention. However, as the duty member recognised in the Decision, the mobile phone analysis was "crucial to further explore" whether there were any breaches of licence conditions or the Sexual Harm Prevention Order, and it was "necessary to await the outcome of the analysis" before further exploring the matter. In such circumstances, it was unfair for the Defendant to make a finding on the risk posed by the Claimant, and the need for further detention, when crucial evidence on the veracity of the allegations against the Claimant had not yet been analysed or become available.

b) Indeed, how was the Claimant to demonstrate that he had a good challenge to the decision to recall him, absent being granted an oral hearing and a direction that the police provide an update. The Decision provokes circular reasoning which **Osborn** forbids. The Defendant denied the Claimant an oral hearing because he did not yet have the outcome of the investigation, which was crucial to determine his application for release.

c) The grant of an oral hearing is entirely separate from when a case is listed. Any further delays in the police investigation could be met by further case management directions (including adjournments) or concluding the case on the papers if necessary.

d) It is axiomatic that a prisoner such as the Claimant remains in custody while a parole review is ongoing – there is thus no risk to public protection if a parole review is adjourned or deferred pending the outcome of 'crucial' investigations. There is no need for an 'interim' decision by the Defendant to hold the ring and ensure the prisoner's continued detention. By contrast, having concluded the review on the papers during a pending police investigation the result of which is necessary to inform any findings of fact by the Defendant and any risk assessment, the Defendant unfairly made positive findings that –

- the recall was appropriate;
- the Claimant's risk had escalated in the community necessitating his recall; and
- his risk was now such that he could not be managed on licence and required further detention.

This was a substantive, not interim, decision. It was unfair for the Defendant to make this final decision while recognising itself that crucial relevant evidence for that decision was not yet available to it, and without allowing the Claimant an opportunity to challenge the unproven allegations against him.

v) The Claimant's case is comparable to **Wylie** where it was held that an adjournment was required to clarify matters relating to the police investigation. It was procedurally unfair to not grant or to consider granting a further adjournment. It denied the Claimant an opportunity to resolve the issue of the allegations, which had been identified by the Defendant in its provisional

and final decision. The Claimant was ultimately subject to no charges arising out of the examination of his mobile phone, which meant that the Defendant could have made findings of fact on the allegations, if it had adjourned for that information.

29. The other parties have remained neutral and have taken no active part in the proceedings.

Analysis

30. Prior to the Decision being made:

a) The Claimant had admitted to clearing all of the history on his mobile device in breach of his license conditions but claimed that his actions were not deliberate but by accident as a result of him being unfamiliar with the technology and after being in prison for a prolonged period of time.

b) On instructions, the Claimant's solicitors had denied all the other allegations.

31. Therefore, the Defendant was on notice that there were important issues of fact which were disputed or open to explanation/mitigation, and which in turn informed the assessment of risk.

32. Indeed, the Decision expressly acknowledged the need to determine disputed facts at an oral hearing where it records:

“This [full forensic] analysis [of the Claimant's mobile phone] is crucial to further explore the extent to which [the Claimant] was in breach of licence conditions and/or his SHPO. It is necessary to await the outcome of the analysis before the matter is explored at an oral hearing.”

33. In those circumstances, in my judgment, procedural fairness required an oral hearing. A decision to grant an oral hearing is separate to a decision of when the case is ready to be heard. Having determined that an oral hearing was required, the Decision maker could and should have given case management directions pursuant to r.6(3) of the 2019 Rules and timetabled the case for an oral hearing. The directions could and should have provided for (i) the immediate disclosure of the initial forensic analysis of the Claimant's mobile phone and the record of interview from the polygraph test, and (ii) a reasonable period of time for disclosure of the full forensic analysis of the Claimant's mobile phone. (The earliest available hearing date was likely in any event to be several months after any direction for an oral hearing was made, since the Defendant's 'Listing Prioritisation Framework For Oral Hearings' placed the initial recall review of standard determinate sentenced prisoners as the second lowest order of priority.)

34. If the Defendant was subsequently advised by the police that the full forensic analysis would not be available in time for the listed oral hearing, a decision could then be made as to whether the oral hearing ought to (i) be adjourned under r.6(11) of the 2019 Rules to allow for production of the full forensic analysis and in light of any clarification then given as to the likely timescales for its production, or (ii) proceed without an adjournment on the basis of the other available evidence and weighing up the need to provide a decision within a reasonable period of time.

35. However, despite having concluded that an oral hearing was required to resolve disputed facts, the Decision maker simply chose to “conclude [the] case on the papers...irrespective of [the Claimant's] acceptance of the recall allegations” because “There are no timescales for [the full forensic analysis] to be undertaken and [in the Decision maker's] experience.. this may take a lengthy period.... It is premature to direct an oral hearing to explore the recall..”

36. By deciding to conclude the case on the papers in this way the Provisional Decision that “for the protection of the public it remains necessary for [the Claimant] to continue to be confined” became final without the Claimant ever having had an opportunity to contest the disputed allegations at an oral hearing, and which disputed allegations were fundamental to the assessment of risk and upon which the Provisional Decision was based.

37. That approach was entirely contrary to the Guidance on Allegations, which required the Defendant to -

- a) investigate relevant and disputed allegations;
- b) give the Claimant the opportunity to contest those disputed allegations;
- c) make findings on those disputed allegations; and
- d) give reasons for making the findings.

38. In addition, that approach was contrary to the principles in **Osborn**:

- i) By denying the Claimant the opportunity fairly to contest the disputed allegations at an oral hearing, the Decision gave the impression of having been made as a means of saving time, trouble and expense by favouring the official account of events over the case advanced by the Claimant.
- ii) The Decision appeared to focus on the possible outcome of an oral hearing by concluding that it was premature to direct one. However, the Claimant did not need to demonstrate that the Provisional Decision was wrong, or even that it may have been wrong. The issue was whether an oral hearing was appropriate.
- iii) The purpose of an oral hearing is not just to assist the Defendant in its decision-making, but also to reflect the Claimant's legitimate interest in being able to participate in a decision with important implications for him.

39. Nor do I consider, for the following reasons, that it was any answer to such procedural unfairness that the "Secretary of State is able to refer the case back to the Parole Board for a further review once the outcome of the police investigation is known":

- i) The Defendant is an independent quasi-judicial body. S.239(2) of the 2003 Act provides that it is the duty of the Defendant to advise the Secretary of State with respect to any matter referred to them by the Secretary of State which is to do with the early release or recall of prisoners.
- ii) On receipt of such a reference, s.239 (3) and (4) of the 2003 Act require the Defendant to consider any documents given to it by the Secretary of State and any oral or written information obtained by it and to deal with the case "on consideration of all such evidence as may be adduced before it".
- iii) In recall cases, the Defendant has both a power and a duty to consider the decision on recall. That duty is an important and necessary duty - *R(Calder) v Secretary of State for Justice [2015] EWCA Civ 10150* at para [45].
- iv) The Defendant failed to discharge that important duty by declining to make findings of relevant disputed facts and the appropriateness of the Claimant's recall on the ground that it was premature to do so. The Defendant effectively delegated

the issue of whether fairness required an oral hearing to the Secretary of State to make once the outcome of the full forensic analysis was known.

v) If, once the outcome of the police investigation was known, the Secretary of State chose to refer the case back to the Defendant, which then directed an oral hearing, the oral hearing would inevitably have been very significantly delayed. Such delay would be contrary to the Defendant's duty to ensure a decision within a reasonable period of time.

vi) I repeat that once the Decision was made, the Provisional Decision became final. The Provisional Decision recommended:

"... [the Claimant] be assessed for work to address his sexual interests while he is in custody and the public is protected. It encouraged those managing him in prison to have him assessed for the Healthy Sex Programme.

Until the investigation has concluded and there is evidence of work having been completed to address his sexual interests, which might improve his compliance with licence conditions, the panel considered that his risks could not be safely managed in the community."

vii) It strikes me as unlikely that the Claimant would be assessed suitable for a programme of work to address sexual interests, which he continued to deny. However, without completing that proposed programme of work, the Claimant had been assessed as posing a risk that could not be managed in the community. The Claimant was left in the invidious position of having to choose between maintaining his denials in the hope that, at the conclusion of the police investigation whenever that was, the Secretary of State might refer the case back to the Defendant for an opportunity to challenge those allegations, or admit the allegations against him in order to undertake the recommended programme of work to facilitate his release.

viii) Finally, whatever the outcome of the police investigation into the Claimant's mobile phone that would still leave undetermined the other serious and disputed allegations made against the Claimant and in particular what he had allegedly said during the polygraph test. Those other allegations were clearly highly relevant to the assessment of risk, since they were extensively referred to and relied upon in the Recall Report, the Post Recall Risk Management Report, and the Provisional Decision.

Conclusion

40. In my judgment, procedural fairness required an oral hearing.

41. The Decision refusing the Claimant's request for an oral hearing is quashed.

42. I direct that there be an oral hearing before the Defendant.

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