

The King (on the application of FG) v Parole Board for England and Wales v Secretary of State for Justice



No Substantial Judicial Treatment

Court

King's Bench Division (Administrative Court)

Judgment Date

17 March 2025

Case No: AC-2024-MAN-000436

High Court of Justice King's Bench Division Administrative Court Manchester

[2025] EWHC 631 (Admin), 2025 WL 00835050

Before: Kate Grange KC (Sitting as a Deputy Judge of the High Court)

Date: 17/03/2025

Hearing date: 5th March 2025

Representation

Olivia Beach (instructed by Howards Solicitors) for the Claimant.
The Defendant and Interested Party did not attend.

Approved Judgment

Kate Grange KC sitting as a Deputy Judge of the High Court:

Introduction

1. This is an application for judicial review, brought on behalf of Mr FG (hereinafter "the Claimant"), challenging the Parole Board's decision to refuse him an oral hearing after his recall to prison on 6 June 2024.
2. The Claimant raises a single ground of challenge namely a failure to ensure procedural fairness by denying him the opportunity to make oral representations before the Parole Board, contrary to the guidance in *R (Osborn) v Parole Board* [2014] AC 1115 .

The factual background

3. The Claimant is a serving prisoner currently held at HMP Risley. He is 53 years old. On 11 October 2013 he was sentenced to 13 years and 6 months for the rape of a female under the age of 16, indecent assault on a female under the age of 14, indecent assault on a female under the age of 16, and gross indecency with a child. The complainants to these offences were

the daughters of the Claimant's then partner. The sentencing judge also noted a background of serious domestic violence and harassment of the Claimant's partners by him. His sentence expires on 10 December 2026.

4. The Claimant was released at the automatic release date in his sentence of 11 March 2020. He was in the community on licence for a period of 4 years, 2 months and 26 days before he was recalled on 6 June 2024 and returned to custody on 7 June 2024.

5. He was recalled on the basis that he had breached his license conditions which required him:

- i) To be of good behaviour and not behave in a way which undermined the purpose of the licence period;
- ii) Not to commit any offence;
- iii) Not to own or possess more than one mobile phone or SIM card without the prior approval of his supervising officer and to provide his supervising officer with details of that mobile telephone, including the IMEI number and the SIM card.

6. According to the HM Prison and Probation Service Recall Report ('the Recall Report') completed on 6 June 2024, police officers attended the Claimant's home on 5 June 2024 at which time he was arrested for an offence of failure to comply with the notification requirements placed upon him under the [Sexual Offences Act 2003](#). This apparently related to the Claimant opening a bank account and subsequently failing to inform the police as he was required to do. In addition, upon attending the Claimant's address, the police conducted a search of the premises at which time a number of mobile phones were discovered, in circumstances where he had declared only one mobile phone to his supervising probation officer, which was believed to be a breach of his licence conditions.

7. The Recall Report also recorded that the police discovered "*a number of knives, one of which was placed on Mr FG's bedside table, a shortened iron bar which was believed to be a weapon and a crossbow*" in the house. The report continued:

"In my assessment, although the possession of such weapons does not constitute an offence in itself, there remains a significant risk...to both members of the public and Mr FG, up to and including death, should he develop a perceived need to use them. This is exacerbated by [the Claimant's] significantly hostile attitude to professionals who may need to visit his home, including both Police and Probation officers. ...

...[The Claimant's] compliance with supervision since his release has been somewhat erratic. Since release, he has been offered 193 appointments...by his offender manager, of which he has attended 182, with 10 absences being considered acceptable and one unacceptable, for which a warning letter was issued."

8. On 7 June 2024 the Claimant attended Tameside Magistrates Court and received a conditional discharge for failure to comply with the Sex Offender Register. The Claimant's solicitors understand that this conditional discharge related to the alleged opening of a bank account without informing the authorities.

9. Following the Claimant's return to custody, the case was referred to the Parole Board for it to consider whether to direct his release or make no direction as to release. As part of that process a number of reports were prepared for the Parole Board

including a 'Part B: Post Recall Risk Management Report'. Within that report it was recorded that an analysis of the Claimant's internet search history on his phone showed a very high volume of searches for pornographic material and there were also thousands of pornographic photos on the phone which was being submitted for analysis in order to check whether any of the material related to persons under the age of 18.

10. On 22 July 2024 the Claimant's instructing solicitors submitted detailed written representations to the Parole Board requesting an oral hearing and so that the Claimant's suitability for release could be considered further.

11. Within these written submissions the following key points were made on behalf of the Claimant:

- i) With regard to the bank account, he did not open a new bank account, but was given a new bank card by his bank which increased his withdrawal limit, but the sort code and account number remained the same.
- ii) The Claimant had instructed his legal representatives in the Tameside Magistrates Court proceedings that he was pleading not guilty, but a guilty plea was incorrectly entered, something which he corrected in open court. In those circumstances confirmation of his conviction was requested.
- iii) He did have old mobile phones which had been stored in his property throughout the custodial part of his sentence. These phones were important to the Claimant as they were his at the time of the offences for which he was convicted and he had kept them as he hoped to appeal his conviction and they were part of his defence. The probation service and the police had the IMEI numbers and SIM card details for these phones and the authorities had also been provided with details of the two phones which he had used at different times since being released into the community on licence.
- iv) While he had a lot of images on his phone, not all were pornographic and there were no inappropriate images of anyone under the age of 18. He was not prohibited from accessing pornography. A lot of the 'pornographic' pictures were also art and were used by him as inspiration as an artist.
- v) Some of the "weapons" which were said to have been found at his home were, in fact, household items. The iron bar which was found at his home was part of a dumbbell set where weights could be attached and he was using this to weight his net curtains to stop them blowing in the wind. The knife which was found was a kitchen knife which was part of a set which had been seen multiple times by the police and probation service when visiting his property. The knife was in his bedroom as he had recently used it to open a packet of biscuits.
- vi) He had reflected on the concerns which had been expressed about the crossbow and understood why the probation service were concerned, however he had it for his own protection after someone came into his house the previous year. He acknowledged the concerns however.
- vii) He did not accept the allegation that he had a hostile attitude towards staff and posed a risk to staff given that he had attended almost 200 probation service appointments with only one unacceptable absence. He denied that he had been aggressive rather than assertive. He was angry with his situation as he continued to deny the index offences and was therefore assertive in his discussions with probation officers. There was no evidence that he had ever made any threats, whether physical or verbal.
- viii) The risk assessments within the reports made available to the Parole Board were inconsistent – in one report he was assessed as a high risk of causing serious harm to prisoners and in another he was assessed as posing a medium risk to prisoners.
- ix) He had been in the community for 4 years and 3 months prior to recall with no reports of any harm caused by him during that time, nor any reports of any contact with children.
- x) He disputed what had been written about him and could provide explanations for the concerns which had been raised.

12. The submissions drew attention to the guidance from the Supreme Court in the *Osborn* case and in other first instance decisions regarding when it was appropriate for the Parole Board to convene an oral hearing in the interests of procedural fairness.

13. On 5 August 2024, a Member Case Assessment (MCA) officer of the Parole Board conducted a paper review of the case. At the outset of that decision, the officer addressed the application for an oral hearing in the following terms:

"In making this decision the panel has considered this case against the principles set out in the case of *Osborn, Booth & Reilly [2013] UKSC 61* concerning oral hearings.

The panel does not find that there are any reasons for an oral hearing. However, if it is believed that this case should proceed to an oral hearing, further representations should be submitted to the Parole Board within 28 days of receipt of this decision outlining why it should proceed to a hearing."

14. In more detailed reasons which followed the officer analysed the Claimant's past offending behaviour including the index offence. He concluded that a number of risk factors arose which made it more likely the Claimant would offend including: controlling behaviour and violence within intimate relationships, his attitude towards the use of violence, offending for sexual gratification, being preoccupied with sex, having a sexual interest in children and poor thinking skills. He noted that the Claimant was refusing to engage in a psychological risk assessment and so a comprehensive assessment of risk was not available for the review.

15. The officer also conducted an "Analysis of Evidence Change" which largely repeated information provided in the reports to the Parole Board. The officer, as it happens, inaccurately recorded that the Claimant was maintaining that he had "weapons" in his possession for his protection. That was not what the Claimant had said in his written submissions, having disputed that the iron bar and the knife were "weapons" rather than being domestic household items. Nowhere in the decision was the Claimant's explanation for being in possession of the knife and iron bar set out. As to the mobile phones, the officer recorded that the Claimant "has provided reasons for having them in his possession" but there was no consideration of whether those reasons might merit recourse to an oral hearing.

16. Under the heading "Analysis of the Manageability of Risk" the officer stated:

"In order to assess whether the risk management plan would be sufficient to manage his risk of serious harm in the community, the panel would have directed an updated psychological risk assessment for the purpose of assessing whether there are any outstanding treatment needs that should be addressed before he is released. Given that [the Claimant] would refuse to engage with a PRA, such an assessment has not been directed and so that information is not available to the panel.

An oral hearing would not be effective in the absence of that information and so a referral to an oral hearing cannot be justified. Should [the Claimant] wish to engage with a psychologist for a PRA to be completed for the next review, there may be grounds to refer the case to an oral hearing then."

17. In the conclusions section of the report, the officer noted the serious nature of the index offending and noted a hostile attitude towards the police and probation service on the part of the Claimant. The decision continued:

"...A number of weapons were found in his property, which may not constitute an offence but does raise significant concern about his risk of serious harm to professionals who may attend his property for a home visit.

There was also evidence of searches for pornographic content, which is not denied by Mr FG, although is explained in part in his representations. Again, while that does not necessarily constitute an offence, it does raise concern about sexual preoccupation. He is an untreated sex offender and so evidence of sexual preoccupation causes concern about his risk factors being active and the potential for an increase in the risk of sexual offending.

His phones are subject to examination and until that examination has concluded, the panel will not have access to all the information required to assess risk and suitability for release. His refusal to engage with a PRA further inhibits the panel from making that assessment.

There are no grounds for an adjournment or an oral hearing at this review, for the reasons provided..."

18. Following receipt of the paper decision from the Parole Board, on 14 August 2024 the Claimant's solicitors filed further written representations appealing the paper decision and requesting that the decision was progressed to an oral hearing.

19. At paragraph 18 of those written representations, the Claimant's solicitors set out a list of reasons as to why an oral hearing should be granted:

- "• Fairness is to be the overriding factor in all parole reviews.
- The MCA Member has not given fair or balanced consideration to the concerns raised in this case given that [the Claimant] disputes a lot of what has been written and can provide explanations for a lot of things.
- [The Claimant] raises a number of counter-arguments to what has been written in the dossier and these have been dismissed without testing the evidence at an oral hearing.
- [The Claimant] disagrees with the evidence of the Probation Service and wishes to challenge the evidence at an oral hearing.
- It is impossible for the Parole Board to fairly assess [the Claimant's] risk or his likely compliance on the papers alone given he disputes the recall and wishes to give evidence.
- [The Claimant] cannot fully express his views on his risk factors or his future plans in representations drafted by his legal representative.
- An oral hearing would allow [the Claimant] to fully and fairly participate in the parole process.
- An oral hearing will ensure that [the Claimant] is able to explain to the Parole Board his understanding of risks and his plans to manage these in the future.

- [The Claimant] requests that his case is progressed to an oral hearing so that he can give evidence to the panel as to his account of the recall, what he has learned and how he intends to manage his risk in the future."

20. On 23 September 2024, the Parole Board issued its final decision which maintained the position that an oral hearing was not required in the Claimant's case. The reasons for refusing an oral hearing were as follows:

"The Duty Member carefully considered the request. The MCA Member had the benefit of legal representations when making the provisional decision and there does not appear to be any significant new information contained in the request for an oral hearing which was not available to the MCA Member. It is noted that [the Claimant] managed an extended period of licence before recall but also notes that the recall was linked to serious matters which are relevant to risk. The assessment of sexual preoccupation comes from the evidence of 'a very high volume of porn searches' on his internet history and 'thousands of pornographic photos and videos' on his phone(s), which the Duty Member concludes is sufficient evidence. Whilst there may not be concerns about seeking out children or IPV, there are concerns about weapons including a crossbow, the sexual material, possession of multiple phones and SIM cards, and a conditional discharge for breach of SOR. It is noted that [the Claimant] wishes to engage in this review, but the Duty Member weighed this against his reported hostility in court and towards professionals, and him declining to engage in the Part B interview (even withstanding the reasons given). Noting that [the Claimant] would also decline to engage in a PRA, the Duty Member concludes that a paper decision making no direction for release is appropriate. It does not consider the MCA Member's conclusion on this unfair or illogical.

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."

21. Upon receipt of this decision, the Claimant's solicitors sent pre-action correspondence in accordance with the relevant pre-action protocol and judicial review proceedings were subsequently issued in December 2024. On 30 December 2024, the Parole Board filed an Acknowledgment of Service along with a legal position statement which confirmed that it intended to remain neutral in these proceedings, as is the standard practice in cases of this nature.

22. On 23 January 2025, Karen Ridge sitting as a Deputy High Court Judge granted the Claimant permission to proceed with his judicial review on the single ground of procedural unfairness. The matter was then listed for a substantive hearing, which came before me on 5 March 2025 at which time I heard oral submissions from Ms Beach, Counsel for the Claimant.

The legal framework

23. The Claimant was released from custody in March 2020 pursuant to [s.33\(1\)\(B\) of the Criminal Justice Act 1991](#) . [Section 254 of the Criminal Justice Act 2003](#) ('the 2003 Act ') gave the Secretary of State the power to revoke the Claimant's licence and upon the Claimant's return to custody the case was referred to the Parole Board in accordance with [s.255C\(4\) of the 2003 Act](#) in order for it to consider whether to direct release (under [s. 255C\(5\) of the 2003 Act](#)) or make no direction as to release (under [section 256\(1\)\(b\) of the 2003 Act](#)).

24. The [Parole Board Rules 2019](#) governed its consideration of the Claimant's case once the matter had been referred to it. Rule 19 reads, so far as material, as follows:

"Consideration on the papers

(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.

...

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

25. Rule 20 provided that the prisoner could apply in writing for an oral hearing if a provisional decision on the papers refused the application. That application had to be made within 28 days and had to be heard by a duty member of the Parole Board who had not been involved in the provisional decision. That decision was the final decision in the Claimant's case, with judicial review the only potential remedy thereafter.

26. In determining whether an oral hearing ought to be granted or not, regard must be had to the principles identified by Lord Reed in *Osborn* which remains the leading authority on oral hearings in Parole Board reviews.

27. Lord Reed, giving a judgment with which Lords Neuberger, Kerr, Clarke and Lady Hale agreed, summarised his conclusions at §2 as follows:

"(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 \(1\) 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 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. ...

(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.

(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 ..."

28. Lord Reed made clear (at §65 of *Osborn*) that the role of the court when considering whether a fair procedure has been followed by a decision-making body such as the Parole Board was not merely to review the reasonableness of the decision-maker's judgment of what fairness required, but to determine for itself whether a fair procedure was followed.

29. Lord Reed emphasised that one of the advantages of procedurally fair decision-making was that it was liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested (at §67). But he also made clear that the purposes of a fair hearing were not merely to improve the chances of the tribunal reaching the right decision. At least two other important values were engaged:

- (1) the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel (see §§68-70, as recently discussed by Fordham J in *R (Clarke) v Parole Board* [2025] EWHC 190 (Admin) at §14 per Fordham J under the heading "Participatory-Justice"); and
- (2) the rule of law, which was engaged because 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 (see §71).

30. On the first topic Lord Reed said this at §68 and §70:

"...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. ...

...This aspect of fairness in decision-making has practical consequences...Courts have recognised what Lord Phillips of Worth Matravers described as "the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result" *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 63). In the present context, research has established the importance attached by prisoners to a process of risk assessment which provides for their contribution to the process (see Attrill and Liell, "Offenders' Views on Risk Assessment", in *Who to Release? Parole, Fairness and Criminal Justice* (2007), ed Padfield)."

31. The principles set out in *Osborn* have been reflected in later case law, notably *R (Stubbs) v Parole Board* [2021] EWHC 605 (Admin) , *R (Welsh) v Secretary of State for Justice* [2019] EWHC 2238 (Admin) , *R (Somers) v Parole Board* [2023] EWHC 1160 (Admin) , *R (McKilligan) v Parole Board* [2024] EWHC 336 (Admin) , *R (Taylor) v Parole Board* [2024] EWHC 1363 (Admin) , *R (Wylie) v Parole Board* [2024] EWHC 52 (Admin) , and most recently, *R (Clarke) v Parole Board* [2025] EWHC 190 (Admin) .

32. I have read all of these decisions, however many of them turn upon their own facts and, as I explain below, this is a case which is capable of being determined by a straightforward application of the principles identified in *Osborn* .

33. Before leaving the relevant authorities, I note that one criticism of the Parole Board that has been identified in some of the case law concerns an improper focus on the possible outcome of an oral hearing. As Lord Reed made clear at paragraph 2(ii) (v) of *Osborn* the question whether fairness requires the prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released and cannot be answered by assessing that likelihood. In *R (on the application of McKilligan) v Parole Board of England Wales* [2024] EWHC 336 (Admin) HHJ Belcher drew attention to the fallacy of focusing on the possible outcome of an oral hearing rather than the correct question which is whether an oral hearing was appropriate (per Lord Reed in *Osborn* at 2(ii)(x)) (see §37). That point was also highlighted in the recent decision of Fordham J in *Clarke* where he noted that this "Outcome-Utility Approach" to oral hearings had been rejected by the Supreme Court in *Osborn* as unduly narrow (see §§10-11).

The Claimant's submissions

34. On behalf of the Claimant Ms Beach submits that this case is a prime example of one that would significantly benefit from an oral hearing and that, applying *Osborn* , fairness required an oral hearing in his case. She made three overarching points: (1) that there were a large number of factual issues in dispute, (2) there was material in the dossier provided to the Parole Board which posed unanswered questions which the Claimant should be permitted to address and (3) the Claimant's participation in the process was important given the significant consequences for him, particularly as someone who had been recalled to prison after being out on licence for over 4 years.

35. On the factual disputes Ms Beach drew attention to paragraph 2(ii)(a) of *Osborn* and emphasised that a number of key matters relevant to the recall were in dispute including whether the Claimant had opened a new bank account, whether he had unauthorised access to mobile phones, whether he had "weapons" within his property and the nature of any images or videos on his phone. She also drew attention to the Claimant's candid reflection and insight about having a crossbow at his home; a matter which she submitted ought to be explored at an oral hearing given the extent to which this affected his credibility. She also submitted that findings had been made by the Parole Board about "sexual pre-occupation" but without a clear evidential basis for those findings and without any opportunity by the Claimant to address that question. She said it was important for the Parole Board to know what the outcome was of the examination of his phones given the phones had recently been returned to him and no indication had been provided that there was anything illegal about the material which had been identified. She criticised the decision for focusing on what the Parole Board needed by way of evidential persuasion and also its predisposition to favour the official account of events in the reports without giving the Claimant a proper opportunity to respond. Lord Reed had warned about the latter approach at paragraph 2(vii) of *Osborn* i.e. favouring the official account of events over the case advanced by the prisoner. She also submitted that further investigation was required into the basis for the conditional discharge given the Claimant's assertion that he had not, in fact, opened a new bank account.

36. Ms Beach emphasised that all of the factual matters in dispute were highly relevant to the risk posed by the Claimant both in terms of its level, and its manageability, thereby engaging paragraph 2(ii)(b) of Lord Reed's examples in *Osborn*. She submitted that the risk posed by the Claimant could not be fairly or properly addressed without providing an opportunity for the evidence to be explored by way of oral evidence. She also pointed out that some of the risk assessments which appeared in the dossier were not consistent with each other about the level and nature of the risks posed by the Claimant; a matter which it was also important to explore at a hearing.

37. It was submitted that this was also a case where it could be said on tenable grounds that a face to face encounter with the board was necessary in order to enable the Claimant to put his case effectively (as per paragraph 2(ii)(c) of Lord Reed's examples in *Osborn*). Based on the reports which had been provided to the Board and the conclusions it had reached, it was apparent that a number of questions needed to be asked of the Claimant so that he could give a full account of his behaviour. She drew attention to the multiple references by the Parole Board and in the reports provided to it that the Claimant was "aggressive" towards professionals despite the fact that there were few references to any specific examples of how and when this was alleged to have occurred (the only clear reference being to home visits by Sex Offender Management Unit officers at visits in December 2023 and June 2024). This was a topic on which the Claimant deserved to be heard and which the Claimant felt there was a lot to rebut given his good record of reporting to the probation service and his lack of any adjudications since he was returned to custody. She also drew attention to the description of the Claimant's reporting to the probation service as "erratic" in the paper decision, despite it being stated clearly that the Claimant had attended 182 appointments, with only 1 unsatisfactory absence. The Claimant had also indicated a wish to take an active part in proceedings by way of giving evidence before the Parole Board, a factor that had not been given appropriate weight by the Board in determining whether to direct an oral hearing or otherwise.

38. Ms Beach submitted that this was a case where the Claimant had a legitimate interest in being able to participate given how important the decision was for him and where the contribution he had been able to make to date had been unfairly limited to written representations. In this regard she drew attention to Lord Reed's examples at 2(iv) and 2(vi) of *Osborn* – the latter of which emphasised that when dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit that that freedom had been conditional.

39. Further, she submitted that in this case the Claimant had been on licence in the community for over four years; a factor which appeared to have been given little weight when refusing an oral hearing. The approach of the Parole Board had been to look at the evidence solely from its own perspective and with no regard to the Claimant's perspective on the matters. This was a case which engaged the matter of participatory justice, as highlighted by Lord Reed in *Osborn* and Fordham J in *Clarke* given the sense of injustice the Claimant would feel if he wasn't afforded a procedure which permitted him to provide relevant information to the board. The only fair way that could be achieved in this case was to allow the Claimant the opportunity to give oral evidence to the board and have the opportunity of answering their questions.

40. Finally, it was submitted by the Claimant that the duty member had applied the wrong test when considering the request for an oral hearing. The duty member should have considered the position afresh and determined what fairness required, not whether there was any new information not available to the MCA official or whether the second set of representations made a material difference.

Analysis

41. I have no hesitation in accepting the Claimant's submissions in this case. In my judgement the Parole Board clearly failed to apply the fundamental test identified in *Osborn*, namely to ask itself whether fairness called for an oral hearing in this case. In particular it failed to identify a number of important features of this case which clearly merited an oral hearing to enable the Claimant to provide evidence and explanations which were relevant to his recall and to the ongoing risk which he posed.

42. I agree with the Claimant's submissions that this was a case which had a number of features falling within the categories identified by Lord Reed in *Osborn* which tended to suggest that an oral hearing was necessary. However, none of those features were properly identified in the Parole Board's decisions and no proper consideration was given to procedural fairness when looked at from the perspective of the Claimant.

43. First, and most fundamentally, the Parole Board failed to address the fact that a number of important factual matters were in dispute and that explanations had been provided by the Claimant which called for an oral hearing so that he could address those matters and his credibility could be assessed. These matters clearly engaged paragraph 2(ii)(a) of Lord Reed's examples i.e. facts which are important or in dispute or where significant explanation or mitigation is advanced. As set out at paragraph 11 above the Claimant had provided explanations for the alleged change of bank account and the possession of "weapons" and unauthorised mobile phones. Fairness required that the Claimant was given the opportunity to explain to the Parole Board why he did not accept the factual position as it had been summarised in the written reports to the Parole Board which were simply repeated in the Parole Board decisions.

44. The alleged possession of "weapons" is a key example. That was a matter upon which significant reliance was placed by the Parole Board when summarising the reasons for recall and continued detention. But the Claimant had provided an explanation for the presence of those items in his home, namely that two of the three "weapons" were, in fact, household items which the probation service was well aware of and had not previously expressed concern over. The Claimant had also accepted that possession of the crossbow was understandably a matter of concern. That was of obvious relevance to his insight into his behaviour and his ability to own up to conduct of concern. Ms Beach is right to point out that the chance to have an oral hearing wasn't just the opportunity for the Claimant to try to rebut some of the factual allegations against him, but was also his opportunity to confront the consequences of some of his behaviour and demonstrate insight into his actions. That was also relevant to the decision the Parole Board had to take.

45. Secondly, the factual disputes were relevant to the Parole Board's assessment of risk, and without an oral hearing the board could not fairly make an assessment of risk (as per Lord Reed in *Osborn* at 2(ii)(b)) or indeed get the further evidence that might be necessary to do so. The factual matters in dispute were of relevance to the assessment of risk and the means by which the risks posed could be managed and addressed and that militated in favour of the Parole Board seeing and questioning the Claimant in person so that any assessment of risk properly took into account the explanations he had provided (whether they were accepted or not). Again, taking the example of the possession of weapons, the Part B: Post Recall report stated "*Risk currently assessed as high until more clarification received about weapons and why he had them in his home*". It is difficult to see how the board was to get that clarification unless the Claimant was able to give evidence and that evidence was assessed by the Parole Board. It follows that hearing the Claimant's explanations for his behaviour and making an assessment of his credibility were matters of obvious importance in the risk assessment process.

46. Thirdly, this was a case where the Claimant had been on licence in the community for over 4 years and 3 months. Contrary to the guidance provided by Lord Reed at 2(vi) of *Osborn* there was no proper recognition of the deprivation of the Claimant's freedom which the recall represented, which applied with particular force given the length of time he had been in the community. It followed that considerations of participatory justice, highlighted so clearly in *Osborn* and other first instance decisions (see paragraphs 29-30 above) should have weighed strongly with the Parole Board in this case.

47. Fourthly, I agree that this is a case where it can be said on tenable grounds that a face to face encounter with the board was necessary in order to enable the Claimant to put his case effectively (as per paragraph 2(ii)(c) of Lord Reed's examples in *Osborn*). A number of matters raised by the Parole Board called for greater exploration and assessment, including the conclusion that the Claimant was "aggressive" with professionals and the suggestion that there was evidence of "sexual pre-occupation". As to the former, not only would an oral hearing give the Claimant the chance to address the concerns and give

his version of his engagement with professionals, but it would present an opportunity for the Parole Board to make a proper assessment of his attitude, presentation and character.

48. Finally, I do also accept that the language used by the Parole Board demonstrates that it applied the wrong test by focusing too heavily on what evidence it thought might make a difference to the outcome of its decision (including the availability of an updated psychological risk assessment) and looking for errors in the paper decision, rather than assessing the matter afresh at the second stage.

49. In conclusion and given all of the features identified above, I have decided that what fairness demanded was the opportunity for the Claimant to be heard at an oral hearing. In those circumstances this application for judicial review succeeds.

Remedy

50. I will adopt the same approach that was taken by the Court in the recent case of *Clarke* at §24, namely I will quash the decision and direct that the Parole Board shall hold an oral hearing to take place as soon as reasonably practicable. I am satisfied that such wording gives the Parole Board appropriate latitude in dealing with this case in the future.

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