Neutral Citation Number: [2019] EWHC 984 (Admin)

Case No: CO/3072/2018

IN THE HIGH COURT OF JUSTICE
MANCHESTER DISTRICT REGISTRY
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before:

MRS JUSTICE O'FARRELL

- -

Between:

THE QUEEN ON THE APPLICATION OF ALI WALLEED	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Adam Wagner (instructed by Duncan Lewis (Solicitors) Limited) for the **Claimant**
David Manknell (instructed by the Government Legal Department) for the **Defendant**

Hearing date: 2nd April 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. The claimant, Ali Walleed, a prisoner in closed conditions, challenges by way of judicial review a decision by the defendant Secretary of State for Justice dated 4 June 2018, rejecting the Parole Board's recommendation of 14 November 2017 that he be moved to open conditions.

2. On 27 March 2009 the claimant was convicted on two counts of rape and sentenced to Imprisonment for Public Protection ("IPP") with a minimum term of 8 years. On 13 July 2016 the minimum term of the claimant's sentence expired.

3. The claimant is liable to deportation. On 31 March 2015 he was served with a notice of a decision to make a deportation order. On 7 February 2018 a deportation order was served on him.

4. The grounds on which the decision is challenged are (i) procedural unfairness, namely, reliance on matters to which the claimant did not have an opportunity to respond; and (ii) breach of the claimant's Article 5 rights, namely, delay in making a decision, resulting in arbitrary prolongation of his detention.

Background

5. The claimant was born in Somalia on 6 March 1971. In 2000 he claimed asylum in Ireland, using a false identity. In November 2000 he was discovered in the United Kingdom and returned to Ireland pursuant to the Dublin Convention. On 26 June 2004 he was discovered again in the UK when he was arrested on suspicion of robbery. He was convicted and sentenced to 19 months' imprisonment. On 21 November 2004 his application for asylum in the UK was refused.

6. On 27 March 2009 the claimant was convicted on two counts of rape. The claimant forced his way into the first victim's home and raped her, threatening her with a knife. He met his second victim in a pub. She was intoxicated. He took her to his flat, raped her, and left her in the street in a distressed condition.

7. The claimant was sentenced to an IPP sentence with a minimum term of 8 years.

8. Initially, the claimant's security risk was Category B (those who do not require maximum security, but for whom escape still needs to be made very difficult). On 20 February 2015 he was re-assessed as Category C (those who cannot be trusted in open conditions but who are unlikely to try to escape).

9. On 31 March 2015 a notice of decision to make a deportation order was served on the claimant.

10. On 13 July 2016 the minimum term of the claimant's sentence expired.

11. On 11 October 2016 the Parole Board recommended that the claimant should progress to open conditions.

12. On 14 December 2016 the Secretary of State rejected the Parole Board's recommendation on the basis that the claimant had been served with a notice of decision to make a deportation order and he was not said to constitute a low risk of absconding.

13. In June 2017 the claimant was assessed by the Offender Assessment System as presenting a high risk to the public and to known adults if he were in the community (and a medium risk to staff), and a medium risk to prisoners while in custody.

14. On 22 August 2017 the claimant was re-classified as Category B.

15. On 20 August 2017 the Parole Board directed that an oral hearing should be heard to determine the claimant's application for release from prison. It was noted that the claimant was assessed as posing a high risk of harm to the public and victims and a medium risk to staff in the community and prisoners. Sex offending and substance abuse were identified as the main risks. The Parole Board directed that reports should be submitted by the Public Protection Casework Section ("PPCS"), the Offender Manager (the "OM") and the Offender Supervisor (the "OS").

16. On 6 October 2017 the defendant wrote to the Parole Board, setting out the claimant's immigration history and current immigration status:

> "Mr Walleed has no valid leave in the UK. He has an outstanding asylum application which if refused will attract an in country right of appeal.
>
> Immigration have also confirmed that they have drafted the stage 2 refusal notice which is currently being checked."

The defendant explained that the claimant was not eligible for removal from the UK under the Tariff Expired Removal Scheme ("TERS") because a deportation order had not been served, he would have a right of appeal against the refusal of his outstanding asylum claim and the travel documents required for his removal were outstanding. The defendant stated:

> "Turning to the Ministry of Justice's policy on transferring foreign national prisoners to open conditions, offenders who have been served with a deportation order and are appeal rights exhausted can no longer be transferred to open conditions as outlined in PSI 37/2014 …
>
> Foreign national prisoners, who are liable to deportation, are eligible [to] be transferred to open conditions and will be considered in accordance with the policy …
>
> Should the Parole Board recommend that Mr Walleed be transferred to open conditions, the Secretary of State will give careful consideration to the recommendation in light of all the available evidence …"

17. On 9 October 2017 the Parole Board gave directions for the claimant's forthcoming hearing, stating:

> "It is not clear from the dossier what steps if any have been taken towards deportation and whether Mr Waleed has applied for asylum. It is very important that the panel are aware of what the

> present immigration situation is. PPCS were directed by the MCA to report on that by 17.9.2017. A report has now been supplied by PPCS by letter dated 6.10.17. … Although late the letter is comprehensive and helpful and I am grateful for it. It does however reinforce the point that the deportation situation needs to be sorted out sooner rather than later. Unless there is any good reason the deportation notice should be served immediately and PPCS should ask the Home Office to expedite this … It would be helpful to know from his legal representative in advance of the hearing whether Mr Waleed intends to appeal against any deportation order or refusal of asylum ... Mr Waleed is seeking release. The panel will have to consider the alternative of open conditions if it … does not agree to that. In that case it will have to consider the risk that Mr Waleed will abscond while his immigration status remains uncertain.
>
> It would greatly assist in this case if the Secretary of State was represented. Firstly so that we can be updated on the deportation situation and be given information of what the Home Office has done. Secondly situations involving deportation can be complicated and it would be helpful to be advised on our options. There is a danger that Mr Waleed will simply be left in limbo while decisions about whether he is to be deported are made if steps are not urgently taken now. Mr Waleed is an over tariff IPP prisoner and undertakings have been given that every possible step will be taken to ensure that they are progressed speedily through the process and the Prole Board are determined that that will happen."

18. The defendant did not provide representation at the hearing but on 24 October 2017 a letter was sent to the Parole Board, setting out the claimant's current immigration status:

> - "Notice of Liability to Deportation served on 31/3/2015
> - A Deportation Order has not been served
> - Appeal Rights have not been exhausted. Once the Deportation Order is served Mr Walleed will be given an in country right of appeal, and will have 14 calendar days to submit an appeal from the date of service.
> - A travel document has not been secured …
>
> In Mr Walleed's case he has not been served with a Deportation Order and his Appeal Rights are not exhausted, and the panel have been invited to comment on his suitability for open conditions.
>
> Should the Parole Board recommend that Mr Walleed be transferred to open conditions, the Secretary of State will

> give careful consideration to the recommendation in light of all the available evidence."

19. On 14 November 2017 the Parole Board held an oral hearing. The OS and OM did not recommend the claimant's release or support a transfer to open conditions.

20. In its decision letter dated 14 November 2017, the Parole Board decided that it could not order the claimant's release but recommended that he should be moved to open conditions:

> "In the light of the Secretary of State's previous decision we have considered the risk of absconding with care … It does not follow as a matter of course that prisoner who is liable to deportation will abscond if sent to an open prison and the prison will have the power to keep the matter under review. He will still be in prison. The concerns previously expressed by the OS on the last hearing were not made in evidence before us. You would not immediately be able to go out of the prison and we consider that the risk of abscond in your case would be manageable in open conditions. If the Secretary of State wished to explore this further in evidence then it was open to him to be represented at the hearing as we requested. In the absence of any evidence to the contrary, we were satisfied that it is not your current intention to abscond if sent to open conditions. We are satisfied that your concern is to progress and not be stuck in closed conditions in a bureaucratic catch 22."

21. On 7 February 2018 a deportation order dated 5 February 2018 was served on the claimant.

22. In April 2018 HMP Hewell was informed by email that the head of PPCS had rejected the Parole Board's recommendation to transfer the claimant to open conditions because his risk of absconding could not be assessed as very low.

23. On 4 June 2018 the defendant issued its decision, rejecting the Parole Board's recommendation to move the claimant to open conditions:

> "In November 2017 a panel of the Parole Board considered your case and recommended that you should transfer to open conditions.
>
> The Secretary of State has now considered the Parole Board recommendation and has rejected the recommendation for the reasons set out in this letter. I am sorry that you have not received earlier confirmation of the Secretary of State's decision and the reasons…
>
> … at the hearing neither your offender manager or offender supervisor supported your transfer at this time to an open prison. It was reported that since your previous hearing in October 2016 your behaviour had deteriorated significantly. As a result of the

> deterioration in behaviour you have been re-categorised to a Cat B prisoner. Your offender supervisor considered that there was a risk of abscond if you were to transfer to open conditions, this view was not shared by the offender manager who nevertheless considered that you needed to demonstrate a period of good behaviour before you would be suitable for open conditions.
>
> The Parole Board panel considered that the risk of abscond would be manageable in open conditions and it was not your current intention to abscond. When considering a recommendation for open conditions for a prisoner who is liable for deportation the Secretary of State will consider the need to protect the public, he will also consider whether transfer to open conditions could frustrate the intention to deport. Open conditions will only be appropriate where it is clear that the risk of abscond is very low…
>
> In March 2015 you were served with a Notice of Decision to make a Deportation Order, following which you made a fresh asylum claim which has now been refused.
>
> The Secretary of State notes your disregard for immigration control having twice entered the United Kingdom without leave, and refusing to embark when your asylum claim was refused. He also notes that your have employed deception in using a false identity to claim asylum in the republic of Ireland. You have used legal avenues open to you to challenge immigration decisions and as a result have remained in prison for almost 2 years after your tariff expired at which point you were eligible to be deported. The Secretary of State considers that you have no intention to leave the United Kingdom and he cannot be certain that you would not abscond from open conditions to frustrate the legitimate deportation process.
>
> Your next review is set at 15 months.
>
> This period will allow for any appeal against the refusal of asylum to be concluded… "

24. On 24 August 2018 the claimant was confirmed as a category B prisoner, on the basis that there were outstanding adjudications for assault of a prisoner and threats to staff.

Proceedings

25. In June 2018 the claimant issued judicial review proceedings, challenging the defendant's decision dated 4 June 2018. On 11 October 2018 Choudhury J refused permission to challenge the decision on grounds of irrationality but granted permission to apply for judicial review in respect of the other grounds.

26. The grounds of challenge relied on by the claimant are:

i) the decision was procedurally unfair as the defendant relied on new issues relating to the claimant's immigration status without giving the claimant any opportunity to respond; and

ii) the defendant was in breach of Article 5(4) of the ECHR by reason of the delay of almost eight months between the Parole Board's recommendation and the defendant's decision in breach of the defendant's policy (PSI 22/205) which required the decision to be made within 28 days.

The legal framework

27. Section 12(2) of the Prison Act 1952 provides that a prisoner may be lawfully confined in such prisons as the defendant directs. Section 47 of that Act empowers the Secretary of State to make provision for the classification and treatment of prisoners.

28. Rule 7(1) of the Prison Rules provides:

> "Subject to paragraph (1A) to (1D), prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperaments and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3…
>
> (1A) Except where paragraph (1D) applies, a prisoner who has the relevant deportation status must not be classified as suitable for open conditions."

It is common ground that at the time of the decision by the defendant, the claimant did not have the relevant deportation status to trigger paragraph (1A) because he was not appeal rights exhausted. Therefore, he was eligible to be considered for transfer to open conditions and classed as a category D prisoner.

29. Section 239(2) of the Criminal Justice Act 2003 provides:

> "It is the duty of the [Parole] Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release … of prisoners."

30. Prison Service Instruction PSI 37/2014 is entitled: "Eligibility for Open Conditions and for ROTL [Release on Temporary Licence] of Prisoners Subject to Deportation Proceedings" and includes the following instructions:

> "[2.6] Any prisoner in closed conditions who has a Deportation Order made against them and who has no further rights of appeal against the Order from within the UK, is prohibited by Prison Rule 7(1a) … from being classified as suitable for open conditions, and therefore must not be categorised or allocated to Category D/Open conditions …

> [2.11] The term "liable for deportation" applies to prisoners who:
>
> - are assessed by the Home Office as meeting the initial criteria for deportation based on such factors as sentence length (whether the prisoner has been informed of this or not);
> - have received a formal notice of liability for deportation;
> - have received a deportation order with appeal rights in the UK remaining;
> - fall below the threshold for deportation but are being considered for or made subject to removal from the UK.
>
> [2.12] *Any prisoner in closed conditions who is liable for deportation must continue to have their security category reviewed at the prescribed intervals described in PSIs 39/2011 and 40/2011 ...*
>
> [2.13] *Risk assessments must be undertaken on the assumption that deportation will take place. Each case must be considered on its individual merits, but the need to protect the public and ensure that deportation is not frustrated is paramount*. The presumption is that prisoners who are liable for deportation will not be suitable for open conditions unless they are assessed as presenting a very low risk of seeking to avoid the intention to deport by absconding. *Risk must be assessed in line with guidance in PSI 39/2011, 40/2011, 41/2011 (as appropriate) and the guidance at Annex E of this instruction…*"

31. Thus, there is a distinction drawn between (i) those prisoners who have been served with a deportation order and have exhausted their in-country rights of appeal; and (ii) those prisoners who are liable for deportation but whose status is not settled, because they have further rights of appeal or otherwise. Those in the first category are not eligible for transfer to open conditions. Those in the second category may be transferred to open conditions but the presumption is against such transfer unless they present a very low risk of absconding.

32. PSI 22/2015 is entitled: "Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners" and provides:

> "[2.2] Article 5 of the European Convention on Human Rights provides all ISPs [Indeterminate Sentence Prisoners] with the right to have their continued detention reviewed by an independent body or court (in the UK

this role falls to the Parole Board) once they have served the punitive element of their sentence – in the UK this is referred to as the minimum term or "tariff". *The first review must take place no later than the expiry of the tariff and at least every two years thereafter.…*

[2.5] PPCS … has overall responsibility for parole policy and procedures … It is responsible for:

Where the Parole Board recommends that an ISP be transferred to open conditions, considering the recommendation and notifying the prisoner of the SofS decision …

[3] Generic Parole Process (GPP) Timetable …

[3.1] … requires that the Parole Board provide the decision and supporting reasons within 2 weeks of the oral hearing date. *Within 4 weeks after the decision has been issued, in the case of ISP, PPCS must consider any Parole Board recommendation for transfer to open conditions in cases where the Secretary of State has invited the Parole Board to consider such a transfer, and/or set a new further review date if the Parole Board does not direct release… The maximum review period for all cases is 24 months.*

[3.55] *In the case of ISPs, PPCS Team Managers must commence consideration of Parole Board recommendations that the prisoner be transferred to open conditions (where appropriate). The decision whether to accept or reject such a recommendation must be completed within 28 days of the decision being issued…*

[6.1] ISPs will only be transferred from closed to open conditions when … a positive parole Board recommendation has been accepted by the respective PPCS Team manager on behalf of the Secretary of State.

[6.2] In those cases where the Parole Board has made a positive recommendation, the process is as follows:

- The Parole Board, having considered the prisoner's dossier containing all relevant reports, makes a recommendation for transfer to open conditions …

- The respective PPCS Team Manager considers the Parole Board's recommendation and decides within 28 days (on behalf of the Secretary of

> State) whether to accept or reject that recommendation …
>
> - The decision will be sent to the establishment via email and the OMU Manager (or equivalent) must then arrange for the prisoner to be informed of the Secretary of State's decision for accepting or rejecting the Parole Board recommendation.
>
> [6.4] … The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are that the panel's recommendation:
>
> - either goes against the clear recommendations of report writers without providing a sufficient explanation as to why;
> - or is based on inaccurate information.
>
> The Secretary of State may also reject a Parole Board recommendation where he does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at this time…
>
> [7.3] *The maximum period that can elapse between post-tariff/PED reviews is 2 years, taken from the month of the previous oral hearing or paper decision. In the case of ISPs, all decisions on the timing of the next hearing must be based on the individual circumstances of the particular case…*"

Applicable principles

33. In *R (Banfield) v Secretary of State for Justice* [2007] EWHC 2605 (Admin) Jackson J (as he then was) set out the relevant principles applicable in respect of challenges to the decision by the Secretary of State where the recommendation of the Parole Board has been rejected at [28]:

> "(1) The decision of the Secretary of State is not lawful if he fails to take into account the recommendation of the Parole Board and the fact that the Parole Board has particular expertise in assessing the risk posed by individual prisoners. Nevertheless, it is a matter for the Secretary of State what weight he assigns to those factors in any given case.
>
> (2) The decision of the Secretary of State is not lawful if it was reached by an unfair procedure. It is for the court to determine in any given case whether the procedure was unfair.

> (3) If the Secretary of State places reliance upon significant material that was not before the Parole Board, then fairness may require that the prisoner be given an opportunity to comment upon it.
>
> (4) The mere fact that the Secretary of State takes a different view from the Parole Board of material that was before the Parole Board is not normally a matter which merits a reference back to the prisoner for his further comments.
>
> "(5) Even if the procedure adopted by the Secretary of State is fair, if his final decision is irrational it may still be quashed on traditional **Wednesbury** grounds."

34. The Parole Board has expertise in assessing the suitability of prisoners for a particular classification and has the benefit of seeing and hearing the witnesses to inform its recommendation. Therefore, weight must be given to the Parole Board's assessment and recommendation: *R (Harris) v Secretary of State for Justice* [2014] EWHC 3752 (Admin) per Dove J at [29]-[32]; *R (Thomas) v Secretary of State for Justice* [2014] EWHC 3569 (Admin) per Stewart J at [27].

35. However, the question of the classification of prisoners is a matter for the Secretary of State. The court will only interfere with the substance of a decision if it can be shown to be irrational: *Banfield* (above) per Jackson J at [28] & [29].

36. In *R (Mormoroc) v Secretary of State for Justice* [2017] EWCA Civ 989 Flaux LJ, giving the judgment of the Court of Appeal, confirmed that it was lawful in principle to treat foreign prisoners differently from domestic prisoners on the basis that they were liable to be removed by deportation. Having considered previous case law at [31]-[41], he stated:

> "[58] … the difference in treatment between someone like the appellant who was liable to deportation, albeit no decision had yet been made, and a prisoner (whether a British or a foreign national) who is not so liable is, as Males J noted in [64] of *Serrano*, that only the latter is likely to be a person whose resettlement into the community needs to be managed.
>
> [59] In my judgment, that difference in treatment is based on liability to be deported or, as Mr Deakin put it, eligibility to be removed. That this and not nationality was the true basis for the difference in treatment was correctly identified by Sir Anthony May P in *Brooke* at [30] … and by Pill LJ in *Francis* at [40]-[42] … As Lindblom LJ put it in argument, this difference in treatment is in fact "nationality blind"."

37. Article 5 of the European Convention for the Protection of Human Rights ("ECHR") provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> …
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

38. In *R (Brown) v Parole Board* [2017] UKSC 69, Lord Reed stated at [2]:

> "The essential aim of article 5 is to confer protection against arbitrary or unjustified deprivation of liberty."

39. For a prisoner's detention to be lawful for the purpose of article 5(1)(a), there must be sufficient causal connection between his conviction by a competent court and the deprivation of liberty. There must also be sufficient causal connection between his detention regime and the purpose of such deprivation of liberty: *James v United Kingdom* (25119/09, 57877/09, 57715/09); *Brown* (above) per Lord Reed at [8]-[10].

40. In the case of IPP prisoners, continued detention after expiry of the minimum tariff may be justified by the need to protect the public and is a matter for determination by the Parole Board. The causal connection between the regime and purpose of detention required by article 5(1) may be broken by failure on the part of the Secretary of State to provide reasonable opportunities for prisoners to demonstrate their rehabilitation. In assessing whether such causal link has been broken, regard must be had to all the circumstances, including the prisoner's progression through the prison system during the whole of his detention: *Brown* (above) per Lord Reed at [20] & [83].

41. The threshold for establishing a breach of article 5(1) of the ECHR is very high. A successful challenge would require exceptional circumstances showing that continued detention had become arbitrary, such as a decision by the Parole Board that detention of the prisoner was no longer necessary, or a prisoner left to languish in prison without any reasonable opportunity to rehabilitate himself and demonstrate that he no longer presented an unacceptable risk of serious harm to the public: *Brown* (above) per Lord

Reed at [29] and [83]; *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66 per Lord Mance and Lord Hughes at [60].

42. In *(Brown)* (above), Lord Reed stated:

> "[44] It is necessary for this court to confront squarely the difficulties arising from its reasoning in *Kaiyam.* The appropriate course is for this court now to adopt the same approach to the interpretation of article 5(1)(a) as has been followed by the European court since the case of *James,* and cease to treat the obligation in question as an ancillary obligation implicit in article 5 as a whole.
>
> [45] Emphasis should however be placed on the high threshold which has to be surmounted in order to establish a violation of the obligation. As the European court stated in *Kaiyam* at para 70, cases in which a violation is found will be rare (see para 33 above). That is consistent with the statement in *R (Sturnham) v Parole Board (No 1)* [2013] UKSC 23; [2013] 2 AC 254, para 13, that "a violation of article 5(1) of the Convention ... would require exceptional circumstances warranting the conclusion that the prisoner's continued detention had become arbitrary". The guidance given by the European court, for example at paras 69-70 of *Kaiyam*, as well as that given in the present judgment, should be borne in mind."

43. Article 5(4) requires the State to provide fast and effective processes by which a prisoner can challenge the lawfulness of his detention. That obligation is satisfied by the availability of judicial review, through which the lawfulness of detention, including the classification of prisoners and their conditions during detention, can be challenged, and the availability of Parole Board review, at which the necessity for continued detention can be challenged. In *R (James) v Secretary of State for Justice* [2009] UKHL 22 Lord Brown stated at [60]:

> "… I have concluded that article 5(4) requires no more than that "a Court" (the Parole Board) shall speedily decide whether the prisoner continues to be lawfully detained, and this will indeed be the case unless and until the Board is satisfied of his safety for release…"

44. In *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66 Lord Mance and Lord Hughes stated at [37]:

> "The duty is to make available access to judicial review by a court or here the Parole Board, which will consider whether the information put before it justifies continued detention or release. Speedy access to the Parole Board like reasonable access to proper courses and facilities represents an important aspect of a prisoner's progression towards release. But the language of article 5(4) is in terms confined to access to judicial review by the Parole Board on the basis of the information available from

> time to time. It does not cover the prior stage of provision of courses and facilities in prison, which gives rise to the information necessary on any Parole Board review…"

45. In *Brown* (above) Lord Reed stated at [43]:

> "…the European court held in the *James* case that the requirement under article 5.4, that a person's release should be ordered if his detention was not lawful, was satisfied by the availability of remedies (1) to bring an end to the aspect of the detention which rendered it unlawful within the meaning of article 5.1(a), namely the failure to provide an opportunity for the prisoner to rehabilitate himself, and (2) to enable the prisoner to secure his release if the Parole Board was satisfied that he was no longer dangerous.…"

46. In relation to IPP prisoners, article 5(4) requires a review as to the continued purpose and necessity of detention at the end, and after expiry, of the tariff. Delay by the Parole Board in carrying out such review amounts to a violation of the prisoner's Article 5(4) rights. If such delay results in a prolonged period of detention, or causes the prisoner to suffer feelings of frustration and anxiety that are sufficiently severe, it will sound in damages: *R (Sturnham) v Parole Board* [2013] UKSC 23 per Lord Reed at [10]-[13].

47. Article 5(4) is not engaged where, as in this case, there has been no restriction or impediment placed upon the availability of judicial review or Parole Board review to determine the continued lawfulness of detention.

Ground 1 – procedural unfairness/breach of policy

48. Ground 1 is set out in the grounds of challenge as follows:

> "The decision is procedurally unfair as the defendant raises a number of new issues relating to the claimant's immigration status without giving the claimant any opportunity to respond. This is in the context of the Parole Board requesting that the defendant participate in its proceedings to address the claimant's immigration history and the defendant not complying with this request."

49. In developing his submissions on this ground, Mr Wagner, counsel for the claimant, relied on two limbs of argument:

    i) The first limb is that the defendant relied on the claimant's immigration history as set out in the defendant's letters to the Parole Board but the letters were not copied to the claimant. The defendant failed to attend and participate in the hearing by the Parole Board, contrary to the spirit of PSI 37/2014, which requires close cooperation so that a fully informed decision can be reached. As a result, the claimant did not have an opportunity to respond to the matters relied on by the defendant in making its decision.

ii) The second limb is that the delay by the defendant in making its decision whilst the claimant was liable to deportation was a breach of policy which left the claimant in limbo and amounted to a form of immigration detention.

50. In respect of the first limb, reliance is placed on the third principle identified in *Banfield*:

> "If the Secretary of State places reliance upon significant material that was not before the Parole Board, then fairness may require that the prisoner be given an opportunity to comment upon it."

51. The matters referred to are those set out in the defendant's letter dated 4 June 2018, namely:

i) the claimant's entry to the UK without leave,

ii) making a claim for asylum in Ireland under a false identity,

iii) failure to leave the UK when his asylum claim was refused,

iv) the absence of any intention to leave the UK and

v) the risk that the claimant would abscond.

52. In my judgment there was no procedural unfairness in respect of the defendant's decision. The claimant's immigration history was set out in letters to the Parole Board dated 6 October 2017 and 24 October 2017 respectively. It is clear from the Parole Board's letter of 14 November 2017 that it was aware that the risk of the claimant absconding in the light of his liability for deportation was a significant factor for consideration. There was no reliance on significant material that was not before the Parole Board. It was a matter for the Parole Board to decide what issues should be raised with the claimant in the oral hearing, having seen the dossier of relevant material. Mr Wagner did not seek to challenge as inaccurate any aspects of the claimant's immigration history set out in the letters.

53. There was no obligation on the defendant to attend the Parole Board hearing, by legal or other representatives. The Parole Board requested the defendant's attendance so that it could be informed of the claimant's current immigration status and the options available to it. In advance of the hearing, the defendant set out the claimant's immigration history (by letter dated 6 October 2017), his immigration status at that time (by letter dated 24 October 2017) and the options available, namely, release by the Parole Board or recommendation as to his suitability for open conditions (by letter dated 24 October 2017). The defendant shared information with the Parole Board and provided guidance on the parameters of the recommendation sought. That was sufficient to discharge his obligation of co-operation.

54. The second limb of this ground is that the delay by the defendant in making his decision whilst the claimant was liable to deportation left the claimant in limbo and amounted to a form of immigration detention. Mr Wagner submits that the defendant should not be able to use the risk of a prisoner absconding as a trump card preventing his release to open conditions: *Lumba (Congo) v SSHD* [2011] UKSC 12. The defendant may only

keep a person in prison post-tariff if they remain a risk to the public. This should be the sole consideration in deciding whether or not to release a prisoner. Whilst the risk of re-offending may be affected by a prisoner's immigration status, this cannot become the only operative factor in deciding whether to allow him to progress towards release. The defendant was in breach of PSI 22/2015 by taking five months (November 2017 to April 2018) to make a decision, instead of 28 days, a delay of at least four months. Such delay used the custodial system as a form of immigration detention.

55. Mr Manknell, counsel for the defendant, admits that the defendant was in breach of policy in failing to issue its decision within 28 days of the Parole Board's recommendation. However, he disputes that this caused any prejudice to the claimant, as the decision was negative, and it had no effect on the claimant's classification.

56. I reject the claimant's case that any delay in issuing the decision left him in limbo or amounted to a form of immigration detention for the following reasons.

57. Firstly, I accept Mr Wagner's submission that the defendant may only keep a person in prison post-tariff if they remain a risk to the public. In this case, the Parole Board determined that the claimant should not be released because he posed a high risk of causing serious harm to the public. That decision has not been challenged. The claimant's continued detention is based on his risk to the public and is unconnected to his immigration status.

58. Secondly, the claimant is not in limbo regarding his immigration status. A notice that he was liable to deportation was served before the expiry of his tariff. He made a fresh asylum claim and, at the date of the decision, was not appeal rights exhausted. On 7 February 2018 a notice of deportation was served. The process to finalise the claimant's immigration status has not yet been concluded but it is in progress. The asylum appeal can be decided and the deportation order confirmed or revoked.

59. Thirdly, at the time of the defendant's decision, the claimant was a prisoner in closed conditions "liable to deportation" for the purposes of PSI 37/2014. He satisfied the criteria for deportation, as a foreign offender and based on his sentence length. He had been served with a notice of liability to deportation. In fact, by the date of the decision in April 2018, a notice of deportation had also been served by letter dated 7 February 2018. As a prisoner in closed conditions liable to deportation, the presumption was that he would not be suitable for open conditions unless he was assessed as presenting a very low risk of seeking to avoid the intention to deport by absconding.

60. Fourthly, the Parole Board considered that the risk of absconding could be managed in open conditions but did not assess the claimant as presenting a very low risk of absconding. The decision on whether the claimant should be moved to open conditions was for the defendant to make. In making that decision, he was entitled to consider the risk to the public of re-offending by the claimant together with the risk of absconding as set out in the decision letter.

61. Finally, the defendant's decision was that the claimant should not be moved to open conditions. Although the claimant had to wait some months for that decision, he has not been deprived of his liberty, or deprived of a less restrictive regime, for a longer period than would have been the case if the decision had been made on time.

Ground 2 – breach of Article 5 ECHR

62. Ground 2 is set out in the grounds of challenge as follows:

> "The defendant is in breach of Article 5(4) of the ECHR. There was a delay of almost eight months between the Parole Board's recommendation and the defendant's decision. This is in breach of the defendant's policy (PSI 22/205) which requires that a decision whether to accept or reject such a recommendation *"must be completed within 28 days of the decision being issued"* (§3.55 – emphasis added). The defendant has apologised for but not explained the delay. The unexplained delay has caused the claimant considerable distress and has also caused, on the balance of probabilities, an equivalent delay in the claimant's sentence progression and therefore his release."

63. Mr Manknell submits that the claimant's reliance on a breach of article 5(4) is misplaced. That submission is correct. For the reasons set out above, there was no restriction or impediment placed upon the claimant's ability to challenge the lawfulness of his detention by judicial review or through the Parole Board process.

64. Mr Wagner has developed his submissions based on a breach of article 5(1). He submits that the defendant's conduct in all the circumstances is arbitrary and unreasonable in breach of article 5(1) as the claimant has been prevented from progressing through the system towards release. The late decision has had a consequential delay to the next review, impeding the claimant's progress through the prison system and delaying his opportunity to demonstrate rehabilitation.

65. In my judgment there is no breach of article 5(1). As set out above, the threshold for establishing a breach of article 5(1) is very high. The Parole Board's decision not to release the claimant based on the risk to the public has not been challenged. The claimant could only challenge the substance of the defendant's decision not to move him to open prison conditions if the decision were wrong in law or irrational. Permission to challenge the decision on those grounds was refused. There is no arguable issue as to the lawfulness of his detention.

66. For the reasons set out above in respect of ground 1, I have rejected the claimant's case that any delay in issuing the decision left him in limbo or amounted to a form of immigration detention.

67. The defendant fixed the next review date so that it fell within the maximum two-year period. That is within the defendant's power and in accordance with policy.

68. The delay by the defendant in notifying the claimant of the adverse decision will have caused disappointment and frustration but would not be sufficiently serious to justify an award of damages. The delay of four months was relatively short. The claimant was already aware that he would not be released. A deportation notice was served in February 2018, clarifying his immigration status. The decision was negative and therefore did not affect his detention or conditions.

Conclusion

69. For those reasons, I conclude that:

i) The defendant was in breach of his policy in failing to issue within 28 days his decision not to move the claimant to open prison conditions.

ii) The claimant's application for judicial review is dismissed.

iii) The claimant's application for a declaration that the defendant was in breach of article 5 of the ECHR is dismissed.

iv) The claimant's application for damages or other relief is dismissed.