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Case No: CO/3750/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2021

Before :
UPPER TRIBUNAL JUDGE MARKUS QC, SITTING AS A JUDGE OF THE HIGH COURT

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Between :

The Queen on the application of Darren Stubbs	**Claimant**
- and –	
The Parole Board	**Defendant**
- and -	
Secretary of State for Justice	**Interested Party**

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Mr Jude Bunting (instructed by **SL5 Legal/ Tuckers Solicitors LLP**) for the **Claimant**
The Defendant and Interested Party did not appear and were not represented

Hearing dates: 9th March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 16 March 2021.

Upper Tribunal Judge Markus QC:

1. The Claimant challenges the Defendant's decision not to hold an oral hearing of the Claimant's parole review. Permission to bring judicial review proceedings was given by Mr David Lock QC sitting as a Deputy High Court Judge on 15th January 2021.

2. In correspondence exchanged pursuant to the judicial review pre- action protocol, the Parole Board stated that it would take a neutral approach to the claim. This is the Board's general position in accordance with its 2019 Litigation Strategy "because of the judicial nature of the decision and the requirements of case law". That remains the Board's position in this case. The Secretary of State for Justice was served as an interested party but has also taken a neutral approach and so has not participated in the proceedings.

3. Accordingly, only the Claimant was represented at the oral hearing which took place by video (MS Teams) on 9th March 2021. I am grateful to Mr Bunting for his clear written and oral submissions.

Facts

4. The Claimant was born on 30th May 1975. He has a long criminal record, having been convicted of thirty eight criminal offences including offences of violence, theft, and drug possession. On 22nd February 2012 he received an indeterminate sentence for public protection ('IPP sentence'), with a minimum term of 3 years 286 days, following his guilty plea to offences of robbery, dangerous driving, causing actual bodily harm and wounding. The facts of the index offences are that the Claimant stole a car from a heavily pregnant woman, drove away from her dangerously and then ran over her elderly mother who tried to stop him. The Claimant's minimum term expired on 6th December 2015 and he became eligible for release. On 19th October 2016, the Claimant received a further 20-week sentence, to be served concurrently, following his conviction for an offence of assaulting a prison officer.

5. The Claimant has completed a number of offending behaviour courses. However, he also has a record of poor custodial behaviour, including nine findings of guilt in prison adjudication hearings the most recent of which were on 25th March and 18th June 2019.

6. The Parole Board considered the Claimant's case at an oral hearing on 14th January 2019. At that time the Claimant did not seek his release or transfer to open conditions but he invited the panel to comment on his level of risk. In a decision letter dated 18th January 2019 the panel noted the seriousness of the index offences and concerns as regards the Claimant's custodial behaviour. In reviewing developments since the previous parole review in 2016, the panel noted that the Claimant was unhappy with his recent transfer to HMP Gartree including that he said that he had arrived there to make a fresh start but that he had been told "lies after lies" and that in consequence "bridges with Gartree were now burned". The panel noted other evidence as to the Claimant's frustrations with the prison system, with Gartree and with his circumstances at that time. The Claimant was reluctant to engage with the recommended offending behaviour programme (the Kaizen programme) at HMP Gartree but said that he was motivated to do so if he was transferred elsewhere. However, the Category B prisons which had been approached were not willing

to accept him. The panel did not direct the Claimant's release or recommend a transfer to open conditions. It noted that there was clearly an impasse as regards the most appropriate pathway to enable the Claimant to progress through his sentence.

7. On 20th February 2019, the Secretary of State for Justice accepted the Parole Board's recommendation and identified further interventions to help the Claimant demonstrate a reduction in risk including engaging with the Kaizen programme and working with the substance misuse teams. The Secretary of State expected that the Claimant's next parole hearing would take place in July 2020.

8. The case was next referred to the Parole Board on 19th November 2019. A dossier was prepared. It included a report from a stand-in offender supervisor, dated 6th February 2020, which explained that the Claimant had commenced the Kaizen programme on 29th May 2019 and completed a number of sessions but then decided to come off the programme on 8th August. Events occurring on 14th August led to him being placed in segregation. On 2nd September a decision was taken to transfer him from HMP Gartree. Shortly after that, the Claimant indicated that he did not wish to continue with the Kaizen programme. The report also stated that the Claimant had engaged with the substance misuse team and joined the relapse prevention group (before disengaging due to personal problems on his prison wing). The offender supervisor noted that the Claimant had had a challenging time in HMP Gartree but that he had done some good work on the wing backed up with some positive entries on his case notes. He noted comments by the Claimant's Keyworker that the Claimant "appears to have had as much as he can take" and felt that no-one was helping him to move out of HMP Gartree. The report concluded that the Claimant needed to complete the Kaizen programme or another suitable intervention before further progression could be assessed. The supervisor felt that the Claimant was unlikely to take these steps at HMP Gartree.

9. The dossier also contained a report from a trainee offender manager, dated 19th February 2020. She stated that the Claimant had refused to engage with her by telephone conference. She incorrectly thought that the Claimant was still pre-tariff. She felt that the Claimant needed to attend programmes or interventions. The offender manager described some good progress in engaging with substance misuse agencies (including the completion of a relapse prevention course in January 2020) and explained that there was now more understanding of the Claimant's custodial behaviour following a recent personality disorder screening. She did not recommend release or a transfer to open conditions.

10. There was a report from the Kaizen Treatment Manager dated 11th September 2019 which explained the Claimant's engagement with and subsequent disengagement from the Kaizen programme. On 13th August he had made threats to staff, said he had swallowed a razor blade and made a noose, and then agreed to attend a meeting the following day to discuss moving forwards with Kaizen. However, on 14th August he was told he could not attend the meeting and he set his cell on fire, variously saying this had been an attempt to take his own life and that it had been to show his frustration. He had been in segregation since then. The Treatment Manager explained that she then met the Claimant on numerous occasions, during which time he discussed the problems he had faced at HMP Gartree, including his possessions being taken by other prisoners (clothing and family photos had been destroyed) and an allegation that an officer had assaulted him. During those meetings the Claimant had maintained that he wanted to remain at Gartree to complete Kaizen. The Governor had decided that the Claimant would

not be staying at Gartree but he had been turned down by other prisons. The Claimant then stated that he would never do Kaizen again and that he felt that Gartree had hindered him doing it. The Treatment Manager encouraged him to re-engage with Kaizen and made suggestions for support at his next prison.

11. Finally, the dossier contained over three hundred pages of intelligence reports containing allegations of poor custodial behaviour from 2017 to January 2020. As I explain further below the Claimant denies or seeks to explain many of the allegations, the overwhelming majority of which have not led to any action being taken against him.

12. On 2nd July 2020, the Claimant's solicitor submitted representations to the Parole Board explaining that the Claimant sought a progressive move to open conditions. He sought an oral hearing for the following principal reasons. First, the Claimant strongly disagreed with the contents of his dossier (including the intelligence reports) and wanted the opportunity to address the Parole Board to make his case for open conditions. Second, the Claimant was of the view that he had been unfairly discriminated against in HMP Gartree and he believed that staff may confirm this. The submission stated that the Claimant had been "provoked" when on the normal prison wing, his property had been taken from him, and his legal papers had been disrupted in his cell. It was submitted that his risk could best be assessed through an oral hearing so that the information within the dossier could be tested. Third, the submission referred to the impasse described above regarding the Claimant's progression and in particular engagement with the Kaizen programme, saying "Whatever the truth is in this situation Mr Stubbs appears to have reached an impasse. A Governor made it clear Mr Stubbs would not be remaining at Gartree and this was 9 months or so ago. (On another occasion it is evident that Mr Stubbs was 'not allowed' to attend a Kaizen meeting.) On receiving such information, it is understandable that Mr Stubbs did not want to engage with his sentence plan, anticipating he would be transferred from HMP Gartree….It is however difficult for him to evidence risk reduction in the absence of OBP completion. It appears Mr Stubbs was informed in September 2019 that he would not be staying at Gartree, however his (disputed) prison record prevents any other prison accepting him. How then does he progress?" The solicitor also identified witnesses who the Claimant would like to be called to the hearing.

13. On 15th July 2020, under a process known as "Member Case Assessment" or "MCA", a single Member of the Parole Board assessed the case on the papers and decided not to direct the Claimant's release or recommend his transfer to open conditions. The decision stated that the Member "did not find reasons to convene an oral hearing as there is core risk reduction work that is required before release can be considered". After a summary of the evidence, the decision stated that the Claimant had "made a small amount of progress in beginning to engage with Kaizen and continuing to work with the prison substance misuse team, but [he had] not completed any further core risk reduction work and [he had] not been able to maintain stable custodial conduct". The Member concluded:

> "Since the last review you have unfortunately made limited progress in completing core risk reduction work and in stabilising your prison behaviour. The Panel Member assesses that you present a high risk of reoffending and a high risk of causing serious harm in the community and considers that you need to complete Kaizen and begin to further stabilise your

> custodial behaviour. The Panel Member acknowledges the hopelessness that you feel at times and would wish you assure you that the Parole Board would be pleased to see positive progress on your part that could be discussed with you at your next review. The Panel Member concluded that it is necessary that you continue to be confined for the protection of the public. The Panel Member does not direct release".

14. On 16th July 2020, the Claimant's solicitor sought an oral hearing of his parole review, submitting: a) the Claimant disputed much of the contents of the dossier and the report writers had relied on inaccurate information; b) the Claimant had spent many years in custody; c) he was a post-tariff IPP prisoner and should have the opportunity of presenting his case orally; d) if the Claimant's concerns about discrimination were warranted, this could impact on the perception of his level of risk; e) the dossier included unproven allegations and adjudications and should be tested fairly.

15. On 20th July 2020, a Duty Member of the Parole Board refused the request for an oral hearing, giving the following reasons:

> "• An oral hearing is not required to consider the facts of the case. They are clearly laid out in the MCA decision.
>
> • The MCA panel correctly identifies that Mr Stubbs' case was reviewed at an oral hearing in January 2019 when it was concluded that Mr Stubbs had core risk reduction work outstanding.
>
> • The MCA panel concludes that Mr Stubbs has made "limited progress in completing core risk reduction work and in stabilising your (sic) behaviour".
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> • Legal representations were considered at the time of the MCA review and the Duty Member concludes that Mr Stubbs' legitimate interest in taking part in his review is satisfied by the consideration of written submissions. This includes the submissions that Mr Stubbs disputes much of the contents of his dossier and that he considers that he has been the subject of discrimination at HMP Gartree. It is clear from the MCA decision letter, that the MCA panel considered these submissions.
>
> • The legal representations do not raise any issues which cause the Duty Member to put the paper decision into serious question."

16. "MCA panel" is a reference to single Member who made the decision dated 15th July 2020, the Parole Board Rules 2019 defining "panel" as "a panel of one or more members".

Legal framework

17. Section 28(7) of the Crime (Sentences) Act 1997 entitles each indeterminate sentence prisoner to have his case referred to the Parole Board by the Secretary of State at any time after he has served the relevant part of his sentence and to further reviews by the Parole Board every two years thereafter. Section 28(5) requires the Secretary of State to release the prisoner as soon as he has served the tariff part of his sentence and the Board has directed his release. By section 28(6) the Board may not direct release unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

18. The key applicable legal principles are found in the decision of the Supreme Court in *R (Osborn and Booth) v Parole Board* [2013] UKSC 61, [2014] AC 1115. Lord Reed gave the sole judgment, with which all other members of the Court agreed. At paragraph 2 Lord Reed summarised the conclusions which he had reached:

> "i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged."
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> 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.
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> 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.
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> 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.
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> 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.
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> xiii) A breach of the requirements of procedural fairness under article 5(4) will not normally result in an award of damages under section 8 of the Human Rights Act unless the prisoner has suffered a consequent deprivation of liberty."

19. At paragraph 65 Lord Reed said that "The court must determine for itself whether a fair procedure was followed…It's function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required".

Discussion

20. I do not set out Mr Bunting's submissions before turning to the discussion and conclusion. This is because I accept them and they are incorporated in to what I say below.

21. I have concluded that in refusing an oral hearing in this case the Board failed to apply a number of fundamental principles established in *Osborn* and so was in error of law.

22. The first error is that the Board applied the wrong test in determining the request for an oral hearing. The decision-maker found that the paper decision had clearly laid out the facts, had correctly identified the January 2019 review and conclusion, and had found that the Claimant had made limited progress in relevant respects. The decision-maker stated that "legal representations were considered at the time of the MCA review" (the paper decision) and that it was clear from the MCA decision letter that the MCA panel (the paper decision-maker) considered those submissions, and continued "The legal

representations do not raise any issues which cause the Duty Member to put the paper decision into serious question".

23. It is apparent from the above that the decision-maker wrongly approached the request as turning on whether the paper decision was correct. This was contrary to the principle at paragraph 2(x) of the judgment in *Osborn* that the prisoner does not need to demonstrate that the paper decision, which is provisional, was wrong; the question is whether an oral hearing is appropriate. The decision did not address that key question. Instead it approached its task as being one of review of or appeal against the paper decision.

24. Moreover, the reasoning demonstrates that the decision-maker treated the facts contained in the paper decision as being presumptively correct. Lord Reed explained at paragraph 95 that "This is to put the cart before the horse. If fairness requires an oral hearing, then a decision arrived at without such a hearing is unfair and cannot stand. The question whether an oral hearing is required cannot therefore be decided on the basis of a presumption that a decision taken without such a hearing is correct."

25. Linked to this, the decision-maker wrongly approached the request for an oral hearing as turning on the Claimant's prospects of release. Specifically, the decision-maker took into account the paper decision that core risk reduction work was outstanding and that the Claimant had made limited progress in regard to core risk reduction work and stabilising his behaviour. This too is an instance of the cart being put before the horse. As Lord Reed said at paragraph 88, the approach "would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success, and thus involves circular reasoning".

26. I am also satisfied that there were a number of fundamental errors in the consideration of the substantive issues relevant to the oral hearing request, as follows.

27. One of the circumstances in which Lord Reed said that an oral hearing is likely to be necessary is where important facts are in dispute or where significant explanation is advanced which needs to be heard orally in order to determine its credibility (*Osborn* at paragraph 2(ii)(a)). Here the Claimant made clear that he disputed the contents of the dossier including the intelligence reports. The decision-maker simply accepted the disputed facts as set out in the paper decision. The denial of an oral hearing denied the Claimant the opportunity to make an effective challenge to the facts in the dossier and as found I the paper decision. It is notable that the intelligence reports contained only the most general assertions as to the Claimant's conduct and did not identify the evidence upon which they were based and yet the Claimant had no effective opportunity to dispute them and, it appears, they were accepted as correct. It was all the more important that the Claimant should have been able to challenge the facts in the dossier given the observation by the previous Parole Board that there were security reports in the dossier which were based on "extremely limited" evidence. Furthermore, findings in the paper decision about the Claimant's behaviour, and which the decision-maker appears to have accepted when refusing an oral hearing, included that the Claimant had swallowed a razor and made a noose, but it is in fact far from clear that he did do those things rather than that he claimed to have done so. In any event, the Claimant had offered different explanations for the behaviours, and ascertaining the true explanation would have been relevant to the assessment of risk and called for both findings of fact and assessment by the decision-maker.

28. Another indicator for an oral hearing is where the board cannot otherwise properly or fairly make an independent risk assessment or the means by which it should be managed and addressed (*Osborn* paragraph 2(ii)(b)). The decision-maker did not address this. Given the complex history of this case, the fact that the Claimant had completed some offending behaviour work and the issues surrounding his unwillingness to continue to engage at HMP Gartree, I cannot see on what basis the decision-maker could reasonably have thought that the Claimant's risk could be assessed adequately without an oral hearing at which the board, including its expert members, could see and question the Claimant in person.

29. In this regard it is important to note that the Claimant had not engaged directly with prison staff, largely (he claimed) as a result of his frustrations with his situation at HMP Gartree. Whatever the reason, the effect of this was that his factual accounts, explanations or views were not available to officers when they prepared their reports. This made it all the more important that the Parole Board should have heard from the Claimant before making either their findings of fact or risk assessments. A good illustration of why this was important is the report by the Claimant's offender manager. That officer had assessed that the Claimant was not suitable for release on licence due to issues in custody regarding behaviour, non-completion of Kaizen and lack of engagement with staff. The offender manager had not been able to discuss any of these matters with the Claimant and had relied entirely on reports by others, including "numerous entries of negative behaviour in custody". Thus the Parole Board was presented with a report based on disputed factual matters and assessments, with no effective input from the Claimant. Moreover, the offender manager's recommendation was in part based on the factual error that the Claimant's tariff had not expired. This had the potential to affect the weight to be afforded to that report, a matter which would have been explored more effectively at an oral hearing.

30. A further indicator for an oral hearing is to allow a prisoner or his representative to put his case effectively and test the views of those who have dealt with him (*Osborn,* paragraph 2(ii)(c)). The Claimant's solicitor had identified two officers who he wished to give evidence at a hearing. There was no consideration by the decision-maker as to whether it was fair to deprive the Claimant of the opportunity to question those individuals. Moreover, a number of the issues raised by the Claimant (for instance, his allegations of discrimination and his reasons for not engaging with the Kaizen programme or with staff) depended on his subjective views and perceptions. The decision-maker gave no consideration to whether an oral hearing was required to enable the Claimant to explain those matters and to enable the board to assess them.

31. Lord Reed gave examples of the cases in which an oral hearing would be required to properly and fairly make an independent assessment of risk, including cases where the risk assessment depended on an assessment of the prisoner's characteristics which can best be judged by seeing or questioning him in person, cases where the risk assessment would be assisted by hearing evidence from a psychologist or psychiatrist, and cases in which a prisoner had spent many years in custody. The Claimant's case fell at least into the first and third of those categories. The second also possibly applied, but without further exploration I cannot say. As I am directing that that there be an oral hearing before the Parole Board, this is no doubt a matter which the Claimant's representatives will consider.

32. The above discussion focusses on the oral hearing as enabling the resolution of the issues before the decision-maker. But, as Lord Reed emphasised at paragraphs 68 to 70, an oral hearing is also important because

> " 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."

33. This applies whether or not the decision-maker requires to hear from the individual in order to improve the quality of the decision-making. Lord Reed referred to the feelings of resentment which can otherwise be aroused in a party, and the "frustration, anger and despair felt by prisoners who perceive the board's procedures as unfair, and the impact of those feelings on their motivation and respect for authority".

34. This value applies with particular force in the present case. The information in the dossier showed that the Claimant was negatively affected by his perceptions of having been treated unfairly and that this had created obstacles to his ability or willingness to engage in relevant programmes and impacted on his rehabilitation. I have already referred to the extremely limited evidence for some security reports, as to which the previous Parole Board had commented "As a consequence, you feel frustrated and resentful that you are labelled as something that you consider that you are not, and this appear to have been a barrier to your progression through your sentence". The value to the Claimant of having an oral hearing was reinforced by the fact that he had spent a considerable amount of time in custody, could not progress in HMP Gartree and yet was unable to obtain a transfer to another provision where he could make progress, and that there did not appear to be any practical plan to break the impasse.

Relief

35. In his decision granting permission on the papers, the deputy Judge said that there may be a "real issue in this case as to whether it is highly likely that an oral hearing would have made no difference" although he suggested that the issue may be of less relevance by the time this case came to a hearing given the passage of time since the decision under challenge. This was a reference to section 31(2A) of the Senior Courts Act 1981 which prohibits the court from granting relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

36. The first thing to point out is that the deputy Judge's comment was based on a misconception in that he thought that the previous Parole Board decision had been only six months before the decision under challenge whereas it had in fact been eighteen months earlier, during which period there had been some significant developments. In any event, as explained by Bingham LJ in *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, at 352, courts should be reluctant to conclude that the same result would have occurred if a person had not been deprived of an adequate opportunity to put his case. The reasons for this include that: (i) experience shows that that which is confidently expected is by no means always that which

happens; (ii) the court should avoid straying from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of reviewing the merits of a decision, (iii) this is a field in which appearances are generally thought to matter, and (iv) a right to be heard is not to be lightly denied.

37. Applying the principles in *Osborn* and in the light of my reasoning above, it was unfair to refuse an oral hearing. An oral hearing is of itself an important right, even if it could not change the outcome (see the discussion at paragraphs 68 to 70 of *Osborn*) and so this is a materially different outcome for the Claimant. In any event, to the extent that it is relevant to consider what the outcome of the parole review would have been following an oral hearing, I cannot say that it is "highly likely" that the ultimate outcome of the parole review would have been the same. Given the disputed facts, the range and complexity of the issues to be decided and the assessment to be made, it is impossible to predict.

38. Accordingly, the decision must be quashed and I direct that there is to be an oral hearing before the Parole Board.
