

Neutral Citation Number: [2024] EWHC 1106 (Admin)

Case No: AC-2023-LON-001233

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9<sup>th</sup> may 2024

**Before :**

**Neil Cameron KC**  
sitting as a Deputy High Court Judge

**Between :**

**THE KING on the application of**

**NEIL GARMSON**

**Claimant**

**- and –**

**THE PAROLE BOARD FOR ENGLAND AND  
WALES**

**Defendant**

**-and-**

**THE SECRETARY OF STATE FOR JUSTICE**

**Interested Party**

**Carl Buckley** (instructed by Kesar and Co) for the Claimant

The Defendant and the Interested Party did not appear and were not represented

Hearing date: 25<sup>th</sup> April 2024

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**JUDGMENT**

**The Deputy Judge (Neil Cameron KC):**

**Introduction**

1. In this case the Claimant seeks to quash a decision made by the Parole Board that the Claimant's case be decided on the papers.
2. The Defendant filed an acknowledgment of service in which they stated that they took a neutral position.
3. The Interested Party did not file an acknowledgment of service, but wrote to the Court stating that he would remain neutral.
4. Permission to proceed with this application for judicial review was granted by Andrew Kinnier KC sitting as a Deputy High Court Judge by order dated 23<sup>rd</sup> November 2023.

**The Background Facts**

5. The Claimant was convicted at the Crown Court at Stafford on 20<sup>th</sup> August 2007 of various offences of kidnapping, rape and sexual assault which related to incidents which occurred in April 2005 and March 2006. The Claimant was sentenced to imprisonment for public protection. The minimum term, as increased by the Court of Appeal (by order made on 6<sup>th</sup> February 2008), was 9 years.
6. The Claimant is a life prisoner as defined in section 34(2)(d) of the Crime (Sentences) Act 1997 ("the 1997 Act").

7. In October 2018 the Secretary of State for Justice referred the Claimant's case to the Defendant under the provisions of section 28(6)(a) of the 1997 Act.
8. On 22<sup>nd</sup> March 2019 the Defendant reviewed the Claimant's case on the papers. Consideration of the case was deferred. In giving reasons the Defendant stated that more information was needed in order to decide whether the review should be conducted on the papers or by way of oral hearing.
9. On the 20<sup>th</sup> September 2019 consideration of the case was again deferred. The reasons given for the deferral decision included the following:

“In the interests of fairness to Mr. Garmson, and taking account of his recently expressed opinion, the MCA Member considers that it is imperative that further legal representations are provided to indicate whether an oral hearing is requested.”

10. On the 6<sup>th</sup> November 2019 the Defendant directed that the Claimant's case be considered at an oral hearing. When making that direction the Defendant's reasons included the following:

“There are issues in the dossier that Mr Garmson wishes to challenge. It is clear that there are a number of issues in this case that require further exploration and, whilst the panel considered the merits of concluding the case on the papers, in view of the original representations and Mr Garmson's stated position that he believes he has no further treatment needs and that the concerns of professionals are irrelevant to risk, it believes his position merits further examination. The panel notes the recommendations and takes full account of the representations submitted. It concludes that an oral hearing is necessary and appropriate in this case, taking account of the fact that Mr Garmson is significantly post-tariff and his case appears to be at an impasse. A review at an oral hearing can consider his application for progression and also consider what risk areas, if any, remain outstanding. In making this decision the panel has considered the case against the principles set out in the case of Osborne (sic) and others concerning oral hearings.”

11. On the 18<sup>th</sup> February 2020 the Defendant decided to defer the hearing of the Claimant's case. The primary reason was that the Claimant was to be transferred from one prison to another.
12. A directions hearing was listed before the Defendant's panel for 5<sup>th</sup> August 2020. By a decision dated 3<sup>rd</sup> August 2020 the Defendant deferred the case. The Defendant's reasons included the following:

“The hearing should be listed from January 2021. If possible, a face-to-face hearing is most suitable to conduct this complex case. However, if this is not an option, due to COVID-19 a video hearing is considered suitable.”
13. On 23<sup>rd</sup> March 2021 the Defendant noted that the Claimant had refused to participate in a psychological risk assessment, and stated that the direction that such a report be prepared should stand.
14. On 20<sup>th</sup> July 2021 the Defendant gave directions that the Claimant's case be adjourned and that the case be listed as soon as possible after 1<sup>st</sup> September 2021. The reason given for allowing the adjournment was that the Claimant had appointed new legal representatives.
15. On 27<sup>th</sup> July 2021 the date for the panel hearing was fixed for 27<sup>th</sup> September 2021. On 19<sup>th</sup> August 2021 the panel chair directed that the hearing fixed for 27<sup>th</sup> September 2021 should proceed as a directions hearing. At the directions hearing which took place on 27<sup>th</sup> September 2021 it was directed that an oral hearing take place on 7<sup>th</sup> February 2022.

16. On 10<sup>th</sup> January 2022 the Defendant directed that the hearing fixed for 7<sup>th</sup> February 2022 be deferred in order to allow an independent psychological risk assessment to take place.
17. On 5<sup>th</sup> April 2022 the Defendant directed that the Claimant's case should proceed to an oral hearing to take place on 11<sup>th</sup> July 2022.
18. On 6<sup>th</sup> July 2022 the panel chair directed that the hearing due to take place on 11<sup>th</sup> July 2022 should be changed to a directions hearing as the independent expert could not attend.
19. On 11<sup>th</sup> July 2022 a directions hearing took place. It was directed that the substantive hearing be listed for 14<sup>th</sup> December 2022. Further directions were made on 14<sup>th</sup> July 2022.
20. On the 19<sup>th</sup> August 2022 the Claimant's solicitors requested that the hearing fixed for December 2022 be adjourned. By a direction dated 8<sup>th</sup> September 2022 the Defendant refused to accede to the request for an adjournment.
21. On 28<sup>th</sup> October 2022 the Defendant gave directions that time for making representations be extended to 17<sup>th</sup> November 2022. In making those directions the panel chair stated:

“The direction for representations is merely to now indicate whether Mr Garmson wishes to conclude his review on the papers to allow him to focus on his sentence plan. This is especially relevant now that he appears to have been allowed to transfer between prisons whilst in his parole window.

The other option is for Mr Garmson to continue with the oral hearing as listed where a decision on his progression can then be made on the current evidence available.”

22. On 7<sup>th</sup> November 2022 the Defendant's panel chair gave further directions which included the following:

“Having now fully reviewed the circumstances surrounds (sic) the review with both Parole Board Panel members listed for the hearing, the panel is of the opinion that;

- 1 ) it is no longer in the interests of justice to hold an oral hearing in this case
- 2 ) The case can be more effectively managed by concluding the hearing on the papers

The rationale for making this decision includes;

The Parole Board are under a duty to give the prisoner a speedy review of his detention per Article 5(4), and in the alternative to give him a review of his detention within a reasonable time, per the common law duty of fairness. As this review commended (sic) in 2018, and there does not appear to be any prospect of a meaningful hearing in the near future, a speedy review can now more effectively be dealt with on the papers alone.

All the historic directions which are capable of being filled have been dealt with and there is no good reason not to progress the review.

Accordingly under Rule 21(3), both Mr Garmson is invited to make representations either personally or through his legal advisor as to whether or not the panel should conclude the review on the papers.

The Secretary of State is also invited to make representations.

There is a statutory time limit of 14 days and (given the lengthy delays in this case and the extended period of time the prisoner's representatives have already had to take instructions and make submissions) no extensions to this time limit will be permitted.

At the conclusion of the 14 day period the panel will decide whether or not to conclude the review on the papers whether Mr Garmson has put in representations or not.”

23. On the 9<sup>th</sup> November 2022 the Defendant's panel chair directed that the time for making representations be extended to 23<sup>rd</sup> November 2022.
24. On 21<sup>st</sup> November 2022 the Claimant's solicitors made representations in which they requested that the case proceed to an oral hearing. In making those

representations the Claimant's solicitors drew attention to the principles set out in *R (Osborn) v. Parole Board* [2014] AC 1115, and included the following points in support of their submission that an oral hearing should be held:

- i) An oral hearing would facilitate a comprehensive assessment of the Claimant's risk to the community.
- ii) The determination of the matter in issue turns, in part, on the testimony of the Community Offender Manager. It would be unfair to the Claimant to permit some of the evidence in the recall reports to remain unchallenged.
- iii) There is a dispute as to risk, and to manageability in the community.

25. On 28<sup>th</sup> November 2022 the Defendant's panel gave the following further directions:

"The panel have decided that ;

- 1 ) it is no longer in the interests of justice to hold an oral hearing in this case
- 2 ) The case can be more effectively managed by concluding the hearing on the papers

Therefore the oral hearing scheduled for 14/12/22 is cancelled."

26. In giving the directions on 28<sup>th</sup> November 2022 the Defendant's panel stated that the directions were to be read in conjunction with the directions given on 7<sup>th</sup> November 2022.

27. On 6<sup>th</sup> December 2022 the Defendant made a decision on the papers.

i) The decision as stated was:

“No direction for release and no recommendation for open conditions”

ii) In giving reasons for their decision, the Defendant’s panel gave reasons for not proceeding with the oral hearing. Those reasons included the following:

“Both Mr Garmson and his solicitor, Mr Tebb, submitted written representations indicating that they thought that a paper decision would be unfair. However, there was no new matters raised in these representations that hadn’t already been covered in previous directions and further progress was unlikely was the view of the panel.

....

Furthermore, unreasonable requests have been made for all previous assessments by professionals in the dossier that are older than 2 years, to be removed and Mr Garmson, in successive directions hearings, has indicated that he would refuse to engage in a process where documents in the dossier that he doesn’t agree with are not removed.

Having fully considered all representations received, the panel have decided that the reasons why the review should be concluded on the papers remain valid and therefore the oral hearing scheduled for 14/12/22 was cancelled and this review is now concluded with a paper decision.”

28. On 8<sup>th</sup> December 2022 the Claimant’s solicitors made further representations in which they requested that the Defendant proceed to an oral hearing. The Claimant’s solicitors request included the following statements:

i) The Parole Dossier contains a number of errors which the Claimant wishes to explain to the Defendant in person.

ii) The Claimant wishes to dispute the security report.



29. On 21<sup>st</sup> December 2022 the Claimant applied, pursuant to rule 28(1) of the Parole Board Rules 2019 (“the 2019 Rules”) for his case to be reconsidered. That application was supported by a document entitled ‘Appeal Representations’ prepared by the Claimant’s solicitors. Those representations included the following:

“It is clear from the above that oral hearings are necessary for fairness and that the Panel Chair in concluding this hearing on the papers acted unlawfully by stopping a post tariff IPP sentenced prisoner from having the opportunity to detail about how he has reduced his risk and to put questions to the witnesses.”

30. On 23<sup>rd</sup> January 2023 the Defendant refused the application for reconsideration. The reasons given by the Defendant included the following:

“35. I have reached the clear conclusion that fairness did not require an oral hearing in the circumstances of the Applicant’s case in November and December 2022. It is important to keep in mind that the Applicant had recently been transferred with his agreement with a view to undertaking HSP – a programme based on one-to-one work with him and of central relevance to his core risks. It is inevitable that any panel or professional assessing his case would wish to know the outcome of the transfer and will be reluctant to make any final assessment or commit to a detailed risk management plan at the moment. Moreover if the Applicant’s engagement in HSP is positive and the outcome indicates that the Applicant’s risk has been reduced, this may be a very important point for a panel to evaluate in his favour. It is therefore in the interests of justice and in his interests that a full review should follow this work; and inevitable that any hearing which takes place when such an important piece of work is in prospect in the immediate future will be overshadowed by it (because witnesses, including the Applicant, will know that much better evidence as to the Applicant’s progress may soon be available and will inevitably have this in mind when answering questions). As noted above, the Applicant himself applied for an adjournment, as others do in these circumstances.

36. I accept that there are issues which the Applicant wishes to raise concerning his level of risk, the contents of the OASys report and the like; and in particular that he wishes to put questions orally to the COM about his concerns. I do not, however, consider that these issues required to be heard and determined in November 2022 or December 2022. As noted above, the Applicant has himself made applications in the past for adjournments; the concerns were not so pressing to him that they needed to be addressed immediately. It is much better, and to my mind both fair and in the interests of justice, that there should be a

full assessment (which in practice is virtually certain to include an oral hearing) after the best up to date evidence is available.”

### **The Grounds of Challenge**

31. The decision under challenge is the decision made by the Defendant on 23<sup>rd</sup> January 2023, being the decision to refuse to reconsider the decision not to proceed by way of an oral hearing.
32. The Claimant relies upon the following three grounds:
  - i) The decision not to hold an oral hearing was breach of the principles of procedural fairness as set out in *Osborn*.
  - ii) The direction made on 6<sup>th</sup> November 2019 that the Claimant’s case be considered at an oral hearing created a legitimate expectation that the oral hearing procedure be followed, and the decision not to follow that procedure breached that legitimate expectation.
  - iii) Breach of Article 5.4 of the European Convention for the Protection of Human Rights (“the Convention”).

### **The Legal Framework**

#### Proceedings before the Parole Board

33. By section 28 of the 1997 Act, the Parole Board is responsible for the (periodic) consideration of whether tariff-expired life prisoners should be released. For those purpose of that provision a life prisoner (as defined in section 34 of the

1997 Act) includes a person serving a sentence of imprisonment for public protection under section 225 of the Criminal Justice Act 2003 (“the 2003 Act”).

34. The 2019 Rules were made by the Secretary of State in exercise of powers conferred by sections 239(5) and 330(3) and (4) of the 2003 Act. The 2019 Rules make provision relating to paper decisions and requests for oral hearings. Rule 19 of the 2019 Rules provides:

**“19.— 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.

(2) Where a panel has received a request for advice from the Secretary of State concerning whether a prisoner should move to open conditions, the panel must recommend whether—

- (a) the prisoner is suitable for a move to open conditions, or
- (b) the prisoner is not suitable for a move to open conditions.

(3) Where a panel makes a decision that the case should be directed to an oral hearing under this rule, the panel may at the same time make any directions relating to the oral hearing.

....”

35. Article 5.4 of the Convention provides:

“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.”

36. In *Osborn* Lord Reed (with whom the other members of the Supreme Court agreed) set out the principles to be applied when the Parole Board considers

whether to hold an oral hearing. The conclusions reached by the Supreme Court are set out at paragraph 2:

“2 It may be helpful to summarise at the outset the conclusions which I have 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.

(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 on the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories. (c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him. (d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a paper decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner’s future management in prison or on future reviews.

(iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

(iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

(v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.

(vi) When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom albeit conditional. When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.

(vii) The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.

(viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.

(ix) The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.

(x) Paper decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong: what he has to persuade the board is that an oral hearing is appropriate.

(xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.

(xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5.4 as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5.4 in relation to procedural fairness.

(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 1998 unless the prisoner has suffered a consequent deprivation of liberty."

37. Lord Reed held (at paragraph 65) that the court must determine for itself whether a fair procedure was followed. At paragraphs 68 to 70 Lord Reed considered the need to avoid a sense of injustice to the prisoner, as an aspect of fairness.

38. At paragraphs 112 and 113, as part of his consideration of Article 5(4) of the Convention, Lord Reed stated:

“112 The conditions mentioned by the European court are likely to apply to most indeterminate sentence prisoners who have served their minimum terms. That is not to say that they will necessarily apply on every occasion when such a prisoner’s case is considered by the board: a prisoner’s case may be considered in different circumstances and at different intervals of time. Bearing in mind however that the continued detention of a post-tariff prisoner must be justified by his continuing dangerousness as independently assessed by the board, and taking account of the importance of what is at stake, it will in most cases be necessary as a matter of fairness that he should have an opportunity to appear in person before the board. That is consistent with the common law, as explained earlier.

113 Since the board failed in its duty of procedural fairness to the appellants at common law, it follows that it also failed to act compatibly with article 5.4.”

39. In *R (on the application of Somers) v. Parole Board for England and Wales* [2023] EWHC 1160 (Admin) Foster J (applying *Osborn*) stated that:

i) The likelihood of release is not relevant when assessing whether or not to hold an oral hearing (paragraph 46).

ii) The submission that it is wrong to decline to an oral hearing on the basis that there may have be little change or that the same decision might be reached after an oral hearing had substance (paragraph 48(c)).

- iii) “However, in my judgement the reasoning in *Osborn* which adverts particularly to the position of the post-tariff lifer, is tantamount to articulating a presumption in favour of a hearing in such cases”. (paragraph 55).

40. In *R (oao McKilligan) v. Parole Board for England and Wales* [2024] EWHC 336 (Admin) HH Judge Belcher held that the Parole Board erred by focusing on outcome when determining whether an oral hearing should be held, stating at paragraphs 37 and 38:

“37. The Decision is clearly focused on the possible outcome of an oral hearing. The Decision refers to there being no merit in an oral hearing “..at this stage..”, as once the 1:1 work has been concluded an updated Psychological Risk Assessment will be required to determine if further interventions are required, or if there is support for progression. The Member, therefore, concluded “...that directing an oral hearing at this time would be premature”. In my judgment this approach fails to address the correct issue as identified in *Osborn* (per Lord Reed at [29(x)]). The Claimant did not have to demonstrate that the paper decision was wrong, or even that it may have been wrong. The issue is whether an oral hearing was appropriate. By considering, indeed focusing on the potential outcome of an oral hearing, in my judgment the Decision fails to specifically address the relevant issues set out in *Osborn*.

38. Miss Beach also relied on Lord Reed’s recognition at [2(vi)] that “.... 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.” She also relied on Foster J’s judgement on *Somers* (set out in Paragraph 13 above) and the need for particular care in the case of a post-tariff lifer and the value of the hearing for a person in the position of the post-tariff lifer. Foster J stated that a good reason for not holding an oral hearing should be present when refusal is made in the case of a post-tariff lifer, for whom the issues of insight, behaviour and risk (at least) are central to progress and are almost certainly best examined and understood in the open forum of an oral hearing. In my judgement no good reason has been put forward by the Parole Board for not holding a hearing in the Claimant’s case. The Decision has focused on the outcome and in doing so has failed to address the central fundamental question outlined in *Osborn*, namely whether fairness called for an oral hearing, and has failed to consider which elements of the Claimant’s case might or might not call for an oral hearing, by reference to the guidance give in *Osborn*.”

Legitimate Expectation

41. A claim to a legitimate expectation can only be based upon a promise or undertaking which is “clear, unambiguous and devoid of relevant qualification” (*R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at page 1569, as approved in *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at paragraph 60).
42. Where a clear and unambiguous promise or undertaking has been made, the authority giving the promise or undertaking will not be allowed to depart from it unless it is shown that it is fair to do so (*Re Finucane’s Application* [2019] UKSC 7 at paragraph 62).
43. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require that promise or practice to be honoured unless there is good reason not to do so. The promise or practice may be departed from where to do so is the public body’s legal duty, or is otherwise a proportionate response (*Nadarajah v. Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 68).
44. The limitations on the principle of legitimate expectation were explained by Lord Neuberger at paragraph 38 in *United Policyholders Group and others v. Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383:

“Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body’s statutory duty: see e.g. *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to



enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.”

## **Consideration of the Grounds of Challenge**

### *Ground 1: Procedural Fairness*

45. In his oral submissions Mr Buckley focussed his arguments on the procedural fairness ground of challenge.
46. Mr Buckley submitted that:
  - i) The Defendant’s direction (made on 6<sup>th</sup> November 2019) that the Claimant’s case be determined by the oral hearing procedure was based upon the application of the principles set out in *Osborn*.
  - ii) At the time that the Defendant made its direction that the case be determined on the papers (28<sup>th</sup> November 2022) and at the time that the decision was re-affirmed (23<sup>rd</sup> January 2023) the factors which, in November 2019 caused the Defendant to order an oral hearing were still present.
  - iii) In making the direction that the case be determined on the papers, the Defendant focussed on outcome and not on what fairness demanded.
47. In giving their directions on 28<sup>th</sup> November 2022, by which they ordered that the case proceed on the papers, the Defendant’s panel referred back to the reasons given when making directions on 7<sup>th</sup> November 2022. The essence of

the panel's reasoning was that there did not appear to be any prospect of a meaningful hearing in the near future, and therefore a 'speedy review' could be more effectively dealt with on the papers.

48. In his oral submissions Mr Buckley placed emphasis on the reasons given at paragraphs 35 and 36 of the 23<sup>rd</sup> January 2023 decision on the application for reconsideration. The main reason given for the finding that fairness did not require an oral hearing was that the Claimant had been transferred to a different prison with a view to him undertaking the Healthy Sex Programme ("HSP"), and that any panel would be reluctant to make any final assessment until the outcome of the transfer was known. In addition the decision maker stated that the issues which the Claimant wished to raise concerning level of risk, the contents of the OASys report, and putting questions to the community offender manager did not require to be heard and determined in November 2022 or December 2022.
49. The court must determine for itself whether a fair procedure was followed (*Osborn* at paragraph 65). In approaching that task I place particular focus on the following factors:
  - i) The Claimant is a post tariff indeterminate sentence prisoner. In *Somers* (at paragraph 55) Foster J expressed the view that the reasoning in *Osborn* (at paragraphs 2(vi) and 112) which adverts to the position of a 'post-tariff lifer' is tantamount to raising a presumption in favour of an oral hearing.

- ii) The purpose of holding an oral hearing is not only to assist in decision-making, but also to reflect a prisoner's legitimate interest in being able to participate in the decision. (*Osborn* 2(iv)).
- iii) An oral hearing should be allowed 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 to enable him or his representative to put his case effectively, or to test the views of those who have dealt with him (*Osborn* at paragraph 82). In making representations the Claimant stated that he wished to challenge the assessment of risk contained in the reports which were before the Defendant, and that it would be unfair to him to permit such evidence (including from the Community Offender Manager) to be presented without giving him the opportunity to challenge it. In representations made on behalf of the Claimant, it was also said that he wished to 'detail' how he has reduced risk.
- iv) The question of whether fairness required the Claimant to be given an oral hearing is different from the question of whether he had a particular likelihood of being released or transferred to open conditions (*Osborn* at paragraphs 2(v) and 88, *Somers* at paragraph 46, *McKilligan* at paragraph 37).

50. The reasons given by the Defendant for deciding that the Claimant's case should be decided on the papers included:

- i) A speedy review could be more effectively be dealt with on the papers alone (reasons given for the 7<sup>th</sup> November 2022 decision, and relied upon in making the 28<sup>th</sup> November 2022 decision).
- ii) In the decision made on 23<sup>rd</sup> January 2023, the Defendant reached the conclusion that fairness did not require an oral hearing in the circumstances of the Claimant's case in November and December 2022.
  - a) The decision maker stated that it was inevitable that any panel would wish to know the outcome of the Claimant's transfer to another prison and response to the HSP, and that any hearing would be overshadowed by the fact that such information would be available in the future.
  - b) The decision maker recognised that the Claimant wished to challenge the assessment of risk and the contents of the OASYs report, and to put oral questions to the Community Offender Manager, but hen stated that those issues did not require to be heard and determined in November 2022 or December 2022.

51. In my judgment, in deciding to cancel the oral hearing listed for 14<sup>th</sup> December 2022, and in refusing to reconsider that decision, the Defendant erred as:

- i) In giving reasons for deciding that the case should be determined on the papers, the decision makers did not give express consideration to whether, as a post-tariff prisoner serving an indeterminate sentence, and given that continued detention must be justified by his continuing

dangerousness as independently assessed by the board, he should have an opportunity to be heard (see **Osborn** at paragraph 112).

- ii) The reasons given on 7<sup>th</sup> November 2012 (and adopted in the 28<sup>th</sup> November 2022 decision) are focussed on achieving speedy review. In my judgment, in the circumstances of this case, reliance on the speed of the review was an impermissible reason to justify depriving the Claimant of an opportunity to present his case as at an oral hearing, particularly as an oral hearing had already been listed, and was due to take place shortly after those decisions were made.
- iii) The reasons given in paragraph 35 of the 23<sup>rd</sup> January 2023 review decision, in particular that a panel would wish to know how the Claimant responded to the HSP, related to likely outcome. That approach was based upon an irrelevant consideration, namely likelihood of release or transfer to the open conditions, and failed to address the relevant issue, namely whether fairness to the Claimant required an oral hearing in the light of the facts of the case and the importance of what was at stake.
- iv) In paragraph 36 of the 23<sup>rd</sup> January 2023 review, the decision maker did not state that he regarded the challenge to the risk assessment or to the Community Offender Manager's views to be untenable, but that the issues did not require to be determined in November 2022 or December 2022. If a conclusion was to be reached on the review, and if the challenges could not be rejected as untenable, fairness demanded the Claimant be allowed advance those challenges at an oral hearing (see **Osborn** at paragraph 2(ii)).

52. For those reasons a fair procedure was not followed, and the Claimant succeeds on Ground 1.

*Ground 2: Legitimate Expectation*

53. The Claimant argues that, as a result of the direction made on 6<sup>th</sup> November 2019 that his case be determined at an oral hearing, he had a legitimate expectation that an oral hearing would take place, and that the Defendant's decision that the case be determined on the papers frustrated that expectation.
54. There are two main issues to consider:
- i) Did the direction that the Claimant's case be determined at an oral hearing constitute an unambiguous promise or undertaking such as to give rise to a legitimate expectation; and
  - ii) If that direction did constitute such promise or undertaking, could the Defendant reasonably decide not to comply with the promise or undertaking.
55. The Defendant's direction that the Claimant's case be determined at an oral hearing was a decision made in the exercise of powers conferred on the Defendant's panel by Rule 19(1)(c) of the 2019 Rules. The 2019 Rules also contain provisions which allow a panel chair or duty member to direct that where a panel has previously directed that a case should be determined at an oral hearing, the case be decided on the papers (Rule 21(1)).

56. When giving the direction on 6<sup>th</sup> November 2019 the panel did not state that there would be no re-consideration of the decision to direct an oral hearing.
57. In my judgment, given the power under which the 6<sup>th</sup> November 2019 direction was made (being a provision of the 2019 Rules), and given that no unambiguous promise not to exercise the power to reconsider was given, there was no unambiguous promise or undertaking sufficient to give rise to a legitimate expectation.
58. If I am wrong in holding that there was no promise or undertaking sufficient to give rise to a legitimate expectation, I find that as the procedures set out in Rule 21 of the 2019 Rules were followed, including giving the Claimant an opportunity to make representations, it was reasonable and proportionate for the Defendant to reconsider the direction that the case be determined at an oral hearing. As a result this is not a case in which the Defendant was prevented, as a result of the law relating to legitimate expectation, from reconsidering its 6<sup>th</sup> November 2019 decision to determine the case by holding a oral hearing.

*Ground 3: Article 5.4 of the Convention*

59. Following the reasoning set out by Lord Reed at paragraphs 112 and 113 in *Osborn*, since the Defendant failed in its duty of procedural fairness at common law, it also failed to act compatibly with Article 5.4 of the Convention.

## **Conclusion**

60. For the reasons I have given the claim succeeds.