Neutral Citation Number: [2024] EWHC 728 (Admin)

Case No: AC-2023-CDF-000035

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 8/3/2024

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court

Between :

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(On the application of SHANE WYLIE)	**Claimant**
- and -	
PAROLE BOARD FOR ENGLAND AND WALES	**Defendant**
-and-	
SECRETARY OF STATE FOR JUSTICE	**Interested Party**

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- -

Mr Stuart Withers (instructed by **Duncan Lewis Solicitors**) for the **claimant**
Mr Tim Johnston (instructed by **Government Legal Department)** for the **defendant**
The interested party did not appear and was not represented

Hearing date: 19 February 2024
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Approved Judgment on costs

This judgment was handed down remotely at 10 am on 8 March 2024 and sent to the parties and to the National Archives.

HH Judge Jarman KC:

1. In the substantive judgment in this case which I handed down on 12 January 2024, I determined that a decision of the parole board not to grant an oral hearing to the claimant on the question of parole was liable to be quashed. However, the claimant's annual review was then before the board and I was informed by email on the day that judgment was due to be handed down that the claimant's request for an oral hearing had been granted. As matters had materially changed since the challenged decision was made, I came to the conclusion that it was appropriate and sufficient to grant a declaration that that decision was procedurally unfair to the claimant and did not quash the decision.

2. Mr Withers, counsel for the claimant, submitted at the end of the hearing that the board should pay the costs of the claimant on the standard basis to be assessed if not agreed, because the board had unreasonably refused to agree to a consent order quashing the original decision. The board and the Secretary of State as interested party took no part in the proceedings and indicated in correspondence that they wished to remain neutral but that costs should not be awarded against them. The point was not argued before me and I awarded costs against the board on the basis put forward by Mr Withers.

3. The board then applied to set aside the costs order against it, and I directed that the application should be listed for an oral hearing, which took place via video link. Mr Withers again appeared for the claimant, and the board was represented by Mr Johnston of counsel. It became apparent at the hearing that there is a difference in principle between them as to the appropriate test to be applied in deciding whether to order the board to pay costs. Mr Johnston submits that the test is a higher one, namely whether the board's conduct was unreasonable in the public law *Wednesbury* sense and whether the outcome was so obvious that the board should have consented to the quashing of the challenged decision. He accepts that there is no express judicial support for that proposition.

4. It would have been helpful if this position had been made clear in writing at the time the board indicated that it would remain neutral but should not pay costs. As it was not, I did not hear full argument on the point in issue at the substantive hearing, but only on the hearing of the application to set aside. It is an important point. The board took two weeks after judgment was handed down to raise the point, and whilst the explanation for that delay is not wholly satisfactory, the claimant took no point on promptitude. In my judgment it is appropriate to set the previous costs order aside and to determine the point, and the appropriate costs order, after hearing submissions from both parties. That does not of itself lead to the conclusion that a different costs order is indicated.

5. A similar issue of principle arose before Foster J in *R (Somers) v Parole Board* [2023] EWHC 2967 (Admin) (Costs), who set out the issue at [11] thus:

> "The Claimant is correct to acknowledge that an order for costs will not generally be made against the Parole Board (recognised as a judicial body for these purposes) where it has played a neutral role in proceedings. However, they argue, the relevant caselaw indicates the court may make an order where

> it determines that the Board has acted unreasonably in continuing to resist proceedings by refusing to sign a consent order, which here, it submits, it has. A dispute has arisen in this case, however, as to the true scope of that principle. It is submitted by the Parole Board that it is not the law that the court may award costs against a tribunal such as the Parole Board where it has unreasonably refused to sign a consent order and bring a case to an end."

6. Foster J then carried out a review of the authorities, which included *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739, which concerned judicial review of the decision of a coroner. In that case Brooke LJ set out what had previously been the position which had obtained as follows in [47(1)]:

> "The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings;"

7. Brooke LJ then referred to the then current position after the introduction of the Civil Procedure Rules 1998, saying at [49]:

> "49. Needless to say if a coroner in light of this judgment contents himself with signing a witness statement in which he sets out all relevant facts surrounding the inquest and responds factually to any specific points made by the claimant in an attitude of strict neutrality, he will not be at risk of an adverse costs order except in the circumstances set out in para 47(1) above…"

8. In *R (Gourlay) v Parole Board* [2017] 1 WLR 4107, the Court of Appeal applied the reasoning in *Davies* to a decision of the parole board. Hickinbottom LJ said at [28] that the court in *Davies* took the opportunity to "state authoritatively the way in which the courts have exercised their discretion" in relation to orders for costs in such cases in the past "and to identify what are the governing principles today." At [51] he applied those principles to the question of whether the parole board should pay the prisoner's costs of the claim if, following judicial review, "it decides neither to concede nor actively to contest the claim" and concluded that there was no logical reason why internal parole board guidance varied the application of those principles.

9. In the *Gourlay* case, the claimant appealed to the Supreme Court ([2020] 1 WLR 5344) on the basis that the parole board was the unsuccessful party within the meaning of CPR 44.2 even if it played no active part in the proceedings, because even if it did not concede a challenge, then in substance it opposed it. That submission was rejected.

10. Lord Reed, giving the lead judgment of the court, at [38-39]said this:

> "However, the appellant's submission that such decisions are treated by the Court of Appeal as binding precedents, in the same sense as decisions on questions of law, appears to be a misleading over-simplification of the position. In the first place, the principles of practice laid down by the Court of Appeal to guide judges in the exercise of their discretion as to the award of costs are not strictly binding even upon those judges, in the way in which a decision of the Court of Appeal on a point of law is binding upon them. There is always a residual discretion as to costs. Since the discretion is to be judicially exercised… the principles laid down by appellate courts must be tempered by an ability to respond flexibly to unusual situations, and to reach a just result in the individual cases…
>
> 39. Secondly, since a decision such as Davies establishes principles which should generally be applied as a matter of practice, as Brooke LJ repeatedly made clear (see, for example, para 47, cited at para 4 above), rather than deciding a question of law, it falls outside the scope of the rules of precedent laid down in authorities such as Young v Bristol Aeroplane Co Ltd, which are concerned with the effect of a "decision on a question of law" (p 729)."

11. Lord Reed then went on at [46] to conclude that a judicial or quasi-judicial body which acts so as to maintain its impartiality in a case, and allows its decision to speak for itself, cannot be what the framers of the CPR rules in 44.2 had in mind when they referred to an unsuccessful party.

12. Hickinbottom LJ returned to the issue in R *(Faqiri) v Upper Tribunal (Immigration and Asylum Chamber)* [2019] 1 WLR 4497, which related to a decision of the chamber and not of the parole board. Nevertheless, Hickinbottom LJ took the opportunity to confirm that:

> "…*Davies* has been regularly cited for the general proposition that, if a decision of a court or tribunal is challenged by way of judicial review, it will not be liable for the costs of the claim unless it has behaved improperly or unreasonably or takes an active part in the proceedings."

13. After that review, Foster J in *Somers* at [27] concluded:

> "It should be noted that the test there expounded and applied was not that there required to be impropriety or "wholly unreasonable behaviour" before a costs order would be made. Nothing subsequently suggests any change. In so far as any court has used the word "improperly" with regard to the Davies test, it does in my judgement comprehend the unreasonable failure to bring the proceedings to an end by signing a proffered consent order, thus saving costs and court time"

14. And at [30]:

> "I am of the view that the failure to agree that the Claimant had a very clear case and that the Parole Board had made an obviously flawed decision was unreasonable. Accordingly I make an award of costs against the Parole Board in this case."

15. In the present case, in my judgment the board neither conceded or challenged the claim. It is not an "unsuccessful party" within the meaning of CPR 44. I have a residual discretion as to costs, having regard to the principles of practice given as guidance by the higher courts. Both parties addressed the issue of whether the board's refusal to agree a consent order was unreasonable.

16. On the authorities, in my judgment, there is no justification of putting a high threshold of *Wednesbury* unreasonableness in the exercise of the discretion. If the refusal was unreasonable to the extent that no other board acting reasonably would have so refused then that may provide a very clear basis for an award of costs. It does not follow that if that degree of unreasonableness is not reached the court may not in its discretion award costs. On the other hand, the degree to which the merits of the claim were, or were not, obvious informs the determination of what is unreasonable in any given case. In *Somers* it was the finding that the claimant had a very clear case and that the board had made an "obviously flawed" decision that was the justification for the award of costs.

17. In the present case, Mr Withers points out that in the substantive judgment, I concluded that two of the reasons advanced why an oral hearing should have been granted were "particularly strong." I found that the focus of the challenged decision was whether the paper decision was wrong, and did not grapple with the particular facts that a police investigation into another complaint against the claimant had been ongoing for some 12 months, at which time the police indicated that it would appear that the matter would be closed due to the withdrawal of the complaint.

18. Mr Johnston points out the claimant's invitation to agree to a consent order was made before permission was given. In giving permission, His Honour Judge Lambert, sitting as a judge of the High Court, observed simply that the grounds were arguable but went no further than that.

19. Mr Withers relied upon my findings in the substantive judgment as to the particularly strong reasons why an oral hearing should have been granted. He also submitted that the board should have instructed counsel to attend the substantive hearing simply to argue the issues of costs should it arise. In my judgment it is unrealistic to expect the board so to instruct counsel and to incur the costs and perhaps extra time that that would involve when the outcome was not certain. It may have been helpful for the board, in its written indication that it should not pay costs, to have gone into more detail why it should not, but that is a different matter.

20. Having heard the issue fully argued and having been taken in detail to the authorities, I have come to the conclusion that although there were strong reasons why an oral hearing should have been granted, the refusal to agree to the consent order was not unreasonable on the facts of this case so that the board should pay costs. At the time of the challenged decision the claimant was facing another complaint of rape, the investigation of which had not then closed. In my judgment although the claim

succeeded in the end to the extent I have set out above, it was not very clear that it would do so.

21. Accordingly, I set aside the cost award against the board, but the order for the assessment of the claimant's publicly funded costs remains. I should hope that any consequential matters can be agreed and a draft order submitted within 14 days of handing down of this judgment, together with any written submissions on any matters which cannot be agreed, which will then be decided on the basis of those submissions.