

Neutral Citation Number: [2024] EWHC 1363 (Admin)

Case No: AC-2023-MAN-000421

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 14th June 2024

Before :

Richard Wright KC Sitting as a Deputy Judge of the High Court

Between :

The King (On the Application of Ezekel Taylor) **Claimant**

- and -

The Parole Board for England and Wales **Defendant**

-and-

Secretary of State for Justice **Interested Party**

Alexa Thompson (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
The Defendant and Interested Party did not attend and were not represented

Hearing date: 30th May 2024

APPROVED JUDGMENT

Richard Wright KC:

Introduction

1. The Claimant Ezekel Taylor is a recalled IPP prisoner. He challenges the decisions of the Parole Board taken on 19th June 2023 and 4th July 2023 refusing to grant him an oral hearing. The decision that there should be no oral hearing became final on 25th July 2023. I granted permission to bring this claim on 12th April 2024. The other parties have remained neutral and taken no active part in the proceedings.

The Facts

2. On 25th June 2007, the Claimant was made the subject of a sentence of Imprisonment for Public Protection. The sentence comprised a custodial term of 5 years and 185 days for offences of wounding with intent and possession of a firearm. He was on the same occasion sentenced to an extended sentence of 12 months' imprisonment with a 12-month extended licence for an offence of affray, and further concurrent sentence of 4 months imprisonment in respect of an offence related to the possession of drugs.
3. The Claimant's tariff expired on 27th December 2012 and he was released on licence on 16th January 2018. He remained on licence until 5th September 2022 until he was recalled to custody having been charged with new offences of intentional strangulation and assault by beating. The Claimant was in due course convicted of those new offences and sentenced to 9 months imprisonment on 5 May 2023. His conditional release date from that new sentence was the 18th September 2023.

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4. Section 32 of the Crime (Sentences) Act 1997 gives the Defendant power to direct the release of recalled prisoners. In accordance with that provision and following the expiry of the custodial element of his new sentence on the 15th September 2022 the Interested Party referred the Claimant to the Defendant via the Public Protection Casework Section.

5. On 16th June 2023 a written application for an oral hearing was submitted to the Defendant on behalf of the Claimant by his solicitors. On 19th June 2023 the Defendant determined that there should be no direction for release in the Claimant's case. That decision was made on the papers without an oral hearing. The Defendant provided the following written explanation for its decision not to hold an oral hearing in the Claimant's case:

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

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

6. The decision went on:

"An oral hearing cannot be justified in the absence of offence-focussed work to address the areas of risk that arise out of the new conviction."

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7. On 19th June 2023 the Claimant’s solicitors made written representations as to why his case should proceed to an oral hearing. On 4th July the Defendant refused the Claimants request for an oral hearing in these terms:

“The MCA Duty Member saw a dossier of 236 pages including a ‘no release’ decision by an MCA member dated 19 June 2023. The dossier includes legal representations dated 16 June 2023 which were considered by the MCA member in reaching their decision.

Further representations dated 19 June 2023 have now been made. The MCA duty Member has carefully considered those further representations and concluded that they do not raise any issues which were not included in the representations in the dossier dated 16 June 2023 and which were taken into account in making the ‘no release’ decision. The MCA Duty Member therefore does not find any grounds for overturning the ‘no release’ decision.” [HB/271]

8. No application for reconsideration was submitted by the Claimant and in accordance with the Parole Board Rules 2019, and in particular with Rule 20(6)(a), the decision of the Defendant became final on 25 July 2023.

The Claim

9. The Claimant advances three grounds of challenge to the decision of the Defendant, these were helpfully set out in the focused skeleton argument prepared by Alexander McColl and ably amplified during the hearing by Miss Thompson.

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10. Ground One is that the Defendant's refusal on 19 June 2023 and 4 July 2023 to grant the Claimant an oral hearing before refusing his application for release was procedurally unfair contrary to the Claimant's:
 - (i) common law rights; and
 - (ii) his rights under Article 5(4) of the European Convention on Human Rights ('ECHR');
11. Ground Two is that the Defendant, on 19 June 2023 and 4 July 2023, unlawfully failed to give any or any adequate reasons for its decision to refuse the Claimant's application for release without an oral hearing;
12. Ground Three is that the Defendant's refusal on 4 July 2023 to grant the Claimant an oral hearing was procedurally unfair and/or irrational in that it erroneously treated the application for an oral hearing as a review of the 19 June 2023 decision, where it should have assessed the necessity of an oral hearing.
13. Although the Claim relates to two decisions (those of 19th June and 4th July, becoming final on 25th July), I treat the Claim as being in effect against one overall decision taken by the Defendant, namely, to direct 'no release' without convening an oral hearing.

The Law

14. In R (Osborn) v The Parole Board [2013] UKSC 61 the Supreme Court reviewed the relevant principles to be applied in relation to oral hearings. Lord Reed gave the following general guidance at Paragraph 2 of his Judgement:

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 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.

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.

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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.

15. In the course of her submissions before me Miss Thompson referred to the decisions of the Administrative Court in *R (Stubbs) v The Parole Board* [2021] EWHC 605 (Admin), *R (Dich and Murphy) v The Parole Board* [2023] EWHC 945 (Admin) and *R (Garmson) v The Parole Board* [2024] EWHC 1106 (Admin). Each of those cases exemplifies the application of the Osborn principles to the individual facts of each case. These are all necessarily fact specific decisions and no point of general principle can be derived from them.

16. As regards the duty upon the Defendant to give reasons for its decision the obligation was clearly articulated by Lord Brown of Eaton-Under-Heywood in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, at para 36:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant ground.”

Submissions

Ground One – Procedural Unfairness

17. As to the first Ground Miss Thompson submitted that fairness to the Claimant dictated that his case required an oral hearing. She amplified that broad statement by reference to six factors:

- (i) That there was a clear dispute arising from the Risk Management Plan as to whether the Claimant's risk could be adequately managed in the community.
- (ii) The Claimant's Community Offender Manager had concluded that he had a demonstrable ability to comply with a further period of licence conditions. A face-to-face hearing would have enabled the Claimant to put his case effectively and demonstrate his ability to comply.
- (iii) The Claimant had not been allocated a Prison Offender Manager during his recall to custody. The Defendant was therefore in possession of incomplete information and that could be rectified at an oral hearing.
- (iv) The Claimant had previously demonstrated an ability to comply with licence conditions between 2017 and 2021.
- (v) Without a further opportunity to consider whether he could again comply at an oral hearing no fair conclusion could be reached in this regard.
- (vi) The Claimant had indicated an intention to appeal against his conviction for the offence that had resulted in his recall. The Defendant could not

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proceed on the basis that there was a reasonable prospect of the appeal being allowed but equally it was wrong to treat his denial as false absent an oral hearing.

18. In support of this final proposition Miss Thompson relied upon the observation by Lord Bingham in *R (Oyston)* [2000] EWCA Crim 3552 that:

“In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole.”

19. Miss Thompson submitted that the only reason given for refusing an oral hearing, namely that ‘*An oral hearing cannot be justified in the absence of offence-focussed work to address the areas of risk that arise out of the new conviction*’ simply could not be sustained if fairly balanced against the six factors that she had advanced in favour of such a hearing. She submitted that fairness dictated that the Claimant should have an opportunity at an oral hearing to demonstrate that such risk reduction work could be carried out in the community.

Ground Two – Duty to Give Reasons

20. Miss Thompson submitted that the reasons that were given in the 19th June decision were in the form of standard wording drawn from the Defendant’s Member Assessment Guidance from October 2022 and in particular from Paragraph 6.9 of that Guidance:

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It is strongly recommended that the standard form of words is used to refer to the judgment in each case. This is because the text is comprehensive and is based on legal advice and is, therefore, less open to challenge. It is easy to insert this prepared standard wording in the paper decision template, saving the member time in paraphrasing.

*The panel has considered the principles set out in the case of Osborn, Booth and Reilly (2013) UKSC 61 concerning oral hearings. It has not found that there are any reasons to hold an oral hearing. **[but note whether any representations have been submitted]**. Therefore, this case is not being directed to an oral hearing.*

21. Although the following Paragraph of the Guidance provides (Paragraph 6.10) that ‘This wording should be expanded to suit particular circumstances’, there was no expansion in the Claimant’s case. It was submitted to me that it was necessary to give expanded reasons in a case where the Claimant had requested an oral hearing and set out reasons for doing so. It was argued that absent further reasons the Claimant could not engage with the Defendant’s application of the Osborn factors in his own case. Finally, it was said that the Defendant’s own Guidance envisaged that further reasons should be given in a case such as this one.
22. As regards the decision of the 4th July it was submitted that these merely parrot the earlier decision. Moreover, they reject the submissions made in writing on behalf of the Claimant without setting out any reasoning for doing so. Thus, it was argued these reasons were themselves deficient.

Ground Three – 4th July Decision Procedurally unfair / Irrational

23. In support of this ground Miss Thompson submitted that the 4th July decision was irrational in that it failed to apply the correct test, namely whether fairness required there to be an oral hearing. In a linked point it was argued that 4th July assessment was approached as if it were merely review of the 19th June decision.

This approach runs contrary to the decision in *Osborn*, and in particular Paragraph 95 of the Judgement:

95. The unfairness which results from the board's treatment of the request for an oral hearing as an appeal is illustrated by the case of the appellant Booth, in which the ICM assessor identified the critical question as being "whether the grounds of the appeal are justified and if an oral hearing would make any material difference to the paper decision". The request for an oral hearing was thus, decided on the basis that the earlier decision was presumptively correct. 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.

Decision

Ground One – Procedural Unfairness

24. As the Supreme Court made clear at Paragraph 65 of its Judgement in *Osborn* it is for this Court to determine for itself whether or not it considers that a fair approach was followed by the Defendant:

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“[the Court’s] function [when considering whether a fair procedure was followed by a decision-making body such as the Parole Board] is not merely to review the reasonableness of the decision-maker’s judgment of what fairness required.”.

25. I have examined that question applying the general principles that were set out in Paragraph 2 of the Judgement in that case.
26. In doing so I have come to the clear conclusion that procedural fairness in this case required there to have been an oral hearing. The Claimant had previously been released from his sentence on licence and his risk had, for several years been successfully managed in the community. An oral hearing would have afforded the Claimant an opportunity to demonstrate that he could once again be successfully managed in the community and that he was capable of complying with licence conditions. An oral hearing would also have enabled the views of the Claimant’s manager to have been explored and tested. It is of course not the role of the Defendant to punish an offender but rather to consider whether the risk that he may pose might be managed on release in the community. An oral hearing would in my Judgement have better enabled that assessment to take place, particularly in the light of the absence of evidence from a Prison Offender Manager.
27. For all of these reasons and finding that all of the arguments advanced by Miss Thompson (See Paragraph 17 above) in favour of fairness requiring an oral hearing were equally well made out, I am satisfied that the Claim succeeds in respect of Ground One.

Ground Two – Duty to Give Reasons

28. Through his solicitors the Claimant had set out in writing on 16th June a number of cogent reasons why he argued an oral hearing should take place. Following the decision on the 19th June further detailed written submissions were provided on his behalf. In my Judgement the reasons provided by the Defendant, both on the 19th June and the 4th July were wholly inadequate. Whilst the Defendant was not obliged to accept the arguments that had been advanced in writing it was at least required to demonstrate its engagement with them at some stage of its decision making.
29. The written reasons given on 19th June adopted the standard wording from the Defendant's own guidance, but that standard wording did no more than set out the test that had to be applied. There was no expansion of the reasoning that would have enabled the Claimant to understand (See Paragraph 16 above) *'why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved'*.
30. The reasons given for the 4th July decision were in my judgement similarly inadequate. They did not engage in any meaningful sense with the arguments that had been raised in writing, either on 16th June or following the 19th June decision. It follows that when viewed as a whole the decision that became final on 25th July was one in respect of which the Defendant had failed to provide adequate reasons at any stage.

Ground Three – 4th July Decision Procedurally unfair / Irrational

31. It is clear to me that the criticism of the 4th July decision made by Miss Thompson is properly made out on the facts of this case. The principal matter for consideration was whether fairness to the Claimant dictated that there should be an oral hearing and yet that did not feature in the decision that was communicated to the Claimant. Rather it is clear to me that the decision maker fell into the error identified at Paragraph 95 in *Osborn* (above) and approached the review of the 19th June decision on the presumption that it was correct and had not been displaced. That was to fall into procedural error and arrive at an irrational decision. This approach to also had the effect of compounding the unfairness that arose from the failure to give adequate reasons for the original 19th June decision.

Conclusion

32. For the reasons that I have set out above I quash the decisions of the Parole Board of 19th June and 4th July (which became final on 25th July) directing no release without an oral hearing. I direct that there is to be an oral hearing before the Parole Board.