Neutral Citation Number: [2020] EWHC 2140 (Admin)

Case No: CO/1851/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2020

Before :

MR JUSTICE SPENCER

- -

Between :

The Queen
on the application of

Lewis Remy Grinham **Claimant**

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

-and-
The Secretary of State for Justice **Interested Party**

Stuart Withers (instructed by **Dobson Law**) for the **Claimant**
The Defendant and the Interested Party were not represented

Hearing date: 28th July 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 4th August 2020 at 10.30am.

Mr Justice Spencer :

Introduction and overview

1. The claimant is a serving prisoner currently detained at HMP High Down. In March 2019 he was released on licence at the half-way point of a determinate sentence of 56 months' imprisonment. He breached the terms of his licence and was recalled to prison in July 2019. Thereafter he was diagnosed with cancer. His solicitors made representations to the Parole Board applying for his release again on licence. An expedited oral hearing of that application took place on 4th February 2020 before a single Panel Member.

2. The claimant's case is that the oral hearing was rushed because insufficient time had been allowed for it and the Panel Chair repeatedly made it clear that she could not sit beyond a certain time. Case management directions had not been complied with. There had been late service of a report from the claimant's Offender Supervisor. This compounded the problem of shortage of time as it was served only on the day of the hearing and his solicitor needed to consider the report and take the claimant's instructions upon it. Other significant information which should have been served before the hearing had not been obtained and provided. The hearing was concluded without oral submissions on the claimant's behalf so that the missing information could be supplied. Thereafter the claimant's solicitor lodged written closing submissions. On 19th February 2020 the Panel Chair gave the Parole Board's decision not to grant the claimant's re-release on licence.

3. In this claim for judicial review the claimant challenges that decision on the grounds of procedural unfairness and invites the court to quash the decision and direct an expedited re-hearing. The full term of the claimant's sentence expires on 11th January 2021.

4. Permission to apply for judicial review was granted on the papers by Kerr J. The Parole Board, as defendant, had served an acknowledgment of service indicating that it remained neutral and would not actively defend the decision under challenge. The Secretary of State for Justice, as an interested party, had also indicated by letter that he wished to remain neutral in the litigation.

5. At the hearing before me the claimant was represented by Mr Stuart Withers. I am grateful to him for his written and oral submissions. The hearing was conducted remotely by Skype video.

The factual background

6. The claimant is now 25 years of age. He has a poor record of offending. On 23rd September 2016 at Croydon Crown Court he was sentenced to a total of 56 months' imprisonment for offences of burglary (domestic and commercial), attempted burglary, harassment, perverting the course of justice, and driving offences. The burglary offences were committed in order to fund his abuse of class A drugs. The victim of the offence of harassment was his girlfriend, Ms H. The claimant was caught driving a vehicle without a licence. He ran away when the police stopped the vehicle. The passengers named him as the driver. The claimant offered them money to withdraw their statements to the police. That was the offence of perverting the course

of justice. The car belonged to his partner, Ms H. She alleged that the claimant had been violent towards her and had sent her threatening messages. That was the offence of harassment. A restraining order was made for her protection, but in 2018, on her application, the order was discharged and she resumed her relationship with the claimant, albeit he was then in prison.

7. On 18th March 2019 the claimant was released on licence. Following release he lived with Ms H and her father for about 5 weeks. The claimant relapsed into drug use and failed to keep in contact with his offender manager by telephone.

8. On 19th July 2019 the claimant's Offender Manager, Shirley George, submitted a recall report to the Secretary of State. The claimant's licence was revoked the same day and he was returned to prison.

9. On 31st July 2019 Ms George provided a Part B recall report recommending that the claimant was not suitable to be re-released. His risk of serious harm to the public, and to any known adult, was assessed as medium. The report stated that whilst on licence the claimant had failed to engage with the drug services despite attempts to encourage him to do so, including the issuing of a licence warning. He had persistently given positive drug tests for cocaine and cannabis. Having relapsed into drug misuse he was at high risk of re-offending, compounded by his lack of employment. Ms George's view was that unless the claimant was able to address his substance misuse and his employment skills he was highly unlikely to comply with a further period of licence in the community. She could not recommend his re-release until he had completed interventions to address his substance misuse and employment needs.

10. On 19th August 2019 the claimant's solicitors made written representations to the Parole Board requesting his release on the papers, or in the alternative requesting an oral hearing. The representations acknowledged that the claimant had relapsed into drug abuse and had been living a chaotic life after release on licence. He had gone to live with his partner, Ms H, but because there were problems with the relationship he vacated the property and became homeless. Eventually a temporary place was found for him at a hostel. The representations made it clear that he disputed several of the factual allegations in the recall report, including the suggestion that he had been untruthful in saying he was working when in fact he was not, and other facts surrounding the circumstances of his recall. Reference was made to previous mental health issues which had probably contributed to his relapse, including bi-polar disorder, ADHD and depression.

An oral hearing is granted

11. On 17th September 2019 the Parole Board determined that the case should be listed for an oral hearing. The decision said that this was because it would be unfair to conclude the review negatively on the papers given that his risk of serious harm remained at the level of "medium" and he was not suspected of further offending. The addition of oral evidence might lead a Panel to conclude that the claimant was manageable on licence subject to appropriate arrangements being put in place. An oral hearing would ensure fairness, providing him with the opportunity to challenge aspects of the dossier and his recall, as well as ensuring that a thorough examination of his case could be conducted against the test for release.

12. Accompanying that decision, directions were given for the obtaining of further reports from the mental health in-reach team and the substance misuse team. The directions

specified in some detail the information required in reports from the claimant's Offender Manager and from his Offender Supervisor. It was directed that the hearing should be listed for 1 hour 30 minutes, to be heard by a single member. The case was unsuitable for a video link between the prisoner and the panel. It was specifically noted that owing to the claimant's reportedly having bi-polar disorder, depression and ADHD, the Panel should conduct a face-to face hearing. Subsequently the direction for mental health reports was revoked as there had been no contact with the metal health in-reach team.

The claimant's cancer is diagnosed

13. Sadly, shortly after re-call to prison, the claimant was diagnosed with stage 4b Hodgkin's Lymphoma and commenced an intense course of chemotherapy. On 30th October 2019 medical evidence of this diagnosis was provided. The claimant was allowed temporary release from custody in November 2019 to attend hospital for treatment, under the close supervision of prison officers.

14. On 5th December 2019 the claimant's solicitor made a further application that the claimant be released, on the papers, in view of this deterioration in his health. By then the claimant was on his second cycle of chemotherapy. It was submitted that his risk of harm to the public was significantly decreased by this change in circumstances. His aunt was able to provide an address for him on release and he would have the support of his family and his partner, Ms H, who is a registered nurse. It was submitted that his poor behaviour on licence might have been a symptom of the cancer which at that stage had been undiagnosed.

An expedited hearing is ordered

15. On 20th December 2019 the Parole Board refused the application for release on the papers but ordered that the claimant's case be expedited and that the oral hearing listed for March 2020 be brought forward to an earlier date. On 10th January 2020 further directions were given for the oral hearing. The claimant's solicitors were invited to obtain a medical report from the oncology consultant confirming the diagnosis and its impact on the claimant's physical capacity, and the prospects of his regaining any lost physical capacity within the next 12 months (i.e. during the remainder of his sentence, which would expire anyway in January 2021). A deadline of 27th January 2020 was set for the provision of the psychiatric report previously ordered and for "police domestic violence call outs".

16. There was no mention in these directions of any revised time estimate for the hearing, previously set at 1 hour 30 minutes. The oral hearing was set for 4th February 2020, commencing at 10.30am. A "timetable" was emailed to the claimant's solicitors on 10th January 2020 which gave a start time of 10.30am but no indication of the length of time allowed for the hearing. The timetable gave the name of the Panel Chair.

Reports are served

17. On 23rd January 2020 the claimant's offender manager, Shirley George, provided a part C risk management report. Her recommendation had now changed. She now supported his re-release on licence. She concluded that the claimant now had accommodation available to him at his maternal aunt's address and it would be safe to re-release him on the grounds of his ill health. Ms George had spoken to the aunt and

visited the address. Ms George confirmed the suitability of the accommodation and the arrangements. She proposed in her report an additional condition of the claimant's licence on re-release: to reside permanently at an approved address and not to reside elsewhere even for one night without obtaining the prior approval of his supervising officer. She had conducted an interview with the claimant in prison on 22nd January together with his Offender Supervisor, Ms Veronica Bryson. The claimant had acknowledged that his recall to prison had saved his life, as he would not have sought medical assistance otherwise because he was more interested in taking drugs. The report explained that because of his medical diagnosis and treatment, the claimant had not been able to complete any work in relation to his employment training and offending behaviour.

18. As required by the directions issued on 10th January, a report from the claimant's consultant oncologist was provided, dated 27th January 2020. The claimant's last cycle of treatment had been on 15th January 2020. A further scan was awaited. If it showed ongoing remission the claimant would move onto routine clinical surveillance involving 3 monthly appointments in the first year. The report concluded that although it could take several months after chemotherapy for symptoms including fatigue and lethargy to resolve completely, if the claimant remained in remission he could be expected to return to his pre-morbid baseline within approximately 6-12 months.

19. The other report which had been required to be served by 27th January 2020 was the Offender Supervisor's report from Ms Bryson. Regrettably there was a long delay in serving that report which contributed to the problems at the hearing. The claimant and his solicitor did not see the report until the morning of the hearing.

20. The oral hearing took place on Tuesday 4th February 2020, before the single panel member of the Parole Board named in the timetable sent out on 10th January 2020. The claimant was represented by his solicitor, Ms Alizeh Khan. Ms Khan has set out the circumstances of the hearing in a witness statement dated 14th May 2020. There is no challenge to the accuracy of her witness statement.

21. On 29th January 2020 Ms Khan chased the reports from the Offender Manager and the Offender Supervisor as she had a legal visit booked with the claimant for 30th January. This was the only opportunity she would have to take his instructions prior to the oral hearing. The Offender Supervisor's report, although dated 30th January 2020 was not, in the event, received by the claimant's solicitor until the morning of the hearing. The report was generally supportive of the claimant's case and recommended release, although it referred to certain negative aspects of the claimant's behaviour following his recall to prison, setting out details from the NOMIS report entries.

The oral hearing

22. On 4th February Ms Khan arrived at the prison by 9.15am and was escorted at approximately 10am to the area of the prison where the hearing was to be held. It was only on the arrival at the prison that Ms Khan was provided with a copy of the missing Offender Supervisor's report. She proceeded to take the claimant's instructions on the report, and in particular the negative aspects. Because of his health issues the claimant was in a wheelchair. Before she completed that task, she was interrupted and asked to attend the room where the oral hearing was to take place as the Panel Chair has asked to speak with her.

23. The Chair asked Ms Khan how long she needed before commencing the hearing. Ms Khan explained that she had only just received the outstanding report which included some security intelligence and other evidence which she needed to discuss with the claimant. The Chair informed Ms Khan that the hearing had been listed for two hours which the Chair thought was the appropriate amount of time required to conduct a fair and effective hearing. Ms Khan says in her statement that she was taken by surprise by this. She had assumed from the fact that the timetable was silent as to the length of the hearing that the case would be listed for a full day. Ms Khan explained that there was a significant amount of evidence in the new report on which she required the claimant's instructions. The Chair then informed Ms Khan that she was unable to stay past the allocated time for the hearing.

24. The Chair went on to explain that when she had initially been asked by the Parole Board to chair this oral hearing she had refused as she was unavailable. Later she had been asked again and this time agreed on the basis that she would have to finish the hearing by around 11.30am or 12 noon. The Chair insisted that the hearing should begin as soon as possible otherwise she would have to adjourn to another date and she had no availability until March. Ms Khan reminded the Chair that the oral hearing had been found to meet the test for expedition and that to adjourn it until March would defeat the purpose of listing it as an expedited hearing. The Chair said the hearing would have to be completed within the allocated time as there was no other option.

25. Ms Khan informed the claimant of her conversation with the Panel Chair. Ms Khan says in her witness statement that the claimant became visibly upset and distressed. That in itself made it impossible for her to take detailed instructions on the recently served Offender Supervisor's report, and specifically in relation to the security intelligence and negative NOMIS entries.

26. When the hearing commenced the Chair again explained (this time in the claimant's presence) that there was limited time available. The claimant became visibly upset and argumentative. He said he felt it would not be fair and he would be rushed. The Chair again confirmed that she would have to adjourn until March if the hearing did not go ahead that day. Ms Khan again pointed out that it was an expedited hearing for good reason.

27. The Chair queried with the Offender Manager, Ms George, why one of the directions had not been complied with, namely the direction to provide a record of domestic violence police call outs. Ms George appeared to be unaware of that direction but eventually conceded that she "must have missed it". The Chair confirmed that she would need to have sight of the call out record before she could make a decision, as she did not feel she could make a fair assessment of risk without it.

28. This prompted further discussion of adjourning the oral hearing until March, depending on when the call out record could be obtained and served. Ms Khan again emphasised that it was an expedited hearing and it was not fair to the claimant to adjourn until March through the oversight of the Offender Manager in not obtaining this information. The Chair reminded Ms Khan that her main concern was the protection of the public and therefore she required all the evidence before she could make her assessment of risk. She also said she may not have time to review the call

out record and draft the decision immediately, so it may be that the decision could not be issued until March in any event. There was further discussion in which the Chair again confirmed that she was not available sooner and urged that the hearing should begin so as not to waste time.

29. The Offender Supervisor, Ms Bryson, gave evidence first. Ms Khan estimates that by now it was approximately 10.45 or 11am. She felt she had not had sufficient time to prepare her questions for cross-examination and therefore the evidence of the witness was very short. However, the witness was supportive of release and briefly explained her reasons.

30. The claimant gave evidence next. Ms Khan says in her witness statement that the claimant seemed to be rushing in answering the questions. After the hearing he told Ms Khan that he felt he could have said more but felt he needed to keep it short because of the discussion there had been about time. Ms Khan says that she went through the claimant's evidence only very briefly, confining his evidence to his ability to comply with his licence conditions, his attitude towards the offending following his recall, his behaviour since his cancer treatment, and his relationship with his girlfriend since his recall. Ms Khan believes that it was during her examination-in-chief of the claimant that the Chair again reminded everyone of the time constraints and said she was now chairing the hearing beyond the time she had agreed to sit. She said she would need to be out of the prison by 12.30 or 1pm, to the best of Ms Khan's recollection.

31. The claimant's evidence concluded. The final witness was the Offender Manager, Ms George. She explained briefly why she was recommending release. Ms Khan says she probably only asked the witness four or five questions, simply dealing with the claimant's risk. She says that had there been more time available she would have liked to explore several other matters: the claimant's relationship with his Offender Manager prior to recall; the claimant's relationship with his family; the claimant's relationship with his associates previously and at the time of the oral hearing; the claimant's relationship with his girlfriend prior to recall and at the time of the oral hearing; the claimant's diagnosis and its impact on all these relationships; risk factors; protective factors; the Offender Manager's understanding of his attitudes; the claimant's mental health condition; the claimant's childhood trauma when he was sectioned under the Mental Health Act; a breakdown of each individual licence condition; the Offender Manager's failure to support the claimant appropriately before and after recall, and the impact of that on his attitude to authority. Ms Khan states that she does not believe she was able to explore these matters in the level of detail that was required for the Panel to make a fair assessment of risk. Nor did the Chair explore these matters in detail either. Ms Khan says she believes that a thorough exploration of these matters would have been crucial to a fair assessment of his risk.

32. As the Offender Manager's evidence concluded the Chair suggested that the call out record should be served as soon as possible and that closing submissions should be made subsequently, in writing.

33. As Ms Khan points out, she was therefore unable to ask the claimant or the Offender Manager or Offender Supervisor any questions in relation to the domestic violence call out record which the Chair had previously highlighted as essential (potentially at least) to her assessment of risk; nor was the claimant able to provide evidence in relation to any entries on the call out record.

The missing records are served

34. The following day, 5th February 2020, an urgent request was raised for the missing information. The request indicated that the Parole Board wanted to know if there had been any call outs relating to domestic violence involving the claimant from the age of 18 onwards. The information was eventually provided to the claimant's solicitor on 12th February. It was a substantial document running to 17 pages. Rather than merely a list of domestic violence callouts, in fact it appeared to be the entire "police intelligence and contact log" from 2015 to October 2019. It disclosed no reports of domestic violence relating to any partner other than Ms H. The only reports of domestic violence call outs were those relating to Ms H in connection with the offences for which the claimant had been sentenced. The document did, however, contain a significant number of other "negative" entries relating to the claimant's conduct over that four year period.

35. Ms Khan was concerned by the failure to serve this material in time, which had necessitated an adjournment of the hearing without it. She complained about this in a stakeholder response form. Her particular concern was that there might be undue delay in receiving the decision of the Parole Board on re-release, as the Chair had indicated that the adjournment might be up to 8 weeks. This would be wholly unreasonable when the hearing had been expedited because of the exceptional circumstances.

36. On receipt of this further information the claimant's solicitor was able to provide her closing submissions in writing on 15th February 2020. The submissions made no reference to the dissatisfaction felt by Ms Khan in relation to the time available for the hearing or her inability to cover all the matters she would have wished. Bearing in mind that the Offender Manager and the Offender Supervisor were both supporting release, and a favourable outcome was hoped for, it may well be that Ms Khan did not wish to antagonise the Panel by complaining at that stage.

The decision letter

37. Despite the concern that there might be a delay of up to eight weeks, in fact the decision letter was issued on 19th February 2020. In relation to domestic violence the decision letter stated in terms that there was no evidence of previous domestic violence call outs, and that although there was a reference to a domestic call out in January 2019 that was at a time when the claimant was in custody so the Panel put no weight on it. However, it was noted that the claimant was arrested in April 2016 for allegedly assaulting Ms H.

> "Your relationship with Ms H was described as 'increasingly problematic' but you had previously denied any violence. At the oral hearing you disclosed that you had kicked her in the back after she slapped you in the face. Other partners have alleged assault and rape when you were aged 14. You have said you find it difficult to control your emotions."

38. In relation to his recall to prison, the decision letter stated:

> "You do not challenge the appropriateness of your recall; there is nothing within the dossier that suggests the recall was inappropriate and in consequence the Panel is satisfied that your recall was appropriate."

39. The decision letter summarised the content of the material in the dossier under the conventional prescribed headings "analysis of offending, "risk factors", and "evidence of change since last review, circumstances leading to recall and progress in custody". Under the heading "Panel's assessment of current risk" the decision letter acknowledged that the claimant had said his health was now his priority and the cancer diagnosis was a wake-up call; he was aware that the use of any drugs could impact on his recovery.

> "This may well be the case but it is not possible to put weight on the physical impact of the diagnosis when assessing your risk over the period until your sentence expires as it appears likely that you will return to full capacity within that timeframe. The panel considered that a medium assessment underestimated your risk of causing harm."

40. Under the heading "evaluation of effectiveness of plans to manage risk", the decision letter acknowledged that the claimant was able to go to live with his aunt and that the Offender Manager, Ms George, had visited her home and assessed it as suitable. He had not lived with her before but thought it would be good as it would be stable:

> "You see this as a temporary arrangement and said you plan to look for accommodation with Ms H as soon as possible. Ms George said [she] would approve you living with Ms H as long as the address was suitable although she had not previously been aware that you had assaulted her."

41. The decision letter said that the Offender Supervisor, Ms Bryson, noted that Ms H was very supportive. However:

> "The Panel had concerns about this. She is not a protective factor as you have been involved with her and offended. She is also a victim of your offending and should not be expected to be relied [upon] as a protective factor. The panel did not consider that the proposed risk management plan was sufficient to manage your risks. It was particularly concerned that it would be likely that you would live with Ms H despite the index offences and your disclosure that you had assaulted her. The proposed plan was was unlikely to be effective in managing your risks."

42. The conclusion and decision of the panel was expressed in the following terms:

> "You have an established pattern of violent and harmful behaviour of which the index offences are a part. You have not completed any interventions to address your risks so the panel would have to rely on the wake up call of the cancer diagnosis to

> evidence a reduction in your risk. Whilst it is understandably likely to have had an impact on you, it is too early to say whether it will have motivated you to change your behaviour and that you have the skills to sustain that motivation. It is fortunate that you are likely to make a full recovery over the next 12 months. This means that it is not possible to rely on your current physical deterioration as evidence that your risk of harm has reduced. The proposed risk management plan is not likely to be effective in managing your risks, particularly as you may well end up living with your partner. Having taken into account the written and oral evidence the panel considers that you need to remain confined for the protection of the public and did not direct your release".

The legal framework

43. The relevant statutory provisions governing the recall of a prisoner released on licence and his subsequent detention and potential re-release (in circumstances such as these) are contained in sections 254 and 255C of the Criminal Justice Act 2003. For present purposes it is necessary only to recite that section 255C provides:

> "(2) The Secretary of State, may at any time after P is returned to prison, release P again on licence under this Chapter.
> (3) The Secretary of State must not release P under subsection (2) unless the Secretary of State is satisfied that it is not necessary for the protection of the public that P should remain in prison."

44. The test of necessity for a prisoner's continued detention depends on whether he "presents a continuing risk to life or limb"; in other words whether he poses a risk of committing offences which may occasion serious harm: see *R (Sturnham) v Parole Board and another (No 2)* [2013] 2 A.C. 254, at [23] and [45].

45. It was held by the Court of Appeal in *R (King) v Parole Board* [2016] EWCA Civ 51; [2016] 1 WLR 1947, at [31], that the words "necessary for the protection of the public" in subsection (3) did not entail a balancing exercise in which risk to the public was to be weighed against the benefits of release to the prisoner or the public, but simply involved safeguarding the public from the danger posed by the prisoner.

46. Proceedings before the Parole Board are governed by the Parole Board Rules 2019 (SI 2018/1038) which came into force on 22nd July 2019. In *R (Vowles) v Parole Board* [2015] 1 WLR 5131 the Court of Appeal held that the Parole Board has an obligation effectively and actively to manage proceedings before it: see [41]–[42].

47. The 2019 Rules provide for notice of an oral hearing. Rule 22 states (so far as relevant):

> "(1) Before fixing a date for an oral hearing the Board must consult the parties.
> (2) The Board must give the parties reasonable notice of the date, time and place of the hearing."

48. The Rules permit the adjournment or deferral of proceedings to obtain further information. Rule 6, which deals compendiously with case management and directions, provides (so far as is relevant):

> "…..(11) The panel chair or duty member may adjourn or defer the proceedings to obtain further information or for such other purpose as they consider appropriate.
> (12) Where the panel chair who is conducting an oral hearing adjourns or defers proceedings under paragraph (11) without a further hearing date being fixed they must give the parties at least 3 weeks' notice of the date, time and place of the resumed hearing (unless the parties agree to shorter notice).
> (13) Any decision to adjourn or defer an oral hearing must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the date of that decision."

49. Rule 24 governs procedure at an oral hearing. Rule 24 (2) provides the general duty that:

> "The panel -
> (a) must avoid formality during the hearing;
> (b) may ask any question to satisfy itself of the level of risk of the
> prisoner, and
> (c) must conduct the hearing in a manner it considers most
> suitable to the clarification to the issues before it and to the just
> handling of the proceedings."

50. The leading authority on procedural fairness in relation to Parole Board hearings is *R (Osborn and Booth) v Parole Board* [2013] UKSC 61; [2014] A.C. 1115. The principal issue in that case was the circumstances in which an oral hearing would be necessary. Mr Withers has helpfully identified the following propositions from the case which are pertinent to the present application for judicial review.

> (i) The court must determine for itself whether a fair procedure was followed. The court's function is not merely to review the reasonableness of the decision maker's judgment of what fairness required: [65].
> (ii) An oral hearing was likely to guarantee better decision making in terms of the uncovering of facts, the resolution of issues and the concerns of the decision-maker, due consideration being given to the interests at stake: [66].
> (iii) One of the virtues of procedurally fair decision-making is that it is liable to result in better decisions by ensuring that the decision-maker receives all relevant information and that it is properly tested. The purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged: [67].

(iv) The first is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel: [68].
(v) Research has revealed the frustration, anger and despair felt by prisoners who perceive the Parole Board's procedure as unfair, and the impact of those feelings on their motivation and respect for authority: [70].
(vi) The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: [71].
(vii) The Parole 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. An oral hearing should therefore 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 representatives to put their case effectively or to test the views of those who have dealt with him: [82].
(viii) When dealing with cases concerning recalled prisoners, the Parole Board should bear in mind that the prisoner has been deprived of his freedom, albeit it conditionally: [83].

51. As Mr Withers pointed out, in *Osborn and Booth* in the Court of Appeal, [2010] EWCA Civ 1409, referring at [37] to American authority, Carnwarth LJ highlighted the fundamental limitations of written submissions:

> "…[written] submissions do not afford the flexibility of oral representations; they do not permit the recipient to mould his arguments to the issues the decision-maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for a decision…".

52. It is also clear that, once procedural unfairness has been established, it is enough to show that but for that procedural fairness the outcome might have been different. It is not necessary that the outcome would necessarily have been different: see *R (Clegg) v Secretary of State for Trade and Industry* [2002] EWCA Civ 519, at [30]. In *R (Gopikrishna) Office of the Independent Adjudicator for Higher Education* [2015] EWHC 207 (Admin) at [209] it was held that "it is not necessary for the claimant to show that the decision would inevitably have been different." Quoting from the judgment of Elias J in *R v Chelsea College of Art and Design, ex p.Nash* [2000] ELR 686, where a breach of the principles of fairness was found:

> "…It has been urged on me that even if there were defects in the procedure they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and

> only in such cases, where one can say that the breach could have made no difference…".

53. It is recognised in the authorities that the court has to caution itself against the suggestion that no prejudice has been caused to a claimant because the flawed decision would inevitably have been the same. For example, in *R v Ealing Magistrates Court, ex p. Fanneran (*1996) 160 JP 409, a case concerning the Dangerous Dogs Act 1991, Staughton LJ said:

> "The notion that when the rules of natural justice have not been observed one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold a conviction if natural justice had not been done.…".

As it is put in De Smith's Judicial Review (8th Ed) at 8-070:

> "Natural justice is not always or entirely about the fact or substance of fairness. It is also has something to do with the appearance of fairness. In the hallowed phrase, justice must not only be done, it must also be seen to be done."

54. The guidance issued by the Parole Board in relation to oral hearings (updated August 2018) sets out the factors that the Panel should consider. Under the heading "The Resettlement Plan" the guidance states, at paragraph 4:

> "When considering release, the Board is assessing the level of risk that the prisoner will present in the community. It is central to that assessment, therefore, that the Board satisfies itself that the plan in place for supervision, monitoring and management of any residual risk is acceptable - it is not a separate issue."

55. The guidance provides, at paragraph 5.1, a table of "additional licence conditions". One of these conditions (recommended by the Offender Manager, Ms George, in her report) reads as follows:

> "To permanently reside at [address] and must not leave to reside elsewhere, even for one night, without obtaining the prior approval of your supervising officer; thereafter to reside as directed by your supervising officer."

The Advice in the table alongside that condition reads:

> "This condition is stronger than the standard condition to reside as directed, which only requires the offender to notify the Probation Service of his address. This condition can be used where it is deemed necessary and proportionate to direct that the offender live at a particular address. Court judgments have confirmed that licence conditions formulated in terms of 'you must reside at' have the clear effect of requiring that the licensee

spend each and every night at the place in question. If the offender should spend just one night away from the specified address they are in breach of this particular licence condition."

The claimant's submissions

56. Mr Withers submits that this hearing, and the lead up to the hearing, was marred by procedural unfairness. There were a number of issues which, individually or cumulatively, led to procedural unfairness which can be categorized under three broad headings: first, the organising of the hearing itself; second, the conduct of the hearing by the Panel Chair; third, how the Panel Chair dealt with the receipt of further evidence. Mr Withers took me through the relevant events chronologically in developing these submissions.

57. Mr Withers submits that a parole hearing requires a high standard of procedural fairness. The decision relates to a prisoner's liberty. It is only proper that the time which is necessary is taken to hear the prisoner's case and allow him to present his case fully. That did not happen at this hearing.

58. First, Mr Withers submits that the time allocated for the hearing put a substantial amount of pressure on the claimant and his solicitor to present his case. Although the original time estimate (given in September 2019) was 1 ½ hours, that should have been revised when the hearing was expedited because the issues were plainly going to expand. As Ms Khan's witness statement makes clear, she felt unable to put her client's case fully in view of the time constraints. This expedited hearing was unduly rushed and witnesses could not be questioned as fully as the claimant's solicitor wished.

59. Second, the claimant himself evidently became frustrated and concerned which meant that he was not giving his own evidence in the best frame of mind. The suggestion by the Panel Chair that the case would otherwise have to be adjourned until March put the claimant's solicitor in an invidious position, facing a choice between a further delay of several weeks or pressing ahead with undue haste. Mr Withers submits that this was not a fair choice in all the circumstances and justice was not done or seen to be done. This flowed from the failure of the Parole Board effectively to manage the case.

60. Third, the Panel Chair made a finding in the decision letter that the claimant's partner Ms H was not a protective factor in the case, and the decision letter assumed he would live with Ms H upon his release. That was contrary to the tenor of the evidence and needed to be explored more fully. The Offender Manager had recommended an additional condition which should have allayed that concern, had it been voiced by the Chair at the hearing. The claimant's solicitor did not have sufficient opportunity to test that finding or allay the concern of the Panel Chair.

61. Mr Withers submits that although the domestic violence call out records were subsequently served, the claimant had been unable to address them at the hearing. The material in those records formed part of the evidence upon which the decision was based and were relevant to the likelihood of the claimant staying with his partner if released on licence. That issue needed to be tested more fully at the hearing.

Discussion and conclusion

62. I have considered all these submissions carefully, together with the full content of the trial bundle which contains the whole of the dossier provided to the Panel for the hearing.

63. There were plainly serious failings in the preparation of the case for the oral hearing which resulted in real difficulty for the claimant and his solicitor on the day of the hearing. I am troubled by those failings and their impact on the fairness of the hearing.

64. First there was a failure to comply with the direction given on 10th January 2020 that the report of the Offender Supervisor, Ms Bryson, be filed by Monday 27th January 2020, i.e. a full week before the oral hearing listed for Tuesday 4th February. Clearly it would be necessary for the claimant's solicitors to take his instructions on that report, hence the deadline imposed for service of that and the other material well in advance of the hearing. The claimant's solicitor had chased the report in the week leading up to the hearing but she was not provided with the report until she arrived at the prison on the morning of the hearing. That afforded inadequate time for her to consider the report properly and take the claimant's instructions upon it. Although in general terms the report was favourable to the claimant in supporting his application for release, it made extensive reference to negative NOMIS entries and it was necessary for the claimant to be able to deal with these.

65. Second, the unfairness arising from the late service of that report was compounded by and fed into what I regard as the even more serious consequence that insufficient time was available for the hearing to be conducted in an unhurried and seemly manner. Although Ms Khan says in her witness statement that she had received no notice that the hearing was to be listed only for 2 hours and that this came as a surprise to her when the Panel Chair informed her of the time constraints upon her, the original directions for an oral hearing, given on 17th September 2019, had indicated that the hearing should be listed for 1 hour 30 minutes. That length of hearing was not repeated in the directions given on 10th January 2020. It may be that, with the wisdom of hindsight, Ms Khan should have checked whether there was a revised time estimate. What she did not and could not know, until she was told at the start of the hearing, was that the Panel Chair had agreed to conduct the hearing on the express basis that she needed to finish by 11.30am -12 noon. That was most unfortunate. It resulted in unreasonable pressure of time which coloured the whole conduct of the hearing. The further problem on the day was the late service of the report and consequent loss of time and undue haste to proceed and complete the hearing. The result, I am satisfied, was an unfair hearing.

66. I attach considerable importance to the fact that the Panel Chair revealed to Ms Khan, and therefore to the claimant, that she had initially declined to hear the matter because she was unavailable on 4th February, and had agreed to hear it on the basis that she would have to finish at around 11.30 or 12 noon. It was she who issued the trial timetable and directions on 10th January 2020. Finishing by that time would give, at the maximum, only 1½ hours for the hearing. As it was, the hearing did not start until about 10.45-11am. It is apparent from Ms Khan's witness statement that the Panel Chair made several references to the pressure of time and the need to get through the hearing. She explained this in the presence of the claimant at the start of the hearing, which provoked a predictable response from him. He became visibly upset and argumentative. He said he felt it was unfair that he would be rushed. Particularly significant was the Chair's observation during the evidence of the claimant himself to

the effect that she was now sitting beyond the time when she should have been elsewhere. After that she still had to hear the all-important evidence of the Offender Manager, Ms George. The decision turned in the end on the adequacy of the plan to manage the claimant's risk if re-released, including the likelihood that he "might well end up living with [his] partner", as it was put in the decision letter. There was an express finding that Ms H was "not a protective factor". That was one of the topics which Ms Khan would have wanted to explore more fully in cross-examination of Ms George, but lack of time apparently prevented her from doing so. I have already listed, at [31] above, the topics which Ms Khan says she would have wanted Ms George to deal with. They were potentially critical to the assessment of risk.

67. The third procedural shortcoming in relation to preparation for the hearing was the failure to obtain the call out records for any incident of domestic violence, something which had specifically been requested in the directions given on 10th January 2020. The deadline for service of those records was, again, 27th January. It seems that the Offender Manager, Ms George, had simply overlooked the request. It is true that, as it turned out, there were no other domestic violence call outs beyond those relating to the index offence of harassment of Ms H which had led to the making of the restraining order. Moreover, the Panel Chair made it clear in the decision letter that there was no evidence of previous domestic violence call outs, whilst noting that in April 2016 the claimant had been arrested for allegedly assaulting Ms H. Nevertheless the Chair had clearly studied the records carefully. She referred in the decision letter to the entry dated 28th January 2019 which, although apparently describing a call out to an incident between the claimant and a partner, the Chair disregarded because it could not be correct as the claimant was then still in prison. There were, however, other entries in the 17 page document which were not related to domestic violence but showed the claimant in a poor light. Had the record been served on time, the claimant could have dealt with these and any concerns the Panel Chair might have raised.

68. Another important consequence of the absence of the domestic violence call out records, combined with the shortage of time for the hearing, was that the claimant's solicitor was unable to make her closing submissions orally at the hearing. Instead she had to make written submissions. This meant there was no opportunity for engagement with the Panel Chair in the course of oral submissions, addressing issues which might particularly be troubling the Chair. The Offender Manager and the Offender Supervisor were both supporting re-release. Had the Chair been able to indicate, during closing oral submissions, that despite this she was particularly troubled by the risk that the claimant would soon be living again with Ms H, Ms Khan would have been able to address that concern. She could have pointed out that the additional licence condition Ms George was recommending would mean that the claimant would be in breach of his licence and liable to immediate recall to prison if he were to stay even a single night at Ms H's address unless a change of residence had been approved by his Offender Manager.

69. Looking at the matter in the round I am satisfied that there was procedural unfairness at and in relation to the hearing, for the reasons I have explained. It is regrettable that the various failures to comply with the case management directions led to undue pressure of time on the morning of the hearing which was compounded by the Panel Chair's expressed anxiety that the hearing must be completed by 12 noon. There was no reason for the Panel Chair to doubt the concerns expressed by the claimant's solicitor that she simply had not had sufficient time to take proper instructions on the new matters.

70. Furthermore, and importantly in my judgment, it is clear that the claimant himself was adversely affected by the Panel Chair's disclosure of the limited time available to conduct the hearing. I bear in mind that one of the reasons why an oral hearing had been granted in the first place was the need for the panel to conduct a face to face hearing. This was a man undergoing treatment for cancer and confined to a wheelchair. That was why the oral hearing had been expedited. He was now faced with a choice between pressing on with hearing even if there was insufficient time, or adjourning to March, thereby losing any benefit of an expedited hearing. Pressure of time became a theme which permeated the whole hearing and was likely to affect the way he gave his evidence and undermine his ability to do himself justice. Inevitably it gave rise to a legitimate sense of grievance.

71. Having found that there was procedural unfairness, the second question I have to consider is whether the procedural defects in fact made any difference to the outcome. It may well be that had the hearing proceeded smoothly with all the directions complied with and no pressure of time, the eventual decision might have been the same. It is impossible, however, to conclude that it would inevitably have been the same. In particular it is likely that the concerns expressed in the decision letter as to the adequacy of the release plan could have been addressed specifically, by more extensive questioning of Ms George and by dialogue with the Panel Chair during Ms Khan's oral closing submissions.

72. I am therefore quite satisfied that this is <u>not</u> one of those exceptional case where it can safely be said that the outcome would inevitably have been the same had there been no procedural unfairness. On the contrary, it is entirely possible, in my judgment, that the outcome could have been different. Furthermore, this is a classic case of the need for justice not only to be done but to be seen to be done.

73. For all these reasons I find that the hearing was unfair and the resulting decision was unlawful. The decision must be quashed and a re-hearing must take place.

74. I am invited by Mr Withers to direct that there should be an expedited re-hearing. I note that the claimant is due to be released in any event no later than 11th January 2021, that is to say in just over 5 months' time. I am also mindful of the restrictions which have inevitably been imposed on the Prison Service by the Covid-19 pandemic, and their impact on the proceedings of the Parole Board as well. In particular, the current lockdown in prisons means that there are no face-to-face hearings possible; instead hearings have to be conducted by video link or by telephone.

75. Nevertheless, I am satisfied that this is a case which does call for urgent reconsideration by way of a further expedited oral hearing. The question is how soon that fresh hearing should take place.

76. Mr Withers referred me to two cases in which similar relief has been granted for an expedited re-hearing. In *R (Davies) v Parole Board* [2015] EWHC 427 (Admin) the order was for a re-hearing within 3 months. In *R (Khan) v Parole Board* [2015] EWHC 2528 (Admin) the order was for a re-hearing within 6 weeks.

77. The particular urgency in the present case is that the claimant's sentence expires on 11th January 2021 in any event. Making allowance for the summer holiday period, I direct that the fresh oral hearing must take place by 30th September 2020, which is just over 8 weeks from the date of the order.

78. If the current restrictions on face-to-face hearings continue (as is likely), the fresh hearing can take place by video link. This possibility was raised by Mr Withers in his closing submissions, and has been raised too by the defendant's solicitors when served with the draft of this judgment and the proposed order. A telephone hearing would not, in my view, be an acceptable alternative. The claimant and his advocate need to be able to see the Panel Chair and the witnesses, and vice versa.