Neutral Citation Number: [2023] EWHC 1160 (Admin)

Case No: CO/1202/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT LEEDS COMBINED COURT CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 May 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

The King
on the application of
Paul Somers

Claimant

- and -

Parole Board for England and Wales

Defendant

Secretary of State for Justice

Interested Party

- -

Mr Jude Bunting KC and **Mr Michael Bimmler** (instructed by **SL5 Legal Ltd**) for the **Claimant**
Mr Nicholas Chapman (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 10 March 2023

- -

Approved Reasons for Judgment

This judgment was handed down remotely at 6:00pm on 15 May 2023 by circulation to the parties or their representatives by e-mail.

.....

MRS JUSTICE FOSTER DBE:

1. These are the full reasons for quashing on 10 March 2023, a decision of the Parole Board for England and Wales ("the Board") dated 5 January 2022 in which the Board refused the Claimant's application for an oral hearing of his parole review.

2. Mr Jude Bunting KC leading Mr Michael Bimmler appeared before me on 10 March 2023 for the Claimant, and Mr Nicholas Chapman on behalf of the Parole Board. The Interested Party did not appear. Mr Chapman, whilst retaining a neutral stance on the application requested that the Court give specific guidance to his client on aspects of decision-making in this context, namely where a post-tariff life sentence prisoner ("a post-tariff lifer") requests that consideration of release or a move to open conditions be conducted at an oral hearing.

3. After the hearing I indicated with broad reasons that I accepted the Claimant's submission that the challenged decision should be quashed and the matter remitted for an oral hearing of the Claimant's parole review to be held. An Order has already been made to that effect.

4. Three distinct grounds of challenge were raised by Mr Bunting KC arguing that fundamental errors of law were made in refusing an oral hearing on 5 January 2022. However, broadly stated, it was the Claimant's case that the decision was contrary to the principles to be derived from *R (Osborn and Booth) v Parole Board* [2014] AC 115.

5. In addition to the Claimant's submissions, there were two additional questions posed by the Board before me who requested guidance. They were as follows:

> "*i) Whether Art.5(4) ECHR is engaged where it is neither party's case that the prisoner should be released.*
>
> *ii) The circumstances in which fairness requires the Board to hold an oral hearing where it is neither party's case that the prisoner should be released.*"

Mr Bunting KC argued that guidance was not necessary - beyond drawing the Board's attention to *Osborn* and also to the Board's own internal Guidance, which was consistent with the applicable principles in *Osborn*, but had not been followed in the present case.

6. The context in which the decision was made was as follows.

Background Facts

7. In 1991 the Claimant who was born on 13th May 1958 was convicted of the rape and murder of Sarah Moslin, a 10-year-old girl, in the grounds of Killingbeck Hospital in Leeds. On 6 June 1991 the Claimant pleaded guilty and was sentenced to life imprisonment with a tariff of 21 years 70 days which expired on 16th August 2012.

8. The details were that he befriended her in a local park when she asked him about his dogs. About a week later he took her to a nearby wood, raped and beat her with a large stone, fracturing her skull, and then strangled her with a dog lead. He returned twice to the body to

remove, burn and bury some of the victim's clothes and then to take her body into the woods where he buried her in a shallow grave. The body was discovered the following day. He initially pleaded 'not guilty' blaming another for the offence but changed his plea on the third day of the trial.

9. His earlier offending included a conviction at the age of 13 for possession of an offensive weapon and an indecent assault of a 13-year-old girl. In 1989 there was unlawful sexual intercourse with a 14-year-old girl and before that various violent offences.

10. Throughout his tariff and in the ensuing years, he has been detained under Category A. Hickinbottom J (as he then was) fixed the minimum term at 22 years less 295 days pursuant to paragraph 3 of Schedule 22 to the Criminal Justice Act 2003. The current review was the eighth post-tariff review undertaken in respect of the Claimant. The most recent oral hearing had taken place in 2020.

11. On 1 July 2021 the Secretary of State referred his case to the Parole Board to consider whether to direct his release under Section 28(6)(a) of the Crime (Sentences) Act 1997, inviting the Board to make recommendations as to license conditions and any monitoring requirements were it to decide to direct his release. If not appropriate to direct release, the Board in the Secretary of State's Referral document was invited to advise the Secretary of State:

> "*(i) On the prisoner's continued suitability for open conditions, if relevant.*
> *(ii) Whether the prisoner, if in closed conditions, should be transferred to open conditions. If the Board makes such a recommendation, it is invited to comment on the degree of risk involved.*
> *(iii) On the continuing areas of risk that need to be addressed.*"

12. The Board was asked to give:

> "*full reasons – which will be disclosed to the prisoner - for any decision or recommendation it makes*."

13. The Secretary of State's referral indicated that the Board should note it was expressly *not* being asked to comment on or make any recommendation about:

> "*(i) The security classification of the closed prison in which the prisoner may be detained.*
> *(ii) Any specific treatment needs or offending behaviour work required.*
> *(iii) The date of the next review.*"

14. At the Claimant's last Parole Board review on 3 August 2020 an oral hearing had been held. The Board did not recommend release nor transfer to an open conditions but by letter of 7 August 2020 the Board recorded the expert view that the Claimant needed to consolidate his learning on addressing his sexual offending behaviour. It saw force in the suggestion that the work needed could not be completed successfully in Category A and that his risk could be managed in Category B. The Secretary of State following that decision, had set him targets

including the PIPE course (Psychologically Informed Planned Environment-part of the Offender Personality Disorder Pathway). An 18 month review period was set.

15. Against this background on 2 November 2021 written representations were made on behalf of the Claimant requesting a recommendation for a transfer to open conditions. The representations did not suggest the Claimant was suitable for release nor that there was professional support for a move to open conditions but noted there was expert support for a move to Category B and he had completed all his core risk reduction work. Sex Offender Treatment Programmes, Core and Extended had been taken, positive feedback was reported, there had been no adjudications, and although the official line stated his behaviour was "mixed" it was submitted that in fact this was very positive, and emphasised that he still had enhanced status. Contained in the prison materials was a report from the Prison Offender Manager ("POM") recording the removal of the Claimant's mentoring roles as a result of behaviour involving female prison staff - although there had been no disciplinary finding against him. The Claimant challenged the removal of his roles, and denied inappropriate behaviour.

16. The representations requested an oral hearing stating that there needed to be evidence heard on current risk assessment, the reasons for removal were unsubstantiated and unclear, his POM accepted that the information against him had not been substantiated but the report had nonetheless felt able to comment adversely that "*these concerns remain*". His representative submitted that an oral hearing was clearly desirable and indicated the Claimant wished to call two witnesses.

17. A detailed decision of 3 December 2021 on paper declined to order release or recommend a move to open conditions: essentially the sentence plan had not been completed in closed conditions, risks had not been sufficiently reduced and he had yet to be tested outside category A conditions. The decision-maker "*did not find a reason for an oral hearing to be convened*" citing the substantive reasons for refusal of release or a recommendation.

The Legal Framework

18. By s28 of the Crime (Sentences) Act 1997, the Parole Board is responsible for the (periodic) consideration of whether tariff-expired life prisoners should be released.

19. The material provisions are as follows:

> "***28. Duty to release certain life prisoners***
>
> *(lA) This section applies to a life prisoner in respect of whom a minimum term order has been made; and any reference in this section to the relevant part of such a prisoner's sentence is a reference to the part of the sentence specified in the order.*
>
> *[…]*
>
> *(5) As soon as-*
> *(a) a life prisoner to whom this section applies has served the relevant part of his sentence; and*

(b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.
(6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless-
(a) the Secretary of State has referred the prisoner's case to the Board; and
(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.
[...]
(7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time-
(a) after he has served the relevant part of his sentence; and
(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference; and [...]
and in this subsection "previous reference" means a reference under subsection (6) above or section 32(4) below."

20. By section 239(2) of the Criminal Justice Act 2003:

> "*It is the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners.*"

21. The Parole Board Rules 2019, made by the Secretary of State in exercise of powers conferred by sections 239(5) and 330(3) and (4) of the 2003 Act make further provision on paper decisions and requests for oral hearings:

> "***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.*
> *[...]*
> *(6) Any decision made under paragraph (l)(b) is provisional.*
>
> ***20. Procedure after a provisional decision on the papers***
>
> *(1) Where a panel appointed under rule 5(1) has made a decision that a prisoner is unsuitable for release under rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing to determine the case.*
> *(2) A prisoner who makes an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of the provision of the written record under rule 19(8).*

[...]

(5) If an application is served in accordance with paragraph (2), the decision about whether the case should be determined at an oral hearing must be taken by a member of the Board who-
(a) is a duty member, and
(b) was not part of the constituted panel appointed under rule 5(1) who made the provisional decision.

(6) If the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, a provisional decision under rule 19(1)(b)-
(a) remains provisional if it is eligible for reconsideration under rule 28 and becomes final if no application for reconsideration is received within the period specified by that rule [...]"

22. By Article 5(4) of the European Convention on Human Rights ("ECHR"):

> "*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.*"

23. In *Osborn* (supra) and in *Re Reilly* [2013] UKSC 61, the leading authority on oral hearings in parole reviews, the Supreme Court had occasion to consider determinate sentence prisoners, recalled prisoners and also post-tariff lifers in the position of Mr Somers. Lord Reed, with whom the other Justices agreed, drew some general conclusions at the start of his judgment. The passages which follow are highly material to the Board's consideration in the present case and indeed they should form the backbone of any consideration as to affording an oral hearing where release or transfer to open conditions is in issue.

24. Lord Reed said the following at paragraph [2]:

> "*(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 (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) <u>It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following:</u>*
>
> *<u>(a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced</u>*

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 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.

...

(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."

[Emphasis added to those parts with particular resonance for the present case.]

24. Lord Reed further held that in assessing whether procedural fairness required an oral hearing, a court must determine for itself whether a fair procedure was followed [65] and he drew particular attention to the need to avoid a sense of injustice in a prisoner, derived from the lack of opportunity to contribute:

"*70. This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hoffmann referred. Courts have recognised what Lord Phillips of Worth Matravers described as "the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result" Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269, para 63). In the present context, research has established the importance attached by prisoners to a process of risk assessment which provides for their contribution to the process (see Attrill and Liell, "Offenders' Views on Risk*

Assessment", in Who to Release? Parole, Fairness and Criminal Justice (2007), ed Padfield).

[…]"

25. With regards to Article 5(4) of the ECHR, Lord Reed held:

> "*112. […] 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.*
>
> *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.*"

26. This approach, which has been the law for ten years now, has of course been reflected in the later case law see *R (Stubbs) v Parole Board* [2021] EWHC 605 (Admin), Upper Tribunal Judge Markus QC (sitting as a Judge of the High Court) and *R (Welsh) v Secretary of State for Justice* [2019] EWHC 2238 (Admin), a case of mine when sitting as a Deputy Judge of the High Court.

The Present Case

27. On 1 July 2021 a referral was made under Section 28 of the 1997 Act. In term*s* "*to consider whether or not it would be appropriate to direct the prisoner's release*".

28. The referral continued:

> "*2. If, after considering the case, the Board decide to direct the prisoner's release on licence under section 28(5)(b) of the Act, it is invited to make a recommendation to the Secretary of State under section 31(3)(a) in relation to any condition which it considers should be included in the licence. The Board is also asked to comment on any aspects of the prisoner's behaviour which need to be monitored in the period prior to release and on the prisoner's return to the community.*
>
> *3. If the Board does not consider it appropriate to direct release, it is invited to advise the Secretary of State;*
>
> *i) on the prisoner's continued suitability for open conditions, if relevant;*
> *ii) whether the prisoner, if in closed conditions, should be transferred to open conditions. If the Board makes such a recommendation, it is invited to comment on the degree of risk involved;*
> *iii) on the continuing areas of risk that need to be addressed.*

4. The Board is asked to give full reasons – which will be disclosed to the prisoner – for any decision or recommendation it makes.

5. In any event the Board should note that it is not being asked to comment on or make any recommendation about;

i) the security classification of the closed prison in which the prisoner may be detained;
ii) any specific treatment needs or offending behaviour work required
iii) the date of the next review.
..."

29. On 2 November 2021 submissions in writing were made for the parole paper review, and also requesting an oral hearing, reminding the Board he was long post-tariff. They advanced an application "*through a live assessment of his current risk factors ... for a recommendation for open conditions*".

30. The submissions argued that Mr Somers had made great efforts and progression in addressing his behaviour and risks and had taken responsibility for the index offence. Five different courses between the years 2001 and 2011 were mentioned together with his submission of diaries to the psychology department. It was submitted that the evidence showed he had engaged fully and thoughtfully and that feedback had been positive. The feedback in the dossier was referred to as very positive, and his 1 to 1 work was emphasised. There had been no adjudications since 2007, and no issues regarding substance misuse for a long time. The positive and negative matters were canvassed, including the suggestion that there might have been concerning behaviour with a member of staff. This had not been particularised and he denied any inappropriate behaviour, yet this had been picked up in the reports as representing concerns remaining. Details were very sparse which suggested the matter could and should be fully ventilated at a hearing. The issue about his loss of his job in October 2020 was also unclear, the notes had shown no previous information and the experts commenting had not been able to ascertain further information.

31. Although it was noted it was "*not for the Parole Board to directly comment on*", reference was made to the unanimous opinion of experts and key workers that Category A was inappropriate for him. It was stated they understood a review was being considered by the Local Advisory Panel on 26 November 2021. A need for the Building Better Relationships intervention had been considered but that was not available whilst he remained in Category A. The submissions referred to the fact that all core risk reduction work had been completed. Since he was a Category A prisoner he could reasonably seek a recommendation for open conditions/release directly so that the security category ought not to be a bar to the Parole Board. Recognising that these were not matters for the instant decision of the Board, the submission noted the expert consensus did not support the Claimant staying in his current location and that required consideration orally and for the hearing of oral evidence to determine progress since the last review.

32. The essential submission in the 2 November 2021 document was that it was not essential that gradual progression through the prison system should be seen. It was possible to go from Category A in closed conditions to open conditions and it could be discussed in more detail at an oral hearing. The prison psychological report said he could continue to manage his risk of

sexual violence in a lower category establishment without further therapeutic intervention. A PIPE unit recommendation had been a long-standing target but that was not necessary to show risk reduction in this expert's view. A new Offender Manager was to arrive which would also allow time for an updated report to be completed.

33. It was asserted that Article 5(4) of ECHR was engaged and that an oral hearing ought to be directed on that basis and on the basis of *Osborn*, which was cited in support together with Paragraph 49 of the MCA guidance.

34. The response to these representations was contained in a document headed "Full Decision" with a Panel date of 3 December 2021. That document reminded itself that whilst the Parole Board could *direct* a release it could only *recommend* a move to open conditions, the decision being for the Secretary of State. In its decision the Parole Board recalled the terms of its refusal to direct release or a move to open conditions in 2020. They set out the various risk factors, including a willingness to use instrumental and sexual violence, offending for sexual gratification, sexual preoccupation and controlling behaviour, angry, suspicious and vengeful thoughts and a lack of emotional intimacy in relationships.

35. The Panel also set out what they referred to as "*several protective factors*". These were willingness to engage in treatment and programmes to address offending behaviour, remorse and shame, largely compliant custodial behaviour and the desire never to offend again. Mr Somers's partner in the community, whom he had known since before the sentence, was supportive. The decision also detailed under the heading "*Evidence of change and progress in custody*" the work undertaken during sentence. This was an extract from the previous decision letter. The decision records that at that previous oral hearing there was a consensus view amongst professionals that Mr Somers was not suitable for release or progression to open conditions but should undertake further work on trauma and transfer to a progression unit. It was hopeful he would be downgraded to Category B at the next recategorisation review because it was felt that Category A was unsuitable and he would not feel safe on such a unit in a Category A prison. The response also noted the removal of Mr Somers from his role as a wing buddy because of concerns in October 2020 about inappropriate behaviour with a female prison staff member – although there was no information regarding that incident. In April 2021 he had also been removed as a DART mentor, because it was said, "*there have been other negative behaviours linked to your attitude to staff*".

36. The decision noted the positive reviews concerning a move to Category B from the psychological assessment in June 2021 of Laura McCraw, and her view that the Claimant could be managed in less secure conditions. They noted that the PIPE was no longer considered necessary and that the Community Offender Manager who had known him since 2017, stated that Mr Somers did not wish to be released, his aim was to achieve Category B status.

37. In an important passage on their assessment of the Claimant's current risk the Panel said:

> "*6. Panel's assessment of current risk*
>
> *You are assessed as posing a high risk of serious harm to the public and children, and low risk to known adult, staff and prisoners as indicated in the report from your COM. However, the panel notes that the OASys indicates that you are assessed as medium risk to prisoners and staff in*

> *prison. However, the OASys does not detail the context of the risk of serious harm to staff and prisoners. The panel therefore questions the rationale for those assessment ratings. The risk to the public and children refers to the seriousness of your index offence, and previous offences. The panel agrees with these assessments and that they reflect your current risks.*"

38. In other words the Board appeared to take issue with the conclusions of the COM. Other assessments were set out from Ms McCraw who had written a recent psychological assessment; it is unclear what their opinion of it was. They concluded that "*little had changed since [the] review [of 2020] and you have yet to be re-categorised*". Unsurprisingly, the request for a move to open conditions was refused.

39. Material to this application, an oral hearing was then refused in the following terms:

> "[The Panel] ... *does not find a reason for an oral hearing to be convened for the reasons outlined above. The panel has given careful consideration to your legal representations and the request for an oral hearing. Submissions indicate that your risk can be managed in open prison. However, you have expressed to your COM that your priority is to progress to a category B prison. Your legal representative acknowledges that there is no professional support for your release or progression to open conditions; rather they support progression to a category B prison. Your re-categorisation is not part of the Parole Board's remit, which is correctly highlighted in your legal representations. <u>The panel therefore concludes that as little has changed since the last thorough assessment from the Parole Board through live evidence at an oral hearing in 2020, a further hearing is not necessary at this stage.</u>*" [Emphasis added.]

40. The "*reasons outlined above*" were those that encapsulated the refusal – that there was no professional support for open conditions or release, and he was not suitable for a move given the risk.

41. An application for an oral hearing was made and further representations made on 21 December 2021.

Decision of 5 January 2022

42. The material part of the Parole Board's decision is as follows:

> "*We refer to the provisional decision of his parole review recently issued by a single member panel. As set out in the decision, he was allowed 28 days in which to consider whether to accept the decision or request an oral hearing.*
>
> *We confirm that he has requested an oral hearing. The basis for this request is that there is evidence of change since the last review, recategorisation has wrongly been prioritised over his parole review, all core risk work has been completed and out of fairness to a significantly post tariff Lifer.*

The duty member considered that the MCA single member panel had not prioritized recategorisation over the parole review, but noted the link outstanding risk work around trauma, which the prison service have suggested needs to be completed in a cat B prison. It is not for the Parole Board to comment on how or where such work is to be completed, but it is still considered necessary. Evidence of change had been fully considered in the MCA decision. It is fair to note that the MCA single member panel had been informed that Mr Somers was not seeking release or a transfer to open conditions or an oral hearing. His representations now seek that on his behalf. However, given he had an oral hearing in 2020 and core risk reduction work indicated in the 2020 decision letter is still outstanding, the duty member did not consider an oral hearing was merited in this case.

The representations submitted have been considered and the request has been refused for the reasons stated above.

The paper decision is therefore final, and his current review is now concluded in accordance with the Parole Board Rules – not applicable for reconsideration eligible cases."

43. In his application for permission the Claimant enlarged upon his core submission that there was procedural unfairness at common law in the failure to grant an oral hearing. This also gave rise to a breach of Article 5(4) ECHR, which includes not only the right to a speedy review but also to a review compliant with ECHR requirements of procedural fairness. *Osborn* at [2] and [113] per Lord Reed.

44. In their skeleton argument, Mr Bunting KC and Mr Bimmler isolate a series of errors by reference to the case of *Osborn*. They say:

    a. That the Defendant treated the application for an oral hearing as if it were an appeal against the decision made by the single member. The use of the phrases considering whether the single member had "*fully considered the evidence of change*" illustrated this. It was the wrong approach.

    b. The focus had been upon the prospect of a Panel directing the Claimant's release or recommending a transfer which were not relevant to a consideration of whether procedural fairness required an oral hearing (see *Osborn* at [88]-[99]). The Defendant paid no regard to the Claimant's legitimate interest in making an oral contribution and did not apply appropriate scrutiny given his lack of progression from Category A and the fact he was 12 years post-tariff.

    c. This was a case involving complex psychological presentation and risk. There were questions about the appropriate next steps and a proper review of risk required an oral hearing including evidence from professionals and the prison psychologist: a paper assessment was inadequate (see *Osborn* at [2] and [86]). Further, two named witnesses desired to be called and the Claimant could not properly present his case absent an oral hearing. The Claimant had reached an impasse with regard to Category A since core risk reduction work had been completed and there were differing views as to the utility

of further engagement with particular work (*Osborn* [2] and [96]). Continuing areas of risk that needed to be addressed were a relevant consideration: this was not a simple question of determining release. This would have been beneficially explored, irrespective of the question of release or transfer (*Osborn* [84]). If there were doubt, then an oral hearing ought to be directed (*Osborn* [2]).

d. The absence of an oral hearing meant the Claimant was unable to challenge the allegations about inappropriate behaviour which he did not accept, but which had led to loss of custodial employment and were referred to by the single member (see above at paragraph … *Osborn* [2]). The Claimant further says that the Parole Board wrongly favoured the COM's report as to what the Claimant was interested in – a downgrade to Category B rather than release or transfer. This was a wrong approach (see *Osborn* [2] and [90]-[91]).

45. The Claimant disputes that the two issues which the Parole Board invite the Court to determine arise on the case, it would therefore be wrong to give an advisory opinion. However, the Defendant has evinced a number of errors of understanding in their approach to the issues, more particularly:

(i) It is not the case that "*if nothing could relevantly be said on behalf of the prisoner that could make a difference*" fairness does not require a hearing (see *Osborn*).

(ii) The appropriate approach is through the lens of the common law – this generally results in Article 5(4) compliance (*Osborn* [2]).

46. In any event, whether or not the Claimant makes an application to be released or states an intention one way or the other the Defendant has a statutory duty to make a decision as to suitability for release necessarily therefore Article 5(4) is engaged. The likelihood of a release is not relevant when assessing whether or not to hold an oral hearing. *Osborn* indicates [112] a pre-disposition towards an oral hearing for indeterminate post-tariff prisoners.

Consideration

47. I have no hesitation in accepting the submissions of the Claimant in this case. In my judgement the overriding error of the Parole Board was to fail to apply the fundamental test outlined in *Osborn*, namely to ask itself whether fairness called for an oral hearing and to isolate the relevant elements of this particular case that might or might not call for that.

48. There were a number of submissions made to the Board seeking to persuade them that an oral hearing was appropriate in the circumstances following the refusal. Those submissions which in my judgement have substance, were expressed in the following way:

a. The principles in *Osborn* are to be applied. Where the prisoner is a post tariff lifer the case has particular protections that must be considered.

b. It was inappropriate to regard the recategorization review as reducing or removing any need for a consideration of the Section 28 reference. A prisoner runs the risk of being caught in a bind. Although entitled to engage meaningfully in the parole process and also to develop his future sentence plan, the system allows for a prisoner to be stuck, unable to demonstrate progress and change, in the Category A regime, and therefore unable to

provide the evidence he needs for progress. Such a position may be much ameliorated by an oral hearing in which the positive (or otherwise) steps taken may be examined and a grip kept on the up to date expert views.

c. It is wrong to decline an oral hearing on the basis that there may have been little change or that the same decision might be reached after an oral hearing. The mere lack of specific recommendations relating to parole is not sufficient reason to conclude no hearing will be necessary. *Osborn* makes plain the value of a hearing in itself for a person in the position of a post-tariff lifer. This is in addition to the practical case for examining challenges to the factual evidence in the reports or exploring reports.

d. New material ought to be explored when the experts provide it, particularly in the context of a post tariff prisoner, otherwise progress may go unremarked or unexplored, which would be unfair given the pressure on a prisoner to demonstrate change, development and insight when on a sentence dependent upon the Board for its duration.

e. Insight, critical to progress in the criminal justice system, is by far best explored in the open forum of a hearing. The experience and expertise of the Board is second to none in understanding and exploring issues of this nature and their judgement is best exercised in the context of a hearing where they can see and assess the individual and progress or otherwise can be recorded, or indeed acted upon.

49. In the present case the Claimant asked rhetorically, what else was required of him: he had managed to stay on the enhanced regime, he had had no adjudication since 2007, there was no concern over the risk of absconding and no issues on substance misuse for a long time. Continued compliance was certainly suggested in a less secure setting but that was impossible to pursue further in the event.

50. New material was available, a psychological assessment by Ms McCraw was completed, not available until the last review. There was a change which needed to be discussed, namely his sentence plan – less-intense courses had been recommended, no longer the long term objectives such as PIPE. Further, he ought to be afforded every opportunity to give evidence of personal insight and that should be done through an oral hearing.

51. The Claimant argued and I accept that the decision had been made without proper regard to MCA guidance paragraphs 6.5 and 6.6.

52. The submission recorded that the Local Advisory Panel (the LAP) had not recommended his downgrade to Category B and, the Category A review team, they suggest, would not downgrade without a positive LAP recommendation at the least. The risk of him being "*bounced back and forth between the Parole Board and the SSJ*" was highlighted. Each makes a negative decision, it is suggested because of the other. This illustrates the risk of a bind in which a prisoner may not or may have the impression that he does not have a fair chance to put himself in a positive position.

53. I agree, as submitted, that the Board fell into reviewable error when refusing an oral hearing. I agree that the case of *Osborn* provided adequate guidance for the Board canvassing as it does a number of matters with a read across to this case. Here, as in *Osborn*, matters which would be of importance to the Claimant's ongoing position such as an inappropriate encounter with female staff had arisen since the last hearing. This was highly relevant to insight, risk, which

were central, but also to Mr Somers' development and eventual progress towards release. Likewise the (inadequately evidenced) adverse notice of the incident in the records, coupled with his denial of any inappropriate behaviour required the close scrutiny of an oral hearing. The statements that progress had been made could, particularly where doubt was expressed by the Board, be much better explored in person. It was wrong that the unlikelihood of release conditioned refusal of an oral hearing. These are exactly the kinds of matters covered in *Osborn* (relevant extract above).

54. The need for a hearing to satisfy the entitlement of a prisoner to a fair consideration of his position is the stronger in the case of a post-tariff lifer and the omission to consider this aspect properly or at all is a serious omission by the Board.

55. The Supreme Court in *Osborn* indicated for a range of prisoners that in cases of doubt a hearing should be afforded. I do not detect in the reasoning of the Board here any doubt in this case. 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. Put otherwise, a good reason for not holding a hearing should be present when a 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. The obligation to consider the prisoner's position falls upon the Board, it is not dependent upon the prisoner, and it does, as the court in *Osborn* recognised, engage Article 5(4).

56. For these reasons this case, in which the Board did not draw the assistance it needed from the guidance in *Osborn*, required an oral hearing.