



Neutral Citation Number: [2020] EWHC 42 (Admin)

Case No: CO/2331/2019

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

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 16 January 2020

Before :

CLIVE SHELDON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

THE QUEEN
(on the application of)
JOSEPH SAMUEL

Claimant

- and -

PAROLE BOARD FOR ENGLAND AND WALES

Defendant

SECRETARY OF STATE FOR
JUSTICE

Interested Party

Sian Beaven (instructed by **Kesar & Co**) for the **Claimant**
Myles Grandison (instructed by **Government Legal Department**) for the **Defendant**
The **Interested Party** did not attend and was not represented

Hearing date: December 19th 2019

Approved Judgment

Clive Sheldon QC, sitting as a Deputy Judge of the High Court :

1. This is an application for judicial review brought by Mr. Joseph Samuel against the decision of the Parole Board of England and Wales, dated March 9th 2019, not to order his release or otherwise recommend his transfer to open conditions. Permission to proceed with this application for judicial review was made by Sir Wyn Williams, sitting as a judge of the High Court, on August 6th 2019.
2. As is customary, the Parole Board has maintained a neutral stance in these proceedings. It has provided submissions, both in writing and orally before me by Mr. Myles Grandison, for the purpose of assisting the Court. The Interested Party, the Secretary of State, has taken no part in these proceedings. He also took no part in the proceedings before the Parole Board.

Factual Background

3. Mr. Samuel was convicted in 2006, following guilty pleas, of (i) wounding with intent to cause grievous bodily harm; (ii) two counts of robbery; (iii) aggravated burglary; and (iv) two counts of assault occasioning actual bodily harm. Mr. Samuel was seventeen years old at the time of the offences and when he pleaded guilty. He was sentenced to detention for public protection (in accordance with section 226(3) of the Criminal Justice Act 2003), with a five-year tariff. The tariff expired on June 20th 2011, and so by the time of the Parole Board hearing on February 25th 2019, Mr. Samuel was very substantially beyond tariff.
4. In its decision, the Parole Board described Mr. Samuel as having a troubled childhood, that he was first convicted at the age of 12 and had a number of convictions before the index offences. These involved “acquisitive offending (theft and burglary) but also violence in a variety of forms”. The Parole Board explained that Mr. Samuel “regularly carried a knife”, and abused drugs and alcohol from a young age. He initially received non-custodial sentences, but did not comply with them and continued to offend. At the age of 16, Mr. Samuel received a 42 months custodial sentence for a series of robberies. He committed the index offences within days of release from that sentence. The index offences were committed over a ten day period.
5. The Parole Board also noted that subsequent to his conviction for the index offences, Mr. Samuel received a 30 month concurrent sentence for a further robbery and a number of burglaries committed prior to the index offences. The Parole Board referred to an assault by Mr. Samuel on a teacher in prison whilst awaiting sentence, and a conviction for assaulting a prison officer during the course of his sentence.
6. The Parole Board stated that although Mr. Samuel “pleaded guilty to the index and other offences, you have increasingly during your sentence minimised your role and actually denied that you were guilty: claiming on occasions that you were merely present but not involved and took the blame for your brother.”
7. The panel of the Parole Board that heard Mr. Samuel’s case included a psychologist, and was chaired by a judge. The panel was presented with a 684 page dossier, which included a variety of reports and other materials relating to Mr. Samuel. At the oral hearing, the Parole Board heard from Mr. Samuel, his current Offender Supervisor

(Richard Burke), his previous Offender Supervisor (Adrian Hayter), and the Offender Manager (Alex Smith).

8. The Parole Board's decision letter ran to four pages. In section 1, the Parole Board stated that:

“The Panel can direct your release only if it is satisfied that it is no longer necessary for the protection of the public that you be detained. In considering whether to recommend a transfer to open conditions, the Panel must perform a balancing exercise: contrasting the benefits to you of a period in less secure conditions against the risk to the public of you being in the community, unsupervised, on periods of temporary licence.”

9. The Parole Board identified the “Risk Factors” at section 4. These were stated to include:

“a chaotic childhood; a criminal lifestyle and associates; drug and alcohol abuse; the use of instrumental violence; poor victim empathy; poor thinking skills; poor compliance with court orders and supervision; difficulty in accepting your role in the offending; poor emotional management; minimisation; and untreated personality disorders.”

10. At section 5 of its decision, the Parole Board set out the “Evidence of change since last review and progress in custody.” This was the most detailed part of the Parole Board's decision. It included the following:

“Yours has not been a straightforward progress through the prison system. Because of your alleged poor behaviour (much of which you deny) you have been moved prison on 47 occasions. In the early years of your sentence there were numerous adjudications, including for threatening behaviour to prison officers. In that context, it is worthy of note that you are a large, well-built man whose mere presence can at times appear intimidating and aggressive even if that is not your intention. . .

There are a number of positives from your time in custody. In the early years you undertook a number of accredited programmes to try to reduce your risks of offending: you have completed both the Thinking Skills Programme and the Enhanced Thinking Skills Programme. You have also done work around your drug and alcohol abuse . . .

You have also engaged in education. You were illiterate on arrival in prison but are now undertaking a degree course in psychology and criminology. You have also trained as a counsellor.

However, you have not completed any offending behaviour work around your violence.

During your sentence you have been the subject of numerous psychiatric and psychological reports. Prior to sentence two psychiatrists agreed that you suffered from a psychopathic disorder . . .

More recently, experts have described your difficulties in terms of personality disorder: anti-social, dissocial and narcissistic traits have been identified and there was considerable evidence of the latter in what you said to the Panel.

Your last Parole Review was long delayed [it occurred in 2016]. A number of reports were produced, including a long report by Psychologist Dr Cordwell, instructed on your behalf. He was of the view that you were suitable for and would benefit from attending the Self-Change Programme. However, by then you were asserting forcefully that you would not engage in any further offence-related group-work interventions. One reason given was that, now you were a Muslim, you were not able to talk about your offending other than to professionals. You have not completed SCP, which no longer exists, but you have adopted the same attitude to engaging with Kaizen. Dr Coldwell had identified psychopathic traits of you being conning and manipulative and having the ability to deceive, mislead and subvert others, especially professionals. He found you lacked genuine remorse, lacked empathy, presented yourself in a positive light and were reckless and impulsive in your behaviour. He advocated further work to try to persuade you to engage in a motivational PIPE or a Personality Disorder Unit.

Psychiatrist, Dr Puri, in a report for the last Review, accepted that whilst ever you were refusing to engage in a Therapeutic Community, there was little point in recommending it. However, he had no doubt that you needed medium to long term treatment by way of psychological intervention, without which you would fail in the community.

Since then, you have continued to refuse to engage with any further such intervention. You have declined to engage with a further psychological assessment by a prison psychologist. You were said to be willing to engage with an independent psychologist but the person instructed was not in fact able to keep the appointment . . .

The number of adjudications has reduced considerably in recent years and the last one was now some time ago. However, there are still references to you being threatening/aggressive to staff. The Panel's own assessment is that there is a realisation that it is part of your personality and there is little point in bringing

repeated adjudications. The situation could be very different if you were in open conditions and repeated threats would likely result in a quick return to closed conditions.”

11. The Parole Board set out at section 6 of its decision the ‘Panel’s assessment of current risk’ as follows:

“Nothing has changed since your last review to reduce your risks from a high risk of causing serious harm to the public and a high risk of violent reoffending.”

12. At section 7, the Parole Board set out its “Evaluation of effectiveness of plans to manage risk”, as follows:

“Given you display little insight into your risk factors there can be no confidence that you would comply with conditions designed to cater for risk which you do not accept still exist. Whilst your mother, with whom you are now in touch, may be a supportive factor, her age and poor health will limit her ability to be a protective factor. You do not appear to have any other support in the community. You are institutionalised and totally underestimate the challenges you will face when you do return to the community.”

13. The Parole Board set out its “Conclusion and decision of the panel” at section 8:

“Your previous and present Offender Supervisors and Offender Manager were all of the view that you did not meet the test of release. However, all were supporting a move to open conditions. That was not on the basis that you had reduced your risk levels to an acceptable level but because there is an impasse and you are stuck in the system. The Panel understands their concerns but must proceed on the basis of what is the test for a move to open conditions.

Your case is far removed from those that the Panel sometimes comes across where a prisoner is deemed not suitable for any available courses. You were assessed as suitable for SCP but declined to engage. There is no reason to suppose that you would not be acceptable for a therapeutic community or personality disorder unit if you applied. But you choose not to. There are ways forward for you but it is up to you to take the initiative. The Secretary of State’s letter after your previous review makes it very clear that the responsibility for addressing your risk reduction rests with you. The options are there if you are willing to take them. Otherwise, you are likely to remain in custody.

Currently, you do not meet the test for either release or a transfer to open conditions. The Panel does not direct release, nor does it recommend a transfer to open conditions.”

Grounds of Challenge

14. There are two grounds of challenge being pursued by Mr. Samuel:
- i) the Parole Board failed to apply the correct test in respect of whether a recommendation for release to open conditions could be made; and
 - ii) the Parole Board made findings of fact that were not based on the evidence and, as such, were unreasonable in doing so.
15. A third ground of challenge was initially pleaded: that the Parole Board acted unlawfully in failing to provide a note of the record of the hearing to Mr. Samuel. This ground is no longer pursued as the note has been provided. Although detailed observations were made about this ground in the Parole Board's skeleton argument for this hearing, I do not consider that it is necessary, let alone sensible, for me to deal with the points made there. I acknowledge that the Parole Board is concerned about the circumstances in which the Court will require disclosure of the note, or going forwards a transcript, of the proceedings before a panel. It seems to me that a proper analysis of the approach that the Parole Board should take to disclosure is best left for a case where the matter remains in issue.
- (i) Failure to apply the correct test in respect of open conditions
16. Under this ground, Ms. Sian Beaven, acting on behalf of Mr. Samuel, contends that (a) the Parole Board has a duty to give distinct reasons on the question of open conditions; (b) the test for open conditions requires a balancing exercise which the Parole Board did not undertake; and (c) there was a need to address the question of open conditions separately from that of release, given the opinions of professional witnesses.
- (ii) Findings of Fact not based on the evidence
17. Under this ground, Ms. Beaven contends that the Parole Board acted irrationally by making findings of fact which were not substantiated by the evidence. In particular, that:
- (i) the staff at the prisons attended by Mr. Samuel had realised that his perceived aggressive behaviour was part of his "personality and there is little point in bringing repeated adjudications."
 - (ii) "nothing has changed since your last review to reduce your risks"; and
 - (iii) the professional witnesses were recommending transfer to open conditions "not on the basis that you had reduced your risk to an acceptable level but because there was an impasse and you are stuck in the system".

The Law

18. The Secretary of State for Justice has issued directions, pursuant to section 239(6) of the Criminal Justice Act 2003, relating to the transfer of indeterminate-sentence prisoners (ISPs) to open conditions. The directions provide that

“A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board’s emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.”

19. The Parole Board is directed by the Secretary of State for Justice to take the following main factors into account when evaluating the risks of transfer against the benefits:

“(a) the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release;

(b) the extent to which the ISP is likely to comply with the conditions of any such form of temporary release (should the authorities in the open prison assess him as suitable for temporary release);

(c) the extent to which the ISP is considered trustworthy enough not to abscond; and

(d) the extent to which the ISP is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage.”

20. The application of these directions and the proper approach to take in cases of transfer to open conditions was discussed by His Honour Judge Blackett, sitting as a Deputy Judge of the High Court, in *R (Green) v. The Parole Board for England and Wales* [2017] EWHC 2612 (Admin) at [5]:

“The first defendant’s duty to follow these directions has been considered in a number of authorities: *R (On the Application of Gordon) v Parole Board* [2000] 1 PLR 275, *R (On the Application of Hill) v Parole Board* [2012] EWHC 809 (Admin), *R (Rowe) v Parole Board* [2013] EWHC 3838 (Admin). The clear principle from these cases is that the first defendant is required to undertake a balancing exercise between risk and benefit when assessing suitability for transfer to open conditions, and the failure to do so is an error rendering any decision unlawful. In *Gordon*, Smith J said at para.38 that “it is not incumbent upon the Board to set out its thought processes in detail or to mention every factor they have taken into account. However, in my judgment the balancing exercise they are required to carry out is so fundamental to the decision-making process that they should make it plain that this has been done and

to state broadly which factor they have taken into account". In *Rowe*, King J said at para.60:

"The failure to balance those benefits against the Board's assessment of the extent to which the claimant had made sufficient progress during sentence in addressing and reducing risk to a level consistent with protecting the public from harm is, in my judgment, fatal to the legitimacy of this decision."

21. It is necessary, therefore, not only for the Parole Board to set out that a balancing test is required, but it must actually do the balancing between risk and benefit. See also *R (Hutt) v. Parole Board of England and Wales* [2018] EWHC 141 (Admin).

Did the Parole Board undertake the balancing exercise between risk and benefit?

22. I am reminded that I should not read the decision of the Parole Board as if it was a statute, or the product of a Chancery draftsman. Rather, I am required to scrutinise the Parole Board's decision to see whether -- as a matter of substance -- it has carried out the balancing exercise mandated by the Secretary of State's directions and in accordance with the case law cited above. In my judgment, the Parole Board has signally failed to do so.
23. At section 1, the Parole Board set out in shorthand form the approach that it was required to take when considering the transfer to open conditions: balancing the risk of and benefit to Mr. Samuel being transferred to open conditions. At section 8, the Parole Board concluded that 'the test for . . . a transfer to open conditions' was not met. However, nowhere in the decision does the Parole Board demonstrate that it did, in fact, carry out the balancing exercise. There is no mention in the Parole Board's decision of any of the benefits, let alone an evaluation of them.
24. The Parole Board briefly mentioned at section 8 that the previous and present Offender Supervisors and the Offender Manager were "supporting a move to open conditions." The Parole Board explained that this was "because there is an impasse and you are stuck in the system". The Parole Board went on to state it "understands their concerns but must proceed on the basis of what is the test for a move to open conditions." The Parole Board acknowledged the "concerns" expressed by the professional witnesses who worked with and knew Mr. Samuel, but did not explore whether giving effect to those "concerns" would engender benefits to Mr. Samuel.
25. There clearly were benefits to Mr. Samuel of a transfer to open conditions. These were articulated, for example, by Alex Smith in the Addendum "PAROM" (Parole Assessment Report Offender Manager), dated June 17th 2018, which formed part of the dossier before the Parole Board. In the PAROM, Mr. Smith stated that:

"the current approach to try and engage Mr Samuel in his Sentence Plan appears to have stagnated with no indications that Mr Samuel will make further progress in open conditions. Although Mr. Samuel's behaviour has been poor, his attitude towards his education has been exemplary and potentially the biggest protective factor for the future. Mr Samuel has stated that throughout his sentence he has not been given the opportunity to

prove himself in a progressive move and this has continued to cause him difficulties, which reinforces his negative attitude towards authority. Should Mr Samuel move to open conditions, then this would give him the opportunity to further his education with local University, receive oversight support from the PD [Personality Disorder] Pathway and to develop further community ties, including with his family. Mr Samuel recognises that he needs to develop further community ties and sees release at this stage as an unrealistic target, he agrees that a period in open conditions would be the best way to prepare him for the future. . . .

It is my assessment that Mr Samuel could be tested in open conditions and his risk to the public could be managed in these conditions, given that there are no recent assaults against prisoners and staff. Mr Samuel states that he is unlikely to abscond as this would serve limited purpose.”

(Emphasis added).

26. Mr. Smith recognised in this report, therefore, that benefits to Mr. Samuel of a transfer to open conditions included access to a local university to further his education, as well as the development of community and family ties. There is no mention of these benefits, let alone an evaluation of them or a weighing of them in the balance, in the Parole Board’s decision.
27. Also, in the Parole Board’s dossier was an Addendum Sentence Planning and Review Report, dated November 6th 2018, by Richard Burke, the Offender Supervisor. This stated that:

“Mr. Samuel is presenting with a reduction in frequency of violent and aggressive behaviour. In my opinion, recent negative behaviours may reflect his current stated position of having ‘given up.’ Moreover, given the decline in direct violence within the prison estate there may be a reduction in the serious harm that he presents to the public. That said, that cannot be evidenced given his current location within closed conditions.

. . .

In light of Mr Samuel’s current situation and unwillingness to engage in the majority of directions from his last parole hearing it appears that there is an impasse in terms of his progression. I note that Mr Samuel’s previous Offender Supervisor and current Offender Manager have adopted a somewhat pragmatic view in that a progressive move to open conditions, with appropriate support, would provide him with an opportunity to test his resolve to lead a pro-social lifestyle. In my opinion such a progressive move could act as a significant catalyst in increasing Mr Samuel’s motivation to engage with his sentence plan.”

(Emphasis added).

28. Mr. Burke recognised in his report, therefore, that benefits to Mr. Samuel of a transfer to open conditions included the opportunity for him to test his resolve to lead a “pro-social lifestyle”, and that this could trigger Mr. Samuel’s motivation to engage with his sentence plan. There is no mention of these benefits, let alone an evaluation of them or a weighing of them in the balance, in the Parole Board’s decision.
29. If the Parole Board had directed itself lawfully in accordance with the Secretary of State’s directions and the relevant case law, it would have mentioned these types of benefit, evaluated them and then weighed them in the balance with the risk factors. This was not done.
30. I do not know why the Parole Board did not make mention of any of the benefits to Mr. Samuel of a transfer to open conditions. It may be that the Parole Board formed the view that there were no benefits to Mr. Samuel of transferring to open conditions. If that is right, however, then the Parole Board should have said so expressly and explained its reasons for so doing. It may be, as Ms. Beaven contended, that the Parole Board may have failed to mention the benefits because it confused the test for release – which is concerned with risk only – with that for transfer. That may be right.
31. Ultimately, however, it does not matter why the Parole Board failed to mention, then evaluate, and weigh in the balance the benefits of transfer. The important point is that the panel was required to carry out the balancing process and there is no evidence on the face of the decision that it did so, and this is an error of law.
32. I have considered, however, whether it is possible to say that it was “highly likely” that the Parole Board would have reached the same outcome even if it had considered and evaluated the benefits, in accordance with section 31(2A) of the Senior Courts Act 1981. This is a high threshold to reach: see *R (Public and Commercial Services Union and others) v Minister for the Cabinet Office* [2018] I.C.R. 269 at [89], per Sales LJ.
33. I acknowledge that the Secretary of State’s directions state that the Parole Board’s “emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.” I also acknowledge that the Parole Board considered that the risk levels posed by Mr. Samuel remained high, but it is simply not possible for me to say that it is “highly likely” that these would have outweighed the benefits of transfer to Mr. Samuel. The benefits were simply ignored, and it is possible that the panel was looking at the risks associated with transfer through the wrong lens: as the panel may have been thinking about risk in the context of release. I cannot adjudge what the panel would have thought about the benefits to Mr. Samuel had they been considered and evaluated in accordance with the correct lawful test.

Ground 2

34. Ms. Beaven, on behalf of Mr. Samuel, has argued that there are a number of findings made by the Parole Board which were not substantiated by the evidence. As she correctly points out, a finding which is based on no evidence cannot be justified, and

this Court will conclude that any such finding is irrational: see *R (on the application of MacKay)* [2019] EWHC 1178 (Admin) at [39].

(i) “Little point in bringing repeated adjudications”

35. Mr. Samuel takes issue with the Parole Board’s finding that:

“The number of adjudications has reduced considerably in recent years and the last one was some time ago. However, there are still references to you being threatening/aggressive to staff. The Panel’s own assessment is that there is a realisation that it is part of your personality and there is little point in bringing repeated adjudications. The situation could be very different if you were in open conditions and repeated threats would likely result in a quick return to closed conditions.”

36. Ms. Beaven contends that this point was merely a “hypothesis” of the panel, without any foundation in the evidence. She says that none of the professional witnesses who attended the oral hearing said anything to support this point. When the matter was asked of Mr. Samuel, he did not give a positive answer. (There is, in fact, no reference to the question and answer about this in the notes of the Panel Chair. However, I have no doubt that it was asked as Mr. Samuel has said so in his witness statement, and it is referred to in the typed-up note of Counsel’s own record of the proceedings: “Have officers given up adjudicating? Just ship you out? (Challenged question)”).

37. What is being criticised here by Ms. Beaven, on behalf of Mr. Samuel, is not really a finding of fact made by the panel, but an “assessment” of the evidence as the panel describes it, or an inference from the evidence. The panel was aware that the number of adjudications brought against Mr. Samuel had gone down. The panel was aware, however, that there was recent security information relating to Mr. Samuel that referred to threatening/aggressive behaviour, or least a perception of that. There was reference in the dossier to threatening behaviour: for instance, Mr. Alex Smith referred in his PAROM report of November 9th 2018 to the fact that “there is no evidence of violence in Mr Samuel’s negative prison entries. He continues to threaten staff, which would highlight problematic issues in this area” (emphasis added). The panel had also seen for itself that Mr. Samuel’s “mere presence can at times appear intimidating and aggressive even if that is not your intention.”

38. In my judgment, there was plainly material available to the panel that allowed it to form this “assessment” or make the inference that adjudications were not being pursued for every possible infraction by Mr. Samuel, bearing in mind also that there is discretion in the decision whether to take forward an adjudication, and the panel members will have their own knowledge and experience of the prison system. In the circumstances, I do not consider that this assessment or inference of the Parole Board was irrational in any way.

(ii) Nothing has changed

39. Mr. Samuel takes issue with the Parole Board’s finding that “nothing has changed since your last review to reduce your risks’. Ms. Beaven contends that this is an irrational finding given that since the last review – which was held on November 16th 2016 – Mr.

Samuel had been studying for his university degree and had studied counselling. This studying had given him an opportunity to gain further insight into his own psychological issues. Ms. Beaven also referred to the fact that the evidence before the panel was that there had been no violent incidents in recent times.

40. I consider that it was not irrational for the Parole Board to make this finding. The Parole Board was making an assessment about risk, and its key concern was that Mr. Samuel had not done any offending behaviour work around his violence. This concern was founded in the evidential material available to the panel. Mr. Samuel had not, since the last review, done any specific offending behaviour work.
41. It was not irrational for the panel to form the view that the Mr. Samuel's engagement in education was not equivalent to undertaking offending behaviour work around his violence. There was no external certification or validation that Mr. Samuel's education had reduced his risk factors.
42. As for the fact that there had been no violent incidents in recent times, the same applied in the period before the last review. According to the Adjudications Record for Mr. Samuel, there were no proven allegations of violent behaviour by him in the year before the last review in November 2016.

(iii) The basis for recommending transfer

43. Mr. Samuel takes issue with the Parole Board's statement that the professional witnesses were recommending transfer to open conditions "not on the basis that you had reduced your risk to an acceptable level but because there was an impasse and you are stuck in the system".
44. In my judgment, this statement of the panel did not reflect the full position that was being articulated by the professional witnesses. The professional witnesses were saying that there was an "impasse", but they were also saying (as explained above) that a move to open conditions would have benefits for Mr. Samuel. Furthermore, they were also saying that Mr. Samuel's risk levels were such that he could be managed in open conditions.
45. In setting out too narrow a view of what the professional witnesses were saying, I consider that the panel did misunderstand the evidence before it. This was, in my judgement, an error of law.

Relief

46. In the circumstances, my judgement is that the Parole Board's decision with respect to transfer cannot stand, and should be quashed. The question of whether the Parole Board should recommend Mr. Samuel's transfer to open conditions should be remitted to a freshly constituted panel. I do not remit the question of release to the Parole Board. Although the Grounds for Judicial Review included a challenge to the decision to refuse release (as well as transfer), this was rightly not pursued by Mr. Samuel at the oral hearing.

Costs

47. Mr. Samuel does not seek his costs of succeeding with his judicial review. He rightly accepts that, in accordance with the case law -- (*R (Davies) v. Birmingham Deputy Coroner* [2004] 1 WLR 2379; and *R (Gourlay) v. Parole Board* [2017] 1 WLR 4107) – costs are not awarded to successful parties where, as here, the Parole Board has adopted a neutral position in the litigation.
48. Mr. Samuel does, however, seek his costs of the applications for specific disclosure and for permission to rely on further evidence.
49. It seems to me that, as a matter of principle, even though ordinarily the Parole Board will not be required to pay the Claimant’s costs in judicial review proceedings where it maintains a neutral stance, that does not apply to each and every aspect of those proceedings if the Parole Board has acted unreasonably at any particular stage.
50. In this regard, I note that in *Davies* Brooke LJ observed that the ordinary rule is departed from where the tribunal or court has acted unreasonably in declining or neglecting to sign a consent order disposing of the proceedings: see paragraph 47(1). I see no reason why this approach should not also apply where a tribunal or court – here, the Parole Board -- has acted unreasonably in other aspects of the proceedings.

(i) Specific Disclosure

51. On August 30th 2019, His Honour Judge Worster (sitting as a Judge of the High Court) made an order for specific disclosure of a copy of the note of the evidence taken by the panel chair, and ordered “Costs in the case”. In circumstances where I have found that Mr. Samuel has succeeded in substance on his application for judicial review (albeit there are some aspects of his claim that did not prevail), I consider that in accordance with HHJ Worster’s order the Parole Board should pay Mr. Samuel’s costs of the application for specific disclosure.

(ii) Application to adduce further evidence

52. With respect to Mr. Samuel’s application for permission to rely on further evidence, I do not consider that the Parole Board’s approach constituted such unreasonable conduct as to justify the payment of Mr. Samuel’s costs.
53. When making his order for specific disclosure HHJ Worster explained in his reasons that typed up notes might be required, saying that:

“It is generally not for the disclosing party to type up a written document (or interpret it). But where the document is the official record of the proceedings, and can only serve that purpose if it is legible, it furthers the overriding objective if both parties (and the Court) can read it. In the first instance a copy of the notes are to be provided, and if they are not legible D is to provide clarification (and if necessary) a typed copy. If there is an issue about the costs of typing (or transcribing the document), then given the urgency, D should bear them in the first instance but

may apply for an order that C pay them at the substantive hearing.”

The implication from HHJ Worster’s reasoning was that Mr. Samuel may have to bear the costs incurred by the Parole Board typing up the panel chair’s notes if they were not sufficiently legible to assist the Court. The flip-side of this reasoning is that Mr. Samuel may have to bear the costs if he had to type up the notes.

54. The original copy of the note provided by the Parole Board was of poor quality. A better quality copy was provided on November 1st 2019. The Parole Board explained that the panel chair had been asked to type a copy of his note, but had not done so by the time of his departure from the Parole Board, having retired. Mr. Samuel’s instructing solicitors considered that the handwriting in the second copy of the note was not “completely legible” and they were concerned that the Court would not be able to make out the entire content of the Note. To this end, they proposed that Mr. Samuel would provide a short witness statement to address one point to which he took issue: “the contentious line of questioning adopted by the Panel Chair”. This is the point dealt with above at paragraphs 35-38.
55. I totally understand why it was that Mr. Samuel wished to adduce evidence about this line of questioning. I do not consider, however, that this justifies a departure from the ordinary rule that the Parole Board should not have to pay costs where it has acted neutrally in the proceedings. The Parole Board’s conduct in dealing with the question of the note of the panel hearing was not unreasonable. The Parole Board provided Mr. Samuel with two copies of the note of proceedings. The second copy was to my mind reasonably legible. Furthermore, it did not refer to the line of questioning that Mr. Samuel wished to complain about in the proceedings. In the circumstances, a typed up version of the note would not have assisted Mr. Samuel in any way in showing what was said to him at the hearing. Mr. Samuel needed to put in his own evidence if he was to make good the factual basis for his grounds of challenge. This is what he did, and sought permission to do.
56. In the circumstances, it seems to me that the evidence adduced by Mr. Samuel, and the application to adduce that evidence, should be treated in the same way as the general costs involved in bringing this judicial review. In my judgement, therefore, Mr. Samuel is not entitled to his costs of this application.