



Neutral Citation Number: [2023] EWHC 2962 (Admin)

Case No: CO/1202/2022

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
SITTING AT LEEDS COMBINED COURT CENTRE

1 Oxford Row
Leeds LS1 3BG

Date: 13 July 2023

Before :

MRS JUSTICE FOSTER DBE

Between :

REX

(on the application of PAUL SOMERS)

Claimant

- and -

PAROLE BOARD FOR ENGLAND AND WALES

Defendant

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 Judgment

**DETERMINATION AS TO COSTS FOLLOWING
WRITTEN SUBMISSIONS**

This judgment was handed down remotely at 10.30am on 13 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE :

Introduction

1. In this case on 10 March 2023 I allowed the Claimant's challenge to a decision of the Parole Board, accepting the submissions of the Claimant to the effect that the decision was flawed and inconsistent with authority. I gave brief reasons at the time for allowing the claim and thereafter on 15 May 2023, delivered a reasoned written judgement on the issues.
2. In the decision I referred to the cases of *R (Osborn and Booth) v Parole Board* [2014] AC 115 and *Re Reilly* [2013] UKSC 61, and said:

“[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.”

Having cited the passages I stated:

“[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 (oao Welsh) v Secretary of State for Justice [2019] EWHC 2238, a case of mine when sitting as a Deputy Judge of the High Court.”

3. I concluded the case, accepting all the submissions of the Claimant, thus:

“[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..”

and

“[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.”

The Dispute

4. Submissions have been made in writing that it is appropriate in this case for the Claimant to have his costs since the Parole Board unreasonably did not concede its case at an early stage as it was invited to do, and ought to have done. Mr Jude Bunting KC for the Claimant argues that the illegality which I found in the judicial review claim was obvious from the start. He says the Defendant had multiple opportunities to avoid this claim. Instead, they unreasonably refused a consent order, which would have saved time and expense for the parties and the Court.
5. The Claimant says two so-called issues which the Parole Board invited the Court to decide were not in truth issues requiring decision - the first did not arise on the facts and the second was already decided by *Osborn*. Accordingly, the approach taken by the Parole Board was unreasonable. Indeed, relying on this reasoning, on 3 February 2023 in good time before the case was listed, the Claimant wrote to the Parole Board inviting a consent order be signed, and indicating that in their view the judicial review claim was highly likely to succeed. The letter reminded the Board of its own guidance (see below) and was in fact the last in a line of correspondence which the Claimant's representatives had entered with the Board suggesting the case was clear and the decision ought to be reconsidered.
6. The Parole Board declined to sign the Consent Order saying it was appropriate for the Board ask the Court to provide guidance on the matters which they had canvassed in the Detailed Grounds of Response, and the two issues it said arose.
7. The issues isolated by Mr Chapman who appeared for the Parole Board were expressed as:

“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.”

8. The Parole Board resists paying costs on the grounds that the test in the caselaw for an award of costs against them requires that it be shown that the Board has acted with impropriety or has actively participated in the case, and neither is the position here.
9. The Board state it was not improper to ask for the Court's guidance on the issues it did. In particular they say, whilst it is clear that an oral hearing will be required in most post-tariff cases, it is also clear that there will be circumstances where that is not the case: see *Osborn* per Lord Reed at [112]. It is prudent, and consistent with its statutory functions, they say, for the Board to ask for guidance on the circumstances in which an oral hearing will, and will not, be necessary. Its conduct could never be characterised as improper. It was not partisan and its submissions were neutral - not seeking a particular outcome, and it has at all times been careful to make clear that its only interest is in obtaining clarity so that its panels understand and act in accordance with their legal powers.
10. I say at once that the Parole Board in fact conceded in oral argument that the first issue did not arise on this case. The Claimant submits that clear guidance already exists - it is in *Osborn*. In my judgement the concession was properly made, and the issue did not arise. Likewise, in my view the second issue was really a plea for the Court to explain to the Board that they had to apply *Osborn*, possibly (although it was not so put), a tacit acceptance that they had not. Mr Chapman addressed the court with great charm on behalf of the Board, and did not seek to suggest a positive line of argument, in keeping with a neutral stance, but it is the case that this was a matter in which it was very plain that the Board had gone wrong.
11. The Claimant is correct to acknowledge that an order for costs will not generally be made against the Parole Board (recognised as a judicial body for these purposes) where it has played a neutral role in proceedings. However, they argue, the relevant caselaw indicates the court may make an order where it determines that the Board has acted unreasonably in continuing to resist proceedings by refusing to sign a consent

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

The Applicable Principles

12. In my judgement the case law is to the following effect. First, the jurisdiction to make an award of costs is a wide one - that proposition is supported throughout the caselaw; but see in particular in the present context *Gourlay* [2020] 1 WLR 5344, at [38] per Lord Reed (below). Second, particular considerations apply where costs are sought against a body acting judicially as it is agreed the Parole Board is in the present circumstances.
13. The recent learning derives from a case in the Court of Appeal in 2004: in *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739, it was explained that in certain circumstances costs might be ordered against a judicial body. The history of the exercise of that power was explored: see paragraph [47](1) and the conclusion reached by the Court per Brooke LJ. *Davies* has since been approved in a number of authorities: *R (Gourlay) v Parole Board* [2017] 1 WLR 4107, paragraph [30] and in the Supreme Court *Gourlay* [2020] 1 WLR 5344, paragraph [4]; see also *R (Faqiri) v Upper Tribunal (Immigration and Asylum Chamber)* [2019] 1 WLR 4497, paragraphs [22]-[23].
14. In *Davies* Brooke LJ described the position hitherto thus:

*“47(1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a **flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings;**”*
[Emphasis added.]
15. He then canvassed the changes brought about by various factors including the CPR, reflecting it was unfortunate that a successful litigant could generally not recover costs against a tribunal which adopted a neutral stance and did not participate in proceedings, this however was a matter of parliamentary choice.

Brooke LJ continued thus:

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

[Emphasis added.]

16. The Court of Appeal in *Gourlay* characterised the principles in *Davies* as still good law. That proposition has not been expressly gainsaid elsewhere.

17. Hickinbottom LJ in *Gourlay* said:

“31. It is noteworthy that the principles set out by Brooke LJ were not new, those propositions being expressly confirmation of the established practice of the courts. **However, *Davies* is now regularly cited for the general proposition that, if a decision of a court or tribunal is challenged by way of judicial review, it will not be liable for the costs of the claim unless it has behaved improperly or unreasonably or takes an active part in the proceedings. That is reflected in the standard form of acknowledgement of service in judicial review proceedings which, in section A (tick box in form), a court and tribunal defendant can indicate that it does not intend to make a submission in relation to the claim, i.e. it does not intend to take an active part.**

32. Para 47(3) of Brooke LJ's conclusions has given rise to a considerable amount of debate as to the level of participation by a court or tribunal that is required to amount to active participation such that it may have a costs order made against it; but that is not in issue in this case, in which it is common ground that the Board played no active part in the claim at all.

33. The sole ground relied upon by Mr Southey is that the principles set out in *Davies* as applicable to courts and tribunals do not apply to the Board.”

[Emphasis added.]

18. *Gourlay* was a case in which the Board had played no active part in the case, and in which the submission to the Court was that *Davies* should not apply, but rather the usual costs regime of loser pays should be followed – which submission failed. The case did not touch on the matter of refusing to sign a consent order or what unreasonable behaviour might consist in. It did not purport to change or even discuss the test as set out in the earlier case. The Court considered cases where a court may ask for assistance from a tribunal party, but found that that, and a number of other factors including the legally aided status of a claimant were “no reason for overriding the principle in *Davies*, and generally imposing a costs order upon [the Parole

Board] if they do not actively participate in the claim against them and the claim is successful.” In other words the *Davies* principles remained.

19. In my judgement *Davies* indicates the appropriate approach. This is supported by the following comprehensive statement of principle and reasoning from the Court of Appeal in *Gourlay*, which explained the context thus:

“25 Under CPR r 44.2(1) and (4), the court has a general discretion as to any costs order it makes, having regard to all the circumstances including the conduct of the respective parties; but rule 44.2(2)(a) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. That general rule applies to a public law claim in the Administrative Court as much as to a claim made in any other part of the justice system: see *R (M) v Croydon London Borough Council* [2012] 1WLR 2607, para 52, per Lord Neuberger of Abbotsbury MR. Therefore, where someone challenges the decision of an arm of government, and is successful, he can expect to obtain a costs order in his favour; and, subject to giving suitable notice (e.g. in the form of a pre-action letter) and exhausting alternative remedies etc, that is so even where the decision-maker takes no part in the claim.

26 However, the courts have long recognised the need for a different approach where the decision challenged is that of an inferior court or tribunal, over which the High Court has a supervisory jurisdiction; and the challenge comes by way of judicial review only because of the absence of a statutory right of appeal. A court or tribunal is usually required to provide reasons as part of its decision; and, in such cases, as in the case of an appeal, it does not usually seek to justify its own decision over and above those reasons. Relying upon those reasons, it does not usually seek to play any active part in the claim.

27 Often, the court or tribunal determination challenged will have been made following a *lis* between competing parties, usually an individual affected by the initial administrative decision on the one hand and the arm of the executive that made the decision on the other. **When a dissatisfied party seeks to challenge the determination of the court or tribunal by way of judicial review, the other party to that *lis* will be an interested party in that claim; and will have an opportunity to make submissions in support of the decision, in a similar way to the respondent to an appeal. Where that other party plays an active part in the judicial review, it is likely that it will have a costs order made against it as an interested party, if the challenge is successful. Consequently, the question of costs against the court or tribunal itself arises only infrequently; because, usually, the court or tribunal plays no part in the case and there is another party which is a more appropriate target for a costs order.**

28 However, **the circumstances in which a cost order against a court or tribunal is appropriate did arise before this court in *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739, in which Brooke LJ (with whom Longmore LJ and Sir Martin Nourse agreed) took the opportunity, at para 46, to state authoritatively the way in which the courts have exercised their discretion [in relation to orders for costs] in these matters in the past, and to identify what are the governing principles today. In**

Davies, the central issue was thus as to the nature of the established practice of the High Court and whether that practice required reconsideration.”

[Emphasis added.]

20. The Court of Appeal at [29] then commended and upheld the principles expounded by Brooke LJ in *Davies* whose judgment it characterised as a “...*magisterial review of the relevant authorities*”.

21. Hickinbottom LJ in *Gourlay* had made it clear that a party does not actively contest a claim simply because it does not concede it (see paragraph [50]). In dismissing the appellant’s arguments which had claimed support from the Parole Board’s Guidance, Hickinbottom LJ stated (at [51]), that it did not...

“vary the application of the Davies principles by making it the rule that the Board should pay the prisoner’s costs of the claim if, following the review, it decides neither to concede nor actively to contest the claim. There is no logical reason why it should do so.”

22. None of this in my judgement goes behind the relevance of an unreasonable failure to concede a case which *may* found an order for costs against the Board. Although Hickinbottom LJ, perhaps understandably, did not accept that the Guidance created a rule obliging concession, the Guidance given to the Parole Board concerning judicial review applications is nonetheless illuminating as to the approach of the Board. It includes the following:

“2.12 Under its Litigation Strategy, the Parole Board generally does not defend cases where the challenge is against a judicial decision of the Board. As well as a final parole determination, this includes decisions about making directions and using case management powers.

2.13 The Board remains neutral because it is a court-like body which makes judicial decisions. The general rule in law is that a junior court or a tribunal does not actively defend its decisions when they are considered on appeal by a senior court or tribunal. The junior court or tribunal has made its judgment, and given its reasons, and the judgment and reasons will stand or fall on their own merits. The junior court or tribunal may assist the senior court or tribunal by providing information about the case or their own procedures, but it does not actively defend its decisions. This is known as taking a ‘neutral stance’.

...
2.15 The Parole Board will take an active part in judicial reviews which are brought

against its wider policies and procedures. These cases are rare.

...
2.20 *In the rare cases where the Parole Board takes an active role in the proceedings, the Acknowledgement of Service will be accompanied by Summary Grounds of Defence, which explain why the Parole Board thinks it has acted lawfully.*

....

2.26 *Where the Parole Board is taking an active part in the proceedings, it will be represented by Counsel, but otherwise will not be present. The Court will then deliver its judgment on the basis of the documents and oral submissions.”*

23. The Guidance thus suggests that the Parole Board makes a decision as to whether it will take an active part, and it chooses to be represented in those cases where it is taking an active part. Mr Chapman for the Parole Board states that his position was at all times neutral, even though he did draft a skeleton argument, appear before me, and particularly, invited the Court to make findings on two issues in order to guide the Parole Board.
24. Again, in the Supreme Court the issues in play in *Gourlay* were different from the present case. It was argued that *Davies* was incompatible with CPR r 4.2(2), since it created an exception to that general rule. The Claimant argued there that the Board must be viewed as “*the unsuccessful party*” even if it played no active part in the proceedings, thus it was said that if the Board did not concede a challenge, then in substance it opposed it. That submission was rejected. Lord Reed held that a judicial or quasi-judicial body which acts so as to maintain its impartiality in a case, and allows its decision to speak for itself cannot be what the framers of the CPR rules in 44.2 had in mind when they referred to “*an unsuccessful party*” (see [46]).
25. This argument does not assist the Parole Board. As I have said, I do not read the caselaw as somehow modifying the *Davies* test by dropping the unreasonable failure to enter a consent order as a ground upon which a costs order might be made in favour of a successful claimant against a tribunal.
26. Paragraphs [25] to [28] from *Gourlay* were repeated verbatim (also Higginbottom LJ) in the latter case of *Faquiri (supra)* at paragraphs 18 to 22 of that case, in which in

addition, the whole of paragraph 47 of Brooke LJ in *Gourlay* was cited. Higginbottom LJ then described the effect of the *Davies* principle compendiously as:

“[23] ...over the last 15 years, Davies has been regularly cited for the general proposition that, if a decision of a court or tribunal is challenged by way of judicial review, it will not be liable for the costs of the claim unless it has behaved improperly or unreasonably or takes an active part in the proceedings. That is reflected in the standard form of acknowledgement of service in judicial review proceedings which, in section A (tick box in form), a court and tribunal defendant can indicate that it does not intend to make a submission in relation to the claim, i e it does not intend to take an active part.”

[Emphasis added.]

He then confirmed in terms (paragraph [24]) *Davies* was still good law.

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

Conclusions

28. I am prepared to accept that the position adopted by the Parole Board was effective neutrality, although two issues for determination were propounded, and, as I agree, the issues did not strictly require to be determined. Importantly, though, this was a case where, very obviously, the guidance in *Osborn* had not been followed. I held it was a clear case; the opportunity to settle it by consenting was not taken.

29. The Parole Board argued:

“ ... failure to concede the claim and/or agree to a consent order allowing the claim does not give rise to costs, even were that failure to be wholly unreasonable. Only if the Board has acted with impropriety in failing to concede the claim, or where it has actively entered the fray as a partisan litigant in proceedings may costs ensue.”

I disagree. This is not what was said in *Davies*; and the *Davies* approach has been repeated and endorsed in the subsequent authorities. There is no inconsistency

between these authorities, and in any event it is inconceivable that the subsequent approval of the *Davies* approach included somehow a silent, implied revision to it. At no point has a Court expressed the view that the approach in *Davies* was wrong – indeed to the contrary. I adopt it here.

30. I am of the view that the failure to agree that the Claimant had a very clear case and that the Parole Board had made an obviously flawed decision was unreasonable. Accordingly I make an award of costs against the Parole Board in this case. It was unreasonable not to agree to the consent order, the so-called issues thought to arise did not in truth require decision. There was a plain failure to respect the *Osborn* guidance. Many features of that case which were persuasive of the need for an oral hearing were present here, and required no further exegesis. Further, the approach of the decision-maker following the single member refusal was also flawed- treating the exercise of reconsideration rather as a review of the previous decision.

31. It will not be every case of a Claimant's ultimate success that will attract an award of costs, that is plain, but this was an obvious case to concede in my view. The Order for costs is consistent with the overriding objective that effectively hopeless cases are settled. I remind myself that there is a wide discretion as to costs, subject always to principle, which I have set out and applied. Importantly, at paragraph [38] Lord Reed also said the following in *Gourlay* in the Supreme Court:

“38. ... In the first place, the principles of practice laid down by the Court of Appeal to guide judges in the exercise of their discretion as to the award of costs are not strictly binding even upon those judges, in the way in which a decision of the Court of Appeal on a point of law is binding upon them. There is always a residual discretion as to costs. Since the discretion is to be judicially exercised (Pepys v London Transport Executive [1975] 1 WLR 234, 237), the application of the principles laid down by appellate courts must be tempered by an ability to respond flexibly to unusual situations, and to reach a just result in the individual case. ... Brooke LJ's judgment in Davies itself recognised that there was scope for judges to exercise their discretion: see para 47(4), cited at para 4 above.”

32. In my judgement, consistently with *Davies*, the Parole Board should pay the Claimant's costs, to include those of this application for costs.