



Neutral Citation Number: [2024] EWHC 336 (Admin)

Case No: AC-2023-LDS-000179

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting at LEEDS COMBINED COURT CENTRE

Date: 20/02/2024

Before :

HER HONOUR JUDGE BELCHER

Between :

DOMINIC McKILLIGAN
(now known as Dominic Ngqobe-Kunuk)

Claimant

- and -

PAROLE BOARD FOR ENGLAND AND WALES

Defendant

-and-

SECRETARY OF STATE FOR JUSTICE

Interested Party

Miss Olivia Beach (instructed by **Bhatia Best Solicitors**) for the **Claimant**
The other parties did not appear and were not represented.

Hearing date: 13 February 2024

Approved Judgment

Her Honour Judge Belcher :

1. The Claimant, Dominic McKilligan (now known as Dominic Ngqobe-Kunuk), a prisoner currently detained at HMP Frankland, challenges the decision of the Parole Board dated 18 April 2023 refusing his request for an oral hearing (“the Decision”). Permission to apply for judicial review was granted by HHJ Jackson on 30 August 2023. The other parties have remained neutral and taken no active part in proceedings. Accordingly, only the Claimant was represented before me at the substantive hearing.
2. Whilst remaining neutral, the Parole Board served a response dated 10 October 2023 clarifying an issue raised by HHJ Jackson in her permission reasons. I am grateful for the clarification provided, but do not consider it necessary to set it out in this Judgment. What it makes clear is that the decision challenged in this case was a final decision not open to challenge or reconsideration under Parole Board Rules. Thus the only remedy available to the Claimant is pursuant to this claim for judicial review.
3. References in this Judgment to the hearing bundle will be in bold type face, with the Tab letter and page number, for example **D58**.

The Facts

4. On 23 July 1999 the Claimant, then aged 19, was sentenced to life imprisonment for the murder of an 11 year old boy. The sentencing Judge set the tariff at 20 years, which expired on 6 July 2018. He was also convicted and sentenced for rape but that conviction was subsequently quashed by the Court of Appeal. The Claimant has always maintained his innocence and that he had no intention to kill the victim.
5. The Claimant is now 5 years and 6 months post tariff. At the date of the Decision he was 4 years and 9 months post tariff. He was detained at HMP Wakefield until 16 August 2021 when he was moved to HMP Frankland.
6. His case first came before the Parole Board on 14 February 2019, and was reviewed by the board again on 24 September 2021. It would appear from the 2021 paper decision that the intention had been to hold an oral hearing at that time as the Claimant wished to apply for open conditions or release (See **E154-E155**). At the request of the Claimant’s solicitors at that time, the 2021 review was dealt with on the papers. As I understand the position, this was because the Claimant had only very recently been transferred to HMP Frankland with a view to assessment of his suitability for the Kaizen Programme, and in order to progress on his sentence (**E155**).
7. On 9 March 2023 a provisional decision of a single Parole Board member (a procedure known as a Member Case Assessment (the “MCA”)) was issued with no direction for release and no recommendation for open conditions (**D58-D66**). Within the relevant 28 day time limit, the Claimant’s solicitors duly requested an oral hearing (**D67-D68**). In summary they asserted that (i) there were clear disputes of fact (Mr McKilligan’s alleged history of lying and manipulation which he does not accept), (ii) a clear dispute as to his level of risk, (iii) concern that the dossier included a discredited report and the possible influence of that report on other report writers, (iv) concerns about the omission from the dossier of certain reports, (v) the need for an up-to-date full psychological assessment, and (vi) that, being significantly post tariff

and “stuck without progress”, the Claimant should have the opportunity to participate in an oral hearing. They also pointed out that the dossier was completed at a time when the report writers were not permitted to make recommendations. This was under Amended Parole Board Rules which were subsequently found to be unlawful in (*R*) *Bailey and Morris v Secretary of State for Justice* [2023] EWHC 555 (Admin) (“*Bailey and Morris*”), a case I shall come back to later in this judgment.

8. On 18 April 2023 the request for an oral hearing was refused in the following terms (C56-57):

“.....We confirm that you have requested an oral hearing. The basis for this request is that you are not suitable for KAIZEN, 1:1 work recommended has not commenced and you have stagnated in the system.

In making the decision, the duty member took into account the legal representations, personal representations from Mr McKilligan, a report from Dr Nicoll from 2019, and a report from Dr Richardson from 1997. The panel also had sight of a dossier of 274 pages.

The panel notes that Mr McKilligan was not found suitable for KAIZEN. It may be that the 1:1 work has not commenced, but this is the current treatment plan. The duty member could see no merit in an oral hearing at this stage, as once the 1:1 work has been concluded an updated psychological risk assessment will be required to determine if further interventions are required, or if there is support for progression. It was therefore concluded that directing an oral hearing at the current time would be premature.

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

The reports of Dr Nicholl and Dr Richardson referred to in the Decision were documents provided by the Claimant’s solicitors when they requested an oral hearing and which had, therefore, not been considered in the MCA.

The Law

9. By Section 28 Crime (Sentences) Act 1997 the Parole Board is responsible for consideration of whether a tariff expired life prisoner should be released. The statutory scheme has provision for the Secretary of State to refer a prisoner’s case to the Parole Board. If the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined, the Parole Board shall direct his release and it shall be the duty of the Secretary of State to release him on licence. The first review is carried out after the prisoners tariff has expired with regular periodic reviews thereafter.
10. Under the Parole Board Rules 2019, where a panel is appointed to consider the release of a prisoner, the panel must decide on the papers either that the prisoner is suitable

for release, or that he is unsuitable for release, or that the case should be directed to an oral hearing. If a decision is made on the papers, that is provisional decision, and a prisoner is afforded 28 days within which to request an oral hearing. That is the procedure that has been followed in this case.

11. The leading case on oral hearings in parole reviews is the Supreme Court decision in *R (Osborn, Booth and Reilly) v the Parole Board for England and Wales* [2013] UKSC 61 (“*Osborn*”). In *Osborn*, Lord Reed, with whom the other justices agreed, drew some general conclusions at the start of his judgment. At paragraph [2] Lord Reed said the following;

“(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 transfer to open conditions whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.

(ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following:

(a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

(b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.

(c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those

who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

(d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a “paper” decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner’s future management in prison or on future reviews.

(iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

(iv) The Board should also bear in mind that the purpose of holding an oral hearing is not only to assist 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”.

12. The bundle of authorities provided to me for this hearing includes the following cases all of which have affirmed and applied the guidance in *Osborn: R (Welsh) v Secretary of State for Justice* [2019] EWHC 2238 (Admin); *R (Stubbs) v Parole Board* [2021] EWHC 605 (Admin); *R (Somers) v Parole Board* [2023] EWHC 1160 (Admin); *R (Dich and Murphy) v Parole Board* [2023] 1 WLR 945 (Admin); and, most recently, *R (Wylie) v Parole Board and Secretary of State for Justice* [2024] EWHC 52 (Admin). I have read each of those authorities. Inevitably each turns on its own facts and I do not consider it necessary to rehearse those here.
13. However, I note that at paragraphs 54 and 55 of her judgment in *Somers*, Foster J says this:

“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... 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 refusal is made in the case of a post tariff life, 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).”

14. Miss Beach also relies on *Bailey and Morris* as having relevance in this case. In *Bailey and Morris* the challenge was to the Secretary of State's decision to exercise his statutory powers to make the Parole Board (Amendment) Rules SI/2022/717). Rule 2(22) of those Rules, which came into force on 21 July 2022, prohibited staff employed or engaged by HM Prison and Probation Service from including in their reports a view or recommendation on the question whether a prisoner is suitable for release or transfer to open conditions. The court concluded that Rule 2(22) applied only to those reports forming part of the dossier which the Secretary of State is required to serve when referring a case to the Parole Board. The court said it did not prevent the Board from using its case management powers to direct a witness to provide a further report containing a view about the prisoner's suitability for release or transfer to open conditions, nor did it affect the witness's legal obligation to comply with such a direction. Similarly, it did not prevent the Board from asking the witness's view during an oral hearing and nor did it affect the witness's legal obligation to answer such a question.
15. Thus the court concluded that on its true narrow construction the Secretary of State had power to make that rule. However the court concluded that the decision to make Rule 2(22) was unlawful for two reasons. The first was because one of the Secretary of State's principal purposes in making it was to suppress or enable the suppression of relevant opinion evidence which differed from his own view in cases where he expressed one. The court found that purpose was improper amounting to an attempt by a party to judicial proceedings (before the Parole Board) to influence to his own advantage the substance of the evidence given by witnesses employed or engaged by him and was therefore an impermissible interference with a judicial process. Secondly there was no evidence that the Secretary of State had ever considered whether a prohibition on the expression of views by employees was justified if it's application was limited (as the court found it to be) to the reports sent with the referral .
16. The court also concluded that two sets of guidance, (one issued in July 2022, and a second in October 2022 replacing the earlier guidance) which were issued to explain the implications of the prohibition to Prison and Probation Service staff, were each unlawful for a number of reasons. In relation to the July guidance this was unlawful for instructing Probation and Prison Service witnesses that they must not include any view on suitability for release or transfer to open conditions in their written reports, and for instructing them to refuse to answer questions about their views on those matters. Whilst that guidance was "revoked" and replaced by the October guidance, the court found that even taken alone, the October guidance would be understood by Prison and Probation Service staff as instructing or encouraging them not to offer views on the question of suitability for release or transfer to open conditions (i) even when they had such views, and (ii) even if they had been directed to provide them in reports or asked for them in oral hearings.
17. At paragraph 5(f) of their joint judgment, Macur LJ and Chamberlain J included the following in their summary of their conclusions;

"The July Guidance and October Guidance were bound to, and did, cause report writers to breach their legal obligations in large numbers of cases. It is not possible to say with certainty what effects this guidance has had in the cases determined

while it was in force. But its promulgation may well have resulted in prisoners being released who would not otherwise have been released and in prisoners not being released who would otherwise have been released.”

That judgment was handed down in March 2023. That passage serves to highlight the potential importance of the opinions of Prison and Probation staff who often know the prisoner well and have regular contact with him.

18. The reports in the dossier from the Claimant’s prison offender manager (“POM”) (**E219-E214**) and from his community offender manager (“COM”) (**E225-E248**) are dated 3/10/22 and 21/10/22 respectively, each during the period when Rule 2(22) applied, and one of the July or October Guidance was in place. Indeed, in his report, the POM expressly refers to a meeting with the Claimant and the COM on 22/9/22 when the Claimant was “... advised of the change to the parole process meaning that myself and the COM would not be making a recommendation in relation to release or open conditions in our reports” (**E220**).

The Challenge

19. On behalf of the Claimant Miss Beach submitted that the Defendant’s decision to refuse the Claimant’s request for an oral hearing was unlawful for four primary reasons:
 - i) that the Defendant has not properly considered the principles set out in *Osborn*.
 - ii) that fairness in the Claimant’s case required an oral hearing.
 - iii) an oral hearing was required to address questions about the appropriate next steps and a proper review of risk to include evidence from professionals and the prison psychologist, and a paper assessment was inadequate.
 - iv) the dossier compiled for the Defendant is based on reports written by the POM and the COM in circumstances where they were unable to make recommendations, something found to be unlawful in *Bailey and Morris*.

I shall address each of these in turn, although there is some inevitable overlap between them.

Failure to properly consider the principles set out in *Osborn*

20. Miss Beach submitted that a proper and fair assessment of risk is of particular relevance in the Claimant’s case. She submitted that there is a clear dispute over the risk assessments and the future treatment pathway, such that an oral hearing is needed to allow the Board to properly assess that risk. In requesting an oral hearing on behalf of the Claimant, Carringtons Solicitors stated “.....there is a dispute over the risk assessments and future treatment pathway” (**D67**, Paragraph 2). As set out above, the Claimant was transferred to HMP Frankland with a view to undertaking the Kaizen treatment programme. Having participated in some “Getting Going” sessions, the Claimant was considered unsuitable for Kaizen as he does not have a history of violent offending. Accordingly, in April 2022 it was recommended that he should

start 1:1 sessions with a psychologist to once again consider his treatment pathway. These 1:1 sessions have not commenced and Carringtons describe the Claimant as "... stuck not making any progress and has not been able to progress for several years now" (D67, Paragraph 6).

21. A simple assertion of a dispute over risk is plainly not sufficient. Often, challenges to risk assessments are based on differences of opinion between expert psychologists or psychiatrists as to the prisoner's risk, and in many cases the prisoner has the benefit of one or more independent psychological or psychiatric assessments. In this case the Claimant had an independent psychological report prepared by a Dr Nicoll in August 2019. That report was not included in the papers for the MCA but was sent to the Board by Carringtons with the request for an oral hearing (D67, Paragraph 12). It is referred to in the Decision. It is not included in the paperwork in these proceedings and when I raised this with Miss Beach, she accepted she cannot put the case forward on the basis of any differences in the assessment of risk or in any aspects of the risk assessments carried out by the professionals involved in the case.
22. However, Miss Beach pointed to the fact that the risk assessments in this case are out of date, and do not reflect the Claimant's unsuitability for the Kaizen programme, a point made by Carrington's at paragraph 9 of the request for an oral hearing (D68). The point is made there that his unsuitability for Kaizen should form part of new risk assessments in order to fairly and properly consider treatment pathway/progression.
23. There are further points raised by Carringtons which are plainly capable of affecting the assessment of risk. It is clear from the reports in the dossier that concerns as to the Claimant's risk include issues as to traits in his personality, and the possibility that he has a personality disorder. When the Claimant was sentenced, the sentencing judge had before him a report dated 30/6/99 from Dr R Nadkarni, a Specialist Registrar in Forensic Psychiatry. That report concluded that the Claimant satisfied the construct of psychopathy.
24. In the Parole Board's paper decision of 24/9/21 there is reference to a letter from Dr Nadkarni dated 12/10/1999 in which he apparently said that the final draft of his report was written by an assistant who misinterpreted the language, that the scores were not as high as previously quoted and "in my view, he is not a psychopath". The September 2021 panel therefore disregarded the discredited report. (E157-E158). Nevertheless that report remains in the dossier which was considered in the MCA. The letter from Dr Nadkarni is not in the dossier, although the paper decision of the Parole Board dated 24/9/21 is in the dossier.
25. Miss Beach submitted that it is not possible to know whether Dr Nadkarni's report was disregarded in the MCA. Whilst Dr Nadkarni has resiled from his conclusion that the Claimant satisfied the construct of psychopathy, there is a lot of information in Dr Nadkarni's report about the Claimant's relationship with foster parents, his beliefs and attitudes towards children and women, the suggestion that his foster parents reported he told lies on a daily basis, the suggestion he told lies and invented stories when at Aycliffe Young People's Centre, and details of psychosexual history and a summary of past psychiatric history. It is impossible to know what if any impact those areas of Dr Nadkarni's report may have had in the MCA. Whilst the 2021 decision confirmed expressly disregarding the report, there is no such confirmation in the MCA.

26. The possibility that the report may have influenced the decision maker is important given that the forensic psychology report of Samantha Chu from 2017 (with an addendum in 2018) deals with personality traits and states that a personality disorder might be relevant to the risk of future offending and harm. There are references to a history of telling lies and being manipulative. Again there are reports of lies he is said to have told foster parents and that his mother had reported he was deceitful, failed to accept responsibility and was unemotional and callous, enjoying causing pain and terror to animals (E174).
27. The importance of issues of personality traits is as follows. Firstly, whilst the Psychology Case Advice Note (which is not a risk assessment) in the dossier confirms that the Claimant had cooperated in the “Getting Going” sessions with a view to commencing the Kaizen programme, and had since been found unsuitable for the program, it goes on to state that given his unwillingness to consider a referral for personality disorder treatment services, it was concluded that members of the psychology department would work with him to identify a treatment pathway in the form of 1:1 sessions (E217). Miss Beach made the point that whilst it is accepted that the Claimant declined to be referred for assessment at the Westgate Personality Disorder Service, he was subsequently found not to be suitable for that assessment in any event, and he has not refused any other personality disorder treatment pathway. This is a dispute of fact and something which Miss Beach submitted should be explored at an oral hearing, to enable a full and proper risk assessment to be carried out.
28. Secondly, Miss Chu identified evidence of some interpersonal traits associated with psychopathy including a cunning and manipulative style, pathological lying and a callous/ lack of empathy. She reported that it was possible that the assessment was an underestimate of the claimant’s level of psychopathy. This is referred to in the Programmes Needs Assessment from July 2017 which is included in the dossier (E209). That document then goes on to give other examples of discrepancies such as the circumstances in which his former partner in America died.
29. The Claimant disputes the suggestion that he lies and is manipulative. I pointed out that one of the issues is his place of birth and that is presumably capable of being established through official documentation. On the information currently available it seems likely that would establish that the Claimant is not telling the truth when he says he was born in Turkey. However, Miss Beach made the point that these are matters which ought to be explored at an oral hearing to give the Claimant the opportunity to challenge the suggestions that he is a pathological liar and manipulative. She submitted that even if the Claimant was found to have lied about some matters, it does not necessarily follow that he is also manipulative.
30. The importance of this issue goes not just to his credibility but also to the inference in the dossier that his statements cannot necessarily be taken at face value when assessing risk, and that he could be manipulating the parole process in some way. I stress this is an inference and not an express statement or conclusion..
31. Miss Beach submitted these are important points particularly bearing in mind what Lord Reed said in *Osborn* at [2(ii)(b)] (set out in Paragraph 11 above). She submitted that this is a case where an oral hearing will be necessary because the Parole Board cannot otherwise properly or fairly make an independent assessment of risk, or of the

means by which it should be managed and addressed. She submitted that the psychological assessment produced by the Ministry of Justice is disputed on tenable grounds and that the Board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. She pointed out that cases concerning prisoners who have spent many years in custody are said by Lord Reed to be likely to fall into the category of cases where an assessment of risk 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. She submitted that the issue of whether or not this Claimant lies and is manipulative plainly falls within those dicta. I accept that submission.

32. Miss Beach also relies on the need for an oral hearing owing to the stagnation experienced by this Claimant. She points to the fact that the 1:1 work referred to in the Decision has been recommended since April 2022, now some 22 months ago, but has still not commenced. In requesting an oral hearing Carringtons pointed to the fact that the Claimant has been fully compliant with all risks assessments and suggested pathways to resolve his current predicament of being stuck without any progress. They point to the fact he had participated in considerable “Getting Going” sessions and the fact that he has not been offered or declined any other PD pathway options and has only ever refused the assessment at the Westgate Personality Disorder Treatment Unit (D67, Paragraphs 4 and 5). I have no detail of when that was refused, but it is clearly some years ago as this background appears in reports from 2017 and 2018.
33. Miss Beach submitted that the Decision that an updated psychological risk assessment would only be required once the 1:1 work has been completed fails to recognise the following factors:
 - i) the stagnation experienced by the Claimant in category A conditions which has been the case for several years;
 - ii) that he has not been offered any other PD pathway options despite being found not suitable for Kaisen or the Westgate Unit Personality Disorder Treatment Unit;
 - iii) that he has taken part in the options available to him in the form of “Getting Going” sessions;
 - iv) that he has a legitimate interest in being able to participate in a decision where he is significantly post tariff, still in category A and where there is no clear treatment pathway (See per Lord Reed in *Osborn* at [2(iv)] set out in paragraph 11 above)
34. Miss Beach submitted that an oral hearing was necessary to consider risk, to identify why the 1:1 treatment has not commenced, and to consider whether other options are available. She submitted that the Claimant has a legitimate interest in asking questions about what is expected of him and any work to be done to reduce risk. She submitted that without an oral hearing, the Claimant could find himself stuck in category A conditions, with no intervention or treatment, and nothing proposed for him to progress. She submitted he could find himself in exactly the same position as

he is now at the next review in two years time. There is nothing proposed in the next two years to enable him to progress and the absence of an oral hearing leaves him in a position of continuing stagnation with no ability to ask relevant questions such as how he is to address risk, questions in which he clearly has a legitimate interest. She submitted an oral hearing would permit the Board to enquire as to what work he has done on the “Getting Going” sessions, to explore issues around stagnation, and to consider what further work can be done, and ultimately how all of this impacts on the risk assessment.

35. In my judgement there is considerable force in the submissions and none of these issues is addressed in the Decision.

Fairness requires an oral hearing

36. Miss Beach submitted that fairness called for an oral hearing in this case. She submitted this applies generally, taking into account the Claimant’s case as a whole, and she also relied on two particular matters as emphasising the need for an oral hearing. The first of these is the fact that the Claimant is now 5 years and 6 months post tariff. At the date of the Decision he was 4 years and 9 months post tariff. She submitted that there is no evidence that the Claimant’s post tariff position has been considered in the decision refusing the oral hearing. I accept that. Indeed I would go further and infer that his position as a post-tariff lifer has not been considered, because this Decision has been taken on a results led approach.
37. The Decision is clearly focused on the possible outcome of an oral hearing. The Decision refers to there being no merit in an oral hearing “..at this stage..”, as once the 1:1 work has been concluded an updated Psychological Risk Assessment will be required to determine if further interventions are required, or if there is support for progression. The Member, therefore, concluded “...that directing an oral hearing at this time would be premature”. In my judgment this approach fails to address the correct issue as identified in *Osborn* (per Lord Reed at [29(x)]). The Claimant did not have to demonstrate that the paper decision was wrong, or even that it may have been wrong. The issue is whether an oral hearing was appropriate. By considering, indeed focusing on the potential outcome of an oral hearing, in my judgment the Decision fails to specifically address the relevant issues set out in *Osborn*.
38. Miss Beach also relied on Lord Reed’s recognition at [2(vi)] that “.... 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.” She also relied on Foster J’s judgement on *Somers* (set out in Paragraph 13 above) and the need for particular care in the case of a post-tariff lifer and the value of the hearing for a person in the position of the post-tariff lifer. Foster J stated that a good reason for not holding an oral hearing should be present when 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. In my judgement no good reason has been put forward by the Parole Board for not holding a hearing in the Claimant’s case. The Decision has focused on the outcome and in doing so has failed to address the central fundamental question outlined in *Osborn*, namely whether fairness called for an oral hearing, and has failed

to consider which elements of the Claimant's case might or might not call for an oral hearing, by reference to the guidance give in *Osborn*.

39. The second point which Miss Beach makes in support of her submission that fairness required an oral hearing is that Carringtons drew to the Defendant's attention documentation which had not been considered in the MCA, comprising the independent psychological report of Dr Nicholl from August 2019, and a 1997 report from Dr Richardson which is referred to within assessments included in the dossier. Carringtons also asked that the two previous parole board decisions of 2019 and 2020 should be added to the dossier.
40. They also raised (i) alleged discrepancies and errors, such as the dossier referring to the Claimant refusing to engage on the PD pathway which they asserted was incorrect; (ii) the need for up-to-date psychological risks assessments particularly as the position had moved on with the Claimant's unsuitability for Kaizen; (iii) concern that the report of Dr Nadkarni was included in the dossier given it had been discredited previously and they submitted that the inclusion of that report had in the past detrimentally influenced other report writers and could do so for in the future, especially as the letter from Dr Nadkarni apparently discrediting his own report is not produced within the dossier.
41. Miss Beach submitted that the combination of the absence of important documents within the dossier, the discrepancies and errors contained in the dossier, and the presence of a report which may have been prejudicial to the Claimant's case, makes it clear that there are significant factual issues which need to be resolved, and that the appropriate forum to do so is at an oral hearing. I accept her submissions in this respect. In my judgment this plainly falls within Lord Reed in *Osborn* [2(ii)(d)] where the representations raise serious issues which place in 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.

Complex psychological and risk considerations

42. Miss Beach accepted that given the nature of the Claimant's offending which resulted in his custodial sentence, his case involves complex psychological and risk considerations. She submitted that the fact that such a complex case has stagnated in the way that the Claimant's case has places even more responsibility on the Defendant to scrutinise whether the level of risk posed is unacceptable. This point was made by Carringtons in their representations seeking an oral hearing, and Miss Beach submitted that the appropriate way for this to be scrutinised, in the interest of fairness is by way of an oral hearing. She again makes the point that consideration of appropriate next steps for the Claimant is critical and this involves a proper review of risk. She submitted this cannot be considered to have been done properly and fairly when the psychological risk assessments contained in the original dossier that informed the Decision are out of date and do not reflect the circumstances the Claimant is currently in. This she submitted is a case where a paper assessment is simply inadequate. Again I accept these submissions.

Dossier is unlawful as per *Bailey and Morris*

43. Miss Beach submitted that the paper decision in this case was based on reports where the POM and COM were prevented from putting forward any recommendations as to release or transfer to open conditions. The importance of that type of evidence was recognised by the court in *Bailey and Morris*, and the Rule and Guidance which form the basis for the POM and COM in this case not including recommendations in their reports, has since been found to be unlawful. In requesting an oral hearing Carringtons pointed to the fact the dossier was completed based on report writers not being able to wreck recommendations, that this was unlawful and inviting an oral hearing so that the full risk assessment and recommendations could be made and presented at an oral hearing.
44. Plainly, the POM and the COM are often those who best know a prisoner and their recommendations can be important in assisting with the matters which have to be considered by the Parole Board. Whilst the Claimant only moved to HMP Frankland in August 2021, some 15 months before the POM and COM reports, in my experience of these cases, each would have had access to previous POM/COM involved with the Claimant when he was at HMP Wakefield. Even if they did not have such access, the Claimant had clearly been at HMP Frankland for more than a few months, and the officers advised him they would not be giving any recommendations, not because he had not been there long enough, but because of the change in the parole process.
45. The views of the POM and the COM here were missing, but again this matter does not appear to have been considered at all in the Decision. Because of the potential importance of that type of evidence as recognised in *Bailey and Morris*, this was another factor which ought properly to have weighed in favour of an oral hearing at which the views of those officers could be sought and explored. In my judgment the failure to consider this issue represents a failure to consider the principles set out in *Osborn*, and in particular whether fairness required there to be an oral hearing.
46. Miss Beach contends that the Decision contains fundamental errors of law and is, therefore, unlawful, unreasonable and irrational. I have no hesitation in accepting her submissions in this case. In my judgment the Decision shows that no proper consideration has been given to the principles set out in *Osborn* and that the Parole Board has failed to ask itself the fundamental question outlined in *Osborn*, namely whether fairness called for an oral hearing, and has failed to consider which elements of the Claimant's case might or might not call for an oral hearing, by reference to the guidance given in *Osborn*.
47. Accordingly, I quash the decision of the Parole Board dated 18 April 2023 refusing the Claimant's request for an oral hearing, and I direct that there is to be an oral hearing before the Parole Board.