



Neutral Citation Number: [2024] EWHC 52 (Admin)

Case No: AC-2023-CDF-000035

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Cardiff Civil and Family Justice Centre  
2 Park Street, Cardiff, CF10 1ET

Date: 12/01/2024

**Before :**

**HIS HONOUR JUDGE JARMAN KC**

Sitting as a judge of the High Court

**Between :**

**R**

**(On the application of SHANE WYLIE)**

**Claimant**

**- and -**

**PAROLE BOARD FOR ENGLAND AND WALES**

**Defendant**

**-and-**

**SECRETARY OF STATE FOR JUSTICE**

**Interested  
Party**

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**Mr Stuart Withers** (instructed by **Duncan Lewis Solicitors**) for the **claimant**  
The other parties did not appear and were not represented

Hearing date: 4 January 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.00 am Friday 12 January 2024 and sent to the parties and to the National Archives

## HHJ JARMAN KC:

### *Introduction*

1. The claimant, who is serving a term of imprisonment, challenges the decision of the Parole Board dated 11 November 2022 refusing his request for an oral hearing in order to determine whether he should be granted parole. Permission was given to bring the only ground of challenge, namely procedural unfairness, by HHJ Lambert sitting as a judge of the High Court. Mr Withers represents the claimant. The other parties have remained neutral and have taken no active part in the proceedings.
2. A total of 14 years imprisonment was imposed upon him in 2014 for three offences of rape. In November 2020, he was released on licence. This was at a time when Covid restrictions were in place. Shortly afterwards he was the subject of a complaint of sending a malicious communication to a female. His licence was revoked on 18 December 2020 and he was recalled into custody. The next day he pleaded not guilty to a charge of harassment arising out of that complaint. However in January 2021 he was served with a notice of discontinuance in respect of that charge on the basis of insufficient evidence.
3. Consequently the Secretary of State referred his case to the board for consideration of whether his recall was appropriate and whether he could be released. By May 2021 he was under further investigation in relation to an allegation of rape said to have occurred at a similar time to the offences for which he has been sentenced. The allegation was made by the same complainant who made the allegation of malicious communication, subsequently withdrawn, but which was not made at the same time as the latter allegation. This information was included in the documentation to be considered by the board.

### *The statutory framework and guidance*

4. Before I set out the background of the proceedings before the board, it may be helpful to summarise the statute, rules and guidance which apply to such proceedings. The statutory scheme for the recall of prisoners on licence and the role of the board is dealt with in the Criminal Justice Act 2003. Under section 239(2) it is the duty of the board to advise the Secretary of State with respect to any matter referred to it which is to do with the early release or recall of prisoners. Section 256A provides that if a prisoner's case has been previously referred to the board and has not been released, the Secretary of State must refer the prisoner's case back to the board no later than the first anniversary of its most recent determination. Subsection (4) provides that the board must not give a direction for a person's release on a reference under that section unless the board is satisfied that it is not necessary for the protection of the public that the person should remain in prison.
5. The Secretary of State has made rules under section 239(5) for proceedings before the board, namely the Parole Board Rules 2019 (SI 2018/1038) which have subsequently been amended.

6. Rule 6 provides that the panel chair or duty member may adjourn or defer the proceedings to obtain further information or for such other purposes as they consider appropriate. By rule 19 the board may direct an oral hearing. By rule 19(6) any decision made as to whether a prisoner is deemed unsuitable for release is provisional. Rule 20(1) provides that a prisoner may apply for an oral hearing if he has been deemed unsuitable for release under Rule 19.
7. In July 2020 the Defendant produced guidance entitled “Adjournments and deferrals”. The guidance at [4.6] provides that an adjournment would not normally be appropriate when the prisoner is subject to a police investigation/criminal proceedings and the outcome is still awaited and is unlikely to be resolved within four months.

*The proceedings before the board*

8. In the present case, after an oral hearing, the board in September 2021 did not grant a release. In its reasons it noted that it had serious concerns that after his release the claimant contacted a young woman known to him at the time of the offences for which he had been sentenced. The board accepted that “these matters have been dismissed and you maintain this was an innocent mistake due to you being lonely” but was concerned about his motivations for making such contact.
9. In relation to the outstanding allegation of rape, the board observed that until that had been investigated it remained difficult “to fully gauge how they might go to risk of serious harm” and that the claimant was identified as a high-risk untreated sex offender who now faces a further allegation of rape. Accordingly, he was not released.
10. That meant that a further review was due to be carried out the following year. On 18 January 2022 the solicitors acting for him in the board reviews emailed the solicitors who had acted for him in the criminal proceedings saying that they were instructed to obtain an earlier review than that set for September 2022. They asked for an update as to whether the outstanding allegation of rape had been referred to the Crown Prosecution Service (CPS) for a decision whether or not to charge or to take no further action. In response, it was stated that the matter was with the CPS and that despite chasing the matter there was nothing further that the writer could do.
11. In the claimant’s annual review by the board the following year, his offender manager’s report dated July 2022 indicated that the allegation was still being investigated and that he had not completed any offending behaviour work. It was noted that he continued to engage in horticultural education and employment as a gardener and that he had shown a willingness to be of good behaviour and had maintained his adjudication free status. He had the highest status of privilege for a prisoner and had received no negative comments from staff.
12. In August 2022, the claimant’s solicitor in the criminal proceedings again emailed the Metropolitan Police for an update on the outstanding rape allegation. On 15 August 2022, a temporary detective constable replied saying “It would appear that the matter is to be closed due to the complainant withdrawing support.” That was passed on to the claimant’s solicitor acting in the review, who as a result confirmed in an email in the review that the allegation had been withdrawn which would “soon” result in no further action.

13. In his representations the claimant requested an oral hearing. He accepted that he had not completed accredited offender behaviour work. It appears this was because he maintained his innocence of the rape charges of which he was convicted. However he stated that he had completed voluntary work with Phoenix Futures and had engaged with psychological work in prison. He attached an email from a drug and alcohol worker which stated that the claimant had undergone a significant amount of work, including identifying possible blocks to recovery and strategies to manage relapse and offending behaviour. He had also completed in-cell packs dealing with personal development and planning for the future.
14. In a note to the board, which is undated but appears to have been filed in September 2022, the probation service indicated that the officer in charge of the rape allegation had informed them that the investigation was not yet complete and that a no further action decision had not been taken “at this time.”
15. The matter was considered by a panel member under what it known as a member case assessment. This is a procedure where the matter is considered by one panel member, who may or may not be legally qualified but who will have received training.
16. On 31 October 2022 the panel member in a provisional decision under rule 19 refused the request for an oral hearing and proceeded to consider the question of release on consideration of the papers. The decision contained the following passage:

“This investigation came about as Mr Wyllie contacted the victim soon after his release from prison. The Panel noted that Mr Wyllie’s legal representative submitted that this investigation has been made subject to no further action. However, this was contradicted / corrected by Mr Wyllie’s COM in a ‘Note to Parole Board’ at page 496 of the dossier in which a message from the police is referenced, recording that: “I have had a response from the OIC that the rape investigation is not yet complete and it HAS NOT been NFA’d at this time.”
17. It is noteworthy that no express reference is made in the decision to the earlier emails from the Metropolitan Police saying that it would appear that the matter was due to be closed due to the complaint being withdrawn, on which the claimant’s solicitor relied in making their statement. These emails were before the member.
18. The decision also noted the work taken with the Phoenix Trust, but observed that no accredited offending behaviour work had been completed since recall and that whatever offending behaviour work may have been undertaken prior to release appeared “to have had no discernible impact on addressing risk factors, given the reasons for the recall.”
19. The conclusion was as follows:

“The Panel has considered the fact that Mr Wyllie is in the midst of a police investigation into a sexual offence committed around the same time as the index offences. Guidance to members is such that if police investigations or Court proceedings are unlikely to be concluded within eight weeks

from the review date, it may be appropriate to decide the case ‘on the papers’. No indication has been provided as to when the investigation is likely to be concluded. Mr Wyllie is entitled to a speedy review and the Panel, therefore, determined that his review should be concluded at this point. Should it be the case that the police investigation be made subject to no further action, any resulting charges be dropped, or he is found ‘not guilty’ or a custodial sentence is not received at any resulting trial, then the Secretary of State could re-refer Mr Wyllie’s case back to the Parole Board or the option would be open to his COM to apply for his Executive Release, should that be felt appropriate.”

20. It is further to be noted that the reference to eight weeks appears to be a mistake, as the guidance refers to four months. Furthermore the reference to their being “no indication” as to when the investigation is likely to be concluded appears to ignore the emails from the Metropolitan Police.
21. On 31 October 2022, the claimant again requested a review of the provisional decision and an oral hearing saying that the police had decided to take no further action against him in relation to the allegation of rape. He maintained that his risk was manageable on licence in the community and repeated points in relation to voluntary work and engagement with psychological services in custody.

*The challenged decision*

22. The matter was considered by a different panel member who then made the decision under challenge on 11 November 2022. It is worth citing the short decision of the member in full:

“We refer to the provisional decision of your parole review recently issued by a single member panel. As set out in the decision, you were allowed 28 days in which to consider whether to accept the decision or request an oral hearing.

We confirm that you have requested an oral hearing via legal representations. The basis for this request is that the MCA panel did not undertake a proper risk assessment, did not consider that Mr Wyllie is maintaining his innocence and did not explore issues relating to his recall or his positive custodial behaviour since that time. Having read the decision letter, the duty member did not consider that any of the above statements were correct. The decision makes clear that the Osborn Judgement was considered, it refers to Mr Wyllie’s good behaviour since recall, it refers to the fact that Mr Wyllie maintains that he is innocence and was indeed a very thorough risk assessment overall. The duty member did not find reasons for an oral hearing on these grounds.

Furthermore, Mr Wyllie continues to be investigated by the Police regarding an allegation of rape. It was concluded that an

oral hearing would not be effective whilst such an investigation is ongoing, particularly as the index offences were also rape.

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

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

23. On 24 November 2022, the claimant sent a letter before action attaching a letter from the Metropolitan Police also dated 24 November 2022 which confirmed that there would be no further action against him in relation to the rape allegation. The board responded on 13 December 2022 saying that it was functus officio.
24. The same day the Claimant requested the Secretary of State to re-refer his case in light of the new information, but no response has yet been received. His latest parole review commenced in June 2023, but no decision has yet been reached as to whether or not he will be granted an oral hearing.

#### *Case law*

25. The reference in the decision to Osborn is to the Supreme Court case of *R(Osborn) v Parole Board* [2014] UKSC 61, upon which Mr Withers for the claimant before me relies heavily. He took me to several passages in the judgment of Lord Reed, with whom the other justices agreed. For present purposes it should be sufficient for me to set out here those conclusions which Lord Reed set out in paragraph 2 of his judgment, and which are relevant in the present case, as follows:

“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 it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.

vi) When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional. 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.

viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.

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.

26. Mr Withers did not place any particular emphasis on article 5(4) because, as indicated by Lord Reed, compliance with the common law duty of procedural fairness should also result in compliance with the requirements of that article. Mr Withers cited three examples, of the many authorities dealing with the application of those principles, where the court has held that fairness required an oral hearing where one had not been held, namely *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 4287.

*The claimant's submissions on procedural unfairness*

27. Mr Withers submits that, applying those principles, the decision of the panel member dated 11 November 2023 is procedurally unfair for four reasons.
28. First, it referred to the previous decision dated 31 October 2022 but gave no separate or fresh analysis of whether of the *Osborn* principles required an oral hearing, although one of those principles is that a request for an oral hearing is not to be treated as an appeal against a provisional decision.
29. Second, there were important facts in dispute, namely whether the allegation of rape was likely to be subject to no further action by the police. The reference in the decision to the solicitor's information being contradicted or corrected suggests that the latest information from the police was being favoured. At the least it was open member to adjourn the proceedings under rule 6(11) to clarify the position, but an oral hearing should have been granted to determine the precise status of the investigation. The allegation of rape was central to the question of the risk posed by the release of the claimant, as shown by each of the decisions since his recall.
30. Third, an oral hearing was required to have a fair an independent assessment of risk given the fact that the claimant had undertaken no accrediting offending behaviour work but had engaged in significant work including offending behaviour. The member appeared to favour official assessments of risk that accredited offending behaviour work was the only way to reduce risk. An oral hearing was required to deal with assessment of risk.
31. Fourth, the decision created a situation of unfairness and circularity. In the provisional decision dated 31 October 2022, the member relied on policy regarding adjournments



and that the claimant was entitled to a speedy review as justification for not making enquiries or holding an oral hearing. However, speed does not trump the overall consideration of fairness. Further, the member in that decision delegated the issue of whether fairness required an oral hearing to the Secretary of State to make a further referral to the board if new information came to light.

*Discussion*

32. In my judgment, there is force in the first three of those submissions. The first two are particularly strong. The focus of the challenged decision appears to be whether the paper decision in October 2022 was wrong or that it may have been wrong, rather than whether an oral hearing was appropriate. There is a reference to the ongoing investigation into the rape allegation, and to the fact that “it was concluded” that an oral hearing would not be appropriate whilst the investigation continued. The decision went on to say that the request “has been refused for the reasons stated above.”
33. The decision does not grapple with the fact that the investigation had been ongoing for some 12 months and that the Metropolitan Police indicated that it would appear that the matter would be closed due to the withdrawal of the complaint. The fact or likelihood of the complaint being withdrawn was not contradicted by the subsequent indication by the officer in the case that the investigation was not complete and that a no further action decision had not been made at that time. It is not surprising in relation to such an allegation that it may take a little while to formalise the withdrawal or to consider such a withdrawal when made in the context of the case as a whole and to reach a no further action decision. In my judgment, these matters did amount to an indication of the timescale of when the investigation may be concluded, contrary to what was stated in the October 2022 paper decision. It was also an indication of whether it might be concluded within the four months (not eight weeks as stated in that decision) referred to in the guidance. It is clear that the allegation was fundamental to the assessment of risk.
34. In those circumstances, in my judgment, procedural fairness required an oral hearing, or at least an adjournment to clarify these matters.
35. Such a requirement also arose, in my judgment, from the fact that although the claimant had not undergone an accredited offending behaviour programme, he nevertheless had engaged in significant work including strategies for avoiding relapse and further offending, albeit the focus of much of that work appears to have been on drink and drug abuse. Again, an oral hearing was required to inquire into the details of that work and its impact on risk assessment. The challenged decision does not address this issue.
36. The fourth reason, in my judgment, adds little to the first. I accept that the desirability of a speedy review is relevant, but as is observed in *Osborn*, the temptation to refuse oral hearings as a means of saving time should be guarded against. I also accept that a potential further referral if new information came to light does not assist on whether it was fair to grant an oral hearing. However, whilst those reasons were relied upon in the paper decision in October 2022, they do not appear to have been relied upon in the challenged decision.

*Relief*

37. The conclusions above are sufficient to render the challenged decision liable to be quashed. However, on the facts of this case it is doubtful whether it would be appropriate or meaningful to do so. Since the challenged decision was made, and it is only that decision which is before me for determination, it has now been confirmed that no further action will be taken on the rape allegation. The claimant's annual review is presently before the board and I was told in the hearing before me that a request for an oral hearing in that review had yet to be determined. I was informed by email on the day this judgment was due to be handed down that the request has been granted. I should not be taken as expressing a view on that review.
38. As matters have materially progressed and changed since the challenged decision was made as summarised above, in my judgment it is appropriate and sufficient to grant a declaration that that decision was procedurally unfair to the claimant.
39. In my judgment, the board should pay the costs of the claimant on the standard basis to be assessed if not agreed.
40. I am very grateful to Mr Withers for the focussed way in which he presented the claimant's case. I would be grateful if he would submit a minute of order within 14 days of handing down this judgment.