

R. (on the application of Brockie) v Parole Board for England and Wales

No Substantial Judicial Treatment

Court
King's Bench Division (Administrative Court)

2025 WL 02949618

Neutral Citation: [2025] EWHC 2551 (Admin)

Case No: AC-2025-BHM-000177

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
ADMINISTRATIVE COURT

33 Bull Street

Birmingham

B4 6DS

Date: 5 September 2025

Before:

HIS HONOUR JUDGE TINDAL

(Sitting as a Judge of the High Court)

Between:

THE KING

(On the application of DANIEL BROCKIE)

Claimant

-and-

THE PAROLE BOARD OF ENGLAND AND WALES

Defendant

-and-

THE SECRETARY OF STATE FOR JUSTICE

Interested Party

MR SIMON RIDDING appeared on behalf of the **Claimant**

APPROVED JUDGMENT

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HHJ TINDAL:

Introduction

1. This is a judicial review by a recalled determinate sentence prisoner of the Parole Board’s refusal to grant him an oral hearing to consider his release. There are many of these cases, where prisoners challenge the parole Board’s refusal of an oral hearing to consider release, whether from recall on a determinate sentence as with this Claimant, or a prisoner on an indeterminate sentence. The leading case is *R(Osborn) v Parole Board [2014] AC 1115 (SC)* .

2. So far as I am aware, in the decade or so since *Osborn*, whilst the Court of Appeal has cited *Osborn* many times as a leading case on procedural fairness generally, there have been few Court of Appeal cases in the Parole Board oral hearing context. the closest example may be *R(Hassett) & SSJ [2017] 1 WLR 4750* , where the Court of Appeal considered the guidance in *Osborn* to the Parole Board did not apply to the Secretary of State when determining prisoner categorisation decisions. But as far as I know, there is no guidance from the Court of Appeal since *Osborn* on when fairness requires an oral hearing from the Parole Board itself.

3. That is probably because no further guidance has been needed after *Osborn*, which is now well-settled, as Foster J observed in *R(Somers) v Parole Board [2023] EWHC 1160 (Admin)* at [26]. First instance decisions generally turn on their own facts. However, from time to time, issues of possibly wider significance crop up. In this case, there are actually three such issues.

4. The first issue is the respective roles of the first and second decision-maker in the Parole Board’s two-stage paper consideration process for considering release and oral hearings. In *Osborn* at para.2(x) Lord Reed observed in relation to the then-practice:

“‘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. [T]o 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”.

Two different views have been taken of this observation in *Osborn*. UTJ Markus QC in *R(Stubbs) v Parole Board* [2021] EWHC 601 (Admin) said it meant it would be wrong for a second-stage decision-maker simply to review the first-stage decision. However, HHJ Belcher in *R(McKilligan) v Parole Board* [2024] EWHC 336 (Admin) thought it prohibited a ‘results-led approach’. I will seek to resolve that question, which is obviously of wider importance.

5. The second issue is linked to HHJ Belcher’s point about a ‘results-led approach’ and arises from Lord Reed’s analysis in *Osborn* that one purpose of procedural fairness is to ensure an individual’s participation in a decision-making process about themselves, as he said at [2(iv)]:

“[T]he purpose of...an oral hearing is not only to assist...in...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”.

In most cases, the question is whether an oral hearing is required due to disputed factual allegations or complex risk assessments which require a detailed evaluation of risk. As I shall explain, this case did not do so. Indeed, there was no realistic prospect of an oral hearing directing the Claimant’s release. So, on a purely ‘results-led approach’ it plainly did not require an oral hearing. However, that then raises the question of whether and if so when procedural fairness may require an oral hearing purely to enable a prisoner’s *participation*.

6. The third question this case raises is the relationship in the prisoner oral hearing context of two closely-related concepts. First, Common-Law ‘pointlessness’ considered by the Supreme Court in a very different context in *R(Pathan) v SSHD* [2020] 1 WLR 4506. Second, s.31(2A)-(3F) Senior Courts Act 1981 (‘SCA’) which (subject to exceptions) require the High Court to refuse to grant relief for judicial review: ‘if it appears to be highly likely the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred’. This is the subject of recent authority in a different context of relevance here too.

7. I will consider these questions even though I have not had opposing argument from either the Defendant Parole Board, or the Ministry of Justice as Interested Party. That is common, as the the Parole Board does not appear as it is a judicial decision-maker; and whilst the Ministry of Justice as an Interested Party would have the right to appear, it often stays neutral. As it is common for these cases to be ‘one-sided’ with submissions only for the Claimant prisoner, inconsistencies in unreported first instance cases can creep in, such as the difference between *R(Stubbs)* and *R(McKilligan)*, also each one-sided cases. Therefore, it may be helpful to try and resolve those. Therefore, I referred Mr Ridding to *Pathan* and other cases and he rose to the challenge commendably. I am grateful to him and his instructing solicitors for their assistance.

Background

8. I can take the factual background from Mr Ridding’s Skeleton Argument and the bundle.

9. The Claimant is serving a 49-months for breach of a restraining order, ABH and battery of his former partner and three counts of criminal damage. He was sentenced on 6 August 2020, and his sentence expiry date is now 20 October 2026. He was released on licence automatically on 22 July 2022, but his licence was revoked by the Interested Party on 31 July 2022. The Claimant was returned to custody on 14 October 2024 after handing himself in to the police. The Interested Party then referred his case to the Defendant for consideration of re-release.

10. The circumstances of the Claimant’s recall to custody were that he absconded from his approved premises following his release. His former partner also alleged he assaulted his former partner, but the Police took no further action on that. In the Interested Party’s referral (where the Claimant was referred to by his alternate name of Mr Deakin), it was noted:

“In my professional opinion, I do not assess that it is currently safe to re-release Mr Deakin into the community at this juncture. Mr Deakin was recalled on 01/08/22 after he absconded from the Approved Premises (AP) after only 9 days following his prison release. This followed an alleged further DV offence which has now been filed by Police with no further action. He then remained unlawfully at large for 26 months before he handed himself in to the Police. Mental health concerns have been evidenced since he was returned to prison. He is expected to engage in core risk reduction work including programmes interventions to improve on his thinking skills and awareness of healthy relationships whilst serving his recall. This is a prerequisite prior to any future release which will need to be facilitated through an AP to ensure additional risk management measures are in place.

Mr Deakin is [under supervision] and until 23/10/24, he was being monitored by prison staff on a constant watch due to M/H issues including him being found with a ligature and after he swallowed a battery on 22/10/24. His COM also notified the prison of a concerning phone call received from Mr Deakin's Sister on 22/10/24 in which she disclosed he had attempted suicide. This information was passed to the POM and the prison were already aware of his M/H issues.”

11. The Claimant, then unrepresented, was invited to make representations but did not do so – it is said due to his poor mental health and literacy that did not enable him to do so. Accordingly, a single-member panel of the Defendant reviewed the case on the papers on 10 February 2025 in the Member Case Assessment process (‘Decision 1’). ‘Decision-Maker 1’ (or ‘DM1’) as I shall call them, declined to direct the Claimant’s re-release or to order an oral hearing, saying:

“In making this decision the panel has considered this case against the principles set out in [*Osborn*] concerning oral hearings. The panel does not find that there are any reasons for an oral hearing. However, if it is believed that this case should proceed to an oral hearing, further representations should be submitted to the Parole Board within 28 days of receipt of this decision outlining why it should proceed to a hearing.”

“[The Claimant needs to] engage with work to address his areas of risk and until that has been completed, the panel would be concerned about his risk of serious harm, especially if he were to enter into a new intimate relationship. Therefore, while core risk reduction work remains outstanding, the panel was satisfied it remains necessary for the protection of the public he should be confined so it did not direct his release.”

This reference to ‘core risk work being outstanding’ is the Building Better Relationships (Domestic Abuse) programme the Claimant had been expected to undertake when released on licence in 2022 but did not do so as he absconded. The first stage decision-maker continued:

“However, his licence was revoked on 31 July 2022 after he absconded from approved premises. The police disclosed there had been an alleged domestic violence incident on 30 July 2022 after a female reported having been assaulted by him. No further action was taken but he remained unlawfully at large until 14 October 2024. It was said that he was encouraged by family members to attend the police station to hand himself in due to the impact of being at large on his mental health. The panel considered the recall to have been appropriate based upon his disengagement from supervision in July 2022, the fact he remained unlawfully at large for a significant period of time raises concerns about his decision making and the degree to which he takes responsibility for his actions. However, he did hand himself in to the police, for which the panel gave him credit. It shows a level of maturity and acceptance of responsibility for his situation. Mr Deakin has denied any involvement [Mr Deakin being the alias of Mr Brockie, the claimant] in the alleged domestic violence incident and maintains he did not have contact with the victim of his index offence. The panel took into consideration that the Claimant he engaged well in interview with his prison offender manager and community offender manager in October 2024. Although there have been no concerns about his compliance with the regime in prison, he has been on ‘Active Care in Custody Treatment’ due to mental health concerns”.

12. On 26 February 2025, the Claimant’s previous solicitors, Purcell Parker, applied for an oral hearing to the Defendant pursuant to Rule 20 of the [Parole Board Rules 2019](#) (as amended and discussed below). In detailed representations, they submitted that the Claimant denied the further allegation which had a material impact on the overall assessment of risk and that the allegation and requirement to complete work around domestic violence would be central to any risk assessment, so that it was only fair to hear and obtain further evidence from the Claimant and professional witnesses. Further, it was highlighted that there were reported issues in relation to the Claimant’s learning style and his ability to understand written documents and that the Claimant was on an ACCT review. It was submitted an oral hearing would allow further exploration as to the relevance of these points and any impact on the assessment of the risk of serious harm. In particular, the solicitors submitted that:

“[W]hen this case was considered on the papers, Mr Brockie was not represented and no representations were submitted either by himself or a legal representative. We note that there are reported issues in relation to Mr Brockie’s learning style and his ability to understand documents. In fairness to him, he was not in a position to submit representations for a paper review, and as such has not been able to have a fair risk assessment in the absence of being represented at that time. The only recourse now is to seek an oral hearing. It is also evident there is a history of mental health concerns in relation to this case and following recall, it is reported that he was on ACCT review. In our submission, an oral hearing will allow further exploration as to the relevance of his mental health and the impact this may have on his assessment of risk of serious harm. And in fairness to Mr Brockie, this can only now be concluded by means of an oral hearing. The benefit of an oral hearing will allow Mr Brockie to provide evidence directly to the panel which will undoubtedly assist in their decision making.

An oral hearing will allow Mr Brockie to take part in a risk assessment process and will allow the Parole Board to uphold his legitimate interest in the proceedings. There is also merit in allowing his legal representative to challenge the professionals managing him, not only to explore the issues regarding potential sentence pathway, but the management of Mr Brockie in the community.

While there have been some concerns regarding mental health since returning to custody, Mr Brockie has otherwise demonstrated compliant behaviour and we are advised he is now an enhanced prisoner...He is working closely with his prison offender manager to complete any core risk reduction work, we also advise the targets set for him are unobtainable in his current establishment....”

13. However, in the impugned decision dated 5 March 2025 (‘Decision 2’) a duty member of the Defendant (‘DM2’) refused the application for an oral hearing. I quote their reasons in full:

“We refer to the provisional decision of your parole review recently issued by a single member panel dated 10 February 2025 as set out in the decision you are 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, legal representation is dated 26 February 2025. The basis for this request is that Mr Brockie had not submitted representations. However, it is clear from the dossier that he was advised of his right to do. The representations raise an issue regarding an allegation; however the paper panel decision maker did not place particular weight on this matter, focusing on Mr Brockie’s absconding from his approved premises and being unlawfully at large despite encouragement to hand himself in. The anticipated offending behaviour work relates to the index offence and was a licence condition that remained unfulfilled. The duty member did not find the important factor in dispute that an oral hearing is needed properly to make an assessment of risk or that you can put your views across effectively. 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.

The duty member did not find that important facts are in dispute, or that an oral hearing is needed to properly make an assessment of risk, or so that you can put your views across effectively. The representations submitted have been considered and the request has been refused for the reasons stated above.”

14. The Claimant changed solicitors and on 16 April 2025, the Claimant’s present solicitors, Bhatia Best Solicitors, served a Letter Before Action on the Defendant challenging the decision not to grant an oral hearing as procedurally unfair by reference to *Osborn* on the basis that there were factual disputes and complex risk assessment. Criticisms were made of the fairness of both Decision 1 and Decision 2, which have been pursued in the claim. As I explained, the Defendant and Interested Party have responded to say they remain neutral.

The Legal Framework and *Osborn*

15. Ordinary determinate prisoners are generally entitled to be released on licence having served the custodial period of their sentence (usually 40% or 50%) under s.246 Criminal Justice Act 2003 (‘CJA’). However, under s.254 CJA they are liable to be recalled by the Ministry of Justice before their sentence expires. Under s.255B, those serving a sentence under four years (now: in October 2024 it was under 12 months) are generally eligible for automatic release after 28 days (14 days if 12 months or less), but under s.255C others (including the Claimant) not released within 28 days must be referred to the Parole Board to consider release under s.255C. Under s.255C(4), the Parole Board must not direct release of a prisoner unless it is ‘satisfied it is not necessary for the protection of the public that the prisoner should remain in prison’. That is a function for the Parole Board under s.239 CJA which empowers the making of procedural rules, currently the [Parole Board Rules 2019](#) (as amended in 2024):

“18 Representations by and evidence of the parties

(1) A party who wishes to make representations to the Board must serve them on the Board and the other party....(b) at the time of referral if the case relates to [recall]

19 Consideration on the papers

(1) Where a panel is...consider[ing] the release of a prisoner, the panel must decide on the papers either that: (a) the prisoner is suitable for release; (b) the prisoner is unsuitable for release, or (c) the case should be directed to an oral hearing....

(5) Any decision made under paragraph (1)(a) which is not eligible for reconsideration under rule 28 is final.

(6) Any decision made under paragraph (1)(b) is provisional....

20 Procedure after a provisional decision on the papers

(1) Where a panel... has made a decision that a prisoner is unsuitable for release under rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing...

(2) A prisoner who makes an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of the decision....being sent

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

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

(7) Where the decision...is that the case should not be determined at an oral hearing, that decision must (a) be provided to the parties by the Board within 14 days of the application....under paragraph (2); and (b) include the reasons for that decision....

21 Decision on the papers after a direction for an oral hearing

(1)...[W]here ... a panel have directed that a case should be determined at an oral hearing under rule 19(1)(c) or 20(5), a panel... may direct that the case should be decided on the papers if an oral hearing is no longer necessary (a) in the interests of justice; (b) to effectively manage the case; or (c) such..reason as [thought appropriate]

28 Reconsideration of Decisions

(1) Subject to para.(2), where a decision has been made under rule 19(1)(a) or (b)... a party may apply to the Board for the case to be reconsidered on the grounds that the decision (za) contains an error of law; (a) is irrational; or (b) is procedurally unfair.

(2) Decisions are eligible for reconsideration only where the prisoner is serving: (a) an indeterminate sentence; (b) an extended sentence; (c) a determinate sentence subject to initial release by the Board... or (d) a serious terrorism sentence.”

28A Setting Aside Final Decisions

(1) The Board may set aside a final decision made under rule 19(1)(a) or (b)...

(3) A final decision may be set aside under paragraph (1) by a decision maker if (a) it is in the interests of justice to do so; and (b) one or more of the conditions in paragraph (4) are satisfied.

(4) The conditions are: (a) the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law or fact...”

16. So considering this statutory scheme of Rules 19 and 20, which is referred to as ‘Member Case Assessment’ (‘MCA’), a recalled prisoner can make representations immediately under Rule 18, the first decision about release or oral hearing under Rule 19 is either ‘provisional’, or ‘final’ (or later become ‘final’, so I call it a ‘Rule 19 decision’. The second decision under Rule 20 is not explicitly called ‘final’ or ‘provisional’ and I call it a ‘Rule 20 decision’:

i. A Rule 19 decision to release a prisoner under Rule 19(1)(a) is final unless liable to reconsideration under Rule 28 (which only applies to indeterminate, extended and similar prisoner, not other ‘ordinary’ determinate sentence prisoners like the Claimant).

ii. A Rule 19 decision to hold an oral hearing under Rule 19(1)(c) is effectively final, but it can be reviewed in the interests of justice if no longer necessary under Rule 21.

iii. A Rule 19 decision not to release under Rule 19(1)(b) is provisional (Rule 19(6)), but it becomes final (unless eligible for reconsideration under Rule 28, again not applicable here) if there is no application for a Rule 20 decision within 28 days (Rule 20(2)/(6)).

iv. If there is, the Rule 20 decision is limited to whether there should be an oral hearing, which must then be provided within 14 days (Rules 20(5)/(7)). If the Rule 20 decision is there should be an oral hearing, again this can be varied under Rule 21.

v. If the Rule 20 decision is to refuse an oral hearing, the Rule 19 decision becomes final (Rule 20(6)), unless reconsideration applies under Rule 28. But there is also a power to set aside that final decision under Rule 28A if *both* in the interests of justice *and* the decision not to direct release would not have been made but for an error of law or fact.

17. This is a marked change from the Parole Board's practice for recalled determinate sentence prisoners at the time of *Osborn*. Lord Reed explained at [14]-[15] it restricted the earlier practice to grant an oral hearing whenever a recalled determinate prisoner requested it following *R(West) v Parole Board* [2005] 1 WLR 350 (HL). The pre-*Osborn* process was:

"Where the prisoner asks for an oral hearing, the panel should: Consider whether it is possible to decide the issues and release on the papers; Otherwise, send the case for an oral hearing . . . Where a prisoner submits representations challenging his or her recall the panel should: Consider whether it is possible to decide the issues and release on the papers; or Refuse the representations . . . or Send the case to an oral hearing. *This should only be done when the panel is unable to decide the issues on the papers and concludes that they can only be determined after hearing oral evidence.*" (Original emphasis).

Lord Reed criticised the impact of this procedure on fairness in *Osborn* at [92]-[94]:

"92 It is also important that the administrative procedure adopted by the board should be well adapted to ensuring that an oral hearing is held when such a hearing is necessary. In that regard, it has to be said that the procedural rules in force at the material time, and the analogous rules currently in force, are liable to give rise to a number of problems...

93 First, the rule requiring a single member panel either to decide that the case should receive further consideration by an oral panel, or to make a provisional decision that the prisoner is unsuitable for release or for a transfer to open conditions, should not be understood as meaning that an oral hearing is appropriate only if the single member panel forms the provisional view that the prisoner is suitable for release or transfer.

I will come to the second, third and fourth problems Lord Reed discussed at [94]-[96] later.

18. Lord Reed also made observations more generally on procedural fairness in relation to oral hearings, summarised in *Osborn* at [2], which I shall quote in full:

"i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under [section 6\(1\) of the Human Rights Act 1998](#) ['HRA'] to act compatibly with article 5(4) [ECHR]...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...of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment...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...

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.

ix) The board's decision...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)...It will be prudent..to allow an oral hearing if it is in doubt whether to do so or not.

xii) The common law duty to act fairly...in this context, is influenced by the requirements of [Art.5(4) ECHR]. Compliance with the common law duty should result in compliance also with requirements of [Art.5(4) on] procedural fairness.

xiii) A breach of the requirements of procedural fairness under article 5(4) will not normally result in an award of damages under section 8 of the Human Rights Act unless the prisoner has suffered a consequent deprivation of liberty.”

19. In *Osborn* at [2(i)], Lord Reed made clear that an oral hearing should be directed ‘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’ (which I will refer to by the shorthand of ‘fairness requires an oral hearing’). The situations he listed at [2(ii)] were clearly not exhaustive hermetically-sealed categories (indeed ‘Categories A-D’ in the prison estate have a different meaning). Sometimes, fairness will require an oral hearing due to a mixture of different elements from (a)-(d), which I shall call ‘examples of’ or ‘factors’ where fairness requires an oral hearing, but ultimately that is the test. Indeed, as I will explain, this case has elements of (c) and (d), but whether that means overall that fairness requires an oral hearing is a separate point.

20. Against that context, I turn to my own analysis of the three questions I set out at the start:

i. Firstly, is it incorrect for a Rule 20 decision to review whether a Rule 19 decision was wrong, rather than reach its own view whether an oral hearing is appropriate ?

ii. Secondly, can procedural fairness require an oral hearing *only* to enable participation of the prisoner, even if there are no material disputed facts, no need for an oral hearing to assess risk and no realistic prospect of an oral hearing directing release ?

iii. Thirdly, what is the role of Common Law ‘pointlessness’ and s.31(2A) Senior Courts Act 1981 in the context of Parole Board decisions whether to have an oral hearing ?

The Relationship between Rule 19 and Rule 20 Decisions about Oral Hearings

21. The first wider question stems from Lord Reed’s observation in *Osborn* at [2(x)] that:

“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.”

As I said, two different views have been taken about this observation. Mr Ridding relied on a comment by HHJ Belcher in *R(McKilligan)*, another a ‘one-sided’ case involving a refusal to grant an oral hearing to a post-tariff Life prisoner, whose Counsel submitted it had been wrong to ignore that status. HHJ Belcher agreed, but then added at [36]-[37]:

“I would go further and infer his position as a post-tariff lifer has not been considered, because this Decision has been taken on a results-led approach....[It] is clearly focused on the possible outcome of an oral hearing. [It] 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* 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...in *Osborn*. ”

Whilst I respectfully agree with HHJ Belcher that Lord Reed in *Osborn* cautioned against a *purely* ‘results-led approach’ (e.g. at [2(iv), (v) and (ix)]), as I shall discuss later, Lord Reed should not be misunderstood as saying it is *irrelevant* whether an oral hearing would contribute towards the result of whether to release. However, I do not believe that is the point Lord Reed was making in *Osborn* at [2(x)], which slightly summarised an observation he went on to make at [94]: i.e. the second problem with pre-*Osborn* practice noted earlier:

“[I]t is important to understand the provisional nature of a decision made by the single member panel the prisoner is unsuitable for release. The right conferred on the prisoner, following that decision, to request an oral hearing is not a right of appeal. The prisoner does not have to demonstrate that the decision was (or may have been) wrong, what he has to persuade the board is simply that an oral hearing is appropriate”

Therefore, Lord Reed was not talking about the requirements of *procedural fairness* as such: he was *interpreting then Parole-Board policy* about its paper decision-making process. Notably, in dealing with the three cases before the Court in *Osborn* at [98]-[100], Lord Reed criticised references to an ‘appeal’ against the paper decision in two of them. But, as I shall explain, because of *Osborn*, processes have now changed and are found in the 2019 Rules.

22. However, in *R(Stubbs)*, a 2019 Rules case, they were not cited. Instead, Counsel relied on *Osborn* at [2(x)] to submit (in my terminology) that it was unfair for a Rule 20 decision to review whether a Rule 19 decision was ‘wrong’. UTJ Markus QC agreed at [22]-[23]:

“22. [T]he Board applied the wrong test in determining the request for an oral hearing. The decision-maker found that the paper decision had clearly laid out the facts, had correctly identified the review and conclusion and had found the Claimant had made limited progress in relevant respects. The decision-maker stated ‘legal representations were considered at the time of the MCA review’ (the paper decision)...[which] considered those submissions’ continu[ing] ‘The legal representations do not raise any issues which cause the Duty Member to put the paper decision into serious question’.

23. It is apparent from the above that the decision-maker wrongly approached the request as turning on whether the paper decision was correct. This was contrary to the principle at para.2(x) of...*Osborn* that the prisoner does not need to demonstrate that the paper decision, which is provisional, was wrong; the question is whether an oral hearing is appropriate. The decision did not address that key question. Instead, it approached its task as being one of review of or appeal against the paper decision.”

I respectfully agree that is consistent with *Osborn* at [2(x)]. The question is whether it is consistent with Rules 19 and 20 Parole Rules 2019, which *differ* from practice before *Osborn*.

23. That matters, as whilst procedural fairness is an objective matter for the Court (*Osborn* at [65]), what it requires depends on the statutory procedures in question, as Lord Mustill said in another prisoner rights case, *R v Home Secretary Exp Doody [1994] AC 531 (HL)* at 560:

“(1) where an Act...confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The[y] are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects... (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.”

24. Therefore, as Lord Mustill said in *Doody* at (4): an essential feature of the context relevant to what fairness demands is the legislation creating the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. That issue is essentially one of statutory interpretation. The modern approach was set out by Lord Hodge in *R(O) v SSHD [2023] AC 255 (SC)* at [29]-[31] and [41] (citing *Doody*). The Court is ‘seeking the meaning of the words that Parliament used’: an objective assessment of what was intended. So, the primary source for their meaning is the language of the legislation itself. Key statutory words or phrases must be read in the setting of the section, surrounding sections and the scheme of the legislation generally. The Court can consider ‘external aids’ to interpretation like Explanatory Notes or Memoranda to legislation which accompany it through Parliament, or legislative or case-law history, as well as interpretative assumptions and presumptions. However, they do not displace the meaning of clear language that does not produce absurdity.

25. Nevertheless, here I will start with the ‘external aids’ to Rules 19 and 20 Parole Rules 2019:

i. The predecessors of what are now Rules 19 and 20 of the 2019 Rules were introduced in Rules 14 and 15 the Parole Rules 2016. Its Explanatory Memorandum was clear at para.7.2-7.4 and 7.20-7.26 the 2016 Rules replaced the pre-*Osborn* 2011 Rules to align the Parole Board's 'Member Case Assessment' ('MCA') process developed after *Osborn*. It was said: to deliver oral hearings in a more efficient manner. A key feature of the MCA process is a triage system by which members assess cases'.

ii. the Parole Rules 2019 had a different purpose. The 2019 Explanatory Memorandum explained they Rules followed the contentious Parole Board decision to release John Worboys, quashed in *R(DSD v Parole Board [2018] EWHC 694 (Admin)*. Whilst the new Rules 19 and 20 were similar to their 2016 predecessors, two new additions were Rules 21 (cancelling oral hearings, to which the 'interests of justice' test was added in 2022) and Rule 28 reconsideration of final decisions which the Memorandum described as 'on the basis the decision was either irrational and/or procedurally unfair, similar to that required to launch a judicial review'. These were intended to allow correction or adjustment of decisions and give victims a voice in the process.

iii. This purpose was then carried through to the Parole Board (Amendment) Rules 2022 introduced along with the Police, Crime, Sentencing and Courts Act 2022, which modified s.239 CJA to give an explicit statutory basis to the existing Rules for 'provisional' and 'final' decisions and 'reconsideration'. The 2022 Rules also made minor changes to Rules 20 (on timing) and 21 (the new test for cancelling oral hearings). But it added Rule 28A, that its Explanatory Memorandum explained was to allow 'setting aside of final decisions where there has been an error of fact or law'. (The 2019 rules were also amended slightly in 2024 which does not affect this case).

Therefore, this external context to the 2019 rules shows that Rules 19 and 20 were originally introduced in 2016 to reflect the new MCA process developed in the wake of *Osborn*, but then overhauled in 2019 to introduce more internal review mechanisms, augmented in 2022.

26. This context is highly relevant to the interpretation of the language of Rules 19 and 20. They do not supply any test or threshold for when a case is suitable for an oral hearing (unlike the pre-*Osborn* process which focussed on factors such as disputed facts and risk assessment). So, the decisions under Rule 19(1) and Rule 20(5) is a matter of apparently open discretion. Therefore, the presumption is that they will be exercised fairly (*Doody*), namely consistently with *Osborn*. This is consistent with the scheme of Rules 19 and 20 in the setting of the rest of the 2019 Rules. In short, they do not codify *Osborn*, but are intended to be decisions taken consistently with it. Three further observations can be made about this statutory scheme:

i. Firstly, a Rule 19(1)(c) decision not to direct an oral hearing cannot be 'reconsidered' under Rule 28 and is not a 'final' decision that can be set aside under Rule 28A. The only challenge is to apply for an oral hearing – but not for release – under Rule 20(2).

ii. Secondly the apparently open discretion about oral hearings in Rules 19 and 20 seems to be a deliberate legislative choice not to have restrictive criteria as in Rules 28/28A.

iii. Thirdly, whilst Rule 28 is a review decision on public law grounds and Rule 28A on 'quasi-appeal' criteria, a Rule 20 decision does not use such language about Rule 19.

27. Therefore, the language of Rules 19 and 20, read in their statutory context, suggests that a Rule 19(1)(c) decision to refuse an oral hearing is effectively 'provisional', subject to the opportunity to apply within 28 days under Rule 20(2) for an oral hearing. If no such application is made, or it is refused under Rule 20(6), the Rule 19 decision becomes final. In short, Rule 20 is a 'second opinion on an oral hearing', not an appeal or reconsideration of the Rule 19 decision. That appears to be a legislative choice to adopt what Lord Reed in *Osborn* at [2(x)], whose wording can be slightly adapted to reflect the new statutory scheme:

“‘Paper’ decisions [under Rule 19] by single member[s]... are provisional. The right of the prisoner [under Rule 20] to request an oral hearing is not correctly characterised as a right of appeal. [T]o justify the holding of an oral hearing, the prisoner does not have to demonstrate the [Rule 19] 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.”

What is ‘appropriate’ has not been spelt-out in Rules 19 and 20, because it had already been spelt-out in *Osborn* at [2] generally, which is consistent with the MCA system enshrined in 2016. Therefore, I agree with the analysis of UTJ Markus QC in *R(Stubbs)* at [22]-[23]. That was a clear case where the Rule 20 decision went wrong in saying: ‘The legal representations do not raise any issues which cause the Duty Member to put the paper decision into serious question’. That said, of course it is permissible for the Rule 20 decision to reach the same view as the Rule 19 decision, provided the Rule 20 decision is *the decision-maker’s own judgment on the Osborn principles*, rather than *reviewing the correctness of the Rule 19 decision*.

28. Indeed, the duty of a Rule 20 decision-maker to reach their own judgment on whether fairness requires an oral hearing on the *Osborn* principles is *itself* an aspect of procedural fairness written-into the statutory scheme.. As explained in *Doody* principles (5) and (6), fairness often requires a duty to allow representations, so the individual must first know the gist of the case against them. Since a Rule 19 decision only ‘provisionally’ refuses release, or an oral hearing, a prisoner will know that gist, so can make representations under Rule 20 hoping to secure an oral hearing. As Lord Kerr and Lady Black explained in *R(Pathan)* at [137]-[141], this duty to inform and allow representations is a procedural duty, even if it produces a substantive benefit. But the benefit itself with Rule 20 decisions is itself *procedural* anyway: an oral hearing. Conversely, if the Rule 20 decision-maker does *not* reach their own judgment about an oral hearing and only reviews whether the Rule 19 decision was *wrong*, that unfairly limits the prisoner’s Rule 20 opportunity to make representations generally. It risks limiting them to the correctness of the Rule 19 decision. But Rule 20 representations may raise a matter important to whether fairness requires an oral hearing of which the Rule 19 decision-maker was unaware (an issue here), or that has happened since the Rule 19 decision. That does not make the Rule 19 decision ‘wrong’ - and if that were the test, the Rule 20 decision-maker would be ignoring relevant considerations simply because the Rule 19 decision-maker did not know about them. Moreover, treating a Rule 20 application as an ‘appeal’ entails wrongly assuming the Rule 19 decision is ‘presumptively correct’ as Lord Reed said in *Osborn* at [95]:

“The unfairness which results from the board’s treatment of the request for an oral hearing as an appeal is illustrated by the case of the appellant Booth, in which the [second-stage] assessor identified the critical question as being ‘whether the grounds of the appeal are justified and if an oral hearing would make any material difference to the paper decision’. The request for an oral hearing was thus decided on the basis that the earlier decision was presumptively correct. This is to put the cart before the horse. If fairness requires an oral hearing, then a decision arrived at without such a hearing is unfair and cannot stand. The question whether an oral hearing is required cannot...be decided on...a presumption that a decision taken without such a hearing is correct.”

All, that said, Rule 20 *also* enables concerns about the Rule 19 decision to be raised, which may themselves justify an oral hearing, as Lord Reed said in *Osborn* at [2(ii)(d)]:

“Where, in the light of the representations by...the prisoner, it would be unfair for a [Rule 19] ‘paper’ decision...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”

But even this does not make Rule 20 an ‘appeal’ against a Rule 19 decision, as it may be correct, but fairness still require an oral hearing for participation, as I discuss later.

29. Standing back, the Rule 19 and 20 decisions on procedural fairness chime with the fact procedural fairness is an objective matter for the Court, as Lord Reed said in *Osborn* at [65]:

“[D]icta.... suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the Board, reviewable by the Court only on *Wednesbury* grounds [are] not correct. The court must determine for itself whether a fair procedure was followed.... Its function is not merely to review the reasonableness of the decision-maker’s judgment of what fairness required.”

Therefore, there are consequently (up to) three stages of decision where the decision-maker must reach their own judgment whether fairness requires an oral hearing of the Parole Board: the Rule 19 decision, the Rule 20 decision and the Court itself on Judicial Review.

30. Unlike the Ministry of Justice, the Parole Board exercises judicial functions: *R(Hassett)* at [51]. Under Rule 20(7), if the Rule 20 decision refuses an oral hearing, it must give reasons within 14 days. This makes the Rule 19 decision final only challengeable under Rule 28 (not here), Rule 28A, or by Judicial Review. So Rule 20(7) reasons must meet Lord Brown's test in *South Bucks DC v Porter (No 2)* [2004] WLR 1953 (HL) at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved... The[y] must not give rise to a substantial doubt as to whether the decision-maker erred in law for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."

Of course, the Rule 20 Decision must give adequate reasons by this standard on all matters which it addresses. However, those will include requiring the Rule 20 decision not to leave 'substantial doubt' whether the decision-maker exercised their own judgment whether fairness required an oral hearing. That said, provided the Rule 20 decision is the decision-maker's own judgment on that issue, there may well be considerable overlap between the reasoning of the Rule 19 and 20 decisions about it. I examine later whether Decision 2 discharged that duty.

Procedural Fairness and Prisoner Participation

31. One reason why there may well be 'considerable overlap' between the Rule 19 and 20 decisions on whether procedural fairness requires an oral hearing is because the criteria for whether it does under the *Osborn* principles will be the same (save perhaps where it arises out of the Rule 19 hearing as envisaged in *Osborn* at [2(ii)] factor (d) as discussed). The long-standing examples of where fairness requires an oral hearing, reflected in pre-*Osborn* guidance following *R(West)* in 2005, were summarised by Lord Reed in *Osborn* at [2(ii)(a) and (b)]:

"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....

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... of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment... is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist...."

32. Most cases about challenges to refusal of an oral hearing (including this one) involve arguments about factors (a) and/or (b), for example, three High Court cases Mr Ridding cited, although they are all very different from the Claimant's case:

i. In *R(Stubbs)*, a prisoner on an indeterminate sentence for public protection ('IPP') was seeking release for the first time. A previous oral hearing had declined release recommending further interventions, but there was alleged to have been a deterioration in his conduct and he sought an oral hearing as he disputed those allegations and wanted to challenge offender managers' risk assessments. So, the case involved factors (a) and (b) in *Osborn* at [2(ii)]. UTJ Markus agreed fairness required an oral hearing on these grounds and because (as discussed) the Rule 20 decision had wrongly reviewed the correctness of the Rule 19 decision, which was only part of her overall reasoning.

ii. In *R(Somers)*, a Life prisoner over a decade post-tariff in 2021 sought an oral hearing for transfer to open conditions (not release), after the previous oral hearing in 2020 had led to transfer from Category A to B to enable preparatory work for eventual release. The prisoner contended an oral hearing was necessary to assess his risk to move to open conditions and dispute allegations about misconduct. In other words, once again, factors (a) and (b) in *Osborn* at [2(ii)] were in issue. Foster J held an

oral hearing was required and added at [55] that *Osborn* implied there was a presumption of an oral hearing with a post-tariff Life prisoner (showing how different from this case that was).

iii. In *R(McKilligan)*, another post-tariff Life Prisoner seeking release or open conditions sought an oral hearing, once again contending there were disputes of fact and a disputed risk assessment in the Offender Managers' dossier. This did not make recommendations for release or transfer, in accordance with a MoJ policy that had since declared unlawful, which affected the Parole Board's Rule 19 decision. Therefore, the case involved factors (a), (b) and (d) in *Osborn* at [2(ii)]. Unsurprisingly given *R(Somers)*, HHJ Belcher held that fairness required an oral hearing. Therefore, her comments in passing at [36]-[37] quoted above about a 'results-led approach' were only a very minor part of her reasons for an oral hearing. It is what Lord Reed said in *Osborn* that is crucial and which should not be misunderstood.

33. Yet Mr Ridding sought to draw parallels between these and the Claimant's case, that he argued involved factors in *Osborn* [2(ii)] (a) ('contested important facts') and (b) ('complex risk assessment'), referring to the Claimant's mental health. I accept if a prisoner's mental health is complex and there is a contested psychological evidence or assessment about it, that can fall within factor (b) where fairness requires an oral hearing. In *Osborn* at [105]-[109], Lord Reed noted the European Court of Human Rights in *Hussain v UK* [1996] 22 EHRR 1 considering Art.5(4) ECHR (i.e. someone deprived of their liberty by detention has the right to have its legality - and if unlawful release - decided speedily by a Court such as the Parole Board) said:

"59. [With] deprivation of liberty, where questions arise which involve...assessment of the applicant's character or mental state, it has held that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing.

60. [I]n a situation such as that of the applicant, where a substantial term of imprisonment may be at stake and where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness, article 5.4 requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses."

Hussain concerned an indeterminate prisoner, but in *R(Whiston) v SSJ* [2015] 1 AC 176 (SC) it was held Art.5(4) did not apply to determinate prisoners like the Claimant even recalled on licence. But as Lord Reed stressed in *Osborn* at [54]-[63], common law procedural fairness is not necessarily co-extensive with the ECHR. *Osborn* factor (b) can mean fairness requires an oral hearing for determinate prisoners, as in *R(Bennett) v Parole Board* [2019] ACD 139, where a prisoner with mental health issues on a 26-month sentence was recalled on licence for breach of hostel rules. HHJ Walden-Smith held fairness required an oral hearing due to (a) and (b): contested breaches and risk assessment given there was no psychological report. However, just because mental health is *relevant* to the decision whether to release, that does not mean factors (a) (contested important facts) or (b) (complex risk assessment) mean that *fairness requires an oral hearing*. As I shall explain, unlike in *R(Bennett)*, in this case an oral hearing is not required due to factors (a) or (b). In my judgment, the real question in this case is whether it falls within *Osborn* [2(ii)] factors (c) and/or (d), which I partially repeat:

"(c) Where it is maintained on tenable grounds that a face-to-face encounter with the boardis necessary...to enable him or his representatives to put their case effectively

d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a 'paper' decision... to become final without..an oral hearing..."

34. In *Osborn*, (d) relates to [96], which was Lord Reed's third concern with current practice:

"[S]ince the effect of the refusal of an oral hearing is that the provisional decision becomes final, it follows an oral hearing should be granted in any case where it would be unfair to the prisoner for that to happen. For example, if the representations made in support of the prisoner's request for an oral hearing raise issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner's future management in prison or on his future reviews, such as reports of poor behaviour or recommendations that particular courses should be undertaken to reduce risk, it will usually follow an oral hearing should be allowed for that reason alone, even if there is no doubt that the prisoner should remain in custody or closed conditions."

Rule 20 is not an ‘appeal’, but factor (d) shows fairness may require an oral hearing to correct disputed matters in a prisoner’s Rule 19 decision that may have a significant effect on his progression. (Minor corrections are more a matter for the Data Protection Act 2018).

35. In *Osborn*, Lord Reed linked (c) with [2(iv)] at [82] and I quote it with [83], [84], [88]-[89]:

“82..[T]he 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. An oral hearing should therefore be allowed 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 to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him....

83 When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional: a factor on which Lord Bingham placed emphasis in *West* [where Lord Bingham said at [30]:

“[A] short-term prisoner who has served half his sentence...[has] a statutory right to be free: a conditional right, but none the less a right, breach of which gives an enforceable right to redress..” [Lord Reed continued in *Osborn*:

84 It also has to be borne in mind that the issues which are considered by the board are not in practice confined to the question whether the prisoner should or should not be released or transferred. As I have explained, the statutory directions given to the board require it to consider numerous matters. The board’s findings in relation to these matters may in practice affect the prisoner’s future progress in prison, for example in relation to the courses which he is required to undertake and his future reviews.....

88 Whether a prisoner’s right to a fair hearing requires the holding of an oral hearing does not depend on his establishing that his application for release or transfer stands any particular chance of success: that approach would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success, and thus involves circular reasoning.

89 The point can be illustrated by the example of a prisoner who is unable to participate effectively in a written procedure due to learning difficulties. To decide whether he should be allowed an oral hearing on the basis of his prospects of success as they appeared on the basis of the official dossier and his written representations, if any, would plainly be unfair. The problem with reliance on the prospects of success, as they appear from the written material, as the touchstone of what fairness requires is not however confined to prisoners who are manifestly disadvantaged by a written procedure....”

Given references to ‘participation’ in [82] and [89], I call factor (c) ‘effective participation’, although it may overlap with factor (d) in cases where a disadvantage of the rule 19 decision being on paper is that it could not enable the ‘effective participation’ fairness required. As I will discuss, Mr Ridding’s main argument is that the Claimant’s case is an example of that.

36. Therefore, Lord Reed in *Osborn* was entirely clear that fairness may require an oral hearing to enable such ‘effective participation’ irrespective of the prospects of success of release. This was partly because an oral hearing may be relevant to future progress in prison ([84]), but also because some prisoners require an oral hearing to participate effectively in decision-making about themselves irrespective of its outcome, such as a prisoner with learning difficulties. To that extent, Lord Reed rejected a ‘purely results-led approach’, to adapt HHJ Belcher’s phrase in *RMcKilligan*). However, that does not mean he considered the result or potential outcome as *irrelevant*: factors (a) and (b) were relevant in all three cases decided in *Osborn* and indeed in *R(McKilligan)* itself. Instead, Lord Reed was saying whether fairness required an oral hearing did not *only* depend on whether it could affect the result e.g. release.

37. Just as with Lord Reed’s example in *Osborn* at [89] of a prisoner with learning difficulties who fairly needs an oral hearing to participate effectively, similarly, a prisoner with mental health conditions may in fairness require an oral hearing to participate effectively. That is analytically different from – but clearly may overlap with - whether their mental health gives rise to ‘contested important facts’: factor (a); or ‘complex risk assessment’: factor (b). For example, in *R(EG) v Parole Board [2020] EWHC 1457 (Ad)* it was accepted an oral hearing was required for a prisoner recalled from licence who lacked mental capacity to litigate or participate in Parole Board proceedings about re-release and May J held the Parole Rules 2019 allowed appointment of Litigation Friends. However, the facts need not be that unusual.

38. After all, procedural fairness in any context is not just focussed on the quality of decision-making in the result, as Lord Reed explained in *Osborn* at [69], citing the famous example by Fortescue J in *R v Chancellor of Cambridge, Ex p Bentley (1723) 2 Ld Raym 1334*, when he observed in Genesis, even Omniscient God gave Adam a hearing before expelling him and Eve from Eden. As Lord Reed added in *Osborn* at [68] and [70]:

“68. [J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken....

70..[R]esearch has established the importance attached by prisoners to a process of risk assessment which provides for their contribution.....[and] reveals the frustration, anger and despair felt by prisoners who perceive the board’s procedures as unfair and the impact of those feelings on their motivation and respect for authority ...Potential implications for...rehabilitation, and ultimately for public safety, are evident.”

These observations, while directed at prisoners seeking oral hearings generally, are in my view particularly apposite for prisoners whose mental health may be significantly affected by denial of an oral hearing; and/or those who cannot effectively participate without one. Nevertheless, none of this means whether an oral hearing will make a difference to the result is irrelevant. On the contrary it is very important. But it is not the only relevant consideration.

39. Having said that, as Lord Reed said in *Osborn* at [82], an oral hearing to enable ‘effective participation’ need only be held where, there are ‘*tenable grounds*’ to maintain that an oral hearing is ‘*necessary*’ for effective participation by a prisoner, such as his example at [89] of a prisoner with learning difficulties *unable* to participate effectively without an oral hearing. So, it is not enough for a prisoner to *assert* he needs an oral hearing on *untenable* grounds. As Lord Bingham said in *R(West)* at [35] (partly quoted in *Osborn* at [75]), procedural fairness does not require an oral hearing in every case where a determinate prisoner objects to recall and does not decline an oral hearing. I stress that fairness must *require* oral hearing.

40. Therefore, in short, I accept that procedural fairness may require an oral hearing *only* to enable participation of the prisoner, even if there are no realistic prospects of the Board ordering a prisoner’s release. One important example, squarely within the contemplation of Lord Reed in *Osborn*, is a prisoner who requires an oral hearing to participate effectively, e.g. due to cognitive impairment or mental health, even if those issues do not give rise to complex *risk assessment* or disputed facts otherwise requiring an oral hearing. I will consider whether that applies to the Claimant’s case later, after I resolve the last of the three wider issues: the role of ‘pointlessness’ and s.31(2A) SCA in oral hearings cases.

Common Law ‘Pointlessness’ and ss.31(2A)-(3F) Senior Courts Act 1981

41. The last wider issue is the role and relationship of Common Law ‘Pointlessness’ (as I shall call it) and s.31(2A)-(3F) Senior Courts Act 1981 (‘SCA’) in the context of Parole Board decisions whether to have an oral hearing. As I shall explain, these are two overlapping but analytically different concepts. But s.31(2A) is a statutory form of an instance of Common Law discretion.

42. ‘Pointlessness’ does not relate to the Common Law discretion to refuse relief, but is rather part of the principles of procedural fairness themselves, described in cases like *Doody* and *Osborn*. ‘Pointlessness’ was not considered in those cases but was discussed in detail by the Supreme Court in *Pathan*. The detailed facts are important to the principle. Mr Pathan was a blameless migrant skilled worker, dependant on his ‘sponsorship’ by his British employer for his leave to remain, who made an application to renew it in good time before it expired. However, he was not told either by the Home Office or his employer that the former had revoked the latter’s sponsorship licence, so Mr Pathan’s application to extend his leave based on *that* sponsorship was bound to fail, but it did not prevent him ‘switching’ to *another* sponsor. His application was inevitably refused and he sought judicial review on the basis of procedural unfairness by the Home Office (i) by failing to notify him of the cancellation so he could ‘switch’ sponsors; and/or (ii) failing to extend his leave to enable him to do so. The Supreme Court split two ways on issues (i) and (ii), with a majority of four Justices holding (i) was procedurally unfair; but a (different) majority of three holding (ii) was not ‘procedural’ at all, but substantive so not unfair. The two Justices in the majority on both issues, Lord Kerr and Lady Black, on issue (i) rejected the Home Office’s argument that it would have been ‘pointless’ to notify promptly, referring to observations in *Osborn* at [68] that procedural fairness is not just about the result and pointing out prompt notification would have given Mr Pathan time to ‘switch sponsors’.

“119. [T]he scope of inquiry into the duty to act fairly cannot be confined, in every instance, to circumstances in which the affected person aspires to change the decision-maker’s mind on the precise decision made. Where notice of the decision might prompt a change of direction which would achieve the aim of the person, albeit by a different route, there is an active inquiry to be had as to whether the duty is activated....

126 The...statements [in *Osborn*] do not, of course, relate directly to Mr Pathan’s case. But they serve as a useful reminder that utility is not the only yardstick by which to measure the duty to act fairly in communicating to an individual why (and more relevantly in this case when) a decision adverse to their interests has been or is to be taken....

131...[T]he duty to give notice of a decision to someone who will be adversely affected by it cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision. The duty to give notice is an accepted element of the duty to act fairly. Three months elapsed between [the employers’] sponsor licence being revoked and the refusal of Mr Pathan’s application. It cannot be suggested that informing him promptly of the revocation of the licence when it had been cancelled would not have made a difference...” (given his ability to ‘switch’).

43. There are three types of argument that a procedural step ‘would not make a difference’ in the Parole Board oral hearing context. Firstly, there is whether the Parole Board can decline a prisoner even an *opportunity to make representations at all* for an oral hearing as it would ‘not make a difference’ or be ‘pointless’ in the *Pathan* sense. The simple answer is no, since as I explained, Rules 19 and 20 provide a statutory mechanism for a provisional decision then opportunity to make representations. But ‘Pointlessness’ can only apply (albeit even then, rarely) to Common Law procedural fairness - it cannot exclude a prisoner’s statutory rights.

44. Secondly, there is whether a Rule 19 or 20 decision can *prospectively* reject a request for an oral hearing as it would ‘not make a difference’ or be ‘pointless’ in the *Pathan* sense. For example, I asked Mr Ridding whether the Board could decline to decline an oral hearing on the basis it would make no difference or be ‘pointless’ in the *Pathan* sense, not simply to a prisoner’s prospects of release or transfer, but even to his future treatment in prison such as future treatment or work, as discussed by Lord Reed in *Osborn* at [84] quoted above. But as Mr Ridding said, in *Pathan*, Lord Kerr and Lady Black at [126] agreed with Lord Reed in *Osborn* that ‘utility’ is not the only yardstick’, e.g. fairness may require an oral hearing for ‘effective participation’ as I discussed and also given what Lord Reed said in *Osborn* at [88]:

“Whether a prisoner’s right to a fair hearing requires the holding of an oral hearing does not depend on his establishing that his application for release or transfer stands any particular chance of success: that approach would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success and thus involves circular reasoning.”

45. Thirdly, there is the related but analytically distinct issue from ‘Pointlessness’ of whether a procedural failing can be adjudged by the Court *retrospectively* to have ‘made no difference’: called ‘the ‘*Simplex* principle’ after *Simplex v SSE* (1988) 57 P&CR 306 (CA). The Court of Appeal in *R(Goring DC) v South Oxfordshire DC [2018] 1 WLR 5161* summarised it at [53]:

“[A Court has] to consider whether there was any realistic possibility of the...decision being different but for the error of law: see Lord Carnwath’s judgment[s] in *Walton v Scottish Ministers [2013] PTSR 51* [111]-[112]...*R(Champion) v North Norfolk DC [2015] 1 WLR 3710* [54]-[66] and *De Smith’s Judicial Review*, 8th ed (2018), paras 18-047-050..”

46. As also confirmed in *R(Goring)* at [53], the *Simplex* principle still exists, but from April 2015, it has been partly superceded by ss.31(2A)-(3F) SCA, which I set out effectively in full:

“31(2A) The High Court (a) must refuse to grant relief on an application for judicial review, and (b) may not make an award [for damages] under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied....

(3C) When considering whether to grant leave to make an application for judicial review, the High Court— (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and (b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave..” [ss.31(3E)-(F) do for (3D) what ss.31(“B0-(2C) do for s.31(2A)].

47. There is now a considerable body of guidance from the Court of Appeal on ss.31(2A)-(3F) in planning cases, though none from the prison context so far as I am aware. So, it is all the more important to note that guidance and how it may apply in the present context, which is so often characterised by ‘one-sided’ judicial review applications where the MoJ and Parole Board do not participate, especially given this ‘no substantial difference’ point can be raised of the Court’s own motion at permission with s.31(3C) as well as at substantive stage with s.31(2A):

i. In *R(Plan B) v SoST [2020] PTSR 1446* the Court of Appeal held the Government’s failure to consider the Paris Agreement in approving Heathrow expansion (which was later reversed by the Supreme Court) was not saved by s.31(2A). It said at [272]–[273]:

“272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather... of duty provided the statutory criteria are satisfied. This is subject to a discretion...nevertheless to grant a remedy on grounds of ‘exceptional public interest’. Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely ‘highly likely’. And thirdly, it does not have to be shown the outcome would have been exactly the same; it will suffice that it is highly likely the outcome would not have been ‘substantially different’ for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is ‘highly likely’ that the outcome would not have been ‘substantially different’ if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, ‘the threshold remains a high one’...”

ii. In *R(Goring)*, the Court of Appeal held s.31(2A) (and *Simplex*) applied to a planning authority’s failure to consider environment assessment and said at [47] and [55]:

“47. In our view...the proposition the s.31(2A) duty applies only to ‘conduct’ of a merely ‘procedural’ or ‘technical’ kind, and not also to ‘conduct’ that goes to the substantive decision-making itself, is a surprising concept. The duty has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in decisions of this court... ‘[C]onduct’ in s.31(2A) is a broad one and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to ‘procedural’ conduct. Nor, in our view, is such a qualification implied. But this, we must stress, is not a necessary conclusion for the purposes of our decision on the application to reopen.

55. It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker... If, however, the court is to consider whether a particular outcome was ‘highly

likely' not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law."

iii. In *Gathercole v Suffolk CC* [2021] PTSR 359 (CA), another case where s.31(2A) rescued a technical deficiency in a planning decision, Coulson LJ said at [38]:

"It is important a court faced with an application for judicial review does not shirk the obligation imposed by s.31(2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic."

iv. In *R(Bradbury) v Brecon Beacons Park* [2025] 4 WLR 58 (CA) Lewis LJ held once again that s.31(2A) saved a technical failure in a planning decision which made no difference to the decision. He observed:

"70. [s.31(2A)] provides a court must refuse to grant a remedy on a claim for judicial review if it appears to the court that (1) it is highly likely (2) that the outcome for the claimant would not be substantially different (3) if the conduct complained of had not occurred. The outcome for the claimant is, usually, the decision or other measure that the public authority has taken. The 'conduct complained of'... is the legal error or flaw which would justify the grant of a remedy in judicial review (unless a remedy was refused by reason of s. 31(2A) or for some other discretionary reason).

71. [With] s.31(2A) the court is concerned with evaluating the significance of the error on the decision-making process. It is considering the decision the public body has reached and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error. It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decision-maker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of s.31(2A) are unlikely to be satisfied....

74 [s.31(2A)] emphatically does not require the court to embark on exercise where the error is left out of account and the court tries to predict what the public body would have done if the error had not been made. Approaching s.31(2A) in that way would run the risk of the court forming a view on the merits and deciding if it thinks that the public body would reach that view if it had not made the error. Rather, the focus should be on the impact of the error on the decision-making process the decision-maker undertook, to ascertain whether it is highly likely that the decision the public body took would not have been substantially different if the error had not occurred."

v. Finally, on the same day, in *R(Greenfields) v IoW Council* [2025] EWCA Civ 488 , Singh LJ (sitting with Lewis LJ) held there was inadequate evidence in that case to enable s.31(2A) to save a failure in a planning decision. He said at [105]-[106]:

"105. If [s.31(2A)] was to be made good it was incumbent upon the respondent to give a full and clear explanation of how certain figures were arrived at..."

106. The Court should...in a witness statement) be given a full, accurate and clear explanation of the decision-making process used by the public authority concerned and should not have to depend upon submissions...”

48. The only case I am aware of about Parole Board oral hearings where s.31(2A) has been analysed in any detail is *R(Stubbs)*, predating most of those cases. UTJ Markus QC linked s.31(2A) back to a case on ‘the *Simplex* principle’ in *R v Thames Valley Police, ex p Cotton* [1990] IRLR 344 (CA):

“36....[A]s explained by Bingham LJ in *Cotton* at 352, courts should be reluctant to conclude that the same result would have occurred if a person had not been deprived of an adequate opportunity to put his case. The reasons...include that: (i) experience shows that which is confidently expected is by no means always that which happens; (ii) the court should avoid straying from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of reviewing the merits of a decision, (iii) this is a field in which appearances are generally thought to matter, and (iv) a right to be heard is not to be lightly denied.

37. Applying the principles in *Osborn* and in the light of my reasoning above, it was unfair to refuse an oral hearing. [It] is of itself an important right, even if it could not change the outcome (see...paras.68 to 70 of *Osborn*) and so this is a materially different outcome for the Claimant. In any event, to the extent that it is relevant to consider what the outcome of the parole review would have been following an oral hearing, I cannot say that it is ‘highly likely’ that the ultimate outcome of the parole review would have been the same. Given the disputed facts, the range and complexity of the issues to be decided and the assessment to be made, it is impossible to predict.”

In my view, with one important caveat, the principles UTJ Markus QC in *R(Stubbs)* at [36] applied by analogy from *Cotton* are consistent with Court of Appeal authority on s.31(2A). As explained in *R(Plan B)*, s.31(2A) is a modified form of the *Simplex* principle, so subject to those changes (e.g. duty not discretion, hence the point in *R(Gathercole)*), guidance on the *Simplex* principle can carry over into to s.31(2A). Indeed, the point Lord Bingham made in *Cotton* about the Court not straying into reviewing the merits was echoed for s.31(2A) in *R(Plan B)*, *R(Goring)* and *R(Bradbury)*. (This is why decision-maker evidence on s.31(2A) may be (but is not always) necessary as said in *R(Greenfields)*). Indeed, the other points made in *Cotton* also reflect basic principles of procedural fairness reflected in *Pathan* and *Osborn*.

49. Indeed, in *R(Stubbs)* at [37], UTJ Markus QC touched on a key point on s.31(2A) and *Osborn* which is worth unpacking. If it was unfair on the criteria in *Osborn* at [2] (‘the *Osborn* criteria’) not to have an oral hearing, on those same *Osborn* criteria, the relevant ‘outcome’ under s.31(2A) is not release, but *an oral hearing itself*. But it is ‘binary’: there is either an oral hearing or not: there is no clear ‘not substantially different’ alternative to it, as there may be to many other public law decisions. So, applying Lewis LJ’s three-step analysis of s.31(2A) in *R(Bradbury)* at [70]: to refuse permission or relief under s.31(3D) or (2A), the Court would have to be satisfied: (1) it is highly likely; (2) the claimant would still not have had an oral hearing; (3) if the conduct complained of (i.e. the unfairness) had not occurred. But (3) creates a problem if it is objectively unfair not to have an oral hearing on the *Osborn* factors, of the kind discussed in *R(Plan B)* at [273]. How can a Court be satisfied *both* that it was objectively unfair to refuse an oral hearing *and* at the same time that it is highly likely *that an oral hearing* would still have been refused in the absence of unfairness? But the caveat is this logical problem with s.31(2A)-(3F) SCA only applies if the Court finds it was objectively unfair on the *Osborn* criteria *to refuse an oral hearing itself*. If there is some *lesser* ‘technical’ procedural unfairness, or *fair but irrational decision-making* (on the *Wednesbury* test, albeit with ‘anxious scrutiny’ *R(Brown) v Parole Board* [2018] EWCA Civ 2024 at [54]), there is logical room for s.31(2A) to apply. After all, ‘conduct’ (the legal error: *R(Bradbury)* at [70]) can include either the substantive decision or procedural steps up to it: *R(Goring)* at [47].

50. For example, as I explained earlier, if a Rule 20 decision-maker unfairly fails to exercise their own judgment on whether fairness requires an oral hearing, that does not itself mean that objectively fairness requires an oral hearing under the *Osborn* criteria. So, if the Court concludes that refusal of an oral hearing was not objectively unfair, then logically, it may well be satisfied that it is ‘highly likely’ that an oral hearing would still have been refused without the more ‘technical’ unfairness – i.e. if the Rule 20 decision-maker *had* exercised their own judgment. Just because ‘conduct’ in s.31(2A) need not only be ‘technical’ (*R(Goring)* at [47]), if it is only ‘technical’ in a loose sense (it is not an analytic category or term of art), that is a paradigm case for s.31(2A) to apply (*R(Gathercole)* at [38]-[39]). However, of course, not all failures to exercise their own judgment by Rule 20 decision-makers will be ‘technical’ in that loose sense. As Lord Reed explained in *Osborn* at [95], if they treated the Rule 19 decision as ‘presumptively correct’ or failed to engage with representations properly, it may well not be possible to conclude it is highly likely they would have refused an oral hearing had they exercised their own judgment,

because as Lewis LJ said in *R(Bradbury)* at [74], the Court cannot speculate about what decision the decision-maker might have made if they had not made an error, but rather whether it can be satisfied that it is highly likely that if the actual legal error had not occurred, the actual decision would not have been substantially different, which is a rather narrower and more focussed exercise. However, for example, the Rule 19 decision-maker may have fairly refused an oral hearing and the *only* error by the Rule 20 decision-maker may have been to say the Rule 19 decision was not wrong about an oral hearing, rather than reach an independent judgment about it. In that case, even without the sort of witness statement discussed in *R(Greenfields)* (which is very unlikely when the Parole Board does not actively defend Judicial Review claims), it may well be legitimate for the Court to infer that it is highly likely if the Rule 20 decision-maker had exercised their own judgment, they would still have come to the same (fair) conclusion as the Rule 19 decision did. As I shall explain, this distinction is a live issue in the present case, to which I will now turn.

Conclusions

51. I have set out the background earlier, so I will proceed straight to the Rule 19 decision in this case ('Decision 1'). There were no initial representations by the Claimant on recall under rule 18, so its decision-maker ('DM1') recorded the Claimant's offending history included offences of drugs, harassment, threatening behaviour and non-compliance with Court Orders. Indeed, that was the context for him having a restraining order against his partner. The Claimant then breached that restraining order in a serious manner by an assault and criminal damage, which is why the sentencing Judge imposed a 49-month sentence. So, it was entirely justified for DM1 to observe the index offences and previous convictions indicated that the Claimant's risk factors included poor anger and emotional regulation, especially within intimate relationships; use of violence; substance misuse; mental health and poor decision-making.

52. This also explains why, when the Claimant was released in July 2022, it was expected that he would complete his Domestic Abuse or 'Building Better Relationships' programme when on licence. However, as DM1 noted in Decision 1 which I re-quote for ease:

"His licence was revoked on 31 July 2022 after he absconded from approved premises. The police disclosed there had been an alleged domestic violence incident on 30 July 2022 after a female reported having been assaulted by him. No further action was taken but he remained unlawfully at large until 14 October 2024. It was said that he was encouraged by family members to attend the police station to hand himself in due to the impact of being at large on his mental health."

DM1 went on to say the Claimant's conduct gave rise to concerns about his decision-making, but his surrender did show maturity. Decision 1 also recorded – without rejecting it – that:

"Mr [Brockie] denied any involvement in the alleged domestic violence incident and maintains he did not have contact with the victim of his offence."

53. Whilst Mr Ridding suggested that Decision 1 must have taken into account the (later dropped) allegation made by the Claimant's former partner which coincided with his disappearance in July 2022, in fact the DM1 specifically noted it – but also the Claimant's denial of it – and actually based the conclusion not to order release in Decision 1 based upon the Claimant's offending history followed by his absconding for two years. Likewise, it does not seem to me there can be any criticism whatsoever of the analysis of future risk in Decision 1:

"The community offender manager did not consider that Mr Deakin's risk could be safely managed in the community until he has completed further work to address his areas of risk, which should include work to address mental health, thinking skills and behaviour within relationships. The community offender manager does not assess he is likely to comply with a further period on licence until he has improved his thinking skills. An assessment of independence has therefore been recommended... Although no further action was taken, he appears to have disengaged at the same time a report was made to the police from a female who alleged he had assaulted her. He has not completed work to address healthy relationships and emotional regulation within relationships, which appears from his history to be his main area of risk and directly linked to his risk of serious harm to the public, especially intimate partners. At the present time the panel concluded there would be a high risk of non-compliance if he were released on licence. If he is not complying with licence conditions his risk of serious harm cannot be safely managed in the community. If he were to enter into a new intimate relationship without having addressed his risks in this area, there may be an increase in risk of serious harm to an intimate partner. Given the need for work to address his thinking skills and behaviour within relationships as well as the risk of non-compliance, the panel could not justify a release decision or referral to oral hearing. He is therefore appropriately located in custody... to protect the public."

54. Whilst I return to the issue of the oral hearing, DM1's analysis refusing to release seems to me to be entirely rational and indeed compelling. Even leaving aside, as the first stage decision-maker plainly did, the question of the truth or otherwise of the allegation, save for the fact that it coincided with the Claimant's disappearance for two years, he had been released on licence in the expectation of undertaking work in the community. He did not undertake that work, indeed he absconded for two years. It would have been astonishing, if DM1 in February 2025 had considered the Claimant a suitable candidate for release only a few months after he had been returned to custody. Indeed, DM1 was scrupulously fair in their analysis which did not rely either upon any disputed allegation nor go wrong in assessing risk, given so much work still needed to be done. Indeed, Decision 1 also dealt (briefly) with an oral hearing, saying:

"In making this decision the panel has considered this case against the principles set out in the case of *Osborn*...concerning oral hearings. The panel does not find that there are any reasons for an oral hearing. However, if it is believed that this case should proceed to an oral hearing, further representations should be submitted to the Parole Board within 28 days of receipt of this decision outlining why it should proceed to a hearing."

55. In response to that, the Claimant then did instruct solicitors, who then made detailed representations why the case required an oral hearing. I have quoted from those extensively already, but the key points were plainly intended to raise *Osborn* factors (c) and (d). Having explained the Claimant had not made Rule 18 representations because he was unrepresented and he had 'issues with his learning style and ability to understand documents' and that he had a history of mental health concerns and was under supervision in prison as a result, adding that

"An oral hearing will allow Mr Brockie to take part in a risk assessment process and will allow the Parole Board to uphold his legitimate interest in the proceedings. There is also merit in allowing his legal representative to challenge the professionals managing him, not only to explore the issues regarding potential sentence pathway, but the management of Mr Brockie in the community."

I note the Claimant's solicitor's submissions, well-judged as they were, did not say that an oral hearing might persuade the Parole Board to release him immediately. Their point was that Rule 19 decisions were premised on the basis that a prisoner would have an opportunity to make representations, but they contended the Claimant had not been able to make those representations when unrepresented due to his cognitive limitations. His solicitors argued the Defendant needed hear the Claimant's side of the story at an oral hearing, not to consider his release, but rather what work was appropriate and the timescales for that work to be done. Equally realistically, Mr Ridding submitted, the argument for an oral hearing was not that it would be likely to order release (in my view there was no realistic chance of that at all), but that as the Claimant only had just over a year to go before he is released automatically at the end of his sentence, given how things went badly wrong after he was released on licence, an oral hearing was an important part of the planning work with the Claimant and ensuring that his release is successful rather than unsuccessful. That in itself would be a valuable exercise.

56. There is considerable force in the need for proper release planning for the Claimant. However, I am not myself convinced that fairness requires an oral hearing for that purpose, given there are other ways that such planning could be undertaken. In relation to the *Osborn* criteria:

a. In relation to *Osborn* factor (a), there are no important facts in dispute. The Claimant denies whatever his ex-partner alleged (which remains unclear) and as Decision 1 observed, its only relevance is that it prompted the Claimant to abscond for two years. There can be no dispute that undermines confidence in his ability to comply with conditions if re-released and means he did not complete the work that was required. If anything, as Decision 1 also observes, it simply adds to the work the Claimant needs to do.

b. In relation to *Osborn* factor (b), risk assessment for the Claimant, even with his mental health, is not sufficiently complex for fairness to require an oral hearing. As Decision 1 said, it is clear what work the Claimant needs to do and he must simply undertake it. An oral hearing cannot be said to be necessary (at least at this stage) for release planning, which in any event must depend on how the Claimant responds to the work he must do. Hopefully, the Claimant's surrender to his licence and his compliance in prison bodes well.

c. Subject to one point, there do not seem to be sufficient 'tenable grounds' that an oral hearing is 'necessary' to enable 'effective participation' either. Assuming the Claimant was not able to participate effectively in Decision 1, he instructed solicitors who said everything that could be said for an oral hearing on his behalf. That point is *provided the representations were considered*

and answered in the Rule 20 decision, then those representations sufficed to ensure ‘effective participation’ for the Claimant given the issue under consideration is not realistically release, nor even complex risk assessment, or sentence planning but have some planning for release. An oral hearing of the Parole Board is not ‘necessary’ for ‘effective participation’ by the Claimant in release-planning, rather than with the usual planning methods for short-term determinate prisoners.

d. Likewise, whilst the Claimant was not able to participate effectively in representations before Decision 1, there is nothing in Decision 1 which is unfair or incomplete in a way where it would be unfair for it to become final – it is scrupulously fair and balanced. If this were a Judicial Review of Decision 1, I would have unhesitatingly dismissed it.

57. For those reasons, one would think DM2 had a relatively straightforward task in Decision 2. Indeed, on first reading, they seemed to have discharged it. I re-quote and italicise the key part

“We confirm you have requested an oral hearing...*The basis for this request is that Mr Brockie had not submitted representations. However, it is clear from the dossier that he was advised of his right to do. The representations raise an issue regarding an allegation. However, the paper panel decision maker did not place particular weight on this matter, focusing on Mr Brockie’s absconding from his approved premises and being unlawfully at large despite encouragement to hand himself in.* The anticipated offending behaviour work relates to the index offence and was a licence condition that remained unfulfilled. *The duty member did not find the important factor in dispute that an oral hearing is needed properly to make an assessment of risk or that you can put your views across effectively.* 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..” (my italics)

However, I have been persuaded by Mr Ridding that DM2 slid into the error - discussed at length already - of a Rule 20 decision-maker reviewing the Rule 19 decision rather than exercising their own independent judgment. On the crucial issues, DM2 said: ‘*The representations raise an issue regarding an allegation. However, the paper panel decision maker did not place particular weight on this*’ and ‘*The duty member [i.e. DM1] did not find the important facts in dispute [,] that an oral hearing is needed properly to make an assessment of risk [,] or that you can put your views across effectively.*’ So, not quite as clearly as in *Stubbs*, Decision 2 is characterised by language of review not independent judgement and is procedurally unfair. Fairness requires under Rule 19 and Rule 20 a two-stage process where two different members of the Parole Board reach their own independent views on the question of whether there should be an oral hearing. It is unfair for the rule 20 decision-maker simply to review the Rule 19 decision’s analysis, especially where representations have been made to the Rule 20 decision-maker that the prisoner was legitimately not able to participate effectively in the Rule 19 process. So, I uphold the claim on normal procedural fairness grounds, but not the *Osborn* criteria.

58. Moreover, on that question, Decision 2 in this case simply did not engage at all with the question of whether fairness required an oral hearing to enable the Claimant to participate effectively in release-planning bearing in mind he was not able to contribute to Decision 1. Decision 2 simply says ‘he was advised of his right to do so’. That is totally inadequate and unfair and fails to grapple in any meaningful way with the submission that the Claimant could not effectively exercise his right to do so, albeit through no-one’s fault. It can hardly be said to be ‘pointless’ in the *Pathan* sense for DM2 to engage with Rule 20 submissions – it was DM2’s job. They may well have reached the conclusion that fairness did not require an oral hearing given planning alternatives for the reasons I have discussed, but DM2 did not do so.

59. In those circumstances, whilst I cannot properly determine that fairness required an oral hearing exercising my own judgment under *Osborn* principles, so cannot properly order the Defendant to arrange an oral hearing, I can and will quash Decision 2. It did not fairly decide that fairness did not require an oral hearing and did not engage properly with the representations about that. Therefore, even though – unlike *Stubbs* – it may be logically open to me to find that s.31(2A) SCA applies in this case, I cannot find that it is ‘highly likely’ that the outcome for the Claimant would not have been substantially different had the unfairness not occurred.

60. Therefore, Decision 2 will have to be re-made. However, I am not saying that the new Rule 20 decision it must direct an oral hearing, simply that it must come to a lawful decision about it, one way or the other. I hope the Defendant can produce a Rule 20 decision which is a clear and comprehensive consideration in the judgment of the Parole Board member themselves about whether fairness requires an oral hearing. They should focus particularly on whether the Claimant’s legitimate interest in participation – particularly given his literacy problems and his impending release in just over a year – means that fairness requires an oral hearing, which may also be a valuable exercise, even if release is not ordered. I make no order for costs in the

circumstances save for public funding assessment of the Claimant's costs because, sensibly, Mr Ridding did not seek a costs order because the Parole Board and the Secretary of State did not participate in the proceedings.

(This Judgment has been approved by the Judge.)

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