Neutral Citation No. [2011] NICA 6 | *Ref:* **COG8105**

Judgment: approved by the Court for handing down | *Delivered:* **6/4/11**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

Reilly's (James Clyde) Application [2011] NICA 6

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JAMES CLYDE REILLY

AND IN THE MATTER OF A DECISION BY THE PAROLE BOARD ON 28 JULY 2009

_____

Before: Higgins LJ, Coghlin LJ, The Rt Hon Sir Anthony Campbell

_____

COGHLIN LJ (delivering the judgment of the court)

[1] This case concerns an appeal by the Parole Board and the Secretary of State for Justice ("the Secretary of State") from a decision of Treacy J delivered on 13 April 2010 that the decision of the Parole Board ("the Board") dated 20 July 2009 not to grant the respondent an oral hearing should be quashed on the ground that it violated Article 5(4) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") and common law and a further decision relating to consequential remedies to be afforded to the respondent delivered by the same learned trial judge on 10 May 2010. For the purposes of this appeal Mr Jason Coppel appeared for the appellants while the respondent was represented by Mr Macdonald QC and Mr Hutton. The court is grateful to all counsel concerned for their exhaustive research and the clarity of their oral and written submissions.

Background facts

[2] The respondent, who is now 42 years of age, was remanded in custody on charges of robbery, attempted robbery and possession of an imitation firearm on 28 March 2002. He was subsequently convicted and sentenced, on 28 January 2003, to an automatic sentence of life imprisonment with a tariff of six years and eight months. His tariff expiry date was calculated as being 20 September 2009.

[3] The offences of which the respondent was convicted concerned the attempted robbery of a post office in St John's Wood, North West London on

26 March 2002 and, on the same date, shortly thereafter, the robbery of a post office in Hampstead High Street, North West London. The respondent has 19 previous convictions including two previous convictions for robbery. The respondent was born in Northern Ireland and, while he was initially imprisoned in various institutions in England and Wales, on 12 December 2007 he was transferred to HMP Maghaberry as a consequence of an order by the Secretary of State made in accordance with paragraph 1 of Schedule 1 to the Crime (Sentences) Act 1997 ("the 1997 Act"). That transfer was a restricted transfer subject to a condition that the respondent was to be treated for the relevant purposes as if he remained subject to the provisions applicable for those purposes under the law of the place from which the transfer was made, namely, England and Wales, in accordance with Part II paragraph 6 of the same schedule. By virtue of paragraph 6(2)(*b*) "the relevant purposes" include the purposes of his detention under and release from his sentence and, where applicable, the purposes of his supervision and possible recall following release.

[4] In December 2006, prior to his transfer to Northern Ireland, a pre-tariff expiry review of the respondent's case was carried out by the Parole Board for the purpose of considering the suitability of a move to open conditions and identifying any areas of concern to be tackled or resolved before the next review. The Parole Board did not recommend the respondent's transfer to open prison conditions noting that the respondent had exhibited regular problematic behaviour, that there was a long list of unaddressed risk factors and that he had taken part in very little offending behaviour work. A covering letter from the National Offender Management Service ("NOMS") confirmed that the respondent should remain in closed conditions and that his next review by the Parole Board would take place in September 2009. The following reasons were specified:

> "
>
> - To show a sustained period of good behaviour
>
> - To remain adjudication free
>
> - To undertake work on drug relapse prevention e.g. RAPT
>
> - To undertake the cognitive self-change programme, victim awareness and the enhanced thinking skills course
>
> - To undertake offending behaviour work on all relevant risk factors."

[5] In or about the Spring of 2009 the respondent was furnished with a copy of a dossier which had been sent by the Lifer Management Unit at HMP Maghaberry ("the LMU") to the Parole Board. That dossier contained various documents and reports including reports from the Governor at HMP Maghaberry, Mr Gallagher, a Prison Psychologist, the Probation Board for Northern Ireland and the Dunlewey Substance Abuse Centre. No submissions were made by the respondent in response to the receipt of that dossier.

[6] In or about June 2009 the respondent received an undated document entitled "Intensive Case Management (ICM) Paper Decision Form (2009 Version 1). That document bore a sub-title "Prison No. GJ8240 Tariff Expiry ALP Review - Notification of Paper Decision; please read carefully" and read as follows:

> "The Parole Board has decided not to direct the release (or recommend your transfer to open conditions if applicable). This is a decision taken on the papers and the full decision is attached.
>
> You should read the decision very carefully and you are advised to discuss this with your legal representative as soon as you can. You can appeal the decision and ask for a full oral hearing before a panel of the Parole Board if you believe that there are significant and compelling reasons for this. You have four weeks (28 days) from the date of this letter to decide if you wish to lodge an appeal.
>
> An appeal will be considered by the Board but may not necessarily result in an oral hearing being granted. It is important that you give full reasons for why you believe that an oral hearing is necessary, what witnesses might be needed, and what they are likely to add to what they have written in reports. You do not have a right to an oral hearing and need to say why it is necessary in your case."

That covering letter was signed by the "Oral Hearings Team, Parole Board" and enclosed with it were a number of forms whereby the respondent could signify whether or not he accepted the decision and a section where he was asked to "set out your reasons for requesting an oral hearing."

[7] Also included with the covering letter and forms was a document recording the decision by a panel consisting of a single member of the Parole Board expressed in the following terms:

"1. **Decision of the Panel**

The Panel considered this case on the papers and concluded that the matter should not proceed to an oral hearing. This decision was based on the following reasons:

2. **Evidence considered**

The dossier supplied to the panel comprised 88 pages. The dossier did not contain any representations from or on behalf of Mr Reilly and none were submitted separately.

3. **Analysis of offending**

In January 2003 at age 35 Mr Reilly was sentenced to life imprisonment for robbery, attempted robbery and possession of an imitation firearm with intent. The tariff was set at six years and eight months which will expire in September 2009.

Mr Reilly was involved in the robbery of two post offices with two co-defendants. They entered the first office, brandishing a weapon at members of the public but left empty handed. They were wearing balaclavas at the time. A short while later there was a second attack, on another post office from which they stole just over £2,000 and attempted to escape on foot but were arrested. Mr Reilly had brandished a weapon which had the appearance of a sawn off shotgun but was actually two metal pipes taped together.

Mr Reilly has a record of previous offending from age 16. He has almost 20 convictions for more than 30 offences. As a teenager he committed offences of theft from vehicles, AOABH, burglary, criminal damage and possession of drugs. In 1998 he was sentenced to 30 months for robbery and in 1992 was sentenced to six years imprisonment for an offence of robbery involving an imitation firearm. He received an 18 month consecutive sentence in 1994 for an affray committed whilst in custody. The Probation Board report indicates that the PNC printout may not

include full details of Mr Reilly's history of convictions in Northern Ireland in particular, convictions for attempted robbery in 1999 for which he received custody probation orders, comprising 30 months imprisonment and 30 months probation.

4. **Factors which increase or decrease risk of re-offending and harm**

Risk factors have been identified as including use of weapons, instrumental violence, threats of violence, criminal lifestyle, lack of consequential thinking and drug misuse. There is also concern that Mr Reilly lacks victim empathy. He is said to show remorse on the surface but to lack a full understanding about the effects of his actions, which he minimises.

5. **Evidence of change during sentence**

This is Mr Reilly's second Parole Board review, his previous review having taken place pre-tariff in December 2006. That Panel noted that Mr Reilly had exhibited problematic behaviour with regularity. He had taken part in very little offending behaviour work and there was a long list of unaddressed risk factors. The Panel concluded that it was not satisfied that he had made sufficient progress in addressing and reducing his level of risk to allow him to be safely supervised in open conditions. At that time, areas outlined to be addressed by Mr Reilly included, showing a sustained period of good behaviour, working on drug relapse prevention and undertaking work on risk factors to include CSCP and ETS.

Whilst some progress has been made, the current Panel noted that there were still outstanding areas of concern. Mr Reilly remains on basic regime. Since his move to Northern Ireland in 2007 he has been adjudicated on for matters including possession of unauthorised articles, attempted assault on staff, damage to prison property, possession of a shift knife, disobeying orders and abusive behaviour. He continues to fail drug tests. His last test on 21 April 2009 was positive and from January 2006 he has failed on a further two occasions and refused on two occasions. The last negative test was in May 2008.

More positively, Mr Reilly has undertaken drug related work with an addictions counsellor, although the drug test results indicate that he has been unable to translate this work into positive action. He has undertaken ETS programme with positive indications in terms of his engagement. There is, however, follow up work to be done. In relation to the Cognitive Self-Change Programme, probation report that given Mr Reilly's failure to show an ability to remain drug free, and the impact this might have on his suitability to meet the demands of the programme, it has been indicated by the Treatment Manager for the programme that he would need to demonstrate in a concrete way the ability to address the drug issue.

6. **Assessment of current risk re-offending and serious harm**

The probation report indicates that Mr Reilly has been assessed, using accredited PBNI assessment tools as presenting a high likelihood of re-offending on any possible return to the community and a high potential risk of harm to the public, particularly in regard to the instrumental use of violence.

7. **Plans to manage risk**

The Probation report does not go into detail in relation to any release or resettlement plan as it is not considered that release or even a move to open conditions is currently a realistic prospect.

8. **Conclusion: Level of risk and suitability for release/open conditions**

The Panel took into account the serious and violent nature of the index offences, Mr Reilly's offending record which includes previous violent offences and the use of instrumental violence. It noted Mr Reilly's poor disciplinary record and his continuing inability to remain drug free. The Panel balanced against these factors the more recent evidence of Mr Reilly's efforts to start to address his offending behaviour. Whilst Mr Reilly is to be commended for the progress he has made, the Panel noted that there is no support from

> any report writer for a move to open conditions or release. In the Panel's view, there is more work to be done, particularly in relation to the use of violence and Mr Reilly will need to demonstrate that he can maintain his behaviour and motivation before less secure conditions can be considered. The Panel concluded that the risk remains too high to support either a move to open conditions or release."

[8] In response to the single member decision of the Panel the respondent sought an oral hearing and furnished reasons for this request under cover of a letter dated 10 July 2009. The respondent pointed out that the decision relied to a significant extent upon findings from the previous pre-tariff review at which he had not been present and the dossier did not contain any representations made on his behalf. He asserted that reliance upon his adjudication record was apt to create a false impression and he provided the following explanations:

> "*(i)* Possession of unauthorised articles – Mr Reilly was in possession of extra items from the tuck shop – these articles were given to him by other prisoners.
>
> *(ii)* Possession of a knife – Mr Reilly had removed this knife from another prisoner on the relevant date so as to seek to avoid an incident.
>
> *(iii)* Disobeying a lawful order – Mr Reilly objected on health grounds to attending the prison workshop; he is epileptic and objected to being around heavy machinery; furthermore he was suffering from a work related infection at that time; there would appear to have been an issue as to whether the order was lawful at all; following adjudication it is significant to note that he was not asked to return to the workshop and commenced work in another area of the prison.
>
> *(iv)* Abusive to staff – this adjudication has been dismissed.
>
> *(v)* Damaging Prison Property – Mr Reilly was accused of tearing a prison bed sheet which had already sustained damage."

The respondent also provided further details of the adjudication alleging an assault on staff suggesting that it was not a particularly serious incident and he submitted that, overall, his adjudication record on closer perusal did not indicate that he was an individual whose release or whose transfer to open conditions would put the public at unacceptable risk.

[9] The respondent asserted that he did not accept the propriety of the drug-tests relied upon in the body of the decision and pointed out that during the relevant periods he had been prescribed various medications for his health ailments. He denied that he was taking any illegal or unprescribed substances within the prison.

[10] In all the circumstances, the respondent submitted that he should have an oral hearing concluding in the following terms:

> "As Mr Reilly has never had an oral hearing before the Parole Board the Board should consider that oral hearings are necessary for achieving fairness. A prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what was at stake for him, and for society. Even where facts are not in dispute these facts might be open to explanation or mitigation, or might lose some of their significance in the light of other new facts. The Parole Board could well be assisted in discharging its task of assessing risk by exposure to the prisoner or the questioning of those who had dealt with him. It will be very difficult for the prisoner to address effective representations without knowing the points which were troubling the decision maker."

[11] On 20 July 2009 the respondent received a further letter from the Parole Board in the following terms:

> "We refer to the paper decision of your parole review recently issued by a single ICM member panel. As set out in the decision, you were allowed 28 days in which to consider whether to accept or appeal against your review.
>
> We confirm that you have appealed the decision. The representations submitted have been considered and the appeal has been refused.

> The appeal has been refused on the grounds that while individual adjudications may have explanations there still remains significant offending behaviour work for you to carry out, particularly with regard to instrumental violence. Until such work is successfully completed, the risk of reconviction or of causing serious harm cannot be regarded as reduced. No report writers recommend a move to open or release at this review. This panel endorses the view that no recommendation can be made at this time and the appeal is refused.
>
> The paper decision is therefore final and your current review is now concluded.
>
> You will be eligible for a further review at a time set by the Ministry of Justice Public Protection Casework Section."

[12] The respondent subsequently received a further letter from NOMS dated 23 July 2009 which stated:

> "**Outcome of Parole Board review**
>
> As you know the Parole Board has considered your case and did not direct your release on life licence for the reasons attached.
>
> The Secretary of State has now considered the Parole Board recommendation, agrees with this view for the reasons given by the Panel and considers that the following risk factors are outstanding and require further work:
>
> - Use of weapons.
> - Instrumental violence.
> - Treats (sic) of violence.
> - Criminal lifestyle.
> - Lack of consequential thinking.
> - Drug misuse.
>
> Your case will next be referred to the Parole Board for a provisional hearing to take place on **01 December 2010** for the following reasons:

> *To complete further work in relation to your use of violence. You need to address your behaviour and drug use in prison over a sustained period. In addition, to allow you to undertake follow up work form (sic) your ETS outcome and to prepare yourself for the recommended cognitive self change programme or any other work recommended to address your risk.*
>
> You will be notified by the Parole Board nearer the time about the exact date of that hearing."

In fact it appears that the next review arranged for December 2010 was subsequently adjourned to January 2011 and has now been further adjourned.

[13] Following the commencement of judicial review proceedings in September 2009 the Parole Board responded through the Treasury Solicitor by letter dated 3 November 2009 stating, inter alia, that:

> ". . . Mr Reilly alleges that he has a right to an oral hearing before the Parole Board, such a right arising either under the common law or through the operation of Article 5(4) of the European Convention on Human Rights. The Parole Board would submit that neither the common law nor Article 5(4) give Mr Reilly such a right. The Parole Board would comment that, although pleaded as separate grounds, the position under Article 5(4) is no different from the position at common law (per Latham LJ, R (O'Connell v. (1) The Parole Board (2) The Secretary of State for Justice [2007] EWCA 2591 (Admin) at paragraph 21). Further it is now established case law that neither Article 5(4) nor the common law give an applicant a right to an oral hearing in all the circumstances (per Lord Bingham, R (Smith and West) v. Parole Board [2005] 1 WLR 350 at paragraph 35)."
>
> The Parole Board would submit that, taking into account the judgment in Smith and West (supra), namely that oral hearings should be heard where there are disputes of fact or where it would be very difficult to address effective representations without knowing the points that were troubling the decision maker, it is hard to see of what use an oral hearing could be in this case. Contrary to Mr Reilly's assertions, this case does not turn on a factual ambiguity; Mr Reilly has indeed failed drugs tests

> and does not dispute the accuracy of the record of adjudications. In any event, the Parole Board's decision did not turn on their interpretation of these issues; it is clear from the decision that a large number of factors influenced the decision, most notably in relation to Mr Reilly's use of violence. It is also worth noting that there was no support from any report writer for a move to open conditions or release.
>
> In light of the overwhelming documentary evidence, the contention that oral evidence would convince the Parole Board to reach a different conclusion is simply not sustainable . . ."

The statutory framework

[14] The respondent in this case received an 'automatic' life sentence which, taking into account his date of sentence, was imposed in line with Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. That Section required an automatic life sentence for a second serious offence.

[15] When a person is subject to such a sentence release is gained by virtue of Section 28 of the Crime Sentences Act 1997 which provides for referrals to the Parole Board on expiry of the relevant tariff and at least every 2 years thereafter. When the Parole Board directs release it shall be the duty of the Secretary of State to release the prisoner. The Parole Board shall not direct release until the case has been referred to them and they are "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

[16] The Parole Board is subject to a general duty to advise the Secretary of State in respect of any matter referred to it relating to the release and recall of a prisoner under Section 239 of the Criminal Justice Act 2003.

[17] Prior to the coming into force of the Parole Board (Amendment) Rules 2009 on 1 April 2009 prisoners serving indeterminate sentence could require the Board to hold an oral hearing. Rule 12(1) of the amended Rules provides that where a single member panel has made a provisional decision that the prisoner is unsuitable for release the prisoner *may request* an oral panel to give consideration to his case with an oral hearing. Rule 12(2) provides:

> "12(2) Where the prisoner does so request consideration of his case with a hearing, he must serve notice to that effect, giving full reasons for the request on the Board and the Secretary of State within 19 weeks of the case being listed."

The decision at first instance

[18] After hearing the respective submissions of the appellant and the respondent and carefully analysing the relevant Strasbourg and domestic case law Treacy J rejected the respondent's argument that all prisoners serving indeterminate sentences were entitled, as of right, to an oral hearing but he accepted that the respondent should have been entitled to such a hearing in the circumstances of the particular case. At paragraph [35] of his judgment the learned trial judge recorded the following observations:

> "[35] In the indeterminate sentence/parole board context an oral hearing is often likely to be required because many such hearing will involve 'matters of [such] crucial importance as the deprivation of liberty' where 'a substantial term of imprisonment may be at stake'. Moreover the decisions will frequently require considerations of:
>
> *(i)* the prisoner's 'mental state';
>
> *(ii)* his character;
>
> *(iii)* his personality; and
>
> *(iv)* his maturity.
>
> Where the above conditions are satisfied Article 5(4) may require an oral hearing. The considerations adumbrated above are likely to embrace many (perhaps most) parole board hearings. In my view these considerations apply to the present case and the denial of an oral hearing was accordingly not compatible with Article 5(4). Oral hearings would ordinarily not be required, of course, where the prisoner declines to have one."

[19] Treacy J also held that a prisoner did not need to show that he had any or a better chance of success via an oral hearing as a precondition to being granted such a facility and doubted whether a refusal to afford an oral hearing based solely on the fact that the prisoner could not demonstrate any particular chance of success in obtaining release would be Convention compliant. At paragraph [38] he said:

> "[38] It cannot justifiably be contended, in any event, that an oral hearing would have made no difference.

> The Parole Board on hearing from expert witnesses, evidence from the applicant, a proper analysis of the prison records and detailed oral and written submissions from counsel in respect of, inter alia, various matters including the interpretation and weight to be given to the reports contained in the dossier might well look at the matter differently or attenuate the date for the next review. For these reasons, quite apart from the benefit of a fair hearing in the public interest before depriving an individual of their liberty for a substantial time, I have concluded that procedural fairness requires an oral hearing in this case."

The submissions of the parties

[20] On behalf of the appellant, Mr Coppel sought to uphold the rejection by the learned trial judge of the proposition that prisoners subjected to indeterminate sentences had an absolute right to an oral hearing when reviewed by the Parole Board. In support of the appellant's appeal from the learned trial judge's decision that the respondent was entitled to an oral hearing in the circumstances of the particular case he relied principally upon a number of domestic authorities, in particular, R (Smith and West) v. Parole Board [2005] 1 WLR 350, R (O'Connell) v. Parole Board [2008] 1 WLR 979, R (Roose) v. Parole Board [2010] EWHC 1780 (Admin) and R (Osborn and Booth v. Parole Board [2010] EWCA Civ 1409. Mr Coppell submitted that the distinction made by the learned trial judge between prisoners serving determinate and indeterminate sentences in terms of the requirement to hold an oral hearing was not justified and the appropriate test was whether there was a realistic prospect of the Parole Board's decision being affected as a consequence of holding an oral hearing. Mr Coppel further submitted that when considering whether such a test had been satisfied this court should determine the matter in the context of the relevant circumstances identified and evaluated by the Parole Board. In applying such an approach to the circumstances of this case Mr Coppel further argued that the correspondence confirmed that the Board had assumed that the respondent's behaviour had not been as poor as a superficial consideration of his record might indicate but that the real and effective reason for the refusal was that the respondent had not completed "significant offending behaviour work . . . particularly with regard to instrumental violence", and that until he did so, the risk of reconviction or of causing serious harm could not be regarded as reduced. It followed from the risk of reconviction and causing serious harm that the Parole Board had determined that the respondent's continuing detention was necessary for the protection of the public in accordance with Section 28 of the 1997 Act.

[21] In support of the respondent's cross appeal from the decision of the learned trial judge that the respondent did not enjoy an absolute right to an oral hearing Mr Macdonald relied primarily upon a number of decisions of the Strasbourg Court and, in particular, Hussain v. UK (1996) 22 EHRR 1 and Waite v. UK (2003) 36 EHRR 54. He supported the distinction made by the learned trial judge between determinate and indeterminate sentences and emphasised that the application of the decision of the House of Lords in Smith and West should be restricted to those serving determinate sentences. He argued that prisoners serving indeterminate sentences were entitled as of right to an oral hearing before the Parole Board and rejected the submission that, in order to exercise such a right, a prisoner had to show some prospect of success relying, in particular, on paragraph [59] of the judgment in Waite. Mr Macdonald further submitted that, in any event, it was far from clear from the relevant correspondence that the Parole Board had applied any specific or coherent criteria when reaching the decision to reject the respondent's request for an oral hearing. He pointed out that in the initial undated covering letter from the oral hearings team of the Parole Board the respondent had been informed that he could ask for a full oral hearing if he believed that there were "significant and compelling reasons for this." Mr Macdonald asserted that there was no basis for the imposition of such a requirement and he further noted that the ensuing correspondence from the Parole Board appeared to be concerned with the question of whether the respondent should be released or moved to open conditions and made no specific reference to his request for an oral hearing or the criteria applicable thereto. He referred to paragraph 13 of the affidavit sworn on 9 December 2009 by Ms O'Prey of the Parole Board declaring the policy of the Board in the following terms:

> "The Parole Board has a declared policy that a prisoner who has been given a life sentence or an indeterminate sentence for Public Protection (IPP) will not be released or recommended for open conditions without an oral hearing. This policy has been in place since February 2007."

At paragraph 14 of the same affidavit it is asserted that an oral hearing will *normally* (our emphasis) be granted in two sets of circumstances:

> "1. where the ICM member considers there is a realistic prospect of release or a move to open conditions; or
>
> 2. in any case where the assessment of risk requires live evidence from the prisoner and/or witnesses. This would include a case where a progressive move is not a realistic outcome, but where live evidence is needed to

> determine the risk factors. It is envisaged that this will be a rare step to take and would normally only be necessary where experts disagreed about a risk factor; for example, whether or not there was a sexual element to an offence that needed exploring. It is only intended to apply this principle where there is a dispute about whether an issue is a risk factor at all, not necessarily whether it has been addressed or not."

Mr Macdonald emphasised that the respondent had never been put on notice of the "no realistic prospect of success" test or that it was the respondent's failure to complete or begin the relevant ETS and CSC programmes that had been the crucial factor in reaching the Board's decision to refuse an oral hearing as opposed to the decision that he should not be released or moved to more open conditions.

Discussion

Procedural fairness

[22] Article 5(4) of the Convention provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention if not lawful."

[23] It is important to note that, while it does require the lawfulness of detention to be decided by a court, Article 5(4), not surprisingly, given the variation of circumstances between Member States and their domestic legal systems, does not specify the nature or content of any particular procedure to be adopted. As Lord Hope observed at paragraph 74 of the judgment in Smith and West:

> "This is where the common law steps in. The requirement of procedural fairness is part of the common law. It is a requirement that applies to bodies in this jurisdiction which have the characteristics of a court within the meaning of Article 5(4) because domestic law says so. Common law procedural fairness as such is not a Convention requirement. But the Convention can and does

> inform the common law, and the common law informs the Convention."

The Probation Board is accepted as an independent and impartial tribunal capable of fulfilling the role of a court as required by Articles 5(4) and 6(1) of the Convention and, as such, is required by the common law to observe fair procedures. As Lord Hope went on to note in the same case procedural fairness is built into the Convention because Article 5(4) requires that continuing detention must be judicially supervised and because domestic law requires such supervision to be conducted in a way that is procedurally fair.

[24] In the course of giving his judgment in Smith and West Lord Bingham referred to a passage from the judgment of Lord Mustill in R v. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 at 560 in which he observed that the requirements of fairness change over time, are flexible and are closely conditioned by the legal and administrative context. Lord Bingham then drew attention to further guidance given by Mason J in Kioa v. West [1985] 60 ALJR 113 at 127 in the following terms:

> "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations . . ."

Lord Bingham noted that the possibility of a detainee being heard either in person or, where necessary, through some form of representation has been recognised by the European Court as, *in some instances* (our emphasis) a fundamental guarantee in matters of deprivation of liberty. However, he went on to hold, at paragraph 35:

> "35. The common law duty of procedural fairness does not, in my opinion, require the board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose

> some of their significance in the light of other new facts. While the board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."

In the event, their Lordships were unanimous in holding that the individual circumstances of the applicants in Smith and West warranted the holding of oral hearings by the Parole Board.

The relevant Strasbourg jurisprudence

[25] Bearing in mind that the approach of the Strasbourg court is to concentrate upon the facts of the individual case rather than reviewing the law 'in abstracto', together with the importance of factual context when considering procedural fairness in domestic law it is extremely important to look carefully at the individual factual circumstances of the relevant Strasbourg authorities.

[26] In Hussain v. United Kingdom the applicant, then aged 16, had been convicted at Leeds Crown Court on 12 December 1978 of the murder of his younger brother aged 2. He received a mandatory sentence of detention "during Her Majesty's pleasure" and his tariff was ultimately set, some eight years after conviction as a result of a secretive process, at 15 years. It appears that the trial judge suggested 10 years to take account of the young age of the prisoner at the date of the offence but he was overruled by the Secretary of State who emphasised the gravity of the offence. The applicant was not informed of the details of his tariff fixing until 1994. By the date of the hearing by the Strasbourg Court the applicant had been detained for over 17 years, his case having been reviewed by the Parole Board upon four separate occasions. The applicant was not shown any of the reports considered by the Parole Board or afforded a hearing before the Board until he applied for judicial review of the most recent hearing in 1993.

[27] In delivering its judgment the court identified as the central issue in the case the question as to whether detention during Her Majesty's pleasure, given its nature and purpose, should be assimilated under the case law on the Convention to a mandatory sentence of life imprisonment or rather to a discretionary sentence of life imprisonment. The government had argued that the mandatory element rendered the sentence essentially punitive, that the trial and appeal process provided its own justification for continuing detention and

therefore did not require review by the Parole Board. At that time, pursuant to the Parole Board Rules 1992, those subject to discretionary life sentences were entitled to an oral hearing, disclosure of all evidence before the panel, cross-examination of witnesses and legal representation. The court referred to the tariff but noted that an indeterminate term of detention for a convicted young person, which might be as long as that person's life, could only be justified by considerations based upon the dangerousness of the prisoner and the need to protect the public. It felt that such considerations must of necessity in the case of a young person take account of the inevitable changes and developments in attitudes and personality during the ageing process.

[28] At paragraph 58 of the its judgment the Strasbourg Court noted that the Parole Board did not satisfy the requirements of Article 5(4) because of its inability to order the release of a prisoner and then proceeded to comment upon the procedure before the Board in the following terms:

> "59 The Court recalls in this context that, in matters of such crucial importance as the deprivation of liberty and where questions arise which involve, for example, an assessment of the applicant's character or mental state, it has held that it *may be* (our emphasis) essential to the fairness of the proceedings that the applicant be present at an oral hearing.
>
> 60 The Court is of the view that, *in a situation such as that of the applicant* (our emphasis), 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."

It is perhaps hardly surprising that in the case of a prisoner who had been detained for over 17 years, from the age of 16 to 33, who had never seen any of the reports upon which his continuing detention was based or been afforded a personal hearing that the court should reach such a conclusion.

[29] The case of Waite also involved a minor who, aged 16, had been convicted of murdering his grandmother in particularly gruesome circumstances and sentenced to detention during Her Majesty's pleasure. After the expiry of his tariff he was released on life licence in January 1994. He was subsequently recalled to prison by the Secretary of State in July 1997 on the recommendation of the Parole Board following concerns as to his conduct including misuse of drugs, a sexual relationship with a minor, attempted suicide and failure to keep contact with his supervising probation officer.

There are a number of significant matters to be taken into account in relation to this case, including:

(i) The applicant's supervising probation officer had originally recommended that, while he posed a risk to himself, there were "no indications that he was a risk to the public in terms of dangerousness".

(ii) A decision was taken not to prosecute him for any of the alleged drugs offences.

(iii) In a report dated 29 June 1998 his probation officer stated:

> ". . . provided that he is given the necessary support and receives sustained input to encourage his current anti-drugs attitude and drug-free status he can safely be released into the community."

(iv) The Prison Service conceded that, "due to an oversight" the procedures had not followed the interim arrangements for dealing with HMP detainees and he had not received the oral hearing that he should have been afforded in accordance with the administrative provisions then in force.

(v) When an oral hearing by the Parole Board did take place in October 1998 the Board directed his release which took place on 17 November 1998.

[30] In such a context it is again scarcely surprising that the EctHR recorded at paragraph 59 of its judgment:

> "59. The Court is not persuaded by the Government's argument which appears to be based on the speculative assumption that whatever might have occurred at an oral hearing the Board would not have exercised its power to release. Article 5(4) is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention – an applicant is not required, as a precondition to enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release. In matters of such crucial importance as the deprivation of liberty and where questions

> arise involving, for example, an assessment of the applicant's character or mental state, the court's case law indicates that it *may* (our emphasis) be essential to the fairness of the proceedings that the applicant be present at a oral hearing. In *such a case as the present* (our emphasis), where characteristics pertaining to the applicant's personality and level of maturity and reliability 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."

The domestic authorities

[30] In R (O'Connell) v. Parole Board the claimant was convicted of an offence of assault occasioning actual bodily harm as a result of which he received an extended sentence in accordance with Section 227 of the Criminal Justice Act 2003 comprising a custodial period of 2 years and a licence period of 3 years. The claimant served one half of his custodial term but the Parole Board refused to direct his release on the ground that it was not satisfied that it was no longer necessary that he should continue to be confined for the protection of the public. The claimant sought judicial review on the ground, inter alia, that the Board had failed, in breach of both its common law obligation of fairness and its obligations under Article 5(4) of the Convention to give him an oral hearing. In the course of delivering the judgment of the Divisional Court it is significant that Leatham LJ, after considering the relevant authorities, concluded that the question as to whether or not Article 5(4) was engaged was not answered by ". . . any formal analysis of the original order of the court in cases such as the present". At paragraph 14 of the judgment he went on to make the following observations in relation to the potential engagement of Article 5(4):

> "The question is whether, bearing in mind its purpose, namely to prevent arbitrariness, it has a function to perform in the particular circumstances of the case in question. In the present case, the decision as to whether or not to direct release is critical to the claimant's entitlement to release after he has served one half of the custodial period. That decision is capable of being an arbitrary decision unless controlled by a mechanism which is Article 5(4) compliant. In other words there is a clear purpose to be served by the Article in this context, in exactly the

> same way as it has a function to perform in the case of indeterminate sentences."

[31] Leatham LJ then went on to consider the question as to whether an oral hearing should have been held and, in doing so, he emphasised the necessity to look in detail at the underlying facts. The assault of which the claimant had been convicted had been committed upon his wife against a background of a history of domestic violence largely fuelled by his consumption of alcohol. Nevertheless, his wife wished to continue with the relationship and the relevant probation officers supported earlier release. The Probation Board balanced the various relevant factors but ultimately concluded that the risk remained unacceptably high and refused parole. Leatham LJ rejected the submission that Article 5(4) required an oral hearing in every case in which the question to be determined was the assessment of risk to the public. In his opinion the question of whether or not an oral hearing was necessary would depend in any given case upon the particular facts, a view that he considered to be consistent with the principle set out at paragraph [59] of Hussain's case. He did not consider the position to be any different at common law and quoted with approval the words of Lord Bingham at paragraph [35] of the judgment in Smith and West. He confessed that he had not found it easy to decide whether in cases in which it was necessary to assess a relevant risk the presence of the prisoner at an oral hearing was required as a matter of fairness and went on to express his conclusions in the following terms at paragraph [24] of the judgment:

> "It seems to me that the Parole Board should be predisposed to hold an oral hearing in such cases. That would certainly be the case where there is any dispute of fact, or any need to examine the applicant's motives or state of mind. But in the present case I do not read the Parole Board's decision as being one which could have been affected in any way by anything further that the claimant could have said beyond that which he had set out in his written representations. What stands out a mile from the material before the Parole Board is the fact that the claimant and his wife clearly intended to be together as soon as they could after his release, and that whatever steps were taken by the claimant himself, his wife was not prepared to engage with the domestic violence liaison officer nor was she happy with licence conditions. It is difficult in those circumstances to see how the Parole Board could have come to any other decision even if it had heard from the claimant in person. I do not accordingly consider that in this particular case, the lack of an oral hearing

amounted to a breach of Article 5(4) or the claimant's entitlement at common law to a fair hearing."

[32] The relevant Strasbourg and domestic authorities have been recently reviewed by the Court of Appeal in England and Wales in the case of R (Osborn and Booth v. Parole Board [2010] EWCA Civ 1409. In that case Carnwath LJ, in the course of delivering the leading judgment, identified, at paragraph 25, two issues for consideration by the court:

> "*(i)* What criteria should the Parole Board apply in deciding whether to direct an oral hearing?
>
> *(ii)* What criteria should the court apply when reviewing the decision of the Parole Board not to hold such a hearing?"

[33] In dealing with the first of these issues Carnwath LJ referred to the judgment of the House of Lords in Smith and West and the Divisional Court in O'Connell together with the Strasbourg decisions of Hussain and Waite. After noting the interpretation placed by Leatham LJ in O'Connell upon paragraphs 59 and 60 of the decision in Hussain Carnwath LJ concluded that it did not follow that an oral hearing was "always necessary" where an assessment of dangerousness was being undertaken on the basis of personality and maturity. In each case it would depend on the circumstances, including the information already available from previous assessments.

[34] Carnwath LJ then proceeded to deal with an argument grounded upon paragraph 59 of the decision in Waite's case that the strength of a prisoner's application was "not relevant" to the question as to whether an oral hearing was required and at paragraph 35 of his judgment he made the following remarks:

> "Again, I think this is reading too much into the language of the judgment. The court was warning against *ex post facto* "speculation" by the Government as to what the Parole Board might have done, or requiring the claimant to show likely success. That, in my view, is far from saying that the Board is not entitled to take into account its own judgment on the basis of the material available to it, and to consider whether there is a realistic prospect of that being affected by an oral hearing. If not, then to hold an oral hearing, is not only a waste of public time and resources, but it risks raising the hopes of the prisoner for no purpose. On the other hand, as the House of Lords made clear, where the Board is in doubt as to

> whether an oral hearing may be of assistance, the presumption should be in favour of it."

[35] Moses LJ, in the course of delivering his own judgment in Osborn and Booth referred to the problem in resolving the issue as to whether fairness required an oral hearing and at paragraph 54 said:

> "That problem lies in the difficulty, if not impossibility, of drawing any identifiable line to distinguish between those cases in which an oral hearing ought to take place and those in which there is no such need. It is likely that where there is a dispute of fact relevant to the Board's decision, an oral hearing should take place. But it is not possible to be dogmatic where there is no such dispute."

Whilst it was understandable that a judgment that there was "no realistic prospect" that an oral hearing could affect the Board's conclusion was the only test which had been devised by the Board and the courts, Moses LJ emphasised the absence of any hard and fast rule and the importance of flexibility. Bearing that in mind he underlined the importance, demonstrated by Sedley LJ in the same case, of the effect of oral persuasion and discussion on cases hitherto believed to be "open and shut".

Is there an absolute right to an oral hearing?

[36] In support of his argument in favour of such a right the respondent relied heavily upon paragraphs 59 and 60 of the judgment in Hussain. For the reasons that we have set out earlier in this judgment that decision, consistent with the general philosophy of the Strasbourg Court, must be related to the individual circumstances of the case. When that has been done, we are not persuaded that the court was there purporting to identify the existence of an absolute right. Rather it appears to have acknowledged the possibility that fairness might require the presence of the applicant at an oral hearing as a general principle, which had become a requirement in the context of the particular facts. Accordingly we consider that the learned trial judge was right in rejecting this proposition advanced on behalf of the respondent. It follows that there is no need for this court to consider the challenge to the compatibility of the Parole Board Rules 2004 (as amended) with the Convention.

Was an oral hearing required in the circumstances of this particular case?

[37] In the course of the first instance judgment Treacy J emphasised the periods of time at issue in any particular Parole Board decision in an indeterminate prisoner's case, as compared to that of a prisoner serving a determinate sentence, a submission which was adopted and advanced before

this court on behalf of the respondent by Mr Macdonald. After a careful review of the Strasbourg and domestic authorities Treacy J set out his conclusions with regard to the particular circumstances of the respondent's case at paragraph [35] of his judgment.

[38] Whilst there is certainly substance in the submission advanced by Mr Macdonald that, in general terms, a prisoner subject to a determinate sentence has a predetermined "end stop" as opposed to a prisoner subject to an indeterminate sentence, who may face significant periods of custody between reviews, we are not persuaded that such a distinction should necessarily be determinative with regard to the question as to whether an oral hearing should be required. In this case, as indicated at paragraph [15] above, the reviews are required by statute to be no longer than two years apart. Whether the review arises in the course of an indeterminate sentence or revocation of a licence granted during a determinate sentence the decision concerns the same issues. Ultimately, the question remains whether the circumstances of the particular case require the Parole Board, as a matter of procedural fairness, to hold an oral hearing in the course of determining whether the continued detention of the prisoner is necessary for the protection of the public. Essentially, that is a judgment about risk involving a careful and complex balance between the right of the prisoner to his or her liberty and the right of the public to an acceptable degree of protection.

[39] At paragraph [38] of the first instance judgment Treacy J also rejected the submission that, as a pre-condition, a prisoner needed to show that he has any or a better chance of release with the benefit of an oral hearing.

[40] On behalf of the appellant Mr Coppel submitted that the Parole Board was entitled to employ the "realistic prospect of success" test in reliance upon the judgments of the Court of Appeal in Osborn and Booth. However, while it is true that such a test was articulated by Carnwath LJ at paragraph [35] and [38] of his judgment in that case, it is important to note that his reference was to the entitlement of the Parole Board to take into account its own judgment that the applicant had "no reasonable prospect of success." Otherwise there was the prospect of time and resources being wasted. He was not placing any onus upon the applicant and he expressly acknowledged that, in a doubtful case, there was a presumption in favour of an oral hearing. The judgments delivered by Moses and Sedley LJJ in the same case are also of significance. Moses LJ thought that it was likely that such a hearing should take place where there was a dispute of fact relevant to the Board's decision but both he and Sedley LJ were in agreement that such hearings might be required irrespective of the existence of any evidential conflict.

[41] The views expressed by Carnwath, Moses and Sedley LJJ in Osborn and Booth as to when an oral hearing should be required mirror similar opinions

delivered by Lord Bingham and Lord Slynn in Smith and West in which the latter observed at paragraph [50]:

> "If there is doubt as to whether the matter can fairly be dealt with on paper then in my view the Board should be predisposed in favour of an oral hearing."

[42] Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board. In exercising that judgment the Board must have regard to the individual circumstances of the case which are likely to be infinitely variable. Relevant factors may include the existence of factual disputes, issues of personal credibility, conflicting expert reports that cross examination might help to resolve, significant issues as to the development of the prisoner's personality, behaviour and attitudes, the reasons put forward on behalf of the prisoner when requesting an oral hearing, etc. However, it is important to bear in mind that the decision is the responsibility of the Board, that there is no onus on the prisoner and that the common law has long recognised the concept of oral adversarial hearings as being central to fair procedure.

[43] In this case the respondent ticked the box on the appropriate form to indicate that he wished to have an oral hearing and his representative was informed by the Parole Board by email dated 8 May 2009 that he had a "target month" for oral hearing of September 2009. In or about June of 2009 the respondent received the decision taken by a single member of the Parole Board who had considered the papers and concluded that the matter should not proceed to an oral hearing. The single member took into account, inter alia, the serious and violent nature of the respondent's offences, his previous record, his poor disciplinary record and inability to remain drug free. Those factors were balanced against his efforts to address his offending behaviour but the single member concluded that there was more work to be done and that the respondent needed to demonstrate that he could maintain his behaviour and motivation before less secure conditions could be considered. The respondent appealed against the refusal to grant him an oral hearing and the reasons put forward included the absence in the dossier of any representations upon his behalf, some explanation as to why his adjudication record was apt to create a false impression, an explanation as to why the record of drug testing might be misleading and a general submission that an oral hearing was necessary in order to achieve fairness. On 20 July 2009 the Parole Board replied stating that the appeal had been refused essentially because of the respondent's failure to complete the specified offending behaviour courses.

[45] The need to complete offending behaviour work in order to lower the risk to the public had also been specified as a reason for refusing the respondent's first Parole Board review in December 2006. It is accepted that the respondent has yet to undertake follow up work from the Enhanced Thinking Skills

("ETS") and to complete the Cognitive Self Change ("CSC") programmes and the respondent has not challenged that reasoning. It is submitted on behalf of the appellant that the basis for the decision to refuse an oral hearing was that, until he completed the relevant programmes, the risk of reconviction or causing serious harm could not be regarded as reduced and consequently his continuing detention was "necessary for the protection of the public." In essence, even if the factual differences highlighted by the respondent were to be resolved in his favour, given the failure to complete the requisite programmes, the decision maker was able to fairly conclude that an oral hearing would not assist his determination of the relevant issue.

[46] In determining our approach to this aspect of the case we have born in mind the judgment delivered by Sedley LJ in Berezovsky v. Terluk [2010] EWCA Civ 1345 in which he discussed some authorities relating to the approach to be adopted by an appellate court to questions of procedure and then observed at paragraphs 19 and 20:

> "19 But as Lord Hope went on in his next sentence in Gillies (Gillies v Secretary of State for Work and Pensions [2006] UKHL 2) to point out, the appellate judgment
>
> 'requires a correct application of the legal test to the decided facts…'
>
> Thus the judgment arrived at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.
>
> 20 We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in Bullen (R v S W London SBAT, ex parte Bullen 919760 120 Sol.Jo.437), it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was 'the' fair one."

At paragraph [42] of his judgment in Osborn and Booth Carnwath LJ adapted that passage as follows:

> "Translated to the present context, the question of fairness should be judged in the context of the circumstances identified and evaluated by the Board, including their appraisal of the material already available, formed with the expertise which the court does not share, and their resulting assessment of what will be needed to satisfy it that release will not put the public at risk."

Having carefully scrutinised the decision taken by the Parole Board in this case we do not consider that it was unfair in all the circumstances. Accordingly, the appeal will be allowed and the respondent's notice and cross-appeal will be dismissed.

[47] We conclude this judgment with the recommendation that this aspect of their procedure would benefit from a careful and thorough review by the appellant. We note that in the lengthy correspondence between the appellant and the respondent and his representatives subsequent to the initial request for an oral hearing no clear distinction was made between release and the request for an oral hearing. The letter before action from the Treasury Solicitor, dated 3 November 2009, made no mention of the relevant courses the applicant had failed to complete and referred to the inability of an oral hearing to "*convince*" the Parole Board to reach a different conclusion. The undated letter from the Parole Board conveying the initial refusal taken on the papers contained the sentence "You can appeal the decision and ask for a full oral hearing before a panel of the Parole Board if you believe that there are *significant and compelling* (our emphasis) reasons for this," thereby suggesting a significant onus on the appellant which it is quite impossible to reconcile with the policy set out at paragraph 14 of the affidavit sworn by Ms O'Prey for the judicial review proceedings. It appears that the appellant was not informed of that policy prior to the commencement of those proceedings. While the paragraph introducing that policy does refer to an oral hearing *normally* (our emphasis) being granted in two sets of circumstances, the appellant may consider that it would be appropriate to review the policy in the light of this judgment particularly bearing in mind that there is no onus on an applicant and the wide variety of circumstances that may justify an oral hearing.