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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Reilly's (James Clyde) Application [2010] NIQB 46

AN APPLICATION FOR JUDICIAL REVIEW BY JAMES CLYDE REILLY

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TREACY J

Introduction

[1] By this judicial review the applicant challenges a decision of the Parole Board dated 20 July 2009 refusing him release on licence from his life sentence without giving him an oral hearing.

[2] There are two limbs to the applicant's challenge. The first is that the decision is in breach of Art 5(4) ECHR/Common Law because an oral hearing is *required* where it is requested by a life sentence prisoner seeking release on licence. The second limb is that an oral hearing was required in the particular circumstances of his case. Whereas the first limb involves a challenge to the Parole Board Rules 2004 (as amended) the second limb involves no challenge to the validity of the Rules.

Grounds Upon Which Relief is Sought

[3] The applicant commenced judicial review proceedings in September 2009. The grounds upon which relief is sought are as follows:

"(a) The impugned decision was contrary to common law and unfair in that it denied the Applicant an oral hearing in a case where:

(i) Facts which may have affected the outcome were in dispute; and
(ii) Explanations and mitigations of the Applicant's behaviour were available which may have affected the outcome;
(iii) The denial of an oral hearing did not provide the Applicant the benefit of a procedure which fairly reflected on the facts of his particular case the importance of what was at stake for him.

(b) The impugned decision was contrary to Article 5(4) ECHR in that in a case involving matters of such crucial importance as the deprivation of liberty, and where a substantial term of imprisonment was at stake, and in a case where questions arose which involved an assessment of the Applicant's character, mental state, characteristics pertaining to his personality and level of maturity, 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 impugned decision denied the Applicant such a procedure and thus violated his rights under Article 5(4) ECHR.

(c) Where the Applicant's rights under Article 5(4) ECHR have been violated damages should be awarded to afford him just satisfaction.

(d) Rule 10(a), 10(b) and 11 of the Parole Board (Amendment) Rules 2009, and Rules 12(1), 12(2) and 13 of the Parole Board Rules 2004 (as so amended) are unlawful and incompatible with the Convention Rights of the Applicant in that they permit the question

> **of his release on licence, as a life sentence prisoner, to be determined by a parole board without an oral hearing in circumstances in which he has requested such an oral hearing; the said Rules should either be declared unlawful and struck down, or interpreted in a manner that achieves compatibility under Section 3 of the Human Rights Act 1998."**

Background

[4] The applicant is James Clyde Reilly aged 41 (dob: 17 April 1968). On 28 March 2002 he was remanded in custody in respect of offences of robbery, attempted robbery and possession of an imitation firearm. He was subsequently sentenced on 20 January 2003 whereby he received an automatic life sentence with a tariff of 6 years and 8 months. His tariff expiry date is calculated as being 20 September 2009.

[5] In or about April 2009 the applicant was copied a dossier which was sent by the Lifer Management Unit at HMP Maghaberry (the LMU) to the Parole Board. This 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 Dunlewey Substance Abuse Centre. No submissions were made by the applicant in response to the dossier.

[6] In or about June 2009 the applicant received an undated document entitled 'Intensive Case Management (ICM) Paper Decision Form (2009 Version 1)' which was sub-titled 'Prison No. GJ8240 Tariff Expiry ALP Review; Notification of paper decision' which stated inter alia that:

> **"The Parole Board has decided not to direct your 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…

If we do not hear from you within the 28 days the paper decision will be taken as final, and the Secretary of State will set a date for your next review."

[7] This covering letter was signed by the 'Oral Hearings Team, Parole Board' and contained forms whereby the applicant could signify acceptance of this decision or not and a section where he was asked to 'set out your reasons for requesting an oral hearing'. The letter further contained a section representing the ICM member's decision as follows:

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 6 years and 8 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 post 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' 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 are 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 2008 he has failed on a further 2 occasions and refused on 2 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 the ETS programme with positive indications in teams 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 of 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 risk remains too high to support either a move to open conditions or release."

[8] In response to the initial refusal decision from the Parole Board the applicant sought an oral hearing. The reasons for requesting an oral hearing were furnished under cover of letter dated 10 July 2009, namely:

> **"Mr. Reilly wishes to have an oral hearing before the Parole Board.**
> **His grounds for requesting same having read the ICM member's decision are as follows:**
>
> **1. The dossier did not contain any representations from the prisoner and none were submitted separately.**
>
> **2. The decision relies to a significant extent on findings from the pre-tariff review. Mr. Reilly was not present for any hearing related to such a pre-trial review.**
>
> **3. Reliance on Mr. Reilly's adjudication record is apt to create a false impression of the prisoner. His record since being in Northern Ireland includes the following :**
>
> **(i) Possession of unauthorised articles – Mr. Reilly was in possession of extra items from the tuck shop- these items were given to him by other prisoners**
> **(ii) Possession of a knife – Mr. Reilly had removed this knife from another prisoner earlier on the relevant day 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

4. The only other adjudication Mr. Reilly is aware of relates to an allegation of attempting to assault staff. The accounts of this incident are inconsistent and belie the suggestion that he assaulted staff. One witness statement suggests that the attempted assault was his flicking a sock in the direction of the officer. At the adjudication hearing Mr. Reilly believes that the attempted assault was described as his standing up or attempting to stand up from a sitting position. Notwithstanding these rather passive actions the prison officers involved appear to have beat Mr. Reilly to such an extent that they caused various facial injuries recorded in his medical charts and induced an epileptic fit.

5. Mr. Reilly's adjudication record on closer perusal does not indicate that he is an individual whose release or whose transfer to open conditions would put the public at unacceptable risk.

6. Mr. Reilly does not accept the propriety of the drug-tests relied upon. During the relevant periods he has been prescribed various medications for his health ailments including clomazepam, a benzodiazepine, dihydrocodeine and on an occasion following a broken arm on 28th March 2009 he was prescribed morphine or a morphine derivative for a period of approximately 10 days. He is not taking illegal or unprescribed substances within the prison.

7. Report writers are positive about his enthusiasm and willingness to work on offending-behaviour. The major reservations in the reports and the ICM decision relate to his prison record and failed drugs tests.

8. Mr. Reilly believes that he has progressed sufficiently to at least be seriously considered for open conditions. He believes that offending behaviour courses can be accessed by prisoners on the Prisoner Assessment Unit. Not all report writers

comment on whether open conditions are appropriate or not.

9. 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, as 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.

10. In all the circumstances Mr. Reilly should have an oral hearing.

11. Should the Parole Board be minded to grant a hearing Mr. Reilly will indicate the witnesses be believes should attend."

[9] The Applicant subsequently received a letter from the Parole Board dated 20 July 2009 which refused an oral hearing in the following terms:

"Appeal Against Paper Decision

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 prison 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.

…"

[10] The Applicant subsequently received a further letter from NOMS[1] 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 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**
- **Threats of violence**
- **Criminal lifestyle**
- **Lack of consequential thinking**
- **Drug misuse**

[1] National Offender Management Service

> **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 from 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.**
>
> **…"**

[11] Accordingly the earliest date at which the applicant will have an oral hearing before the Parole Board will be December 2010 which will be approximately 15 months post the date of the expiry of his tariff.

[12] Following the commencement of 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 & 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 could be very difficult to address effective representations without knowing the points which 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 drug 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…."

Statutory Framework

[13] The applicant received an 'automatic' life sentence which, taking into account his date of sentence, would have been imposed in line with Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. This section required an automatic life sentence for a second serious offence.

[14] Where he is subject to such a sentence, release is gained through Section 28 of the Crime Sentences Act 1997 which provides for referrals to the Parole Board on tariff expiry and at least every two years thereafter. When the Parole Board direct 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'.

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

[16] Whereas previously under the Parole Board Rules the prisoner could "require" an oral hearing amendments introduced on 1 April 2009 largely abrogated that right to require an oral hearing. These amendments were effected by the Parole Board (Amendment) Rules 2009.

Applicant's Submissions

[17] The applicant submits that the Parole Board's refusal to allow him an oral hearing before refusing his licence was unfair and contrary to both common law and his rights under Art 5(4) ECHR. The applicant contends that in the particular context under consideration (a life sentence prisoner seeking release on licence from the Parole Board at the date of expiry of his tariff) an oral hearing must be provided on request to a prisoner, in order to satisfy the demands of fairness under common law and Art 5(4) ECHR. Should that general submission not be accepted, the applicant submits that in the particular circumstances of this case, an oral hearing was required.

Respondent's Submissions

[18] The respondent submitted that neither the common law nor Art 5(4) gave the applicant such a right relying, inter alia, on the judgment of Lord Bingham in ***R (Smith & West) v Parole Board*** **[2005] 1 WLR 350.** The Parole Board also submitted that an oral hearing was not required as a matter of fairness in the circumstances of the present case.

Article 5(4) ECHR

[19] Mr Hutton, for the applicant, sought to extrapolate from a detailed review of European jurisprudence the proposition that Art 5(4) (and therefore the common law) required an oral hearing, if requested by the prisoner, in all life sentence parole board determinations irrespective of the merits or the prospects for release. As he put it in para 4 of his supplemental written observations:

> **"… it is not a precondition to having an oral hearing that the Applicant show prospects of release; … this is to confuse the purpose of Article 5(1) and 5(4); … an oral hearing is required where deprivation of liberty is at stake and where characteristics pertaining to a prisoner's personality and level of maturity are of importance in deciding on his dangerousness. As all life sentence parole board**

> **determinations involve such factors it is impossible to envisage a life sentence case where an oral would not be required in accordance with Article 5(4) ECHR."**

[20] This argument is inconsistent with the decision of the House of Lords in ***Smith & West.*** The claimants in that case were prisoners serving determinate sentences who had been released on licence and then recalled to prison, and who were seeking to resist revocation of their licences. Lord Bingham held at para 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 do not think that the duty is as constricted as hitherto it has been 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. Whilst the Board's task certainly is to assess the risk, it may well be greatly assisted in discharging it (one way or another) 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."***

[21] Lord Slynn held at para 50:

> **"There is no absolute rule that there must be an oral hearing automatically in every case. Where, however, there are issues of fact, or where explanations are put forward to justify actions said to be a breach of license conditions, or where an officer's assessment needs further probing, fairness may well require that there should be an oral hearing. If there is doubt as to whether the matter can be fairly dealt with on paper then in my view the Board should be predisposed in favour of an oral hearing. On any view the applicant should be**

> **told that an oral hearing may be possible though it is not automatic; if having been told this the applicant clearly states that he does not want an oral hearing then there need not be such a hearing unless the Board itself feels exceptionally that fairness requires one."**

[22] The House of Lords also held that the requirements of Art 5(4) would be satisfied if the Parole Board complied with its common law duty of procedural fairness[2].

[23] In ***R(O'Connell) v Parole Board*** **[2008] 1 WLR 979**, the prisoner was serving an extended sentence under S.227 of the Criminal Justice Act 2003 and it fell to the Parole Board to decide whether or not to direct his release on licence. The Divisional Court rejected a submission, based on ***Hussain v UK*** **(1996) 22 EHRR 1**, that "where issues have to be evaluated in circumstances such as the present, consistent Convention jurisprudence makes it clear that an oral hearing is a necessary part of the protection required by Art 5(4)" (see para.20). Latham LJ stated at para 24:

> **"Insofar as the submission is to the effect that Article 5(4) requires an oral hearing in *every* case where the question is the assessment of risk to the public, I reject it. In the first three cases referred to in the previous paragraph [*Von Bulow v United Kingdom*], the court was not dealing with the particular facts of each individual case. It was identifying the characteristics of a hearing which was capable of being Article 5(4) compliant. I do not read the judgments as dealing with the question of whether in every case without exception there must be an oral hearing. The principle is accurately set out in paragraph 59 of *Hussain*. The question of whether or not an oral hearing will be necessary in any given case will depend upon the facts. I consider that the position in this respect under Article 5(4) is no different from the position at common law. This appears to me to be the view taken by the House of Lords in *West and Smith* (supra)."**

[2] Per Lord Bingham para.37 and Lord Slynn para.55

[24] Latham LJ ruled (para 25) that – whether under Art 5(4) or at common law - an oral hearing need only be held where, as a matter of fairness, the question whether or not the claimant posed a relevant risk could not be answered without his presence at an oral hearing. That would be the case "where there is any dispute of fact, or any need to examine the applicant's motives or state of mind". An oral hearing had not been required in O'Connell's case because the Parole Board's decision was not "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 representation".[3] To similar effect Stadlen J in ***R (Hopkins) v Parole Board*** **[2008] EWHC 2312 (Admin),** relying on ***O'Connell*** and ***Smith & West,*** rejected the submission that an oral hearing was required in every case where the question is the assessment of risk to the public (para 31).

[25] Whilst the authorities relied upon by the respondent were all in the context of determinate sentence prisoners they are firmly against the applicant's absolutist proposition. The respondent submitted that there was no material difference between determinate sentence and indeterminate sentence cases in relation to the Art 5(4)/common law requirements of procedural fairness since, it was argued, the key question of risk to the public is the same in each and the issue of whether or not it is necessary to hold an oral hearing arose equally in both types of cases. I do not accept that there is no material difference.

[26] In law context is everything and I accept that the context between this case and ***Smith & West*** is significantly different. The Court was dealing with *determinate* sentence prisoners. In the present case, the applicant *potentially* could remain imprisoned for the *rest of his life* on grounds of risk. As matters stand the earliest date on which he can get an oral hearing (and that is not guaranteed) is December 2010.

[27] The following broad themes emerge from the decision in ***Smith & West****:*

> (i) The fact that they were dealing with a statutory regime where the (maximum) period of imprisonment was fixed by the Court with a significant role for the parole board in determining the actual period (depending on recall, assessment of risk and release on licence) to be served;

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[3] The Divisional Court's decision was over-ruled by the Court of Appeal **[2009] 1 WLR 2539** on the grounds that it had been wrong to hold that Article 5(4) applied at all in the particular circumstances of a prisoner serving an extended sentence under s. 227 of the Criminal Justice Act 2003. The respondent submitted that the reasoning of the Divisional Court as to what Article 5(4) would require if it did apply remained good law.

(ii) The Court's recognition that it was dealing with *determinate* and not indeterminate sentences. In particular Lord Bingham (at para.1; para.27 p766 Letter B; para.32 p767 Letter G: "In this country, as already noted, revocation hearings are routinely held in the case of life sentence prisoners and HM's prison detainees.") referred to the regime for lifers when the procedural norms involved oral hearings (introduced in response to the very European authorities upon which the applicant relies in the present case);

(iii) The *"interest at stake"* - at para.30 Lord Bingham stated:

> **"30. In considering what procedural fairness in the present context requires, account must first be taken of the interests at stake. On one side is the safety of the public, with which the Parole Board cannot gamble: *R v Parole Board, Ex p Watson,* above, at 916-917. On the other is the prisoner's freedom. This is a conditional, and to that extent precarious, freedom. In *Weeks v United Kingdom* (1987) 10 EHRR 293, para 40, the European Court recognised the freedom enjoyed by a discretionary life sentence prisoner on licence as "more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen" but as, nonetheless, a state of liberty for the purposes of article 5 of the Convention. The value of freedom to the prisoner, even when conditional, was acknowledged by the Supreme Court of the United States in *Morrissey v Brewer* 408 US 471 (1972) para 12, and by Dickson J, dissenting (although not on this point), in the Supreme Court of Canada in *Howarth v National Parole Board* (1974) 50 DLR (3d) 349, 358. It is noteworthy that a short-term prisoner who has served half his sentence and a long-term prisoner who has reached his non-parole date have a statutory right to be free: a conditional right, but nonetheless a right, breach of which gives an enforceable**

right to redress (see *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19)."

(iv) The "institutional reluctance" of the relevant authorities to grant oral hearings. This is (adversely) commented upon in all of the speeches:

Lord Bingham:

"33. The argument addressed to the Court of Appeal on behalf of the appellant West did not rely on the common law. Simon Brown LJ did however record (para.2) that in the year ending 31 March 2002 the Board had considered 516 cases in which determinate sentence prisoners had made representations against recall and had during that year held an oral hearing in only one. He observed (para.40) that the Board "should be altogether readier than presently they are to hold oral hearings if in truth their determination is likely to turn upon the resolution of important issues of fact". But it appears that, in the judgment of the Board, very few cases turn on such issues. In the nineteen-month period from 1 April 2003 to 31 October 2004, the House was informed, the Board considered representations against the recall of determinate sentence prisoners in 1945 cases but held oral hearings in only 4."

Lord Slynn:

"48. It is perhaps not surprising that the Parole Board should have felt initially that it was right, or that through available resources they were constrained, to decide as many applications as possible by prisoners whose licence was revoked and who were recalled to prison, without anything approaching a court process, or even an oral hearing. Such a process is time consuming and expensive and some of the applications may on the face of it have appeared without merit. But the facts and the arguments addressed to your Lordships on behalf of the applicants in these two cases have made it plain that in respect of

determinate sentence prisoners the decisions taken (where such revocation has been ordered) can have a serious effect on the liberty of the applicant. If the decision is taken on the basis of a misunderstanding of the law or of a failure to appreciate the facts relied on there can be a very serious interference with the prisoner's liberty albeit that liberty is a conditional right. There is a risk that if only written representations are looked at a decision may be taken without a full appreciation of what really matters. When we are told of the number of oral hearings which have been held in practice in respect of the very large number of applicants, it is clear that the risk is serious." [Emphasis added]

Lord Hope:

"The common law

63. I can well understand the reluctance of the Parole Board to hold oral hearings in *other* than a very small proportion of those cases which fall outside the categories of mandatory and discretionary life prisoners, extended sentence prisoners and HMP detainees, *for whom it has been decided that continuing judicial supervision of the detention is required to satisfy their article 5(1) and 5(4) Convention rights.* But I agree that the absence of an oral hearing in these two determinate sentence cases was a breach of the duty to act fairly at common law. For reasons that I shall explain, I think that this means that the proceedings were not conducted in the way a court would be expected to conduct them and that it must follow that there was a breach of the appellants' article 5(4) Convention rights.

64. It is, of course, more costly and time-consuming to deal with cases by means of oral hearings. Arrangements have to be made to ensure that they are conducted fairly. Notices must be given of the witnesses to be called and the substance of their evidence. They will almost

always have to be held at the prison or other institution where the prisoner is held. A simple cost-benefit analysis, looking at the matter from the Board's point of view only, will no doubt show that its resources are better employed by dealing with these applications on paper. That, no doubt, is why the number of oral hearings that are being held in these cases is so tiny, despite Simon Brown LJ's observation in the Court of Appeal in West's case [2003] 1 WLR 705, 717A-B, para 40 that the Board should be altogether readier than presently they are to hold oral hearings if their determination is likely to turn upon the resolution of important issues of fact.

65. Commenting however on the fact that only four oral hearings were held out of the 1945 cases falling outside the categories mentioned above during the period from 1 April 2003 to 31 October 2004, Mr Pannick said that the Board's experience was that decisions in these cases almost never turn on disputed issues of fact. I would make two comments on this explanation.

66. First, the figures that we have been given appear to me to indicate that there is a long-standing *institutional reluctance* on the part of the Parole Board to deal with these cases orally. *It would not be surprising if a consequence of that reluctance was an approach, albeit unconscious and unintended, which undervalued the importance of any issues of fact that the prisoner wished to dispute. If the system is such that oral hearings are hardly ever held, there is a risk that cases will be dealt with instead by making assumptions. Assumptions based on general knowledge and experience tend to favour the official version as against that which the prisoner wishes to put forward. Denying the prisoner of the opportunity to put forward his own case may lead to a lack of focus on him as an individual. This can result in unfairness to him, however much care panel members may take to avoid this."* [Emphasis added]

(v) The value of oral representations – see Lord Bingham at para.35 and Lord Slynn at para 50 set out at paras 19 and 20 above.

[28] Given the context of these cases and the importance of what is at stake for the applicant the requirements of procedural fairness would have to fairly reflect "the importance of what is at stake for him as for society" - Lord Bingham at para 35. It is apparent from the decision in ***Smith & West*** that the common law and Art 5(4) march hand in hand. What the European authorities say is therefore of great importance in defining the requirements of procedural fairness in the context of indeterminate prisoners. Whilst I have accepted that the English authorities are against the absolutist argument the circumstances in which a Parole Board could, justifiably and in compliance with Art 5(4), refuse an oral hearing (when requested) must be viewed against the background of consistent European jurisprudence.

The European Context

[29] The essential purpose of the Art 5(4) jurisdiction is as stated in ***Benjamin & Wilson v UK*, 26 September 2002, App. No. 28212/95**:

> **"33. Art5(4) provides a crucial guarantee against the arbitrariness of detention, providing for detained persons to obtain a review by a court of the lawfulness of their detention both at the time of the initial deprivation of liberty and, where new issues of lawfulness are capable of arising, periodically thereafter (see, *inter alia*, *Kurt v Turkey* judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, para.123, and *Varbano v Bulgaria*, No. 31365/96, ECHR 2000-X, para. 58). While the "court" referred to in this provision does not necessarily have to be a court of law of the classic kind integrated within the judicial machinery of the country, it does denote bodies which exhibit the necessary judicial procedures *and safeguards appropriate to the kind of deprivation of liberty* in question, including most importantly independence of the executive and of the parties (see *De Wilde, Ooms & Versyp v Belgium* judgment of 18 June 1971, Series A no. 12, pp. 41-42, paras.76 and 86; X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 23, para.53, and *Weeks v. the***

> ***United Kingdom*** **judgment of 2 March 1987, Series A no. 114, p. 30, para.61).”** [Emphasis added]

[30] For indeterminate sentence prisoners, this Art 5(4) review should take place at, around and preferably before the date of tariff expiry, ***R (Noorkoiv) v Home Secretary*** **(2002) 4 All ER 515,** paras 57-58, 69.

[31] The fact that the judicial procedures and safeguards should be coupled to the type of deprivation of liberty in question, requires an approach to procedure tailored to the nature and circumstances of the case. Thus procedures akin to the Article 6 ‘fair trial’ procedures are not required in the determination of every ‘deprivation of liberty’, eg see ***Winterwerp v Netherlands*****, 26 September 1979, App. No. 6301/73** para60 :

> **“The judicial proceedings referred to in Article 5 para. 4 (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6 para. 1 (art. 6-1) for civil or criminal litigation (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 42, para. 78 in fine). Nonetheless, it is essential that the person concerned should have *access to a court and the opportunity to be heard* either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty"…”** [Emphasis added]

[32] However, where the deprivation of liberty resembles that imposed by a criminal court the safeguards should not be “markedly inferior” to those in criminal matters. In ***De Wilde, Ooms & Versyp v Belgium*****, 18 June 1971, App. No. 2832/66 and others** at paras 78 & 79 the European Court stated:

> **“78…The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. Thus, in the Neumeister case, the Court considered that the competent courts remained "courts" in spite of the lack of "equality of arms" between the**

> **prosecution and an individual who requested provisional release (ibidem); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5 (4) (art. 5-4).**
>
> **79…It is therefore the duty of the Court to determine whether the proceedings before the police courts of Charleroi, Namur and Brussels satisfied the requirements of Article 5 (4) (art. 5-4) which follow from the interpretation adopted above. The deprivation of liberty complained of … *resembles* that imposed by a criminal court. *Therefore, the procedure applicable should not have provided guarantees markedly inferior to those existing in criminal matters in the member States of the Council of Europe.*"** [Emphasis added]

[33] In my view in an indeterminate prisoner's case the periods of time at issue in any particular Parole Board decision will frequently be measured, as in this case, in years. Thus the nature of what is at stake for the prisoner may call for the highest standards of procedural fairness. This is consistent with Lord Bingham's approach in ***Smith & West*** and is confirmed by a review of European authorities in UK parole cases.

[34] The case of ***Singh v UK*** **App. No. 23389/94, 21 February 1996** (reported along with ***Hussain v UK*** at **[1996] 22 EHRR 1**) concerned a prisoner subject to an indeterminate sentence 'during Her Majesty's Pleasure' (the English equivalent of a Secretary of State's Pleasure prisoner) who was released on licence in October 1990 but then recalled in March 1991. His case both in the context of recall and re-release was considered on several occasions by the Parole Board between 1991 and 1996 (see Judgment, paras 6-25). The Court found a violation of Art 5(4) ECHR on grounds that no oral hearing had been provided:

> **"66. …However, the lack of adversarial proceedings before the Parole Board also *prevents* it from being regarded as a court or court-like body for the purposes of Article 5 para. 4 (art. 5-4).**
>
> **67. 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 essential to**

> **the fairness of the proceedings that the applicant be present at an oral hearing (see, mutatis mutandis, the Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, p. 45, para. 67).**
>
> **68. The Court is of the view that, in 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 para. 4 (art. 5-4) requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.**
>
> **69. It is not an answer to this requirement that the applicant might have been able to obtain an oral hearing by instituting proceedings for judicial review…".**[4] [Emphasis added]

[35] In the indeterminate sentence/parole board context an oral hearing is often likely to be required because many such hearings 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 consideration of:

(i) the prisoner's 'mental state';
(ii) his character;
(iii) his personality; and
(iv) his maturity.

Where the above conditions are satisfied Art 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 Art 5(4). Oral hearings would ordinarily not be required, of course, where the prisoner declines to have one.

[36] The critical importance of oral hearings in indeterminate sentence/parole board cases is confirmed by ***Waite v UK* App No. 53236/99, 10 March 2003**. In

[4] In the linked judgment of ***Hussain v UK* App. No. 21928/93, 21 February 1996,** (reported together with ***Singh*** as mentioned above), similar considerations are expressed in paras.58-61.

that case the European Court dealt with an allegation that the lack of an oral hearing resulted in a breach of Art 5(4), and the Government's submission (echoing that made by the respondent in the present case) that an oral hearing would have made no difference, holding:

> **"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 be essential to the fairness of the proceedings that the applicant be present at an oral hearing. In such a case as the present, 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*** **(see the above-mentioned Singh judgment, p. 300, paras. 67-68).**[5] [Emphasis added]

[37] Notwithstanding the presence in this case of factors analogous to those identified in ***Singh*** and ***Hussain*** the applicant was denied an adversarial procedure by way of an oral hearing. The Parole Board contended that 'an oral hearing would have made no difference', see letter of 3 November 2009 (see para.11 above). In light of ***Waite*** I doubt that an applicant could be Convention compliantly denied a hearing solely on the basis that he could not demonstrate any particular chance of success in obtaining his release before the parole board.

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[5] This insistence on a 'fair procedure' as a means of ensuring a 'fair result' in Art5(4) ECHR cases chimes readily with the European Court's similar conclusions on the use of Special Advocates in Article 5(4) cases in ***A v UK*** **(2009) 26 BHRC 1** as discussed in ***Home Secretary v AF*** **(No.3) (2009) 3 All ER 643**, paras18-19, 21, 23-24, 33-38, 51-56, 58-59, 84-85, 107-108.

A prisoner does not need to show that he has any or a better chance of release via an oral hearing as a precondition to getting one.

[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.

[39] Up until April 2009 such hearings were considered necessary (at least for a decade) in the case of indeterminate sentence prisoners and formed part of the statutory regime – a regime which was itself introduced in response to the developing European jurisprudence and the perceived requirements of Art 5(4) such hearings are still deemed necessary in Northern Ireland where they currently remain part of the statutory framework for parole hearings. The Court has not been made privy to the arguments that led to the change but given the adverse comments in ***Smith & West*** as to why, in practice, oral hearings (in the determinate sentence context) were being unjustifiably withheld, it is not difficult to speculate as to the reasons. The "institutional reluctance" of the parole board to grant oral hearings referred to in ***Smith & West*** might gain further momentum if individual panel members perceived the issue of oral hearings as a matter within their wide discretionary power.

[40] In my view, having regard to the decision of the House of Lords in ***Smith & West*** and the decisions of the ECHR, I consider that the failure to provide the applicant with an oral hearing violated Art 5(4).

[41] There is also merit in the applicant's contention that his adjudication record and the contested drug tests may underpin some of the conclusions in the various reports relied upon by the parole board and for this reason as well fairness requires a full and adequate opportunity of exploring these matters at an oral hearing.

Conclusion

[42] The decision of the parole board dated 20 July 2009 refusing the applicant release on licence without giving him an oral hearing, in the circumstances of this

case, violated Art 5(4) and common law. I will hear the parties as to what further or other relief may be required.