

## **Annex E**

### **The Parole Board for England and Wales**

### **Practice Guidance for referring cases to Oral Hearings**

**December 2013  
(amended April 2017)**

## Practice guidance for referring cases to oral hearings

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### 1 Overview

- 1.1 Following the Supreme Court's judgment in the case of [Osborn & others v Parole Board \[2013\] UKSC 61](#) (PDF), the Parole Board has revised its existing practice guidance on the consideration of the necessity of or suitability for oral hearings to assist both members in making their decisions, and offenders and their representatives in understanding the Board's position following the judgment.
- 1.2 There remains no statutory entitlement by right to an oral hearing before the Parole Board for any case other than life or indeterminate sentenced prisoners who are assessed as 'not unsuitable' for release, or life or indeterminate sentenced prisoners at first review following recall. **However, the UKSC judgment clearly indicated that the previous policy and practice of the Board could no longer stand. This means a fundamental change in the way the Parole Board regards the purpose of and necessity for an oral hearing in each case before it. While this does not mean that an oral hearing will be necessary in every case, the judgment has significantly broadened the circumstances in which such a hearing will now be required.**
- 1.3 Detailed practice guidance follows at section 3 below, but members should note the main change in the position at law following the judgment. **Fairness to the prisoner is now the overriding requirement; the perceived utility of an oral hearing is not the deciding factor.** Prior to the Supreme Court decision, the domestic courts had agreed with the Board's position that a relevant factor in deciding whether or not to hold an oral hearing was whether such a hearing would be likely to make a significant difference to the final outcome. In cases where it would not be likely to make a significant difference, the courts had considered that a hearing on the papers, with written representations, was procedurally fair. This is no longer the case.
- 1.4 It is therefore necessary for the Board to fundamentally change the way it thinks about oral hearings; where previously we might not have held an oral hearing in circumstances where resolving a dispute of fact or hearing mitigation would have no material effect on the outcome, this is no longer the position. It is purely a question of fairness to the prisoner.

### 2 *Osborn & others* – the Judgment

- 2.1 The court found that board had breached its common law duty of procedural fairness to the three appellants and article 5(4) ECHR, by failing to offer them oral hearings. In judgment of the Court, Lord Reed clarified that human rights is not a distinct area of the law based on the case law of the European Court, but

permeates our domestic legal system. Lord Reed reminded us that “paper” decisions at the ICM stage are provisional and the right to *request* an oral hearing is not an “appeal”. (Members will be aware that we had already amended our template wording to remove references to the word “appeal”, however, the approach taken by the Board often remained one of a challenge to the paper decision as opposed to a separate question of whether fairness required an oral hearing before a decision could be reached). Lord Reed also stated that a prisoner need only persuade the board that an oral hearing is *appropriate*. The common law duty to act fairly is influenced by the requirements of art 5(4); if we comply with the former then typically we’ll also comply with the latter.

2.2 **Lord Reed sets out guidance on complying with common law standards in this context. The Board should hold an oral hearing whenever fairness to the prisoner requires one in the light of the facts of the case and the importance of what is at stake. By doing so, the Board will act compatibly with art 5(4).**

2.3 In paragraph 2 of his judgment, Lord Reed summarised the conclusions he had reached. The full judgment may be accessed [here](#), but for ease of reference, paragraph 2 is copied below. We have **emboldened** those paragraphs which are particularly significant:

i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.

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

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

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

c) **Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.**

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

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

iv) **The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.**

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

vi) When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional. **When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.**

vii) The board must be, and appear to be, independent and impartial. **It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.**

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

ix) **The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.**

x) "Paper" decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not correctly characterised as a right of appeal. **In order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may**

**have been wrong: what he has to persuade the Board is that an oral hearing is appropriate.**

**xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.**

xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5(4) in relation to procedural fairness.

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

### **3 Practice guidance to members**

- All members, when considering a case on the papers, must apply the principles set out by the Supreme Court in the case of *Osborn*;
- If in any doubt, we should hold an oral hearing;
- Fairness to the prisoner in the individual case before you is the over-riding factor;
- We can no longer decline an oral hearing merely because it’s unlikely to make any difference;
- We must not be tempted to refuse an oral hearing in order to save time, trouble or expense;
- While there are some phrases in the judgment which might be construed to say that the Board has a role in sentence planning, the Board considers that the judgment does not vary our statutory role, or widen the Secretary of State’s terms of reference to include assessing a prisoner’s sentence plan and offending-behaviour work. But Lord Reed observes that the Board may consider a variety of matters and recognises the Board’s role in determining how those with responsibility for providing the sentence plan may act when it assesses the existing risk factors and progress. We must therefore consider the need for an oral hearing having regard to any controversies or disputes in relation to any matter which we may properly mention in our decisions;
- The panel ought to consider whether or not fairness implies an oral hearing, even where the prisoner doesn’t ask for one. But the panel may consider the fact that the prisoner hasn’t asked for an oral hearing as a factor against an oral hearing;
- Save where there are exceptional reasons against a video-link, the video hub may be equated with a face-to-face hearing;
- From now on, it may be sensible for all decisions to cite the judgment. A paper decision might still refuse an oral hearing: for instance, if the prisoner offers no reasons for an oral hearing and there would not be anything to discuss at an oral hearing. In these circumstances, the panel might write: “*We/I have considered*

*the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 concerning oral hearings. We/I do not find that there are any reasons for an oral hearing. In addition, the prisoner has not submitted any reasons for an oral hearing. Therefore an oral hearing is declined."*