Neutral Citation Number: [2020] EWHC 1457 (Admin)

Case No: CO/1822/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2020

Before:

MRS JUSTICE MAY DBE

- -

Between:

The Queen (on the application of EG) (by his litigation friend The Official Solicitor)	**Claimant**
- and -	
Parole Board (1)	**Defendant**
Secretary of State for Justice (2)	**Defendant**
- and -	
Equality and Human Rights Commission (1)	**Intervenor**
The Law Society (2)	**Intervenor**
The Official Solicitor (1)	**Interested**
The Lord Chancellor (2)	**Parties**

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Caoilfhionn Gallagher QC, Ian Brownhill & Jake Rylatt (instructed by **Kesar & Co**) for the **Claimant**
Jonathan Auburn & Hannah Slarks (instructed by **Government Legal Department**) for the **Defendant (1)**
Jack Holborn (instructed by **Government Legal Department**) for the **Defendant (2)**
Amanda Weston QC (instructed by **the Equality & Human Rights Commission**) for the **Intervenor (1)**
Alexander Ruck Keene (instructed by **The Law Society of England & Wales**) for the **Intervenor (2)**
John McKendrick QC (instructed by **the Office of the Official Solicitor**) for the **Interested Party (1)**
Jack Holborn (instructed by **Government Legal Department**) for the **Interested Party (2)**

Hearing dates: 11, 12 & 13 February 2020

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Approved Judgment

Mrs Justice May:

INTRODUCTION

1. The Claimant ("EG") is subject to an extended sentence. Having been released on licence in August 2017 he was recalled to prison in September 2017. His case was thereafter referred to the Parole Board ("the Board"), to review the necessity for his continued detention. The Board ordered an oral hearing. That hearing has not yet taken place.

2. EG has learning difficulties in respect of which he was assessed in 2018 and found to lack capacity to participate in his parole hearing. In these judicial review proceedings brought by his litigation friend, the Official Solicitor ("OS") against the Board and the Secretary of State for Justice ("SSJ"), EG alleges an unlawful failure by the Board and the SSJ to secure his effective participation in his parole process so as to ensure a timely review of his continued detention as required by Article 5 of the European Convention on Human Rights ("ECHR").

3. EG is represented by Caoilfhionn Gallagher QC, Ian Brownhill and Jake Rylatt, Jonathan Auburn and Hannah Slarks act for the Board and Jack Holborn for the SSJ and the Lord Chancellor. The Equality and Human Rights Commission ("EHRC") and The Law Society of England and Wales ("the Law Society") have been permitted to intervene; they were represented by Amanda Weston QC and Alexander Ruck Keene respectively. The OS in her capacity as statutory office holder, joined to proceedings by agreement shortly before the hearing, appeared and was represented by John McKendrick QC. I am grateful to them all for their submissions.

Grounds of Challenge

4. In his Consolidated Grounds EG articulated three separate grounds of challenge against both defendants:

   (1) An unlawful failure to provide a mechanism for prisoners who lack capacity to conduct their parole proceedings so as to enable their active participation in the process.

   (2) The failure to secure EG's participation in his parole review process

   (3) The unlawful failure to provide EG with a speedy examination of the continued lawfulness of his detention.

Evidence

5. The evidence filed by the parties contained several hundred pages of correspondence, meeting minutes and other documents, as well as a number of witness statements from the following persons:

   (1) Killian Moran, solicitor at Kesar & Co Solicitors acting for EG, four statements dated 3 May 2019, 12 July 2019, 9 October 2019 and 6 December 2019.

   (2) Michael Atkins, employed by the Government Legal Department as Head of Legal at the Parole Board, two statements dated 5 September 2019 and 11 November 2019.

   (3) Glen Gathercole, Head of Business Development at the Parole Board, statement dated 6 September 2019.

(4) Simon Creighton, solicitor at Bhatt Murphy, specialising in prison law and the first solicitor to be appointed to the Prisoners Advice Service in 1993, statement dated 8 October 2019.

(5) Katie Webber, head of the Court of Protection team at Ashfords LLP, statement dated 9 October 2019.

(6) Sarah Jane Castle, Official Solicitor to the Senior Courts, statement dated 9 October 2019.

(7) Stephen Bailey, head of the Parole Board Rules Review Team at the Ministry of Justice, statement dated 18 November 2019.

(8) Elizabeth Hill, practice manager at Kesar & Co Solicitors, statement dated 6 December 2019.

(9) Lubia Begun-Rob, director at the Prisoners Advice Service, statement dated 11 December 2019.

(10) Michael Henson-Webb, Head of Legal at the mental health charity MIND, two statements dated 23 October 2019 and 6 December 2019.

The Parole Board

6. The Board is an independent executive non-departmental public body, whose members are appointed by the SSJ. It is a judicial body (*R (DSD) v Parole Board* [2019] QB 285 at [184]); its members take judicial decisions independent of the Government.

7. An account of the Board, its membership and training is given in the witness statement of Michael Atkins (at paras 3-16). Mr Atkins describes the function of the Board as follows (at para 4):

> "*The [Board]'s role is … to make risk assessments about prisoners, and make decisions as to whether prisoners are released into the community on licence. Before a direction for release is made, the relevant [Board] members must consider whether the statutory test for release is met: namely that it is no longer necessary for the protection of the public that the prisoner remains detained.*"

8. The process of a parole review and the function performed by a legal representative acting for a recalled prisoner during their review is set out in the statement of Simon Creighton (at paragraphs 4-18) and in other evidence before me. Mr Creighton is a solicitor with extensive experience of prison law in general and hearings before the Board in particular. There are four broad stages to the process of a parole review, which I understand are as follows:

(1) The Public Protection Casework Section gathers information from relevant parties (which may include prison, probation, social services) and produces a dossier as to the prisoner's risk. Unless and until the dossier, with the core documents required by the Schedule to the Parole Board Rules, is provided, then referral to the Board does not take effect (by virtue of Rule 16 of the parole Board Rules). Once the dossier has been served, the prisoner has 28 days to make written representations to the Board as to whether there ought to be an oral hearing. If an oral hearing is ordered (as it was in EG's case) the review moves to the next stage.

(2) Reports are ordered and evidence is gathered ahead of the hearing. Live witnesses are identified as is any evidence upon which the prisoner him/herself wishes to rely on.

(3) A panel of Board members is convened for the oral hearing. It hears live evidence from witnesses, including the prisoner and oral submissions from the prisoner or their representative as well as the SSJ's representative, if attending. All parties have the opportunity to question witnesses.

(4) The panel provide their decision in writing following the hearing. They may direct a prisoner's release, decide against release (but make observations about sentence planning), or in certain circumstances recommend that the prisoner be moved to open conditions. The prisoner may challenge the Board's decision in judicial review proceedings, or under the review mechanism provided for by the Parole Board Rules 2019 ("the 2019 Rules").

9. The Supreme Court considered the utility of an oral hearing in *R (Osborn) v Parole Board* [2014] AC 1115; UKSC 61. The case concerned a (successful) challenge to the Board's decision, made in a number of cases before the court, not to have an oral hearing. In the course of his judgment Lord Reed observed as follows, at [82]:

> "82. 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. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the Board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him."

10. It is not in dispute that an oral hearing is necessary in EG's case; nor is it contested that if the Parole Board Rules do not provide a proper mechanism to enable EG, as a person lacking capacity, to participate in his hearing then he will have been prevented from having a fair hearing and is entitled to succeed in his claim.

The legal framework

The Parole Board Rules 2016 and 2019

11. Section 239(2) of the Criminal Justice Act 2003 provides that the Board is under a duty to advise the SSJ "with respect to any matter referred to it by him which is to do with the early release or recall of prisoners". Section 239(5) permits the SSJ to make rules with respect to proceedings before the Board and section 239(6) entitles the SSJ to give directions to the PB regarding the discharge of its functions under Chapter 6 of Part 12 of the 2003 Act, which concerns the release, licenses and recall of determinate sentence prisoners, or under Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 as amended, which concerns the release, licences and recall of indeterminate sentence prisoners.

12. The orders made by the SSJ regarding the discharge by the Board of its statutory functions are contained within the Parole Board Rules. The current version is the Parole Board Rules 2019 which came into force on 22 July 2019 ("the 2019 Rules).

13. Since part of EG's complaint concerning delay relates to a period before the coming into force of the 2019 Rules it is necessary to set out the position under the previous rules, namely the Parole Board Rules 2016 ("the 2016 Rules").

14. The provision regarding a prisoner's representation before the Board was formerly to be found in Rule 6 of the 2016 Rules, the material parts of which provided as follows:

> *"**Representation***
>
> *6. – (1) Subject to paragraph (2), a party may be represented by any person appointed by, or on behalf of, the party.*
>
> *(2) The following may not act as a representative*
>
> *…*
>
> *(3) Within 5 weeks of a case being referred to the Board, a party who has appointed a representative (or who has a representative who has been appointed on his behalf) must notify the Board and the other party of the name, address and occupation of the representative.*
>
> *(4) If a prisoner does not have a representative, the Board may, with the prisoner's agreement, appoint a representative on the prisoner's behalf."*

15. The 2016 Rules also contained, at Rule 10, general provisions as to the directions which could be made by the Board in an individual case, with particular examples given, but in terms that were not exclusive.

16. As indicated above, the 2019 Rules came into force on 22 July 2019. Rule 6 is the current provision dealing with case management and directions:

> *"**Case management and directions***
>
> *6.-(1) A panel chair or duty member may be appointed in accordance with rule 4 to carry out case management functions and may at any time make, vary or revoke a direction.*
>
> *(2) The panel chair or duty member appointed under paragraph (1) may make any direction necessary in the interests of justice, to effectively manage the case or for such other purpose as the panel chair or duty member considers appropriate.*
>
> *….."*

Rule 10 concerns a prisoner's representation in proceedings before the Board:

> *"**Representatives***
>
> *10.-(1) Subject to paragraph (2), a party may appoint a representative (whether a solicitor or barrister or other representative) to represent that party in the proceedings.*
>
> *...*
>
> *(6) If the prisoner has not appointed a representative, the panel chair or duty member may appoint a representative (solicitor or barrister or other representative) for the prisoner-*
>
> *(a) with the prisoner's agreement, or*
>
> *(b) where the prisoner lacks the capacity to appoint a representative and the panel chair or duty member believes that it is in the prisoner's best interests for the prisoner to be represented."*

17. The 2019 Rules were accompanied by an Explanatory Memorandum, which provided this explanation regarding rule 10(6):

> "*7.9 **Lack of mental capacity:** Rule 10 specifically provides for a panel to appoint a representative for prisoners who lack the mental capacity to participate in the proceedings or make decisions about instructing legal representatives. The amended rule is based on the procedures within the Mental Health Tribunal (whose proceedings can include those who ultimately go through the parole system) and ensures that where a prisoner is unable to appoint a representative, or lacks the capacity to consent to a representative being appointed, the panel has the explicit power to appoint one for them. The panel will need to decide what is in the best interests of the prisoner to ensure a fair hearing and can appoint a legal or other representative to meet that requirement.*"

18. The Board itself issues non-statutory guidance for the assistance of members and participants in the conduct of review hearings, the *Oral Hearing Guide* ("the Guide"). The latest published version of the Guide (dated 7 November 2018) does not explicitly deal with prisoners who lack capacity. Following the coming into force of the new 2019 Rules a further draft Guide has been issued but has not yet been finalised; I was told that it is awaiting the decision in this case.

19. The "Framework Document between the Parole Board and the Ministry of Justice", published in July 2012, sets out the relationship between the Board and the SSJ and includes the following provisions:

"*2.3 The Parole Board duties include:*

...acting within the terms of the European Convention on Human Rights and relevant case law when making its decisions in relation to the release or progress of prisoners

Parole Board Responsibilities

...determine Parole Board policies regarding its fulfilment of its primary objective to make decisions regarding the suitability of prisoners for release or recommendations for progression to open conditions"

EG

20. EG is a 55-year old man with learning disabilities. On 3 January 2013 he pleaded guilty to an offence wounding with intent contrary to section 18 of the Offences Against the Person Act 1861. At Woolwich Crown Court on 22 April 2013 he was given an extended sentence of nine and a half years' custody comprising a custodial period of four and a half years together with an extended licence period of five years. Taking into account the time spent on remand EG's extended sentence expires on 5 July 2022.

21. EG was initially released from custody on licence on 4 August 2017. He failed to comply with his licence conditions and on 2 September 2017 he was arrested whilst under a drug-induced psychosis and taken to hospital pursuant to powers under the Mental Health Act 1983. He was subsequently returned to a police station where he was abusive, assaulting a police officer and causing criminal damage. He was convicted of offences arising from this behaviour on 4 September 2017 at Camberwell Green Magistrates Court and recalled to prison on 6 September 2017 under the terms of his licence.

22. As a recalled prisoner, EG's continued detention was required to be reviewed by the Board. I deal with the chronology of his parole review in more detail below.

History of EG's parole review to-date

23. Upon his recall to prison in September 2017, the legality of EG's ongoing detention was a matter for review and determination by the Board. The evidence served in these proceedings discloses the following chronology of events.

24. A single Board member first considered EG's case on the papers on 6 November 2017, at which point the case was directed to an oral hearing. The single member's decision included the following observations:

> *"On 4th August [EG] was released to an AP. He has a learning disability and Glaucoma which has caused difficulties in relation to supervision. Additionally [EG] has stated that he will not comply with his licence conditions… On 2 September [2017]..[EG] was arrested and taken to hospital under the Mental Health Act where he was assessed as presenting with drug induced psychosis and Personality Disorder so did not meet the criteria for admission…To date his OM [Offender Manager] has not been able to see him in custody… The Panel felt unable to conclude the case on the papers…an oral hearing was necessary to ascertain the level of risk that [EG] presents…In addition, given the time*

> *since [the last psychological report prepared for the Pre-Sentence report], and the nature and circumstances of the case and breach a Psychological Risk Assessment is directed.*
>
> *…*
>
> *[EG]'s case is not a straightforward one, with the involvement of several different agencies, and a face to face hearing for him is needed*."

25. Concerns about EG's learning disability and its effect upon his ability to understand the Parole process were raised by the panel convened by the Board to consider EG's case ("the Panel") when giving directions on 15 February 2018:

> "*As an unrepresented prisoner with identified learning disability and physical (Glaucoma) difficulties, it is imperative that the Prison Governor makes arrangements for this letter to be explained to [EG] as soon as possible. It has been necessary to adjourn [EG]'s oral hearing for several reasons including: late disclosure of the dossier, inadequate psychological risk assessment, non-attendance of witnesses and most significantly, the need to secure legal representation…The two-member Panel, including a psychologist member and professional witnesses including [EG]'s Offender Supervisor, Offender Manager and Social Worker all expressed concerns about [EG]'s understanding of the Parole Process and his ability to actively participate without legal representation. The Panel agreed that it could not guarantee [EG] would have a fair hearing without legal representation and the necessary assessments…Given the concern regarding [EG]'s intellectual ability, [the Social Worker] stated that he would undertake a Mental Capacity Assessment to determine whether a 'best interests' decision could be taken to orchestrate the instruction of legal representation, and an advocate, on behalf of [EG]*."

The Panel chair directed that a Mental Capacity Assessment take place and noted that the attendance of all witnesses would be required, referring to EG's *"significant learning difficulties"*.

26. On or around 4 June 2018 the Board took steps to secure legal representation for EG through the Prisoner's Advice Service (a charity providing legal advice and representation to prisoners in England and Wales). His case was circulated on the Association of Prison Lawyer's website with a request that someone attend the next parole hearing to represent EG. Mr Killian Moran of Kesar & Co Solicitors ("Kesar & Co") attended on 7 June 2018. On that occasion Mr Moran raised issues as to EG's capacity to instruct solicitors to conduct his parole review.

27. By directions issued on 9 June 2018 the Panel noted that a Mental Capacity Assessment had still not been undertaken, referring to a disagreement between the boroughs of Southwark and Greenwich as to which authority had responsibility for EG's case. Further directions directed at ascertaining the responsible borough, and obtaining a capacity assessment, were issued on 20 June 2018.

28. On 18 July 2018 EG's solicitors made representations to the Board pressing for the continued involvement of Southwark in presenting evidence about EG and referring to the issue of EG's capacity as still unresolved. Directions issued by the Panel on 27 July 2018 noted that Greenwich had accepted responsibility for EG and that work was

underway to complete a Mental Capacity Assessment and Speech and Language Assessment.

29. On 14 August 2018 EG's solicitors submitted representations to the Board asking for a litigation friend to be appointed. In directions dated 23 August 2018 the Panel chair noted that she had liaised with the Board's legal adviser in respect of the solicitor's representations and recorded as follows:

> *"(a) The Panel Chair is content to make a direction for all parties to disclose any, and all, assessments of mental capacity, or the reasons for not making such an assessment if one has not been conducted…*
>
> *…*
>
> *(c)given that the Parole Board can only make directions where it is empowered to do so by the Parole Board Rules 2016, and as those Rules make provision about representatives but do not make any explicit provision about the appointment of a litigation friend, while recognising the need for the process to be fair and for reasonable adjustments to be made where possible, the Parole Board does not consider that it has the power to make such an appointment in the absence of specific vires to do so.*."

30. On 18 September 2018 Kesar & Co wrote a letter before action to the Board and the SSJ. The Board responded on 28 September 2018 reiterating its view that it did not have the statutory authority to appoint a litigation friend. On 4 October 2018 the SSJ wrote indicating his position that, on a purposeful reading of the Parole Board Rules 2016 (the version then in force), a litigation friend could be appointed.

31. The Board's understanding of its power to appoint a litigation friend subsequently appeared to change. In directions dated 15 October 2018 the Panel chair recorded:

> "*..while the Parole Board Rules 2016 do not specifically provide for the Board to make a direct appointment, they do allow for a direction to be issued that a litigant friend be appointed.*
>
> *The panel is surprised that the legal representative has felt unable to identify a litigant friend to meet the needs of his client.*
>
> *In such circumstances the Board would ordinarily look to the Office of the Official Solicitor to instruct accordingly, however the panel notes that the Official Solicitor has declined to do so citing funding and resources as a barrier…*"

32. On 20 November 2018 (the Panel having sat on 29 October 2018) the Panel gave further directions noting, *inter alia*, the absence of a *"robust Risk Management Plan to include accommodation options, and licence conditions, that are capable of managing risk should the panel direct [EG]'s release"*. However, in these directions the Panel confirmed that the legal advice it had been given was that the Board *"did not have vires to appoint a litigation friend."*

33. On 4 February 2019 the SSJ published a review of the Parole Board Rules, intended to deal principally with changes introduced following the *Worboys* case review, but

including reference to prisoners who lacked capacity. On 19 March 2019 Kesar & Co sent an addendum letter of claim to the Board and the SSJ. The Board responded on 2 April 2019 saying that its position remained unchanged and that a future iteration of the Parole Board Rules would encompass prisoners who lacked capacity to conduct their parole process. The SSJ replied on 12 April 2019 accepting that the 2016 Rules lacked clarity in respect of prisoners who lacked capacity but re-stating his view that the existing rules permitted a litigation friend to be appointed.

34. On 24 June 2019 new Parole Board Rules (the 2019 Rules) were laid before Parliament. On 25 June 2019 there was a further directions hearing in EG's case. The Panel was informed that judicial review proceedings had commenced. EG's solicitor explained at the hearing that in the absence of a litigation friend being appointed he had no instructions and could make few submissions.

35. There have been no further hearings in EG's review pending the outcome of these proceedings. The progress of his parole review has effectively stopped.

These judicial review proceedings

36. EG's claim was filed on 7 May 2019. In his original grounds EG alleged deficiencies in the 2016 Rules then in force. The claim form sought an abridged timetable for Acknowledgments of Service; the same day Murray J ordered that they be served within 14 days. Summary Grounds of Defence were filed on 29 May 2019.

37. Following service of the Summary Grounds EG filed and served a Reply dated 5 June 2019. Permission was granted on the papers by Walker J on 24 June 2019. The claim was expedited, with Detailed Grounds ordered to be filed and served by 8 July 2019.

38. Following the publication and coming into force of the new 2019 Rules EG filed Addendum Grounds on 17 July 2019. On 1 August 2019 Sir Duncan Ousley granted permission for EG to amend his grounds and ordered him to provide Consolidated Grounds. These were filed on 5 August 2019.

39. A two-day hearing was listed for 27/28 November 2019 with Detailed Grounds of Defence to be filed and served by 6 September 2019.

40. On 8 August 2019 the Equality and Human Rights Commission ("EHRC") applied to intervene by way of written and oral submissions. On 12 August 2019 the Law Society also sought to intervene but by way of written submissions only. On 3 October 2019 permission was granted to both parties to intervene in the manner sought.

41. On around 9 October 2019 EG served a number of further witness statements. On 11 November 2019 the Board served one further witness statement and on 18 November 2019 the SSJ filed Amended Detailed Grounds of Defence, together with a witness statement from Stephen Bailey, seeking permission for the amendment. In the light of this further material, EG applied to vacate the hearing date.

42. On 22 November 2019 Saini J allowed EG's application to vacate the original hearing date. The hearing was re-fixed for two days on 11/12 February 2020.

43. On 6 December 2019 the Board wrote to the Lord Chancellor asking him to direct the OS to act for the Claimant in his parole process. On 24 January 2020 the Lord Chancellor responded declining to give such a direction.

44. Meanwhile, on 9 January 2020 the Board wrote to the other parties to the claim indicating

that it would no longer seek to argue that Kesar & Co could act in the parole process without a litigation friend.

45. On 17 January the Board issued an application requiring the Lord Chancellor to be joined as third defendant; mindful of the possible impact on the hearing which was by then imminent, the parties agreed that the Lord Chancellor and OS could be joined as interested parties. I allowed the joinder at the start of the hearing, permitting Mr McKendrick to make short oral submissions.

The hearing

Time estimate

46. The 2-day listing for this hearing was woefully insufficient. The time estimate was set at the beginning of the claim, when there were just 3 parties involved. By the time of the final hearing 4 further parties had been added and considerable further evidence had been filed, yet the court had at no stage been asked to reconsider the time estimate. The hearing easily ran into a third day (although time on that day was limited by reason of counsel's other commitments) and the arguments were even then unfinished. I deal below with the way in which the issues developed over the course of written submissions put in after the hearing. The result was that, some three weeks after the hearing ended, I was still receiving further arguments in writing on issues which were said to fall for my decision. It has made my task in identifying the matters which can properly be dealt with in this judgment and the various arguments addressing them, a great deal more difficult and time-consuming.

The case as pleaded vs the case as later developed

47. In view of the preliminary case management ruling which I made at the start of the hearing (see below), it is necessary to look in some detail at EG's case set out in his Consolidated Grounds, in particular the extent to which a discrimination case was made and relied on in that pleading.

48. I have set out the three grounds of challenge advanced in EG's Consolidated Grounds at paragraph [4] above.

49. So far as Ground 1 is concerned, there was no reference to any issue arising under the Equality Act 2010 ("EA") in connection with this ground either in the initial Summary Grounds, or in EG's final Consolidated Grounds. Ground 1 was described as raising "systemic issues"; the points raised additionally focused on the proper construction and effect of rule 10(6)(b) of the 2019 Rules.

50. To the extent that the reference in EG's Consolidated Grounds to a "systemic illegality" was intended to raise a legal issue separate from the points raised under the EA in connection with Ground 2 (see further below), it was not further pursued in Ms Gallagher's skeleton argument or at the hearing. In his submissions prepared in advance of the hearing Mr Auburn discussed the proper approach to a claim of systemic illegality and the principles to be applied set out by Hickinbottom LJ in *R (Woolcock) v SSCLG* [2018] EWHC 17 (Admin). I agree with Mr Auburn that, when applied to the factual circumstances in this case, it is clear that the Woolcock test of systemic illegality is not met. I did not understand Ms Gallagher or Ms Weston to suggest otherwise.

51. The pleaded case regarding Article 14 of the EHRC and duties arising under the EA was made in connection with Ground 2, which sought to challenge "the absence of a mechanism by which to secure EG's participation in his parole process" (my emphasis). The discrimination challenge was pleaded as follows (underlining reflects the amendments/additions to the original case following the coming into effect of the 2019 Rules):

> "*The application of Article 14*
> 76. Further, or in the alternative, article 14 guarantees that the Claimant should enjoy the same rights under the Convention as other prisoners. The Claimant ought to have equal access to an effective review of the legality on [sic] his ongoing detention as a prisoner would who did not have the same cognitive impairments that he has. The failure of the Defendants to agree a mechanism to enable participation for prisoners who lack capacity to conduct proceedings not only breaches article 5, but article 14 in addition.
>
> *The application of the Equality Act 2010*
>
> 77. [EG] is disabled within the meaning of section 6(1) of the Equality Act 2010. There is therefore a duty arising from section 20 of the Equality Act 2010 in respect of both Defendants to make reasonable adjustments to enable his participation in the parole process. Both Defendants are obliged to consider detriment upon persons which may arise from their protected characteristic: *R(oao Coll) v Secretary of State for Justice* [2017] UKSC 40.
>
> 78. The Defendants' approach to establishing a mechanism for prisoners with cognitive impairment who lack capacity to conduct their parole proceedings is contrary to the public sector equality duty and incompatible with the Court of Appeal's decision in *Finnegan* [2013] EWCA Civ 1191. This is amply illustrated by that judgment [32]:
>
> > "It is not in dispute before us that the duty to make reasonable adjustments is anticipatory. It is owed to disabled persons at large in advance of an individual disabled person coming within the purview of the public authority exercising the relevant function."
>
> …
>
> 80. The Defendants' failures to secure [EG]'s participation in the process are unlawful at common law, contrary to the Equality Act 2010 and in breach of Article 5(4).
>
> *Failure to provide a statutory mechanism or to provide guidance so that a prisoner with cognitive impairment can meaningfully engage in the parole process*
>
> 81. There is no explicit reference in the Parole Board Rules 2016 to how prisoners who are vulnerable as a result of cognitive impairment should be identified within the parole process nor how reasonable

> adjustments should be made to the process to allow them to meaningfully participate.
>
> …
>
> 85. There is a clear 'guidance gap' for both the Parole Board and Ministry of Justice staff in this respect. The arguments in respect of a guidance gap are amplified by the new Rules, are amplified by the new Rules [sic]. There is a dearth of guidance to accompany Rule 10(6)(b) despite the complicated legal issues that arise from it. In the absence of explicit statutory language, there is now a wider guidance gap. In the absence of explicit statutory language, the mechanism that the Secretary of State for Justice has purported to create has no practical effect.
>
> 86. This is exemplified by the Parole Board Panel who remain of the view that the new rule creates the power to appoint a litigation friend for a prisoner who lacks capacity to conduct their parole proceedings. This cannot be correct considering the statutory language.
>
> 87. It is submitted on behalf of the Claimant that the anticipatory duty embedded in the Equality Act 2010 still has not been met. The lack of a detailed statutory framework and/or accompanying statutory guidance causes an unacceptable risk of prisoners who lack capacity to conduct their parole proceedings being disadvantaged in those proceedings. Such persisting disadvantage is unlawful."

52. The relief sought by EG in his claim was set out at paragraph 125 of the Consolidated Grounds, as follows:

> "a. A mandatory order requiring the Defendants to identify and provide a mechanism by which [EG] can meaningfully participate in his parole review process
>
> b. An order quashing Rule 10(6)(b).
>
> c. Declaratory relief
>
> d. Damages as just satisfaction for the unlawful and unnecessary delays in his parole process and/or arbitrary detention period.
>
> …"

53. The Consolidated Grounds did not further elucidate what declaratory relief would be sought; EG had already been required to particularise this as a condition of the original grant of relief. Anticipating (with considerable prescience, as it turned out) a likely proliferation of issues and the consequent importance of defining the matters of law which the court would be required to decide, Walker J, when granting permission and as

a condition of that permission, required EG to notify the defendants of the declaratory relief which he would be seeking at the end of proceedings (see paragraph 1 of Walker J's order dated 24 June 2019). At the foot of his order Walker J explained his reasons as follows:

> "…issues of law arise as between the claimant and both defendants. They need to be defined by being set out in proposed declarations..."

54. The document served pursuant to Walker J's order, entitled "Claimant's note as to declarations sought", was prepared and signed by leading and junior counsel and dated 28 June 2019 ("particulars of declaratory relief"). Although EG subsequently served amended and Consolidated Grounds, there were no amendments to the particulars of declaratory relief, paragraphs 2 and 3 of which read as follows:

> "2. The declarations sought in respect of [EG]'s participation in his parole proceedings are as follows:
>
> There has been a failure to secure [EG]'s right to effective and meaningful participation in his parole process, in breach of common law.
>
> AND/OR
>
> There has been a failure to provide [EG] with the ability or opportunity to effectively participate in his parole process, in violation of Article 5(4) of the European Convention on Human Rights.
>
> AND/OR
>
> There has been a failure to provide [EG] with an effective review of the legality of his ongoing detention due to his disability, in breach of Articles 5 and/or 14 of the European Convention on Human Rights.
>
> AND/OR
>
> There has been a failure to make reasonable adjustments to the parole process to accommodate [EG]'s cognitive impairment, contrary to the Equality Act 2010.
>
> 3. The declarations sought in respect of the delay in [EG]'s participation in his parole proceedings are as follows:
>
> a. There has been a violation of the right to a speedy review of the lawfulness of his detention in respect of [EG]'s parole proceedings (from 15th February 2018 until its lawful conclusion), contrary to Article 5(4) of the European Convention on Human Rights."

55. It is important to note that (i) the declarations are restricted in their terms, relating only to EG, and (ii) whilst paragraph 2 d. of the particulars alleges a failure to make reasonable adjustments, there is no mention at all of the public sector equality duty arising under section 149 of the EA ("the PSED"). Albeit that there was a passing reference to the PSED at paragraph 78 of the Consolidated Grounds (see the extract set out above), it was not further developed and no relief in respect of any breach was sought, against either defendant. Breach of a duty to make reasonable adjustments arising under section 20 of the EA and a breach of the PSED arising under section 149 are different claims, engaging separate and distinct considerations; although the same set of facts may give rise to a claim for a breach of both duties, that will not always, or inevitably, be the case.

56. Reading the Consolidated Grounds and the particulars of declaratory relief together, EG's case under the EA appears as a reasonable adjustments claim turning on the proper meaning and effect of Rule 10(6)(b); in particular whether this rule (or any other under the 2019 Rules) entitled the Board to appoint a litigation friend and thereby to facilitate EG's effective participation in his parole review. A survey of the (voluminous) correspondence before and after the commencement of judicial review proceedings supports this understanding of EG's case and the issues to be decided.

57. There was an indication of a possible widening of the issues to be found in EG's skeleton argument prepared for the hearing – see the passing reference to section 149 of the EA at paragraph 83. But this case was not developed any further in the skeleton argument, moreover the section entitled "Conclusions and Relief" at paragraphs 104 and 105 explicitly affirmed the particulars of declaratory relief (which made no mention of the PSED, see above).

58. Of more concern to the defendants on the first day of the hearing was Ms Weston's skeleton argument, for the EHRC as first intervenor. Here was to be found an invitation to the court to consider the position of potentially non-capacitous prisoners generally, raising questions (amongst others) of how all prisoners who might lack capacity are to be identified, what test of capacity is to be applied and by whom. Ms Weston's submissions also included a survey of what the PSED was said to require of "the Defendant" (the Board and the SSJ were not separately considered) – see for instance paragraphs 3.7-3.8 and 4.1-4.3 of her skeleton submissions.

59. At the hearing, Ms Gallagher and Ms Weston proceeded to develop a case on the PSED and a duty to make reasonable adjustments still further, notwithstanding the case management direction that I had by then made (see below). When, for a variety of reasons (including the unfortunate ill-health of EG's leading counsel on the first day together with the inadequacy of the time estimate for the hearing), I allowed Ms Gallagher to conclude her reply points in writing, both the EHRC and OS took the opportunity to submit further argument, to which all of the Defendants then felt obliged to respond.

60. It was easy to understand why the Defendants each felt it necessary to put in further written submissions after the hearing, since the case being made by EG and by the EHRC under section 149 and section 20 of the EA had by then changed out of all proportion. There was now a case alleging breaches of the PSED by both defendants referable to three separate time periods or "phases": (i) prior to 2019 under the 2016 Rules (ii) the period of review of the rules in early 2019 and (iii) after the coming into force of the

2019 Rules. Further, the case under s.20 of the EA now embraced far more than whether or not the 2019 Rules provided a proper mechanism to permit EG to participate in his parole review, namely the appointment of a litigation friend.

My case management decision

61. The Defendants raised concerns about the burgeoning scope of the issues at the start of the hearing, seeking my determination as to the permissible range of the argument. In Ms Gallagher's unfortunate absence on that day, I invited Mr Brownhill to confirm whether EG's particulars of declaratory relief remained an accurate summary. He confirmed that it did.

62. I decided that the issues to be covered were to be determined by reference to EG's particulars of declaratory relief. My decision to do so was based upon a review of the case as pleaded – see above – and was, as I saw it, in keeping with the spirit and intention of Walker J's order made when granting permission at the outset of these proceedings.

63. Notwithstanding my ruling made at the beginning of the first day of the hearing, counsel for EG and the EHRC opened with submissions which tended toward a wider arena. The claimant's subsequent written submissions in reply proceeded to develop an already impermissibly wide case even more broadly, supported by further written submissions from the EHRC. The defendants each responded in writing with yet further argument, pushing back against the expansion of EG's case and the issues arising.

64. I have considered all these pages of further submissions very carefully, together with the many (additional) authorities to which I was referred. I have concluded that it is impossible to deal in this judgment with the full range of matters raised and developed for the first time at the hearing, let alone in further written submissions after the hearing.

65. I have contemplated a further hearing. The wider matters which EG and the EHRC have cogently and forcefully sought to raise at the hearing and in their later written submissions – for instance concerning the need for reliable identification and assessment of non-capacitous prisoners prior to their parole hearings and what the PSED requires of (i) the Parole Board and (ii) the SSJ (each of which is likely to involve very different considerations) – raise a number of matters of important public interest, as Ms Weston rightly pointed out. Persons who are detained and who lack capacity are uniquely vulnerable in the parole process; such a cohort risks discriminatory disadvantage; the circumstances of such prisoners, even if there are only very few of them in the prison population (see below - there was disputed evidence of likely numbers affected), demands serious and detailed consideration to address the possibility of such discrimination and to ensure that the state's obligations under Article 5 are properly met.

66. But it is clear to me that the very significance of these wider issues requires them to be fully and properly pleaded with relevant evidence from all sides put before the court, and that counsel with full notice of all factual and legal matters arising, or said to arise, should be able to address the court in argument on all those points, with sufficient time in which to do so. It would not otherwise do justice to the significance of the wider issues adverted to by Ms Gallagher and (in particular) Ms Weston; also, and equally importantly, it would not be fair to either of the defendants.

67. What has occurred in this case – the late articulation and development of salient matters

of public law – underscores the necessity of an early and comprehensive identification of the relevant factual background, the relief which is said to arise from the facts and, crucially, the legal principles the application of which to the facts are said to give rise to the relief sought. These are basic pleading requirements. The need for rigorous identification of the issues in a public law dispute has been emphasised recently by Singh LJ in *R (Talpada) v SSHD* [2018] EWCA Civ 841, at [67]-[69]:

> "67. … It cannot be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour…both fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation.
>
> 68. … grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.
>
> 69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

Respectfully, I entirely agree.

68. In determining what issues to address in this judgment, therefore, I have directed myself by reference to the relief sought in the Consolidated Grounds and, specifically, to EG's particulars of declaratory relief. The declarations sought in these proceedings, set out at [54] above, are all to do with EG; they are focussed on his particular situation. I have sought to do the same in this judgment. As Mr Auburn, for the Board, pointed out, the temptation might otherwise have been to succumb to the siren call of invitations to consider wider aspects of the parole process for the entire population of recalled prisoners ("a Law Commission inquiry", as he put it), rather than focussing on select aspects relating to the treatment of EG, in particular the need for a litigation friend (or other mechanism) to enable his effective participation in his parole process.

Matters bearing on the resolution of the issues

69. There were matters arising on the facts and the 2019 rules upon which Counsel addressed me in argument, the conclusions in relation to which were said to inform the resolution of issues arising in connection with EG's Grounds of challenge. These may conveniently be gathered under the following heads:

(1) Numbers of prisoners lacking capacity to participate in their parole review.
(2) Whether a solicitor can act in a dual capacity in parole reviews, as they do in the Mental Health Tribunals.
(3) Whether the 2019 Rules, properly construed, permit the appointment of a litigation friend.
(4) The role of the OS as litigation friend of "last resort" for prisoners in their parole review.

70. I deal with these in turn, before addressing EG's claim in these proceedings.

Numbers of prisoners lacking capacity to participate in their parole review

71. There was a dispute between the parties as to the prevalence of prisoners lacking capacity to participate in their parole review.

72. The evidence on this issue was as follows:

(1) Michael Henson-Webb in his second witness statement said this (at para 2)

> *"Having mental health problems, dementia or learning disabilities does not amount to lacking capacity. However, the definition of incapacity within the meaning of the [MCA] concerns people who "suffer from an impairment of or disturbance in functioning of the mind or brain"[s.2 MCA]. This means people who do have a mental health problem, dementia and/or learning disability (or co-morbidities) are far more likely than the rest of the population to lack capacity. As such, information about the prevalence of these conditions in the prison population is relevant, and in the absence of information on capacity, vital to any inquiry concerning the capacity-related support needs of the prison population"*

(2) Mr Atkins statement dated 5 September 2019 at para 19-20 set out his experience:

> *"…I am confident that this issue arises only very rarely in practice. If it has arisen in practice previously, the issue of adequate representation has in the past been resolved without the formal appointment of a litigation friend.*
>
> *20. The number of prisoners who lack mental capacity to represent themselves or to provide instructions to representatives in proceedings before the Board is likely to be extremely low.."*

Mr Atkins goes on to given reasons for this view: prisoners whose mental impairment is at the severe end where capacity is impacted are most likely to be in a hospital, not a prison setting; similarly, persons with a serious impairment are likely to have been found unfit to plead and (if found to have done the act) will be treated in a hospital setting or discharged, not sent to prison. Mr Atkins refers also to the fact that the Association of Prison Lawyers had never before raised the question of a litigation friend and said that from his own experience it had only been raised in three cases, each by Kesar & Co, of which the only one ultimately found to lack capacity was EG.

(3) Mr Gathercole, at paras 6 and 7 of his statement said this:

> "*6. Historically, the main driver behind a prisoner being unrepresented was the lack of legal aid. However, the legal aid rules were changed in 2018 to allow all prisoners to access legal aid for parole proceedings (subject to means testing). Since that change I am very rarely contacted regarding an unrepresented prisoner. From that time to date I have only been contacted in relating to issues of prisoner representation (which includes legal issues of legal representation) on six occasions. With one exception, none of these cases had mental capacity highlighted as an issue. The sole exception was the case of [EG] where the panel chair had concerns about capacity.*
>
> *7. During the time I have been first point of contact for issues relating to prisoner representation [since 2013], I would be notified of an unrepresented prisoner with mental capacity issues very rarely, once or at the very most twice a year. When this happened, I followed my usual process of locating a solicitor prepared to represent the prisoner, who would then represent that prisoner, acting in their best interests.*"

(4) Mr Moran, in his third statement, took issue with the suggestion that the incidence of prisoners lacking capacity will be low, based upon data which he set out in his statement, dealing with the incidence of dementia, autism and acquired/traumatic brain in prisoners, none of which conditions would fall under the MHA.

73. I agree with the submissions of EG and the EHRC that the evidence of Mr Atkins and Mr Gathercole – which is anecdotal only - does not convincingly deal with the likely scale of the problem. I note the evidence of Mr Henson-Webb that, given the high incidence of mental health issues in prison generally, it is possible that some prisoners who lack capacity may have slipped through the net to-date.

74. But in my view this "numbers issue" is something of a red herring. The case of EG shows that the issue of prisoners lacking capacity to participate in their parole review is not theoretical and that there is a need to be addressed. Indeed this appears to have been the Board's own view, as evidenced by the following email exchange between the Board and the SSJ on 31 August 2018:

> "*How often are litigation friends needed? Is this a widespread problem?*
>
> *It is a recurring theme, there are many prisoners with mental health issues in prison and I raised the issue with you following a case that day where the matter arose – it is a gap that needs to be addressed, the funding of litigation friends and/or legal reps where one isn't appointed needs to be looked at.*"

Solicitor acting in dual capacity

75. As I have noted above, the SSJ's position is that it is possible for EG's participation in his parole process to be achieved by a solicitor appointed by the Board to act in his best interests, as happens in the Mental Health Tribunal (MHT). Although, by the time of

the hearing (on 9 January 2020), the Board had conceded that EG's solicitor could not assume the dual role of legal representative and litigation friend, the SSJ continued to maintain that it was possible for Kesar & Co to do so.

76. Mr Holborn drew my attention to the case of *YA v Central and North West London NHS Trust* [2015] UKUT 0037 (AAC), an appeal against the decision of a MHT in respect of a patient for whom a representative had been appointed under rule 10(7) of the Tribunal Procedure Rules. In that case, Charles J (then President of the UT (AAC) further discussed assessments of capacity for the purposes of a hearing before the MHT, the operation of rule 11(7) and the role of a solicitor appointed as a patient's representative pursuant to that rule. At [16] of the decision Charles J discussed how such a legal representative should act:

> "…the legal representative should act as follows:
>
> (i) so far as is practicable do what a competent legal representative would do for a patient who has capacity to instruct him to represent him in the proceedings and thus for example (a) read the available material and seek such other relevant material as is likely to be or should be available, (b) discuss the proceedings with the patient and in so doing take all practicable steps to explain to the patient the issues, the nature of the proceedings, the possible results and what the legal representative proposes to do,
>
> (ii) seek to ascertain the views, wishes, feelings, beliefs and values of the patient,
>
> (iii) identify where and the extent to which there is disagreement between the patient and the legal representative,
>
> (iv) form a view on whether the patient has capacity to give instructions on all the relevant factors to the decisions that found the disagreement(s),
>
> (v) if the legal representative considers that the patient has capacity on all those factors and so to instruct the representative on the areas of disagreement the legal representative must follow those instructions or seek a discharge of his appointment,
>
> (vi) if the legal representative considers that the patient does not have or may not have capacity on all those issues, and the disagreements or other problems do not cause him to seek a discharge of his appointment, the legal representative should inform the patient and the tribunal that he intends to act as the patient's appointed representative in the following way:

- he will provide the tribunal with an account of the patient's views, wishes, feelings, beliefs and values (including the fact but not the detail of any wish that the legal representative should act in a different way to the way in which he proposes to act, or should be discharged),

- he will invite the tribunal to hear evidence from the patient and/or allow the patient to address the tribunal (issues on competence to give evidence are in my view unlikely to arise but if they did they should be addressed before the tribunal),

- he will draw the tribunal's attention to such matters and advance such arguments as he properly can in support of the patient's expressed views, wishes, feelings, beliefs and values, and

- he will not advance any other arguments."

77. I respectfully agree with Charles J that the role of a legal representative acting as above is analogous to that of a litigation friend – see his judgment at [81]. Mr Holborn submitted that Kesar & Co could properly act in EG's parole board review both as his solicitor and effectively as his litigation friend in accordance with Charles J's description of the proper way such a representative should act.

78. The Consolidated Grounds at paras 99-105 set out the regulatory issues for a solicitor in undertaking this dual role, the main objection being that it is contrary to the Solicitors Regulation Authority Code of Conduct, and accordingly unethical, for a solicitor to give himself or herself instructions, or to continue to seek instructions from a client who lacks the capacity to give them. Mr Moran (EG's solicitor) referred to these regulatory issues in his third witness statement.

79. The same difficulties do not arise in the MHT as the Law Society has a membership and accreditation scheme specifically for practitioners representing patients in that tribunal.

80. It is instructive, when considering the SSJ's position, to reflect on how representation is managed in the MHT. These matters strike me as significant:

(i) Since 2014 all publicly funded representatives in the MHT are obliged to be members of the Law Society Mental Health Accreditation Scheme ("the MH accreditation scheme".

(ii) To become a member of the MH accreditation scheme, applicants are required to demonstrate a number of competencies, including

"sufficient knowledge of those areas of law, such as mental capacity, community care and human rights, which are relevant to advising and representing clients in proceedings before the First-tier Tribunal"

and

"Sensitivity to and awareness of the particular difficulties clients may face because of mental disorder…"

(iii) The application form requires those seeking accreditation to fulfil accreditation-specific requirements including attendance on a 2-day approved training course, proof of having attended and observed at least 4 MHT hearings within the past 12 months and to have undertaken a substantial amount of mental health casework.

(iv) Provided applicants show that they are eligible, by reason of having satisfied all the requirements of the scheme, including those set out above, they are called for interview at the Law Society's offices in London. The interview is conducted by two of the scheme's assessors; applicants are given a case study to consider on arrival and are expected to answer questions about how they would best prepare and represent the client in that case.

81. It is apparent from the above that the requirements for membership of the MH accreditation scheme are substantial. Without membership of the scheme, a solicitor cannot receive public funds to represent a patient at their MHT.

82. A further aspect of representation before the MHT concerns the application for public funding. Regulation 22(4) of the Civil Legal Aid (Procedure) Regulations 2012 permits a third party to make an application for funding for Controlled Work including representation in the MHT, on behalf of a client who lacks capacity, however Regulation 22(5) provides that the proposed provider may not make an application on behalf of a child or protected party. Despite this, the Category Specific Rules that apply to mental health work provide (at paragraph 9.59) that:

> *"exceptionally, where it is not appropriate to use any of the possibilities for the application for Controlled Work to be made on the Client's behalf and the Client will not sign the application due to their condition, then you may annotate the Application Form to that effect and a Supervisor may sign it"*

83. The pragmatic approach taken by the Legal Aid Agency is reflected in internal guidance, which includes the following:

> "*If the client lacks capacity or is unwilling/unable to sign the application form (and it is not appropriate for a third party to apply on their behalf) the provider can sign the application form in accordance with [paragraph 9.59]*."

84. Applications for legal aid in respect of reviews before the Board fall under the category of advice and assistance in criminal proceedings and are made under the Standard Crime Contract 2017. Under paragraph 4.25 applications in respect of a Protected Party (ie a person lacking mental capacity) are required to be made by an appropriate adult or litigation friend, or if one is not available then by another person with a "sufficient connection to" or "sufficient knowledge of" the Protected Party to be able to act in their best interests, however paragraph 4.25(d)(iii) precludes a director or other employee of the firm undertaking the work from being such a person. There is no equivalent to the exception found in paragraph 9.59 of the Category Specific rules relating to Mental Health work, referred to above.

85. The safeguards in terms of training and accreditation, taken together with specific legal aid funding arrangements create, in my view, a very particular mechanism for the

representation by solicitors acting in the best interests of patients lacking capacity to participate effectively at a hearing before the MHT. There is currently no similar accreditation scheme, and different arrangements for public funding, in respect of a parole review for a prisoner who lacks capacity.

86. Mr Holborn submitted that, although a system of accreditation might be thought desirable, the absence of it could not render unlawful the appointment of solicitors to act in the best interests of a prisoner before the Board. On the evidence of Mr Atkins and Mr Gathercole, he pointed out, prisoners have in the past been represented before the Board by solicitors acting in a dual capacity. As to the funding situation, he submitted that any difficulty is theoretical as EG is and always has been in receipt of public funding for his parole review.

87. Whilst I accept that in practice there is no funding issue for EG, I cannot accept Mr Holborn's other arguments. For a prisoner who lacks capacity, the risk assessment process that is fundamental to a parole review considering release from prison engages a consideration of many similar matters to those arising at a MHT where the tribunal is considering release from hospital, such as: mental capacity and human rights, housing, risk to others and a suitable care package. In the MHT the effective participation in his or her hearing by a patient lacking capacity is in my view able to be secured because they are represented by someone who has had to demonstrate extensive experience, who has attended at a special training course and who has been screened and interviewed. I do not see how effective participation in their parole review for a prisoner who lacks capacity could be ensured if they were to be represented by a "best interests" solicitor without similar safeguards. That some prisoners lacking capacity may in the past have been represented by a solicitor acting in their best interests without challenge is not, in my view, an answer to the issue which has now been raised.

88. Accordingly I agree with submissions made by the other parties that, in the absence of an analogous system of accreditation to that operating in the MHT, EG needs a litigation friend to act in his best interests, amongst other things to give instructions to his solicitors. That raises the question of whether the 2019 Rules enable the Board to make such an appointment.

Do the 2019 Rules permit the Board to appoint a litigation friend?

89. The proper construction of the 2019 Rules, in particular rule 10(6)(b), is at the heart of this case.

90. EG, the EHRC, Law Society and OS all argued that the 2019 Rules do not permit the appointment by the Parole Board of a litigation friend to act for EG. Detailed submissions for this understanding of the 2019 Rules were presented by Mr McKendrick, appearing for the OS.

91. Mr McKendrick's submissions (supported by Ms Gallagher, Ms Weston and Mr Ruck Keene) may be summarised thus:

    (i) The wording of Rule 10(6), in particular the use of the term "representative", is inapt to cover a litigation friend and accordingly excludes the appointment of a litigation friend.

    (ii) Legal representatives and litigation friends occupy entirely different roles, being legally and factually distinct.

(iii) When read as a whole, taking account of the use of "representative" in other provisions of the 2019 Rules, it is clear that the function performed by a "representative" under the rules is that of a legal representative, not a litigation friend.

(iv) The reason for the exclusion of a litigation friend is clear: the SSJ intended to, and has, provided exclusively for the appointment of a "best interests" solicitor, to act in the manner in which representatives appearing for patients at Mental Health Tribunals act.

(v) Since the possibility of appointment of a litigation friend is excluded (by the use of the term "representative" see above), there is no room for the purposive interpretation of the rules so as to permit the appointment of a litigation friend.

92. Mr McKendrick directed me to the explanation given in February 2019 for the change to the rules, which omits any reference to litigation friends, and to the Explanatory Memorandum laid before Parliament together with the rules in June 2019 (set out at paragraph [17] above). Mr McKendrick submitted that the clear intention of the new rule 10(6)(b) was solely to provide for the appointment of solicitors acting in a dual capacity. In his submissions sent after the hearing Mr McKendrick stressed that, since this mechanism of representation had been provided for, there was no vacuum in provision which required to be filled by interpreting the rules so as to provide for the appointment of a litigation friend. The SSJ had issued rules which created a mechanism; but in the absence of a proper accreditation system, the mechanism was faulty and could not achieve what it had been intended to.

93. Attractively put though these arguments all were, I do not accept that the 2019 Rules exclude the appointment of a litigation friend. In my view, whilst considerably wanting in clarity, the Rules must and do permit the Board to appoint a litigation friend where one is needed to facilitate access of a non-capacitous prisoner to his or her parole review.

94. The key is in the use of the bracketed words "solicitor, barrister <u>or other</u> representative" in rule 10(6) (my emphasis). These are not mirrored in the MHT rules, which contain only a reference to a legal representative acting in the patient's best interests. I accept Mr Auburn's submission that the use of the extended wording in the 2019 Rules empowers the board to appoint either of two types of representative: a solicitor acting in the prisoner's best interests without a litigation friend, or a litigation friend who can then instruct a lawyer to act.

95. If there were any ambiguity in the wording of Rule 10(6) (which in my view there is not) then the review document published in February 2019 makes it plain that the flexibility of two available options was what was intended, see para 140:

> "*If the panel is satisfied, having considered professional assessments and on application from one of the parties, that the prisoner lacks mental capacity and requires representation to make decisions about the conduct of the process on his or her behalf, the new Rule [10(6)] will make explicit provision for the panel to appoint one. This may be a suitable relative or friend of the prisoner but may also be their legal representative if the panel assesses them to be appropriate to act in that capacity and*

> *to represent the best interests of the prisoner to ensure a fair hearing.*"

The reference to "suitable relative or friend" can only be read as a reference to a litigation friend. In my view the final sentence of paragraph 7.9 of the Explanatory Memorandum to the 2019 Rules is a shorthand reference to the same two options:

> *"..The panel will need to decide what is in the best interests of the prisoner to ensure a fair hearing and can appoint a legal or other representative to meet that requirement."* (emphasis added)

96. Mr Bailey, Head of the Parole Board Rules Review Team at the Ministry of Justice, describes in his witness statement how the process and approach for prisoners who lack mental capacity was first raised by the Board in 2018 as an area that would benefit from consideration in the review. He goes on in his evidence to explain that the intention behind drafting Rule 10(6) in its current form was to give the Board maximum flexibility in its approach to prisoners like EG, including a power to appoint a litigation friend where necessary.

97. But even if I am wrong about the intention and purpose of Rule 10(6) as drafted, then in my view the 2019 Rules, like the 2016 Rules before them, must be read so as to provide for the appointment of a litigation friend when necessary. Section 3(1) of the Human Rights Act 1998 provides that:

> "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*"

98. In an employment tribunal context, where the rules were then silent as to the appointment of a litigation friend, the court read in a power to appoint: *Jhuti v Royal Mail Group Ltd* [2019] ACR 1077. Likewise, in the immigration context: *R (C) v FTT* [2016] EWHC 707. Such an approach was approved and applied by the Court of Appeal in *AM (Afghanistan) v Secretary of State for the Home Department* [2018] 4 WLR 78 where, at [44] Ryder LJ said this:

> "…there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached."

99. In the present case Mr McKendrick sought to distinguish the above authorities on the basis that, in each, the rules were silent as to how a person lacking capacity was to be enabled to participate; here, he submitted, the 2019 Rules were not silent, having

provided for a "representative", as opposed to a litigation friend. As I have pointed out above, I read the term "other representative" used in the 2019 Rules as capable of referring to a litigation friend; but even if I am wrong to do so, it would in my view require much clearer wording for me to conclude that the 2019 Rules prevented the Board from being able to appoint a litigation friend where it was necessary to ensure a fair hearing. The disadvantage to which a prisoner lacking capacity risks being subject, without a person to act in his best interests upon the available material and to instruct a solicitor or other legal representative to act in his parole review, would be so extreme that an explicit exclusion would be required before a court could conclude that this was what Parliament had intended. I think Mr Auburn is right to say that having a litigation friend is so fundamental to ensuring a fair hearing for a person who lacks mental capacity that it would require words which clearly exclude such an appointment before a court could find that it was not provided for.

100. In my view this provides the answer to Mr McKendrick's point made in his final written submission: if, as I have found (see above) the mechanism of a solicitor acting in a dual capacity cannot, in the absence of proper selection and training, provide proper representation in his parole review for a prisoner who lacks capacity, then such a prisoner would be left with no effective mechanism under Rule 10(6). In those circumstances the power given to the Board to make any necessary direction under Rule 6 must be interpreted so as to enable the appointment of a litigation friend.

101. If, therefore, the wording of Rule 10(6) is not apt to permit the Board to appoint a litigation friend for EG, then it would in my view be able to do so pursuant to its general power to "make, vary or revoke" directions under Rule 6.

102. As I understood the parties' submissions made at the hearing, all now agree that, in the absence of any explicit provision in the former version of the Parole Board Rules, the general power to make directions contained in rule 10 of the 2016 Rules would have enabled the Board to appoint a litigation friend, applying the principles discussed above. As the chronology of parole proceedings reveals, however, this was not always the position adopted by the Board. Until at least October 2018, possibly not until after the coming into force of the 2019 Rules in June 2019, the Board's view was that it had no power to appoint a litigation friend for EG. This is a potentially relevant consideration to the issue of delay, which I consider later in this judgment.

Role of the OS

103. Insofar as EG's Consolidated Grounds suggested that it was the Board's role to find and appoint a litigation friend to act for EG that position is no longer maintained. Ms Gallagher accepted that it is not the Board's function to find or direct a litigation friend to act for EG. All the Board can do is appoint someone suitable when such a person is found and put before it. In courts and tribunals generally, it is the litigant's family, friends, solicitor or sometimes a person or organisation providing support that identifies a suitable candidate; failing which, the OS can be invited to act.

104. Despite enquiries by his solicitor, no family or friends have been found to act as EG's litigation friend for his parole review. It is not clear whether his solicitors have approached other persons or organisations but if there is no one else prepared to act then

the OS would seem to be the last remaining option (in the absence of a suitable accreditation system which would permit EG's solicitor to act in a dual capacity).

105. The OS has now agreed to act for EG in his parole process, subject to certain conditions being met, as set out in Mr McKendrick's skeleton argument prepared for the hearing.

106. In their skeleton arguments the Board and the SSJ each drew attention to, and complained of, an apparent conflict of interest on the part of the OS. Mr McKendrick pointed out that with just 3 days' notice of such complaints being pursued, his client had not had time to file and serve evidence to meet them. He invited me in these circumstances to decline to entertain criticism of his client and to focus instead on how EG, lacking capacity as he does, is best to be represented in his parole proceedings without any further delay.

107. I am bound to say that, coming into this hearing, the view conveyed by the Claimant's case - of EG, acting in these proceedings by the OS, resisting being allowed by the Defendants what he had all along been seeking to get, namely a litigation friend in his parole process - had a slightly Alice in Wonderland feel to it. I accept Mr McKendrick's submission, however, that his client has not had time to serve evidence, as she would wish to do, to deal with and refute the criticism levelled at her office. He told me that the OS has had no experience of acting for prisoners in their parole process, and little or no appreciation, therefore, of the type of evidence and issues arising in the evaluation of risk involved in that process. If the Lord Chancellor were to give her a direction to act she would do so, seeing as there would necessarily have to be a process of consultation and discussion about the training and other resources which her office would require in order to represent this new class of vulnerable persons.

108. As Mr McKendrick emphasised, the OS is not a statutory litigation friend of last resort, she merely operates a policy of acting as such. She derives her powers from s.90 of the Senior Courts Act 1981 ("SCA"); under section 90(3)(b) she can be required to act by a direction from the Lord Chancellor:

> "***90.-Official Solicitor***
>
> *...*
>
> *(3) The Official Solicitor shall have such powers and perform such duties as may for the time being be conferred or imposed on the holder of that office-*
>
> *(a) by or under this or any other Act; or*
>
> *(b) by or in accordance with any direction given...by the Lord Chancellor.*
>
> *(3A) The holder for the time being of the office of Official Solicitor shall have the right to conduct litigation in relation to any proceedings.*
>
> …"

109. Having initially indicated that he was minded to make a direction under s.90(3)(b), the Lord Chancellor subsequently declined to do so, by his letter dated 24 January 2020.

110. Mr Auburn submitted that no direction is needed for the OS to have the power to act for EG in his parole review as she already has sufficiently wide powers conferred by subsection (3A). Alternatively, he argued, the Lord Chancellor could be ordered to give a direction under subsection (3)(b), despite not having been joined as a defendant, since he is present in these judicial review proceedings as an interested party and is an existing defendant in his person as SSJ.

111. Neither the OS nor the Lord Chancellor has been joined as defendants in these proceedings; in those circumstances I do not propose to make an order against the latter. Nevertheless, in the absence of a proper accreditation system providing for a solicitor to act in a dual capacity, and having no other person to act as his litigation friend, EG needs the OS to act for him if his parole review is to progress.

112. In case it may assist, and given that I was addressed (briefly) in argument on the proper construction of s.90 SCA I set out my provisional views on the operation of that section as it concerns the powers of the OS.

113. Mr McKendrick submitted that the words "any proceedings" appearing in subsection (3A) do not include proceedings before the Board. He pointed out that this provision was inserted by the Legal Services Act 2007 ("LSA") and that the LSA defines "conduct of litigation" in terms of proceedings taking place before a court, further that under the LSA "court" only includes such tribunals as are listed in Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 (a list which does not include the Board).

114. Mr Auburn, in response, argued that on the ordinary and natural reading of section 90(3A) the intention was to give the OS wide powers to act in a broad range of courts and tribunals generally, including, where necessary, for a prisoner appearing before the Board. He pointed out that although the LSA amended other parts of the SCA, it left the actual wording of subsection (3A) untouched, in the form it was when first introduced by the Courts and Legal Services Act 1990; it is hard to see, Mr Auburn suggested, how definitions used in a statute from 2007 could properly inform the intention behind wording introduced by a different enactment 17 years earlier. He relied also on *Jhuti* and other cases, arguing that if it was necessary to construe s.90(3A) broadly to prevent a breach of EG's human rights due to the absence of a litigation friend then the provisions of s.3 Human Rights Act could be used to achieve this result.

115. There was no time at the hearing to hear full oral argument on this construction point; accordingly any view I express is necessarily provisional. Having said this, I prefer Mr Auburn's construction. Subsection (3A) is couched in very general terms, as indicated by the words "any proceedings". Moreover "litigation" cannot be restricted to cases in court, since proceedings before tribunals are plainly also covered. Parliament could have amended the SCA to introduce a narrower definition of "conduct of litigation" at the time it introduced subsection (3A) in 1990 but it did not do so.

116. However, although, as I have (provisionally) found, the OS has the power under section 90(3A) SCA to act for prisoners who lack capacity, she could not be expected reasonably to exercise that power in circumstances where her department was untrained or otherwise

ill-equipped to do so. I make no finding as to whether that is the case here, but one of the purposes of consulting affected parties, like the OS, when introducing rule changes must be to identify and address such issues. As I understand it, neither the OS nor any other party who might have been affected (such as the Law Society) by the new rule 10(6) was consulted before it was brought into force.

Grounds 1 and 2

117. Shorn of the extra points which Ms Gallagher sought to develop at the hearing and afterwards arising under the EA, EG's case on Grounds 1 and 2 in my view resolves to a question of whether the 2019 Rules permit the appointment of a litigation friend. For the reasons given above, I have concluded that they do.

118. Consistent with my case management decision made at the start of the hearing, I do not propose to make any findings in relation to the PSED said to have been breached by either the Board or the SSJ. The absence of a sufficiently pleaded case (see above) is in my view sufficient reason to adopt this course. Having now read and considered the arguments as developed at the hearing and (more particularly) afterwards in extensive written submissions I make these further observations.

119. In the first place, neither Ms Gallagher's submissions nor those of the EHRC as intervenor clearly sought to distinguish between the Board and the SSJ. Yet the roles of each are different: the SSJ is the detaining authority and is responsible for making the Parole Board Rules; it is the Board's responsibility to administer the rules and to produce guidance to assist its members in applying them. Mr Auburn was right to emphasise the necessity for proper analysis of what the PSED – which requires the public authority to pay due regard "in the exercise of its functions" – requires in each case. In my view there was insufficient analysis applied by EG and the EHRC to this point here.

120. Next, I acknowledge the force of Mr Auburn's submission that the obligation under section 149 of the EA is a procedural duty, which focuses on thought processes, not outcomes (see, for instance, *R (Baker) v SSCLG* [2009] PTSR 809 per Dyson LJ at [31]). EG's criticisms in its pleaded case and at the hearing, were in essence directed at a failure to secure an outcome, namely a litigation friend (or other mechanism such as an accreditation scheme) to facilitate EG's participation in his parole review. The material before me was not marshalled in a form that coherently addressed the thought processes of each defendant in relation to prisoners who lack capacity.

121. Ms Gallagher's submissions at the hearing suggested a case that the defendants had breached the PSED in relation to the 2016 Rules. As Mr Holborn pointed out, a proper consideration of this allegation would require evidence relating to the period leading up to the coming into force of those rules, which his client had not (for good reason, given the way the case had been pleaded) thought it necessary to compile or serve.

Reasonable adjustments

122. EG's pleaded case included reference to a claim for a failure to make reasonable adjustments; however as I have indicated above the case under section 20(3) of the EA was directed at the absence of any provision in the Rules entitling the Board to appoint a litigation friend. I have reached the conclusion that the 2019 Rules do entitle the Board

to appoint a litigation friend. I do not propose to make any further findings, on any wider case arising from the duty falling on either defendant pursuant to section 20(3) of the EA.

123. My case management decision (above) is sufficient justification for this decision. Again, however, I had a number of concerns at aspects of the case made by EG and the EHRC at the hearing, and afterwards.

124. Ms Weston called attention to what she described as the "anticipatory" duties of *"assemb[ling] an evidence base concerning a particular detainees'[sic], or class of detainees', needs (and thereafter addressed what changes are needed to meet those needs, including the role to be played by other public authorities in the exercise of their respective functions"*. She relied in this respect on the case of *R (VC) v SSHD* [2018] 1 WLR 4781; [2018] EWCA Civ 57. *VC* concerned the position of mentally unwell immigration detainees who lacked support or assistance in understanding or challenging the reasons for their detention and/or segregation. At [147]-[148], Beatson LJ dealt with the requirements of a claim for breach of a duty to make reasonable adjustments:

> "147. …there are three relevant stages in determining whether there has been a breach of the duty to make reasonable adjustments:
>
> Identifying the "provision, criterion or practice", commonly abbreviated as "PCP") which is said to put the disabled person at a substantial disadvantage.
>
> Determining whether the PCP in fact puts disabled persons at a substantial disadvantage.
>
> Assessing whether the Secretary of State took such steps as it was reasonable to take to avoid the disadvantage.
>
> …
>
> 148. The PCPs were not explicitly identified either in the judgment below, or in the claimant's submissions. Whilst the identity of the relevant PCP may be considered obvious, it must be identified in order to ensure clarity and focused argument."

125. The above extract from *VC* emphasises the need for a claimant to identify the PCP relied on. Neither EG's pleading, nor the skeleton argument served in advance of the hearing, made reference to a PCP, let alone particularised what it was in relation to either defendant (whose roles are different, as indicated above). In the context of a narrow case where the complaint focussed on the meaning and content of the Parole Board Rules and the interpretation placed on them by the Board, the PCP for each defendant may have been easily inferred (as it was in *VC*). But if the case was to be opened up in the way that Ms Gallagher and Ms Weston sought to do in oral submissions at, and written submissions after the hearing, then it was critical to make the PCP alleged against each defendant explicit in advance - "to ensure clarity and focused argument" as Beatson LJ observed. In her written submissions in Reply after the hearing ended, Ms Gallagher submitted that:

> *"The Defendants were and remain under an obligation to make adjustments to ensure that policies and procedures exist which are capable of avoiding the disadvantages faced by [EG] and others in his position."*

This submission (i) opens up the area of enquiry to potentially every aspect of the parole process including advance-identification of prisoners lacking capacity, and (ii) extends to cover the class of prisoners in general, rather than EG in particular. The defendants simply were not in a position to deal with such a broad case; nor was I.

126. In oral argument at the hearing Ms Gallagher said that the reasonable adjustments ground had always been focused on *"a failure to provide a mechanism for meaningful participation of EG in his Parole Board hearing"*. If this was the PCP which EG intended to allege, it differed from that identified in argument by Ms Weston, who described the PCP as *"the entire Parole process"*. Neither counsel sought to distinguish between the two defendants.

127. I agree with Mr Auburn that Ms Weston's formulation is too general to be workable. In *Carranza v General Dynamics Information Technology Ltd* [2015] ICR 169 the EAT observed that:

> "The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage."

In my view it is necessary for the particular aspect(s) of the parole process to be teased out and the PCP(s) identified for each of the Board and the SSJ separately.

128. Ms Gallagher submitted more than once that it was not for her client (or the EHRC) to identify what steps "the Defendant" should have taken to ensure that EG was not disadvantaged. Whilst I accept that a claimant is not required in their pleading to specify each and every adjustment, they are obliged to give some indication of what it is said the defendant should have done: see *VC* at [159]. Here, of course, there were two defendants, each with a different role in relation to prisoners and their parole proceedings.

129. In her written submissions put in after the hearing Ms Weston referred to a *"range of alternative procedural safeguards…including adjustments to legal aid requirements, an accreditation scheme and Parole Board guidance"* (paragraph 8). Later in the same paragraph and in the one following, there is reference to the needs of the whole class of prisoners who lack capacity: suggesting that reasonable adjustments would include a process for identifying them in advance and (as a minimum) guidance to Board members about how to deal with such prisoners from the first case management stage.

130. I do not at all wish to diminish the importance of all of the detailed points made at a late stage by Ms Gallagher and Ms Weston. As I have pointed out above, the class of prisoners who may lack capacity to participate in their parole hearing are highly likely to be vulnerable to disadvantage of the kind(s) to which counsel refer in their later submissions. But without a focus – by means of a clearly-articulated PCP referable to each defendant separately and some indication of the reasonable adjustments contended for – it is impossible to disentangle, consider and decide what each defendant may have

failed to do to address the risk of such disadvantage, nor is it fair to expect each defendant to meet such a case.

Conclusions

131. My decision on the discrimination claim is confined to the existence of a mechanism for affording EG full and proper representation in preparation for, and at, his oral hearing. In his case no other difficulty has been identified: his lack of capacity was picked up at an early stage and his solicitors have got legal aid to represent him in his parole process; what is wanting is a litigation friend to represent his best interests in giving his solicitors instructions, alternatively an accreditation system (or similar) to permit his solicitors properly and ethically to act in a dual capacity, as solicitors are able to do in the MHT.

132. Insofar as EG's claim included a complaint about the content of the Board's draft Guide, I note Ms Gallagher's concession that EG does not intend to pursue any relief in respect of such guidance.

133. I make no finding about the PSED, as there was no pleaded case against either defendant. So far as the reasonable adjustments claim under section 20 of the EA is concerned, and considering the case of EG within the narrow confines I have identified, I find no breach of the duty to make reasonable adjustments, given my decision that the 2019 Rules permit the appointment of a litigation friend.

134. The Article 14 claim is co-extensive with the reasonable adjustments case, as Ms Gallagher confirmed in closing.

Ground 3 - Delay

135. EG claims that there has been a violation of his right to a speedy review of the lawfulness of his detention, contrary to Article 5(4). Although in his Consolidated Grounds reference was made to Article 5(1) Ms Gallagher in her written submissions in reply confirmed that a claim was only being pursued under 5(4).

136. Article 5(4) of the ECHR provides that:

> *"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 is not lawful."*

137. EG contends that he has been deprived of a speedy parole review. Ms Gallagher drew my attention to the view expressed by EG's offender manager at the conclusion of a report submitted to the Board in August 2019:

> "*I am of the view that [EG] has been confined within custody for a disproportionate length of time, through no fault of his own. His identified learning disability, I believe has meant that [EG] has not been afforded an appropriate response from the custodial establishment in regard to providing reasonable adjustments to meet [EG]'s specific difficulties including sight*

> *and hearing, as well as his well-documented difficulties in communication skills*."

Ms Gallagher submitted that the Board has been aware since January 2018 of issues respecting EG's ability effectively to participate in his parole review due to his lack of mental capacity. Yet, even now, no solution has been found, his oral hearing has not taken place and there has been no review of the necessity for his continued detention. The delay of over two and a half years of itself establishes the breach of Article 5(4), she says. In her written submissions in reply, Ms Gallagher suggested that there was no requirement of causation, that the delay entitles EG to declaratory relief without more.

138. It is important, in my view, to read the report of the offender manager in full, particularly the other parts of the section from which the above passage is drawn. The other passages include the following further information and observations:

> "*At the time of writing I am unable to formulate a sufficiently evidence-based recommendation as to the suitability of re-release of [EG] to the parole board.*
>
> [passage above]
>
> *Mental capacity assessments have been carried out on three separate occasions, with all concluding that [EG] "does not have the capacity to participate in the release planning process". There remains ongoing difficulties in respect of identifying appropriate long-term, supported accommodation for [EG] in the community. This, in my experience of managing his case, has been due to the complex sourcing, information-sharing, assessment and cross-dimensional funding arrangements, seemingly unable to co-exist between health (NHS), local authority social care and the Criminal Justice System.*
>
> *I am of the view that although [EG] has not engaged in, nor completed any offence-focused work during the period he has been on recall at HMP Thameside, it is possible that the risk of serious harm can be managed in the community, with the pre-requisite that his basic care and support needs can be met (with a clear pathway in place) and external control mechanisms such as licence conditions.*
>
> *I consider that, even if significant adjustments were to be made for the provision of offence-specific interventions as a pre-requisite to accessing potential accommodation/social care pathways, the effectiveness of this is reducing the overall level of risk [EG] is assessed as presenting would, at best, be limited. I'd recommend that the primary focus should be on providing appropriate wrap-around care and learning-disability specific therapeutic support to [EG], which may increase his*

> *responsivity levels. In turn, intervention aimed at addressing [EG]'s risk factors can then be embedded as part of joint work between probation and learning disability forensic team in the community.*"

It is apparent from this full extract, taken together with the references to EG's case contained in Panel observations I have recorded at paragraphs [24 and 25] above, that EG's case is highly complex, requiring multi-disciplinary input from a number of health, social and other services. His parole review will need to consider, amongst other things, the provision available to supply the *"wrap around care and learning-disability specific therapeutic support"* needed to manage EG's risk in the community. Mr Brownhill informed us on the first day of the hearing that EG still does not have a concluded care-package to submit to the Board.

139. It is in those circumstances that the defendants seek to rely on section 31(2A) of the SCA, which provides as follows:

> "*The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review…*
>
> *…*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.* "

140. Mr Auburn submitted that this section imports a causative element into the consideration of Article 5(4). He suggested that, given the lack of a care plan and the absence of anyone to act as EG's litigation friend, it is highly likely that the outcome for EG would not have been substantially different: EG would still not have been able to have an effective parole hearing. Mr Auburn argued that the court was therefore obliged ("..must refuse…") to refuse relief.

141. Mr Holborn also argued that a link between a lack of access to EG's parole process and delay in having the review hearing is required to be established; not least, he pointed out, for the purposes of determining against which of the defendants relief is to be ordered.

Conclusion

142. In my view Ms Gallagher is right to say that there has been a failure to provide EG with a speedy review. Even for a prisoner with his complex needs, a delay of over two and a half years appears to me to involve a breach of those rights.

143. I acknowledge the force of the submissions made on behalf of the Board and the SSJ. However I find myself unable to conclude that it is "highly likely" that the outcome for EG "would not have been substantially different". I have declined, for the reasons I have set out, to make specific findings on the PSED or in relation to a fuller case on reasonable

adjustments. But the evidence demonstrates some obvious staging points in EG's review process to-date, which appear to me to warrant consideration when approaching the question of delay. These include:

(1) The Board's mistaken view (as it later accepted) that it had no power to appoint a litigation friend under the 2016 Rules, taken together with the SSJ's acceptance that the 2016 Rules "lacked clarity".
(2) The stance adopted (wrongly, as I have decided) by both defendants that Kesar and Co could act for EG in a dual capacity. This point has never been conceded by the SSJ and was only dropped by the Board in January 2020.
(3) The omission by the SSJ to consult with other parties, including the Law Society and the OS, prior to including rule 10(6) as a "late tack on" (in Mr Holborn's words) to the 2019 rules.

144. I cannot say that if (for instance) the Board had acknowledged the power to appoint a litigation friend earlier under the 2016 Rules, or had accepted that EG's solicitor could not act in a dual capacity sooner than January 2020, or if the SSJ had consulted the OS about acting as litigation friend of last resort under the 2019 Rules, EG's case would not have proceeded more swiftly.

145. As I indicated at the hearing, I will hear the parties further as to the relief, if any, which may be ordered arising from my findings set out above.