

IN THE HIGH COURT OF JUSTICE
(ADMINISTRATIVE COURT)

THE QUEEN on the application of
ALI HUSSAIN

Claimant

v

Respondent

THE PAROLE BOARD FOR ENGLAND AND WALES

Skeleton Argument on behalf of the Claimant (Mr Ali Hussain)

1. This is an application for judicial review of the decision by the Parole Board (“the Board”) of 25 June 2020. The Board decided to list the case of Mr Ali Hussain, the Claimant in this case and a prisoner at HMP Bedford, for a video-link hearing, rather than in person (“the Decision”).
2. The Claimant asks the Court to quash the Decision of the Board on the grounds that a video-link hearing would represent an unlawful breach of procedural fairness.

Procedural Unfairness

3. This Court may review decisions concerning the procedure of a tribunal if they are unlawful on the basis that they are procedurally unfair (Gillies v Secretary of State for Work and Pensions [2006] UKHL 2 [6]).
4. The requirements of procedural fairness in the decisions of the Board are expounded in Osborn (FC) v The Parole Board [2013] UKSC 61. There is a principled analogy between *Osborn* and the instant case. *Osborn* distinguishes between a hearing on the papers and an

oral hearing. It is our position that the same issues of unfairness are engaged when deciding between a virtual hearing and an in-person hearing.

5. In *Osborn*,¹ Lord Reed listed three relevant circumstances in which oral hearings will often be necessary:

- a. “Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively.”
- b. Where “a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility”.
- c. Where the Board cannot fairly assess risk, which may rest on “characteristics of the prisoner which can best be judged by seeing or questioning him in person” or where “a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds”.

6. In the case of Mr Hussain:

- a. The Claimant suffers from several cognitive difficulties, including an “IQ at the lower end of the spectrum”, a weak “ability to retain or comprehend complex information” and a suspected learning disability.² This would put Mr Hussain at a substantial disadvantage if the hearing were conducted by video-link. This is confirmed by the Member Case Assessment Guidelines 2018.³

¹ [2013] UKSC 61 [2].

² Agreed Facts, p.3

³ *Member Case Assessment Guidance*, June 2018, p.27

- b. Mr Hussain will set out an *explanation* for his breach of his license conditions on 2 September 2019. For his credibility to be fairly determined the Board must make an assessment of Mr Hussain’s cognitive difficulties which they cannot do virtually.
- c. A psychological assessment is necessary to determine the risk that Mr Hussain poses. That cannot be conducted virtually as per the statement of the Board’s psychology department that they are unable to assess Mr Hussain’s cognitive function in *any* virtual setting.

Article 6 and R (Michael)

- 7. Article 6 and Article 5(4) of the ECHR guarantee procedural fairness in different proceedings. As Lord Reed held in *Osborn* at [54] to [63], the requirements of Article 5(4) are not divorced from the common law requirements of procedural fairness. Instead, the common law gives domestic effect to these obligations. The Court of Appeal in R (Michael) v HMP Whitemoor [2020] EWCA Civ 29 affirmed this view in relation to Article 6, in that it saw "no difference between the protection provided by the common law and by the ECHR".⁴
- 8. Neither Article 6 nor Article 5(4) are directly engaged by the hearings of the Parole Board in this case (Roberts v. Parole Board [2005] UKHL 45 [40]; R (Whiston) v. Secretary of State for Justice [2014] UKSC 39). However, common law procedural fairness does apply. It is therefore submitted that the requirements of procedural fairness in this case are identical to those established in *Michael*, which considered the question from an Article 6 perspective.
- 9. *Michael* considered the use of video-links in civil cases in relation to Article 6 and cognitive disability. Mr Michael appealed against the Governor’s decision that he should attend county court by video-link. The Court of Appeal affirmed the High Court’s decision

⁴ [2020] EWCA Civ 29 [29]

that there had been no breach of procedural fairness. The High Court's judgment (later partially overturned on a separate point) noted *obiter dicta*:

“If on the facts there had been clear evidence of medical or quasi-medical problems preventing Mr Michael's effective participation in the civil trial [...] the likelihood is that the interests of justice would have required his production at court. Had the decision-maker had such evidence and not reached that view, then it is at least likely that the decision would have involved a breach of Mr Michael's Art.6 rights.”⁵

10. The Court of Appeal confirmed the relevance of the claimant's credibility and of the medical evidence of the claimant's vulnerabilities.

- a. In *Michael*, both courts confirmed that the claimant's credibility would not be in question since it “would centre on the solicitors' explanation of the documents they held and whether they had been produced”.⁶ In Mr Hussain's case, the decision of the Parole Board *is* likely to consider his credibility, especially in relation to the breach of his license.
- b. In *Michael*, the High Court held that there was no evidence before the judge that the claimant's cognitive “difficulties would be exacerbated if the hearing were to be via a [Prison Video Link]”. In Mr Hussain's case, there is clear evidence that a “remote (e.g. telephone) [psychological] assessment would be inappropriate due to questions over Mr Hussain's cognitive function, meaning it would be important to interview him face-to-face”.⁷

Order

11. We submit that the Court should quash the decision.

⁵ [2018] EWHC 2324 (Admin) [33]

⁶ [2020] EWCA Civ 29 [42]

⁷ Agreed Facts, p.5