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Case Nos: CO/3142/2022 and CO/3579/2022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

**Before** :

**LORD JUSTICE WILLIAM DAVIS**
**and**
**MR JUSTICE JOHNSON**

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**Between :**

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| **THE KING**<br>**on the application of**<br>**MINA DICH** | **Claimant** |
| **- and -** | |
| **(1) PAROLE BOARD FOR ENGLAND AND WALES**<br>**(2) SECRETARY OF STATE FOR JUSTICE** | **Defendants** |
| **AND** | |
| **THE KING**<br>**on the application of**<br>**OLIVER MURPHY** | **Claimant** |
| **- and -** | |
| **PAROLE BOARD FOR ENGLAND AND WALES** | **Defendant** |
| **and** | |
| **SECRETARY OF STATE FOR JUSTICE** | **Interested Party** |

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Jude Bunting KC and Stephanie Davin (instructed by Bhatt Murphy Solicitors) for Mina Dich
Edward Fitzgerald KC and Stuart Withers (instructed by Kesar and Co Solicitors) for Oliver Murphy
Russell Fortt (instructed by Government Legal Department) for the Parole Board for England and Wales
Jason Pobjoy and Madelaine Clifford (instructed by Government Legal Department) for the Secretary of State for Justice

Hearing date: 20 April 2023

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# Approved Judgment

This judgment was handed down by release to The National Archives on 26 April 2023 at 10.30am

**Lord Justice William Davis and Mr Justice Johnson:**

1. The common issue that arises in these otherwise unconnected cases is the test to be applied by the Parole Board for England and Wales when considering the risk posed to the public by the release of a prisoner serving an extended determinate sentence, or a prisoner serving a determinate sentence who has been recalled to prison. In particular, is the Parole Board required to consider only risks that may arise before the sentence expiry date, or must it also consider risks that may arise after the sentence expiry date? The issue was addressed in *R (Secretary of State for Justice) v Parole Board and Johnson* [2022] EWHC 1282 (Admin); [2022] 1 WLR 4270. The parties disagree as to the effect of the decision in *Johnson*.

## The legal framework

*Extended sentence: early release*

2. An extended determinate sentence comprises a custodial term, and an extension period for which the offender is subject to a licence: section 279 Sentencing Act 2020 (and, at time of Ms Dich's sentence, section 226A(5) Criminal Justice Act 2003). Such a sentence may only be imposed if the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences: section 280(1)(c) of the 2020 Act; section 226A(1)(b) of the 2003 Act.

3. Once an offender has served two thirds of the custodial term, the Secretary of State must refer the case to the Parole Board: section 246A(4) and 246A(8) Criminal Justice Act 2003. The Parole Board may then direct the offender's release if:

> "the Board is satisfied that it is no longer necessary for the protection of the public that [the offender] should be confined.": section 246A(6)(b) of the 2003 Act.

4. This is identical to the statutory test for directing the release of a life prisoner.

*Determinate sentence: early release*

5. Subject to exceptions that do not here apply, a prisoner serving a determinate sentence is entitled to release at the halfway stage of their sentence: section 244(1) and 244(3)(a) of the 2003 Act. The release is subject to a licence that remains in force for the remainder of the sentence: section 249(1) of the 2003 Act. While the licence is in force, the Secretary of State may revoke a licence, and recall the prisoner to prison: section 254(1) of the 2003 Act. If a prisoner remains in custody 28 days after recall, then the Secretary of State must refer the case to the Parole Board: section 255C(4)(b) of the 2003 Act. The Parole Board may then direct the offender's release if:

> "the Board is satisfied that it is no longer necessary for the protection of the public that [the offender] should remain in prison.": section 255C(4A) of the 2003 Act.

6. This is materially identical to the test that applies in extended sentence cases (see paragraph 3 above).

*The decision in Johnson*

7. The facts in *Johnson* were unusual. The prisoner was subject to an extended sentence. The custodial term had around 9 months to run. The prisoner had a pattern of offending against children. The pattern involved grooming of the children before sexual assaults took place. The Parole Board concluded that this grooming, were it to occur, would still be continuing at the end of the custodial term. It determined that the grooming of itself would not cause harm and that further sexual assaults (of which there was a high risk) would not occur until after the expiry of the custodial term. It directed the prisoner's release. The Secretary of State sought judicial review of the release decision. The court (William Davis LJ and Garnham J) found that the Parole Board's conclusions were irrational because (a) grooming of itself is an offence liable to cause serious harm and (b) there was no basis for the finding that no sexual assaults would occur prior to the expiry of the custodial term. Therefore, the Parole Board should have found that the prisoner's continued confinement was necessary to protect the public purely by reference to the risk in the period up to the expiry of the custodial term: [23] – [27]. The court quashed the decision of the Board on those narrow grounds.

8. The court went on to consider the position if the Parole Board's factual conclusions had been reasonable. In those circumstances the prisoner, having been released, very possibly would have gone on to groom a child or children in anticipation of committing sexual assaults thereafter. To release the prisoner would not (on this assumption) create an immediate or imminent risk to the public. But it was necessary for the protection of the public that the prisoner should be confined because confinement would prevent him from starting the grooming process which was an integral part of his offending. See at [30]:

> "Were he to be released, there is a significant risk that he would engage in those techniques once more. Even if the grooming were not to cause harm in itself and even if it occupied a considerable period, it would put children at risk of harm once it had achieved its ends. Thus, it would be necessary to confine him for the protection of children albeit that the harm may not occur until after the expiry of the appropriate custodial term."

9. The error made by the Parole Board was to put to one side any risk that was not imminent or immediate. No doubt, in the great majority of cases it is the existence of an imminent or immediate risk which leads the Parole Board to conclude that it is necessary for the protection of the public that the prisoner should be confined. On the view of the facts adopted by the Parole Board in *Johnson* the risk was not imminent. Yet the protection of the public required the confinement of the prisoner.

*Parole Board's guidance*

10. On 15 June 2022, following the decision in *Johnson* the Parole Board promulgated guidance entitled "Consideration of the 'at risk' period for determinate sentence cases." The guidance was said to apply to all determinate sentences irrespective of whether the sentence was extended. The Parole Board anticipated that applying the guidance would mean that some determinate sentence prisoners no longer would meet the test for release.

11. The substantive part of the guidance states:

> "In light of the judgment [in *Johnson*], when considering whether the test for release is met in the case of a determinate sentence prisoner (on both initial release and after recall), panels need to bear in mind the following:
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> • The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public.
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> • The statutory test for release does not include a temporal element. The test is whether release would *cause* a more than minimal risk of serious harm to the public *at any time*. Therefore, consideration of risk goes beyond conditional release dates (CRD) and sentence expiry dates (SED).
>
> • This means that, in determinate sentence cases, the test should be approached in the same way as in life and IPP sentences. Panels will need to consider all potential future risk.
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> • The statutory release test is concerned with preventing the release of prisoners where the fact of release would cause more than a minimal risk of serious harm to the public. The point in time when the resulting increased risk of serious harm might manifest itself in actual harm is irrelevant.
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> • In assessing the necessity of continuing detention, the focus must be on the consequences of early release:
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> - If release before the date of automatic release would clearly significantly increase the risk of serious harm to the public, (relative to continuing detention), irrespective of when the actual harm might manifest itself, the statutory release test is unlikely to be met.
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> - Where the prisoner would pose a more than minimal risk of serious harm to the public following automatic release (either at CRD or SED) but not in the period between the panel's decision to release and automatic release, and where their early release would not in any way increase the risk of harm to the public following automatic release, it could not be said that continuing detention in the period between the decision and automatic release would be "necessary for the protection of the public".
>
> **Key points for panels**

> For decisions made on or after 27th May 2022, the period over which a panel is considering risk in all determinate sentence cases is indefinite. When completing the risk period box on the front sheet of the decision template, panel chairs should state 'indefinite'.
>
> Panels will need to consider risk beyond the point of CRD and SED. In doing so, panels may wish to seek the views of professional witnesses on the nature and likely level of risk over the longer term. The panel must then make its own assessment of risk and determine whether release would cause a more than minimal risk of serious harm to the public at any time. In considering this, panels will wish to bear in mind that standard and any additional conditions only apply for the duration of the licence; they do not apply, and therefore cannot be enforced, once the licence has expired. Similarly, while preventative orders may continue after the SED, other aspects of a risk management plan may no longer be in place or be enforceable." [Underlining and italics in original]

## The correct approach to the assessment of risk

12. The statutory test requires the Parole Board to decide if it is necessary for the protection of the public that the offender should be confined. That requires an assessment of the risk to public protection that would be occasioned by the prisoner's release. If the release of a prisoner gives rise to a public protection risk which could be avoided or reduced if the prisoner is confined, then the Parole Board may decide that it is necessary for the protection of the public that the offender should be confined. Conversely, if the release of the prisoner would not give rise to a public protection risk (which could be avoided or reduced if the prisoner is confined), then the Parole Board could not rationally conclude that it is necessary for the protection of the public that the offender should be confined.

13. Mr Bunting KC, on behalf of Ms Dich, argues that the statutory test must be construed in the light of the different statutory frameworks that apply to determinate and life sentences. The latter allow licence conditions to be set that will last for the rest of the offender's life. Future risk is assessed in that context. Determinate sentences expire on a set date (which, says Mr Bunting, reflects a judicial assessment as to the extent of future risk). After the expiry of a determinate sentence, there is no possibility of setting licence conditions. It would, says Mr Bunting, be inconsistent with this framework if the statutory test for release involved an assessment of the risk posed after the expiry of a sentence. He points out, correctly, that *Johnson* referred to the risk of harm after the expiry of the custodial term of an extended sentence, rather than harm that might arise after the expiry of the entire sentence. Mr Bunting is right that the statutory test falls to be applied in the broader statutory context that regulates sentencing and early release. For the reasons given below in the context of Mina Dich's case, we do not accept his submissions that this context requires the Parole Board to ignore any risk that might arise after the expiry of the sentence.

14. The statutory test does not involve any temporal element in relation to risk. It is not necessary for the Parole Board to determine precisely when a risk might materialise. In

many cases, it will be artificial to attempt such an exercise. If there is, generally, a risk to public protection from the release of a prisoner, and if that risk can be addressed by continued confinement, then that may be sufficient for the Parole Board to decide not to direct the prisoner's release, even if it cannot predict precisely when the risk is likely to materialise.

15. The decision in *Johnson* makes it clear that a risk posed by a prisoner serving an extended sentence after the expiry of the custodial term is capable of being relevant to the need for public protection. The reasoning applies equally to a risk posed after the expiry of the sentence. However, nothing in *Johnson* suggests that such a risk is always relevant to the statutory test. Its relevance on the facts of a particular case will depend on the question of whether the risk can be avoided or reduced by continued confinement before the sentence expiry date. There must be a causal link. *Johnson* was such a case because confinement would prevent grooming, which was a precursor to sexual assaults. Although the particular facts of *Johnson* were unusual, it is not uncommon for a prisoner to present no imminent risk but for there to be evidence that on release he will start preparing for some criminal activity. In those circumstances, it may be necessary for the protection of the public that he is confined until he has to be released due to the expiry of the sentence.

16. Where such a case arises, the statutory test to be applied by the Parole Board is the same, namely whether it is necessary for the protection of the public that the offender should be confined. However, the application of the test is different from its application in the context of a life prisoner.

17. In a non-life case, if continued incarceration up until the sentence expiry date will do nothing to avoid or reduce the risk thereafter, then it is not necessary for the protection of the public that the offender should be confined. The position is different if continued incarceration would reduce the risk to the public after the sentence expiry date (for example, by preventing the prisoner from taking steps that are preparatory to an offence, or by facilitating rehabilitative work that might reduce the risk post release). It follows that there must be a causal link between continued detention and prevention or reduction of risk.

18. Given those principles, we turn to consider the guidance promulgated in June 2022 by the Parole Board. In most circumstances, it would not be appropriate for this court to engage in any detailed assessment of guidance issued by the Parole Board. Generally, if the court is invited to consider the legality of such guidance, the court's function is fulfilled by explaining what the law is. It is then for the Parole Board to determine whether any revision or amendment of its guidance is necessary. However, the court in *Johnson* explained the law yet the guidance which followed was based on what we conclude was a misunderstanding of at least parts of the judgment in *Johnson*. To avoid further misunderstanding, we shall go through the guidance promulgated in June 2022 and indicate where and in what terms it should be amended. We shall do that in order to identify what approach should be taken by the Parole Board in cases to which the guidance applies. We do not intend that our proposed amendments necessarily should be adopted. How the Parole Board deals with the issue thereafter is entirely a matter for them.

19. The substantive guidance is set out in bullet point form as appears in paragraph 11 above. The first bullet point is not controversial. It is well established that the Parole

Board is not to engage in a balancing exercise with public protection on one side and the interests of the prisoner on the other. In strict terms the second bullet point accurately states the law. However, the highlighted use of the words "*at any time*" potentially is misleading. There is no reference to the required nexus or causal link to which we have referred. Those words should be deleted to avoid any possible misunderstanding. Further, consideration of the relevant risk **may** go beyond conditional release dates and sentence expiry dates. The last sentence of the second bullet point should be reworded to make that clear.

20. The third bullet point does not represent the correct approach. Cases involving a determinate sentence are not to be approached in the same way as cases where an indeterminate sentence has been imposed. The issue of a nexus or causal link is unlikely to be of significance in the case of an indeterminate sentence whereas it is of critical importance where the Parole Board is concerned with risk arising outside the custodial term. The bullet point should be deleted from the guidance. In relation to the fourth bullet point, the point in time at which the risk becomes manifest is not necessarily irrelevant. The use of "irrelevant" undermines the required nexus or causal link. It should be replaced with "not determinative".

21. The fifth bullet point is in two parts. The first part of that bullet point of the guidance as set out above does not properly reflect what was said in *Johnson*. The words "…irrespective of when the actual harm might manifest itself…" should be replaced with the words "…even though actual harm might not occur until after the expiry of the sentence…" This change emphasises the requirement for a causal link.

22. The second part of the fifth bullet point properly sets out the legal position where the facts are as set out in that part of the guidance. It explains the need for a causal link between release and risk.

23. Under the heading **Key points for panels** the guidance begins by asserting that any Parole Board panel will be required to consider risk in all determinate cases over an indefinite period. It is theoretically possible that some very long term risk will be relevant to the Parole Board's consideration of a particular case. However, it is difficult to see how the necessary causal link between early release and a long term risk could be established. As we shall see, in the case of Mina Dich the panel chairman used the word "indefinite" without qualification. That was understandable given the terms of this part of the guidance. Because it has the tendency to undermine the issue of causation, the opening paragraph under **Key points** should be deleted.

24. The second paragraph under the heading **Key points for panels** refers to the lack of conditions once any licence has expired and the potential unenforceability of a risk management plan after expiry of the sentence. These features almost inevitably will be irrelevant to the issue to be considered by the Parole Board. There is most unlikely to be any causal link between the lack of licence provisions and early release. The paragraph should be amended so as to delete all words from and including "*at any time".* The paragraph should conclude with the words "…whether before or after the expiry of the sentence."

25. On the final page of the guidance there is anticipation of the possible effect of *Johnson* on some determinate sentence prisoners. Whether that speculative assessment is correct is not for us to say. It does not undermine the guidance as amended. For all the reasons

we have given, the guidance promulgated in June 2022 misstates the way in which the test should be applied.

## Mina Dich's claim

*The facts*

26. In the 2010s Mina Dich was living in London with her son and three daughters. In October 2014, her daughter, Rizlaine, tried to reach Syria to join ISIS. In the Summer of 2016, her daughter, Safaa, purported to marry an ISIS fighter, Naweed Hussain, in an online ceremony. In August 2016, Rizlaine purchased tickets for her, her baby, and Safaa to travel to Turkey with a view to going to Syria to meet Mr Hussain. Mr Hussain messaged Rizlaine that if she was caught then she should "do something" in the UK, adding emojis representing a bomb, a knife and fire. Rizlaine responded "yes." Their attempt to travel to Syria was thwarted.

27. Rizlaine planned to carry out a terrorist knife attack on members of the public in central London on 27 April 2017. On 25 April Rizlaine spoke to her mother about the possibility of being tasered during her imminent action. That evening, Ms Dich drove Rizlaine around the Mill Bank area in Westminster, on a reconnaissance trip in advance of Rizlaine's planned action. On 26 April, Ms Dich drove Rizlaine to a supermarket where they purchased a pack of three knives and a small rucksack. Later that evening, Ms Dich drove Rizlaine and undertook repeated manoeuvres which were consistent with anti-surveillance measures. She threw away an old rucksack, containing the packaging for the three knives, and two of the knives, in a rubbish bin. The third knife (which was the largest) was kept by Rizlaine. The following day, Rizlaine went to the house of another woman, Khawla Barghouthi, and practised thrusting the knife with Khawla playing the role of a pretend victim. During the day, ISIS propaganda videos showing martyrdom, operations and beheadings were downloaded on to Khawla Barghouthi's mobile phone. Police arrested Rizlaine and Khawla Barghouthi that evening.

28. Ms Dich pleaded guilty to an offence of engaging in conduct in preparation for terrorist acts, contrary to section 5(1)(b) Terrorism Act 2006. By an accepted basis of plea, she admitted that she had driven Rizlaine around on the evening of 25 April, and had accompanied her to purchase knives on 26 April, and that she placed the packaging and two of the knives in a rubbish bin, and that she believed that Rizlaine might carry out some type of action whereby she would brandish a knife in a public place and threaten violence, but not that she would physically harm anyone.

29. On 15 June 2018, Ms Dich was sentenced to an extended determinate sentence of imprisonment of 11 years and 9 months, comprising a custodial term of 6 years and nine months and an extended licence of 5 years.

30. On 9 November 2021, Ms Dich became eligible for release, subject to a decision by the Parole Board. If not released earlier, she must be released on licence by 8 February 2024. Her sentence expires on 7 September 2029.

31. On 13 February 2021 the Secretary of State referred Ms Dich's case to the Parole Board to consider her release. On 14 January 2022 the Parole Board directed that the case be reviewed at an oral hearing. There was an issue as to disclosure which initially formed

part of this claim, but that has been resolved. On 23 June 2022, at a directions hearing, the panel stated that it would adopt the guideline of June 2022. Using the language of the guideline to which we already have referred, the panel's direction was that it would consider risk on an indefinite basis. This direction is the subject of the challenge by way of judicial review. The substantive hearing has been adjourned pending the outcome of these proceedings.

*The grounds of claim and the parties' submissions*

32. The sole remaining ground of claim is that the decision to apply the guidance is flawed, because the guidance itself misstates the law.

33. Mr Bunting KC contends that the Parole Board's guidance is wrong insofar as it suggests that the test for release of life sentence prisoners is the same as that for extended and (recalled) determinate sentence prisoners. He submits that it is unlawful to consider the question of risk "indefinitely". Rather, the statutory scheme requires account to be taken of the temporal limits in determinate sentence cases. Further, the sentencing judge has already decided the length of time for which there is a live risk, and he imposed an extended determinate sentence accordingly. Mr Bunting's case is that the Parole Board should leave out of account any risk that arises after the sentence expiry date. In his oral submissions Mr Bunting accepted that *Johnson* was correctly decided with particular reference to [30] of the judgment.

34. Mr Fortt for the Parole Board, and Mr Pobjoy for the Secretary of State, contend that the Parole Board's decision to apply its own guidance is entirely lawful and in accordance with the court's decision in *Johnson*. They say that *Johnson* demonstrates that risks that arise after the sentence expiry date may properly be taken into account.

*Discussion*

35. We agree with Mr Bunting's submission in relation to the issue of "indefinite risk" to this extent. The term fails to include the necessary causal link between continued detention and prevention or reduction of risk. We do not agree that the statutory test for release when applied to prisoners serving determinate sentences (whether standard or extended) has a temporal limit, namely the expiry of the sentence. When imposing the sentence, the judge has regard to the purposes of sentencing as set out in section 57(2) of the Sentencing Code 2020. Protection of the public is one of the matters to which he must have regard. Insofar as the judge assesses risk, that is done in the light of the evidence available at the time of sentence. The length of the sentence imposed is at best of limited relevance to the risk posed by a prisoner when he is eligible for release. It cannot be determinative of the period of risk to be considered by the Parole Board. Mr Bunting's submission was stark. Any risk of expiry of the sentence is "out of bounds" when the Parole Board is applying the release test. That is not the law. So long as the causal link to which we have referred more than once is established, a risk arising after the expiry of the sentence may be considered by the Parole Board.

36. We have set out in some detail those parts of the Parole Board's guidance which do not correctly state the law. The Parole Board has said that it will apply its guidance when determining Ms Dich's case. So long as the guidance is revised in the light of this judgment, no issue will arise. If the guidance continues to treat a risk after sentence expiry as relevant, even if it could not be avoided or reduced by not releasing Ms Dich

until the expiry of the sentence, and if that is the basis for any decision in her case, the decision would be unlawful. As matters stand, no substantive decision has been taken. When Ms Dich's case is considered by the Parole Board, it must apply the law as we have explained it in this judgment. If it fails to do so, then Ms Dich will have a remedy at that point. We do not consider that any purpose would be served by quashing the decision of 23 June 2022 which does not, in and of itself, have any substantive impact on Ms Dich's public law rights.

37. Moreover, we consider that any application in relation to the direction given on 23 June 2022 is premature. The Parole Board as yet has not held a full hearing in relation to Ms Dich's application for release. An application to quash the direction given by the panel is akin to one party to magistrates' court proceedings coming to this court in relation to an interlocutory ruling in a summary trial. In such a case this court has no jurisdiction to interfere with the decision of the magistrates' court: see *R v Rochford Justices* (1979) 68 Cr App R 114. The same reasoning applies to Parole Board hearings.

38. In those circumstances we shall grant no relief to Ms Dich. These proceedings have provided the means by which the court has been able to clarify the decision in *Johnson*. The clarification provided by this judgment is sufficient to ensure that Ms Dich's hearing will be conducted on a lawful basis.

## Oliver Murphy's claim

*The facts*

39. On 26 February 2016, Mr Murphy pleaded guilty to offences concerning indecent imagery of children. He was made subject to a sexual harm prevention order for 10 years. On 21 August 2019 he was visited by police. An investigation revealed that he had accessed the internet on devices which, in breach of the order, he had not disclosed to the police. He pleaded guilty to an offence of breaching the order. On 4 December 2020, he was sentenced to a determinate custodial term of 2 years 8 months imprisonment. His sentence expiry date is 16 July 2023.

40. On 17 March 2022, Mr Murphy was released on licence to a probation hostel. On 25 April 2022 a recall report was completed on the grounds that Mr Murphy was a suicide risk. There were also allegations (denied by Mr Murphy) that he had used his phone to search for indecent images. On 25 April 2022, Mr Murphy's licence was revoked. His case was referred to the Parole Board.

41. On 29 June 2022 the Parole Board refused to undertake an oral hearing, and refused to direct his release. It held that recall was appropriate because:

> "…there was evidence that Mr Murphy's risk factors were active as he was searching for sexual images of school girls.
>
> …
>
> Given his entrenched sexual interest in children and lack of completion of any interventions to address his risk of sexual offending, the panel were not persuaded hat the risk management plan would be capable of managing the risk of serious harm."

42. Mr Murphy was entitled to seek an oral hearing following a paper refusal, so long as the request was made within 28 days. Mr Murphy did not request an oral hearing within that time limit. A subsequent request for an extension of time to appeal was refused.

*The grounds of claim and the parties' submissions*

43. Mr Murphy challenges the decision on the grounds that:

(1) it is unfair, because he was deprived of the opportunity of an oral hearing in circumstances where there were significant factual issues,

(2) the decision contains a material error of law, because the Parole Board held that it must examine the risk posed by Mr Murphy on an indefinite basis and post the expiry of his sentence.

44. Mr Fitzgerald KC submits that the principles explained by the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 required the Parole Board to grant Mr Murphy an oral hearing. On the second ground, Mr Fitzgerald advances the same arguments as those advanced in the linked case, namely that the Parole Board has taken an erroneous approach to the relevance of risks that arise after sentence expiry.

45. The Parole Board takes a neutral stance in relation to the first ground of challenge. It does not seek to justify the decision not to hold a hearing.

46. In respect of the second ground, Mr Fortt contends that the decision of the Parole Board is entirely consistent with the judgment in *Johnson*, and the Parole Board was, in particular, entitled to consider risks that might arise after the expiry of Mr Murphy's sentence.

*Discussion*

47. In *Osborn* the Supreme Court set out the circumstances in which an oral hearing is likely to be required (see *per* Lord Reed at [2]):

> "a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.
>
> b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a

> psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.
>
> c) Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.
>
> d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews."

48. In the present case, there were significant factual issues. It is a case where fairness required that Mr Murphy be given a right to an oral hearing. The failure of the Parole Board to order an oral hearing at that point rendered the subsequent determination made on the papers unfair. It was quite clear that Mr Murphy fulfilled more than one criteria identified in *Osborn*. Whether he asked for an oral hearing at that stage was of no consequence. The Parole Board had a duty to order such a hearing of its own volition. If it did not, it was required to explain why such a hearing was unnecessary. The published decision referred to *Osborn* but without any explanation as to why it did not apply to Mr Murphy.

49. Although Mr Murphy had the right to request a reconsideration of the decision and to apply for an oral hearing at that stage, this cannot cure the initial procedural failure. It is not necessary for us on the facts of this case to consider the effect of his later failure to meet time limits and the refusal to extend time.

50. In consequence, the paper decision in Mr Murphy's case must be quashed. His application for release must be considered by a fresh panel at an oral hearing. Given that his custodial term expires in July, we hope that an oral hearing can be organised quickly.

51. The second ground of challenge falls away as a result of our conclusion in relation to the oral hearing. We observe that, although the paper decision referred to *Johnson*, the panel was not concerned with any risk other than the immediate and imminent risk. In those circumstances, the Parole Board's findings did not rely on an erroneous view of the law. It held that the risk factors were "active" and that he was searching for sexual images of school-girls. There was therefore an existing public protection risk. It was not a case where any risk would only arise after the expiry of the sentence.

52. In those circumstances, the issue of whether, in the case of a prisoner serving a determinate sentence who has been recalled to prison, the Parole Board can consider risk which will eventuate after the expiry of the sentence does not arise. However, the point has been fully argued before us. In relation to the relevance of post sentence expiry risk, we see no distinction in principle between a standard determinate sentence and an

extended determinate sentence. If the factual position in *Johnson* were to arise in the case of a man applying for release from a standard determinate sentence following recall, the Parole Board would be entitled to consider risk after the expiry of the sentence so long as the appropriate causal link could be established.

## Outcome

53. For the reasons we have given there will be no relief in relation to Mina Dich's claim. Her application for release will now be considered on a proper understanding of the principles to be applied as explained in *Johnson* and as clarified in this judgment.

54. The decision in Oliver Murphy's case is quashed for the reason given above. A fresh hearing must take place as soon as possible. The hearing will be an oral hearing.