*1 Regina (Howard League for Penal Reform and another) v Lord Chancellor (Equality and Human Rights Commission intervening)

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
10 April 2017

Report Citation
[2017] EWCA Civ 244
[2017] 4 W.L.R. 92

ICLR

Court of Appeal

Gloster , Patten , Beatson LJJ

2017 Jan 31; Feb 1; April 10

Legal Aid—Availability—Criminal legal aid—Lord Chancellor removing funding for certain areas of decision-making concerning prisoners from scope of criminal legal aid—Whether giving rise to inherent or systemic unfairness— Criminal Legal Aid (General) Regulations 2013 (SI 2013/9), reg 12 (as amended by Criminal Legal Aid (General) (Amendment) Regulations 2013 (SI 2013/2790), reg 4)

The claimants, a penal reform charity and a legal advice charity providing representation to prisoners, sought judicial review of the Lord Chancellor's decision to introduce the Criminal Legal Aid (General) (Amendment) Regulations 2013 , which removed funding for a number of areas of decision-making concerning prisoners from the scope of the criminal legal aid scheme by amending regulation 12 of the Criminal Legal Aid (General) Regulations 2013 [1] .

The Divisional Court of the Queen's Bench Division refused permission to proceed, finding that the claim was unarguable. The Court of Appeal allowed the claimants' appeal, granted permission to proceed with the claim on the sole ground that the removal of legal aid from those areas would result in inherent or systemic unfairness, and retained the hearing of the claim in the Court of Appeal. At the hearing the challenge was confined to the removal of legal aid from five areas, namely: (i) pre-tariff reviews by the Parole Board where the board did not have the power to direct release but advised the Secretary of State whether the prisoner was suitable for a move to open conditions; (ii) categorisation reviews of Category A prisoners; (iii) access to offending behaviour programmes and courses; (iv) disciplinary proceedings where no additional days of imprisonment or detention could be awarded; and (v) placement in close supervision centres.

On the claim—

Held , allowing the claim in part, that determining whether the removal of legal aid from any category caused inherent or systemic unfairness depended on the application to the particular category of three factors, namely (i) the importance of the issues at stake, (ii) the complexity of the procedural, legal and evidential issues and (iii) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity and the other assistance that was available; that the question was whether, looking at the full run of cases in that category that went through the system, other forms of assistance were adequate and available to enable a prisoner to participate effectively after the changes introduced by the Criminal Legal Aid (General) (Amendment) Regulations 2013 ; that the high threshold for a finding of inherent or systemic unfairness had been satisfied in the case of pre-tariff reviews by the Parole Board, category A reviews and decisions as to placement in close supervision centres, particularly where vulnerable prisoners were involved, such as those with learning disabilities and mental illness; but that the threshold had not been satisfied in relation to decisions about offending behaviour programmes or disciplinary proceedings (post, paras 51–56, 92, 109, 126, 137, 143, 144–147).

R (Gudanaviciene) v Director of Legal Aid Casework (British Red Cross Society intervening) [2015] 1 WLR 2247 , CA applied.

CLAIM for judicial review

By claim forms issued on 6 November 2013 and on 28 November 2013 the claimants, The Howard League for Penal Reform and the Prisoners' Advice Service, sought judicial review of a decision by the Lord Chancellor by way of the Criminal Legal Aid (General) (Amendment) Regulations 2013 to remove from the scope of legal aid all Parole Board cases where the board ***2** did not have the power to direct release and to remove from the scope of legal aid of the provision of advice and assistance from other areas of decision-making in prison law.

By a decision dated 17 March 2014 [2014] EWHC 709 (Admin), the Divisional Court of the Queen's Bench Division (Rafferty LJ and Cranston J) refused the claim.

By an appellant's notice dated 17 March 2014 and amended on 22 June 2015, and with permission granted by the Court of Appeal (Sir Brian Leveson, Tomlinson and Sharp LJJ) on 28 July 2015 [2016] EWCA Civ 819 the claimants appealed. The Equality and Human Rights Commission was granted permission to intervene on the appeal.

The facts are stated in the judgment of the court.

Phillippa Kaufmann QC and *Alex Gask* (instructed by *Bhatt Murphy Ltd*) for the claimants.

James Eadie QC and *Richard O'Brien* (instructed by *Treasury Solicitor*) for the defendant.

Hugh Southey QC (instructed by *Equality and Human Rights Commission*) for the intervener.

The court took time for consideration.

10 April 2017. BEATSON LJ

handed down the following judgment of the court.

1. This is the judgment of the court.

I. Overview

2. In this judicial review, the first claimant is the Howard League for Penal Reform ("the Howard League") a penal reform charity, and the second claimant is the Prisoners' Advice Service, a legal advice charity providing representation to prisoners and education to solicitors and NGOs. Both claimants have specialist prison law and public law contracts with the Legal Aid Agency to deliver publicly funded legal services on prison law. They challenge changes to criminal legal aid for prison law introduced with effect from 2 December 2013 by the Criminal Legal Aid (General) (Amendment) Regulations ("the 2013 Amendment Regulations"). The changes remove funding for pre-tariff Parole Board reviews and a number of other areas of

decision-making concerning prisoners from the scope of the criminal legal aid scheme. The claimants submit that the removal of legal aid from these areas will result in inherent or systemic unfairness.

3. The defendant is the Lord Chancellor, an office which is held in conjunction with that of Secretary of State for Justice. The Lord Chancellor has a duty under section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") to secure that legal aid is made available in accordance with Part 1 of the Act. Section 1 of the Constitutional Reform Act 2005 preserves the Lord Chancellor's "existing constitutional role" in relation to the "existing constitutional principle of the rule of law". The seventh of Lord Bingham's eight principles of the rule of law is that adjudicative procedures provided by the state should be fair, and he gives Parole Board hearings as an example of "hybrid procedures" subject to this principle: *Thomas Bingham, The Rule of Law* (2011), p 90. The Lord Chancellor is now effectively the other party to the claimants' contracts with the Legal Aid Agency. The Secretary of State for Justice's responsibilities include prisons, sentencing and parole policy, and the probation service, matters that before 2007 were the responsibility of the Home Secretary.

4. The challenges are before this court because, when allowing an appeal against the refusal by the Divisional Court of the Queen's Bench Division (Rafferty LJ and Cranston J) [2014] EWHC 709 (Admin) to grant permission for a judicial review on 28 July 2015 and granting limited permission, this court (Sir Brian Leveson P, Tomlinson and Sharp LJJ) retained the hearing in this court rather than remitting it to the Divisional Court [2016] EWCA Civ 819 at [27] [2] . The Equality and Human Rights Commission was granted permission to intervene by way of oral and written submissions to assist the court in determining the impact and lawfulness of the reforms on prisoners' rights and on the ability of prisoners with particular protected characteristics to obtain access to justice.

5. There are two claims. The first, the "Parole Board claim", issued on 6 November 2013, challenged the removal from the scope of legal aid of all Parole Board cases where the Board does not have the power to direct release. The second, the "Prison Law claim", issued on 28 November 2013, challenged the removal from the scope of legal aid of the provision of advice and assistance from other areas of decision-making in prison law. The question for decision is whether the Lord Chancellor's decision to remove from the scope of criminal legal aid the provision of advice and assistance in the areas identified results in a system that carries "an unacceptable risk of unfair, and therefore unlawful, decision-making". The government's response in September 2013 to the reactions to its April 2013 consultation paper makes it clear that it was relying on existing ***3** procedures to fill the gap left by the removal of legal aid, rather than introducing a new system or new safeguards: see *Transforming Legal Aid: Next Steps* , paras 2.5–2.6 [3] .

6. In the light of the authorities which we consider in section IV of this judgment, there is broadly common ground as to the test required to show systemic unfairness. The threshold is a

high one, and requires showing unfairness which is inherent in the system itself and not just the possibility of aberrant decisions and unfairness in individual cases. The dispute between the parties is the application of that test in the circumstances of these claims. Its determination depends on considering the full run of cases that go through the system and whether the existing alternative processes and procedures on which the Lord Chancellor is relying to fill the gap left by the removal of legal aid provide safeguards that are in practice available to ensure fairness in the light of that removal.

7. Since the grant of permission, the scope of the challenge has narrowed. In October 2015, the Lord Chancellor accepted that legal aid, in the form of exceptional case funding ("ECF") under section 10 of LASPO , is in principle available to prisoners in applications for places on mother and baby units and in respect of licence conditions. In October 2015 and December 2016, the Lord Chancellor also accepted that ECF would also in principle be available for decisions concerning segregation and resettlement cases concerning a prisoner's accommodation or care following release which engage article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). The challenge is now confined to the removal of legal aid from five areas. These are: pre-tariff reviews by the Parole Board where the Board does not have the power to direct release but advises the Secretary of State for Justice whether the prisoner is suitable for a move to open conditions; categorisation reviews of Category A prisoners, defined as those whose escape would be highly dangerous; access to offending behaviour programmes and courses ("OBPs"); disciplinary proceedings where no additional days of imprisonment or detention can be awarded; and placement in close supervision centres ("CSCs"). We give a fuller summary of the procedures concerning these five areas at paras 57–59, 93–94, 110–112, 127–128 and 138–139 below.

8. Those within the prison population are there for the purposes of punishment, the protection of the public, and rehabilitation. The claimants' case proceeds on the basis that the prison population is overcrowded and contains very vulnerable individuals. It includes the mentally unwell, those with learning or other disabilities, the illiterate, those who do not or hardly speak English, and young people. The claimants submit that, in different ways, the decision-making process in the five areas from which legal aid has been removed is complex and can have such profound consequences for prisoners as to call for the highest procedural safeguards to ensure fairness. The complexity may, for instance, arise because of the need to assess the risk of future dangerousness and to consider assessments by the prison authorities, and the psychiatrists and psychologists who advise them, for which independent expert evidence may be required, or because of technical legal issues such as the disclosure of reports. There are some prisoners who, because of their vulnerabilities, are unable to participate in decision-making effectively, and most cannot pay for assistance.

9. Ms Kaufmann QC, on behalf of the claimants, submitted that there is no evidence that assistance by staff and other prisoners in practice provides safeguards that render the system capable of delivering fair decision-making for those vulnerable prisoners. She maintained that

prison staffing levels at present mean that there is insufficient capacity to provide the support that is needed and in any event, support by prison officers who, for example, may be providing evidence which a prisoner wishes to contest is not appropriate. She also submitted that the Lord Chancellor's reliance on post-decision appellate or supervisory mechanisms is misplaced as these mechanisms are incapable of remedying a decision where the flaw lies in its inability to deliver fairness. In respect of categorisation and placement in CSCs, she submitted that decisions in these areas may interfere with article 8 of the ECHR , and that exceptional funding ought to be available under section 10 of LASPO , something which the Lord Chancellor does not accept.

10. The Lord Chancellor's case is that the flexibility in the system means that the high test for "inherent" or "systemic" unfairness is not met, particularly in the light of the margin of discretion allowed to the government in respect of the allocation of scarce legal aid resources. It was submitted that the areas of decision-making that are the subject of this challenge are essentially administrative, procedurally straightforward, and that decision-making is typically by an inquisitorial process.

11. Mr Eadie QC, on behalf of the Lord Chancellor, submitted that vulnerable prisoners are adequately supported within prisons by alternative processes and procedures not involving legal advice or representation, and by family and friends, and that it is not impossible for them *4 to engage in the types of decision-making under consideration. He argued that much of the evidence adduced on behalf the claimants does no more than show that legal representations can play a role. That was not disputed but he submitted that is not the relevant question. The relevant question is whether, in the absence of legal representation, the procedure under consideration is inherently unfair. Mr Eadie also maintained that mechanisms such as the internal complaints system, the Prisons and Probation Ombudsman ("PPO"), Independent Monitoring Boards ("IMB") and civil legal aid for judicial review of decisions affecting prisoners provide substantial safeguards against unfairness.

12. There was a very large volume of evidence before the court, much of it (as anticipated at the permission hearing) filed after permission was granted by this court. The evidence in support of the claimants' case consists of 28 statements by 18 witnesses and the exhibits to them by members of the claimant charities, the claimants' solicitors, and members of other firms of solicitors. The evidence in support of the Lord Chancellor's case consists of five statements by senior members of the National Offender Management Service of the Ministry of Justice ("NOMS") and the exhibits to them. There is also a statement by Sir David Calvert-Smith, then Chairman of the Parole Board, setting out the Board's position in relation to those issues arising in these proceedings which have a material impact upon the effectiveness and fairness of parole reviews. The evidence and the exhibits totalled some 1,417 pages, 448 on behalf of the claimants, including a parole dossier which, with the report of an independent psychologist, is over 250 pages long, and 969 pages on behalf of the Lord Chancellor. Additionally, there are some 920 pages of material concerning the PPO and IMB processes, prison inspection and other

reports, consultation documents, and evidence given to the inquiry of the Joint Committee on Human Rights on the implications for access to justice of the Government's proposals to reform legal aid, the Joint Committee's report, and the Government's response to that report.

13. In view of the volume of evidence, at the end of the hearing the court asked the parties to provide written submissions on the evidence in relation to each of the areas. We have found the post-hearing submissions on the evidence and as to the approach to be taken to it where the challenge alleges inherent or systemic unfairness of considerable assistance. The names and affiliations of those who have made statements in these proceedings or to the Joint Committee on Human Rights are listed in the Appendix to this judgment.

14. In section II of this judgment, we summarise the policy background, the legislation and the 2013 Regulations. Section III contains a summary of the procedural history. The relevant legal principles are summarised in section IV. Section V contains a summary of the processes in the five areas of decision-making that are the subject of the challenge and our analysis of the key evidence, including the alternatives to legal aid within the prison system and outside it that exist or have been introduced since the decision to remove legal aid from them. We have particularly focused on the position of vulnerable prisoners, such as those with learning disabilities and mental illness. Section V also contains our conclusions as to whether other procedures and processes in each of the areas of decision-making enable prisoners to participate effectively in them, where legal aid is no longer available.

15. Section VI summarises our overall conclusion. It is that, for the reasons given in section V(b), (c), and (d), the high threshold required for a finding of inherent or systemic unfairness has been satisfied in the case of pre-tariff reviews by the Parole Board, Category A reviews, and decisions as to placement in a CSC, and, for the reasons given in section V(e) and (f), that threshold has not been satisfied in relation to decisions about offending behaviour programmes and the disciplinary procedures from which legal aid has been removed. Our decisions in relation to the position of offending behaviour programmes and the disciplinary procedures show that we recognise that there may be safeguards other than legal aid and advice that will prevent inherent or systemic unfairness by enabling a prisoner to participate effectively in a category of decision-making. Whether this is so depends on the nature and complexity of the issues involved and what alternatives are in practice available. In the light of the evidence we have analysed in section V(b), (c) and (d), we have concluded that at present the system has not got the capacity sufficiently to fill the gap across the run of cases in the three areas we have identified.

II. The policy background, legislation and guidance

(a) The policy background

16. The coalition government's programme in 2010 included an undertaking to carry out a fundamental review of legal aid to make it work, it was said, more efficiently, and in the light of the financial climate. The proposals that resulted from consultation were broadly implemented ***5** in 2012 by LASPO which introduced major changes to the scope of and eligibility for civil legal aid. The next phase of the review concerned criminal legal aid. In April 2013, a consultation paper, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (" *Transforming Legal Aid* "), stated that it was necessary to make further savings, and proposed changes mainly concerning criminal cases which were estimated to deliver savings of £220m a year by 2018–2019. On 5 September 2013, the Government published *Transforming Legal Aid: Next Steps* (" *Next Steps* "), the document to which we referred (at para 5 above) which contained its response to the April 2013 consultation and its final proposals. Those proposals were implemented by the 2013 Amendment Regulations that are challenged in these proceedings.

17. A full summary of the policy background to the decision under challenge in these proceedings can be found in the judgment of the Divisional Court, delivered by Cranston J [2014] EWHC (Admin) 709 at [5]–[22]. We highlight the main points in the following paragraphs.

18. Chapter 3 of the *Transforming Legal Aid* consultation document reiterated the need to improve public confidence in the legal aid system by targeting public resources at cases which really require legal aid. The first of five proposals addressed the restriction of the scope of criminal legal aid for prison law by outlining current practice and internal complaints mechanisms. The proposals restricted legal aid to cases involving determination of a criminal charge for the purposes of article 6 of the ECHR , engaging article 5.4 of the ECHR , and requiring legal representation as a result of successful application of what (see paras 43 and 139 below) are known as the Tarrant criteria. The document considered specific prison law issues and asked whether criminal legal aid should be restricted to the proposed criteria.

19. In the *Next Steps* document, the government amended its proposals to ensure that criminal legal aid remained available for all proceedings before the Parole Board where it had power to direct release and accepted the importance of ensuring that there was a robust prisoner complaint system. Annex B stated that removal of matters regarding categorisation and licence conditions was in line with the policy intention of providing legal aid where an individual's liberty was at stake and existing complaints processes are sufficient to ensure that offenders' grievances will be properly considered. Annex B stated that categorisation decisions might be an important element of risk assessment but were not necessarily determinative of release, and civil legal aid for judicial review would be available in this area.

20. The *Next Steps* document stated at para 2.5 that "alternative means of redress such as the prisoner complaints system should be the first port of call for issues removed from the scope of legal aid", and at para 2.6 that "we consider that adequate provision is in place to enable

prisoners with mental health issues and/or learning disabilities and young offenders to use complaints systems; advocacy services are available to support young offenders".

21. Appendix B of *Next Steps* referred to a recent audit of the prison complaints system by NOMS which concluded that the system was generally operating in accordance with the relevant Prison Service Instruction (PSI 02/2012). After the publication of *Next Steps* , the Howard League sought clarification from the government about the availability of legal aid for pre-tariff Parole Board reviews. It was told that all cases would be removed from the scope of criminal legal aid if the Board did not have the power to direct release and then highlighted the change of position and the difference that would be made between pre and post-tariff reviews in its evidence to the Joint Committee on Human Rights.

(b) The legislation

22. Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") deals with legal aid. Criminal legal aid is governed by sections 13 to 20 . Section 15(1) enables regulations to provide that prescribed advice and assistance is to be available to individuals described in subsection (2), if prescribed conditions are met and the director of legal aid casework has determined that the individual qualifies for such advice and assistance in accordance with the Regulations. Section 15(2)(c) includes individuals who have been the subject of criminal proceedings and section 15(3) requires the Lord Chancellor to have regard to the interests of justice when making the regulations. Our summary of the consultation and the government's response to it shows that regard was had to alternatives to legal aid to enable prisoners to use and to participate in the procedures and, in this sense to the interests of justice, when making regulations about the scope of legal aid and the eligibility of individuals for it.

23. The Criminal Legal Aid (General) Regulations 2013 (SI 2013/9) ("the 2013 Regulations") make provision for determinations in relation to whether an individual qualifies for criminal legal aid under Part 1 of the 2012 Act. Part 4 of the Regulations covers the making and withdrawal of determinations about advice and assistance for criminal proceedings. Regulation 12 sets out the prescribed conditions contemplated by section 15 of the Act. In its original form it provided:

***6**

> "Prescribed conditions
>
> "(1) The conditions set out in paragraph (2) are prescribed for the purposes of section 15(1) of the Act.
>
> "(2) The conditions are that an individual must— … (d) require advice and assistance regarding a sentence; … (f) require advice and assistance

> regarding the individual's treatment or discipline in a prison, young offender institution or secure training centre (other than in respect of actual or contemplated proceedings regarding personal injury, death or damage to property); (g) be the subject of proceedings before the Parole Board; (h) require advice and assistance regarding representation in relation to a mandatory life sentence or other parole review …"

24. The 2013 Regulations were amended by the 2013 Amendment Regulations which the Government laid before both houses of Parliament on 4 November 2013. The 2013 Amendment Regulations were subject to the negative resolution procedure. The changes they made to the legal aid regime for prison law came into effect on 2 December. As amended, regulation 12 now provides:

> "Prescribed conditions
>
> "(1) The conditions set out in paragraph (2) are prescribed for the purposes of section 15(1) of the Act.
>
> "(2) The conditions are that an individual must— … (d) require advice and assistance regarding— (i) the application of the provisions in Chapter 6 of Part 12 of the Criminal Justice Act 2003 or in Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 , which determine when a prisoner is either entitled to be released by the Secretary of State or eligible for consideration by the Parole Board for a direction to be released; or (ii) the application of the provisions in Chapter 2 of Part 5 of the Powers of Criminal Courts (Sentencing) Act 2000 , which determine when an offender is entitled to be released by the Secretary of State … (f) require advice and assistance regarding a disciplinary hearing in a prison or young offender institution where— (i) the proceedings involve the determination of a criminal charge for the purposes of article 6.1 of the European Convention on Human Rights ; or (ii) the governor has exercised the governor's discretion to allow advice and assistance in relation to the hearing; (g) be the subject of proceedings before the Parole Board where the Parole Board has the power to direct that individual's release …"

25. Paragraph 12(2)(h) was omitted and a definition of "governor" added in paragraph 12(3). Regulation 7 provides that the amendments made by regulation 4 do not apply to cases in which an application for advice and assistance was made prior to 2 December 2013.

26. By sections 10(2) and (3) of LASPO , the Director of Legal Aid Casework, a civil servant appointed by the Lord Chancellor, is empowered to make "an exceptional case determination" in relation to an individual where "it is necessary to make [civil legal services] available to the individual … because failure to do so would be a breach of (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998) …" or because "it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach".

27. On 8 October 2015, the Lord Chancellor accepted that legal aid, in the form of exceptional case funding ("ECF") under section 10 of LASPO was in principle available to prisoners in respect of applications for places on mother and baby units and in respect of licence conditions. On 28 April 2016 the Lord Chancellor accepted that article 8 could be engaged by resettlement cases in so far as they concern prisoners' accommodation or care following release, and that ECF would also be available in such cases. On 19 October 2016, the Lord Chancellor's detailed grounds of defence accepted that ECF was theoretically available for decisions concerning segregation which may engage article 8 of the ECHR . She has not, however, accepted that decisions concerning CSCs engage article 8.1 .

(c) Policy guidance

28. We refer to the guidance in a number of relevant Prison Service Instructions ("PSIs") in the appropriate parts of the discussion below. There are references to categorisation of prisoners (PSI 08/2013) at para 93 below; to prisoner discipline procedures (PSI 47/2011) at para 139 below; to the systems for prison complaints (PSI 02/2012) at para 21 above; to the Prisons and Probation *7 Ombudsman (PSI 58/2010) at para 81 below; to prisoners assisting other prisoners (PSI 17/2015) at para 78 below; to selection into the CSC system (PSI 42/2012) at para 111 below; and to OBPs and sentence planning (PSI 41/2012) at para 136 below.

III. Procedural history

29. We have stated that the "Parole Board" and "Prison Law" claims were respectively issued on 6 and 28 November 2013. The challenges to the legal aid system in the 2013 Regulations were then more wide ranging. As well as the unacceptable risk of inherent or systemic unfairness ground that is before the court, they included: unacceptable risk of interference with prisoners' right of access to justice; discrimination contrary to articles 6 and 14 of the ECHR ;

common law ultra vires [4] ; irrationality; and procedural unfairness in the form of inadequate consultation.

30. On 6 December 2013, it was ordered that the two applications be considered together and, as we have stated, following an oral hearing on 6 March 2014, on 16 March the Divisional Court refused the claimants permission on all grounds. Its judgment stated [2014] EWHC (Admin) 709 at [52]–[54] that the very high threshold was not met on the evidence before the court, that there was a problem of prematurity, and that the Lord Chancellor's conclusions that making the changes will reduce costs and increase public confidence cannot be said to be arguably irrational in the public law sense. The court concluded that these are areas of political judgment and prediction into which the courts cannot venture and that, while understanding the concerns of impressive commentators that the changes will have serious adverse effects for prisoners, for the time being the forum for advancing these concerns remained the political.

31. The claimants applied for permission to appeal and, on 22 June 2015, filed a draft amended detailed statement of facts and grounds in the Prison Law claim to make arguments under the ECHR and to update the case law in relation to systemic unfairness, although the amendments were not formally given permission. Permission to appeal against the refusal of permission was granted by Arden LJ by an order dated 27 June 2015, and, following a hearing on 7 July 2015, by its order dated 28 July 2015 the court granted permission to apply for judicial review only in relation to the "inherent" or "systemic" unfairness ground.

32. Sir Brian Leveson P at paras 25–26 stated that the court accepted that, on the material then before it, there could be a significant number of individuals subject to the decisions that no longer qualified for legal aid for whom it may be very difficult to participate effectively without support from someone and that it was arguable that, "without the potential for access to appropriate assistance, the system could carry an unacceptable risk of unfair, and therefore unlawful, decision-making". He then set out what he considered to be "the parameters of the potential debate". The nature of the question of inherent unfairness was evaluative and concerned not simply the structure of the system which may be capable of operating fairly, but whether there are mechanisms in place other than access to a lawyer or legal aid to accommodate the arguably higher risk of unfair decisions for those with mental health, learning or other difficulties which effectively deprive them of the ability meaningfully to participate in, at least, some of the decisions. That, he stated, "necessarily required a more detailed examination of the support that will be available in practice", and the parties had indicated they would file further evidence.

IV. Common law fairness

(a) An overview

33. The claimants submit that, for the purpose of these proceedings, there is no meaningful distinction between the common law duty of fairness and the duty of fairness under articles 6 and 8 of the ECHR . But, save in one respect (see paras 113 and 116–117 below), they have based their challenge on common law principles.

34. Consideration of whether the removal of the five areas of prison law from the scope of the legal aid scheme means that the system is inherently unfair involves assessing particular requirements of the common law principles of natural justice or fairness in relation to matters such as the information to be provided to the prisoner, the nature of non-legal assistance and advice available, when an oral hearing is necessary, when legal representation should be permitted, and when it is required.

(b) The importance of context

35. The starting point is the commonplace and longstanding orthodoxy (see *R (L) v West London Mental Health NHS Trust [2014] EWCA Civ 47; [2014] 1 WLR 3103* , para 67) that what is required is acutely sensitive to context. In cases involving prisoners, the classic modern ***8** statements of the importance of context are Lord Mustill's third general principle of fairness in public law decisions in *R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531* , 560 and Lord Reed JSC's judgment in *R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115* .

36. In Doody's case, the House of Lords decided that fairness required the Secretary of State (at that time the Home Secretary) to inform prisoners sentenced to life imprisonment of the sentencing judge's recommendation as to the minimum period they must serve before their sentences would be reviewed and to afford them the opportunity to make representations. Osborn's case, which is discussed further below, concerned the circumstances in which an oral hearing before the Parole Board is required. Lord Reed JSC stated at para 80 that "what fairness requires of the [Parole Board] depends on the circumstances" and that "As these can vary greatly from one case to another, it is impossible to lay down rules of universal application" but "the court can … give some general guidance".

(c) The purposes served by procedural fairness and the role of the court

37. Osborn's case also contains important guidance as to the purposes served by requiring procedural fairness and the scope of the role of a court considering a challenge by judicial review to the fairness of the procedure used by an administrative body. As to the first, Lord Reed JSC stated at para 67 that, while "There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested", there are also two other

important values engaged. The first is the individual's legitimate interest in being able to participate in a decision with important implications for him or her where (see para 2(iv)) he has something useful to contribute, which is relevant to the decision (see para 68): see also the references to effective participation at paras 2(ii)(c), 82 and 89. The second value (see para 71) is the rule of law. Lord Reed JSC stated that procedurally fair decision-making serves the rule of law by promoting congruence between the actions of decision-makers and the law which should govern their actions.

38. As to the role of the court, Lord Reed JSC stated (at para 65) that the court was not confined to reviewing the reasonableness of the decision-making body's judgment of what fairness required, that is to review on *Wednesbury* grounds. The court was required to determine for itself whether a fair procedure was followed. A similar approach was taken in relation to the consideration of whether administrative arrangements are systemically or inherently unfair by Lord Dyson MR in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) [2015] EWCA Civ 840; [2015] 1 WLR 5341* , to which we refer at paras 48, 50 and 55 below.

(d) What is required in a given context

39. Although the courts cannot and have not purported to lay down rules of general application, there is a broad consensus in the decisions of appellate courts as to the factors that affect what is required in a given context. That consensus runs from Lord Upjohn's important statement in *Durayappah v Fernando [1967] 2 AC 337* , 349 to the refinements in more recent cases such as *Lloyd v McMahon [1987] AC 625* , 702, and Doody's and Osborn's cases. The factors include the nature of the function under consideration, the statutory or other framework in which the decision-maker operates, the circumstances in which he or she is entitled to act and the range of decisions open to him or her, the interest of the person affected, the effect of the decision on that person's rights or interests, that is, the seriousness of the consequences for that person. The nature of the function may involve fact-finding, assessments of matters such as character and present mental state, predictions as to future mental state and risk, or policy-making. The decision-maker may have a broad discretion as to what to do, or may be required to take into account certain matters, or to give them particular or even dispositive weight. The decision may affect the individual's rights and interests, and its effect can vary from a minor inconvenience to a significant detriment.

40. The legitimate interest of individual prisoners in participating in a decision which has important implications for them and in doing so effectively can require sufficient disclosure of what is said about them or, where there are issues of confidentiality or security, the gist of what is said, to enable them to test it, and to make representations including putting forward their own case in answer to what is said. See *R v Secretary of State for the Home Department, Ex p Duggan [1994] 3 All ER 277* and *R (Williams) v Secretary of State for the Home Department*

[2002] EWCA Civ 498; [2002] 1 WLR 2264 (disclosure of Category A reports), *R v Parole Board, Ex p Wilson [1992] QB 740* (disclosure of Parole Board's reasons for refusing to recommend release), and *R (King) v Secretary of State for Justice (Howard League for Penal Reform intervening) [2015] UKSC 54; [2016] AC 384* , paras 98 and 100 (disclosure of reasons for continued segregation).

***9**

(e) Oral hearing

41. While written representations will often suffice, in the light of the facts of the case and the importance of what is at stake, fairness may require an oral hearing. In *Osborn's case [2014] AC 1115* , after considering *R (Smith) v Parole Board (No 2) [2005] UKHL 1; [2005] 1 WLR 350* , Lord Reed JSC stated, at para 85 that an oral hearing before the Parole Board is required when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted. He continued, at para 86:

> "An oral hearing is also necessary when for other reasons 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 on 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."

(f) Access to legal advice and representation

42. Bearing in mind what fairness is likely to require where the issue is factually or legally complex or the consequences for the individual are serious, the common law rules of fairness will generally entitle a person to have access to legal advice and to be able to communicate confidentially with a legal adviser as part of the fundamental right of access to justice and to the courts: see *R v Secretary of State for the Home Department, Ex p Anderson [1984] QB 778* , 790; *R (Daly) v Secretary of State for Home Department [2001] UKHL 26; [2001] 2 AC 532* , paras 5 and 30 (Lord Bingham of Cornhill and Lord Cooke of Thorndon); and *R (Medical*

Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin) at [43]–[45] (Silber J). The importance of legal advice was referred to in *R (Gudanaviciene) v Director of Legal Aid Casework (British Red Cross Society intervening) [2014] EWCA Civ 1622; [2015] 1 WLR 2247* which we consider below. In its discussion of the potential of an inquisitorial approach by the decision-making body to ensure that a person has effective access to justice, the court, in a judgment handed down by Lord Dyson MR, stated at para 185 that "in some circumstances, legal advice to the litigant in person may be more important than legal representation at the hearing for ensuring effective access to justice".

43. In the context of administrative proceedings, there is no automatic right to legal representation before the decision-making body. Again, factors such as the legal or factual complexity of the issue, the consequences for the individual and whether the individual has the capacity to present his or her own case are relevant: see *R v Secretary of State for the Home Department, Ex p Tarrant [1985] QB 251* where the Divisional Court held that fairness can require prisoners to be permitted to be legally represented at prison disciplinary proceedings, an approach which is now reflected in prison procedures and the Prison Discipline Manual: see para 139 below. Where there is no right to legal representation, fairness may require other assistance to be provided at a hearing: see Ex p Tarrant at p 283 and (by analogy) *R v Leicester City Justices, Ex p Barrow [1991] 2 QB 260* , 289 and *R (AS) v Great Yarmouth Youth Court [2011] EWHC 2059 (Admin); [2012] Crim LR 478* , paras 8–9.

(g) Access to legal aid

44. The decision in Gudanaviciene's case shows that the factors to which we have referred are also in play in the determination of whether, and, if so when, fairness requires the provision of legal aid. Before considering Gudanaviciene's case, however, we refer to the position under the ECHR .

45. In Airey v Ireland (1979) 2 EHRR 305 , the European Court of Human Rights, dealing with proceedings for judicial separation in the Irish High Court, stated at paras 24 and 26 that where a person is unable to "present her case properly and satisfactorily" and "effectively conduct" it and cannot afford to pay for a legal representative, the state is under an obligation to provide legal aid for legal representation. The European court emphasised that this is not so in all cases and that "in certain eventualities" the possibility of appearing without a lawyer's assistance will meet the requirements of article 6 and secure adequate access, even to the High Court. It referred to similar factors to those considered in the decisions of appellate courts in this jurisdiction, such as the complexity of the law, the procedure, or the case, and the ability of the individual to test the evidence, and also to the fact that the requirements of article 6 can be met by other means, for example the simplification of procedure. This chimes with the statement of Lord Reed in ***10** Osborn's case at para 55 that one of the ways in which the detailed provisions of domestic law guarantee the right to a fair trial under article 6 of the ECHR is "the law relating to legal aid",

but, as in Airey's case, recognising that this can and is also done in other ways, including the law of evidence and procedure and the principles of administrative law.

46. The European court recognised that the availability and scope of legal aid was a question of social and economic rights and depended in part on the financial situation in the state in question. It considered, at para 26, that this was not a decisive factor against the provision of legal aid because of the need "to safeguard the individual in a real and practical way as regards those areas" with which the ECHR deals. Other Strasbourg cases have had some regard to the fact that limited resources mean that a machinery is needed to select cases that are to be funded: see the authorities referred to by Laws LJ in *R (S) v Director of Legal Aid Casework [2016] EWCA Civ 464; [2016] 1 WLR 4733* , paras 55 and 61–64. Those authorities, however, also refer to the need for the system of selection to be "reasoned and proportionate" and thus to provide protection from arbitrariness: see *Eckardt v Germany (2007) 45 EHRR SE7* cited by Laws LJ at para 64.

47. We turn to *Gudanaviciene's case [2015] 1 WLR 2247* . Six claimants successfully challenged decisions by the Director of Legal Aid Casework refusing their applications for ECF funding and the Lord Chancellor's guidance which stated that legal aid is not required in immigration cases in the Administrative Court [5] . The Director and the Lord Chancellor appealed in five of the cases. This court, in a judgment handed down by Lord Dyson MR, stated at para 69 that there was no reason in principle why the test that the need for effective involvement in the decision-making process might require the grant of legal aid should not apply to immigration cases. It also stated, at para 72:

> "Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity."

The court dismissed the appeal of the Director and the Lord Chancellor in three of the cases. It decided that the individuals could not present their cases effectively or have any effective involvement in the decision-making process without legal advice, in one case because of language difficulties, in another because of legal complexity and in the third because of a combination of the two. The court allowed the appeal of the Director and the Lord Chancellor in the other two cases.

(h) Systemic unfairness

48. We have referred to the high threshold required where it is claimed that a rule, an administrative system, or a policy is unlawful because it gives rise to an unacceptable risk of unfairness. The principle was first formulated in *R (Refugee Legal Centre) Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219* where Sedley LJ stated, at para 7, that potential unfairness was amenable to judicial review in order "to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself". It was made clear in that case and in others that the test is whether the system "considered in the round" is "inherently unfair", and whether "the risk inheres in the policy itself, as opposed to the ever-present risk of aberrant decisions". Sedley LJ also stated that "it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects". The principle has been applied in several other cases: see *R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin)* at [33]–[36] (Silber J), approved [2011] EWCA Civ 1710; *R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827; [2014] 1 WLR 4620* , paras 34–38; *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) [2015] 1 WLR 5341* , paras 28–30; and the most recent case, *R (S) v Director of Legal Aid Casework [2016] 1 WLR 4733* .

49. In R (S) v Director of Legal Aid Casework Laws LJ stated at para 18 that this area of the law is prone to particular difficulty because of the law's need in a system which has to cater for many individual cases to "encapsulate the difference between an inherent failure in the system itself, and the possibility—the reality—of individual instances of unfairness which do not, however, touch the system's integrity". Laws LJ also stated that there is difficulty because of the danger that a judge will "cross the line between adjudication and the determination of policy" by too great a willingness (perhaps unwittingly) "to treat … individual criticisms as going to ***11** the scheme's legality". He reiterated that "proof of a systematic failure is not to be equated with proof of a series of individual failures" and stated that:

> "there is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated. The difference is a real one even where individual failures may arise, or may be more numerous, because the scheme is difficult to operate."

50. The principles had earlier been summarised by Lord Dyson MR in the *Detention Action case [2015] 1 WLR 5341* , para 27:

> "(i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts."

V. Analysis: The five categories of prison law

(a) Introduction

51. In this section we summarise the processes in each of the five categories of prison law for which legal aid is no longer available and consider the application of the general principles governing fairness to them. Determining whether the removal of legal aid from any category causes systemic unfairness depends on the application to the particular category of the factors to which we have referred, and in particular the three factors expressly mentioned in the passage in the judgment from *Gudanaviciene's case [2015] 1 WLR 2247* that we set out at para 47 above. The question is whether, looking at the full run of cases in that category that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available to enable a prisoner to participate effectively after the changes introduced by the 2013 Amendment Regulations . The contextual approach in the cases and the focus, in particular in Gudanaviciene's case and in *Osborn's case [2014] AC 1115* , on the need for effective participation are at the core of the inquiry as to what fairness requires. In each category, we therefore consider the importance of the issues at stake, the complexity of the procedural, legal and evidential issues, and the ability of the individual to represent himself or herself without legal assistance having regard to age and mental capacity.

52. It was acknowledged on behalf of the Lord Chancellor that in a systemic unfairness case it was incumbent on her to supply evidence of the system and, in her post-hearing submissions on evidence, it was submitted that "it is sufficient to set out what is *available* under that system". The evidence about the operation of the different processes shows that they involve inquiries

that range from simple fact-finding to complex questions of risk assessment and prediction as well as questions of law and procedure of varied complexity. The submissions made on behalf of the parties reflected the parameters helpfully identified by Sir Brian Leveson P (see para 32 above) when granting permission, one of which was that what was required was "a detailed examination of the support that is *available in practice* " (emphasis added).

53. We bear in mind three factors. The first is the difficulty identified by Laws LJ in *R (S) v Director of Legal Aid Casework [2016] 1 WLR 4733* (see para 49 above) of encapsulating the difference between an inherent failure in the system itself and individual instances of unfairness which do not touch the system's integrity. It is, however, a distinction that the authorities require the court to draw. It would be impossible to undertake the research that would be needed to provide a full-blown statistical or socio-legal study as evidence within the time limit for judicial review proceedings. Since the claimants do not have access to prisons and prisoners, all they can do is to furnish publicly available material and evidence of examples of how the system has operated in the five areas since legal aid became unavailable and of difficulties that have arisen. One way of drawing the distinction between inherent failure and individual instances of unfairness which do not touch the system's integrity is to distinguish examples which signal a ***12** systemic problem from others which, however numerous, remain cases of individual operational failure.

54. The second factor we bear in mind is the need for some caution with examples based on unidentified prisoners whose circumstances the Lord Chancellor was unable to investigate. As against this, some of the evidence on behalf of the Lord Chancellor was also unparticularised or related to an individual response after something had gone wrong rather than to a systemic safeguard that was in place before that time. An example of the former is the evidence about help provided by prison officers. It did not state that such help is provided in the majority of cases where it is needed or that it is of a character and quality that ensures effective participation across the full run of cases. An example of the latter is Mr Davison's response (statement, paras 80–82) to evidence about the deferral of the hearing of the case of an unrepresented prisoner in which the deferral letter directed that steps be taken to "arrange legal representation and funding" after which a senior officer in the Offender Management Unit contacted the prisoner's former solicitor and the Bar Pro Bono Unit and managed to secure help for the prisoner.

55. The third factor is that in the *Detention Action case [2015] 1 WLR 5341* , para 27 (see para 50 above) Lord Dyson MR indicated that, although in most contexts the threshold of showing inherent unfairness is a high one, this should not be taken to dilute the importance of the principle that in certain contexts (in that case asylum appeals) only the highest standards of fairness will suffice. Moreover, consistently with what Lord Reed JSC in Osborn's case stated about the role of the court, Lord Dyson MR considered at para 29 that "the court should exercise caution about giving too much weight to the judgment of the Tribunal Procedure Committee" and "the court is well equipped to decide whether an appeal process is fair and just". While accepting that "the concepts of fairness and justice are not susceptible to hard-edged definition",

he considered that the margin of discretion should be "modest" and at para 30 that the question of whether there was a "systemic or structural unfairness inherent" in the scheme is a "question of law for the court to determine" that "turns on whether the safeguards on which the Secretary of State for the Home Department and the Lord Chancellor rely render the system fair and just".

56. Finally, different categories of prisoners have different problems and needs, and the submissions on behalf of the claimants in part relied on the particular position of vulnerable prisoners and in part on the complexity of the legal and other issues involved in the five areas. As indicated at para 14 above, for the purposes of analysis and exposition, we have focused on the position of vulnerable prisoners, those with learning and general communication difficulties, and in particular those with mental health problems. We consider that those with mental health problems are an appropriate sample category of vulnerable prisoners for the purposes of determining whether the claimants have established that the high threshold for "inherent" or "systemic" unfairness has been met. It was accepted on behalf of the Secretary of State that the prison population includes a disproportionately high number of prisoners with mental health problems.

(b) Pre-tariff Parole Board reviews

57. Under section 239 of the Criminal Justice Act 2003 , it is the duty of the Parole Board to advise the Secretary of State for Justice with respect to any matter referred to it by him which is to do with the early release or recall of prisoners. There are two types of case in which the Parole Board may conduct a pre-tariff review. The first is where an indeterminate sentence prisoner ("ISP") has been referred to the Parole Board by the Secretary of State before the expiry of his/her minimum term for advice on a move to open conditions. The second consists of cases where an ISP is removed from open conditions and the Secretary of State is seeking advice from the Parole Board on a return to open conditions. In his post-hearing submissions on the evidence, Mr Eadie stated that these two types of cases comprised 1·8% of referrals to the Board in 2014–2015 and 1·5% of the Board's hearings in 2013–2014. Sir David Calvert-Smith stated that there have been 90 pre-tariff oral hearings since January 2015.

58. The process for pre-tariff reviews consists of two stages. The first stage is a sift to ensure that only ISPs with a reasonable prospect of receiving a positive recommendation will proceed. The second stage is the review itself. ISPs have an opportunity to make representations at both stages. Pre-tariff sift reviews consider a number of factors, including custodial behaviour, risk of absconding and progress against sentence plan objectives. Where it is decided to refer the ISP to the Board for a pre-tariff review, a hearing will take place to focus on the ISP's risk of absconding and risk of serious harm. The Board's proceedings are generally inquisitorial and avoid formality. The ISP is provided with a dossier of material that will be presented to the panel, together with an " *Easy Read* " guide. The Board uses the Parole Board Rules as a broad template. Rule 6 empowers the Board to appoint a representative to assist with making

representations and **13* providing documentary evidence and rule 8 puts in place a procedure for disclosure of sensitive material. Therefore, in practice, the pre-tariff Parole Board hearings follow the same procedure as post-tariff hearings, for which legal aid remains available because the Parole Board has the power to direct release.

59. The Board must give written reasons for its recommendation. The key distinction between pre and post-tariff reviews is that the Board is not empowered to direct release following a pre-tariff review. It is only able to make a recommendation to the Secretary of State about moving or returning a prisoner to open conditions. While the Parole Board's recommendation in a pre-tariff review is not binding on the Secretary of State, he or she can only reject the recommendation if it is rational to do so.

60. Ms Kaufmann submitted that decisions in pre-tariff reviews are very important because a move to open conditions before release remains the Parole Board's normal and preferred route to release. Pre-tariff reviews are, she argued, no different from post-tariff reviews in terms of the material that the Parole Board has to consider and the issues it has to determine. There is complex and lengthy documentation containing medical and legal terminology and, where there is a disagreement with a psychiatric or psychological assessment presented by the Secretary of State as to the question of risk of future dangerousness posed by an indeterminate sentence prisoner, equality of arms may require an independent expert report to be prepared for the prisoner. She submitted that the courts have long recognised the strength of the procedural guarantees that must accompany Parole Board reviews in post-tariff cases and the common law protects the liberty of the subject. Many vulnerable prisoners will be unable effectively and fairly to represent themselves, to understand the lengthy and detailed dossiers, and they do not have the knowledge of how to obtain expert reports or the money to pay for them.

61. Ms Kaufmann submitted that, in the light of the evidence before it, the court cannot be satisfied that the system is capable of operating so that those prisoners incapable of representing themselves will be provided with the assistance they require from other sources such as friends, family, or charities. She argued that the inquisitorial role that the Parole Board currently performs is limited and does not suffice to ensure that vulnerable prisoners who are unable to represent themselves will be able to participate sufficiently in the process to ensure fairness.

62. Mr Eadie relied principally on three matters. He placed most weight on the inquisitorial nature of the proceedings and the expertise of the Parole Board whose members include judges, psychiatrists, psychologists, and those with a probation background. Secondly, he relied on the fact that decisions of the Board are not dispositive, and the evidence is that a significant proportion of ISPs are released directly from closed conditions. He also relied on the other assistance from within the prison and outside it available to a prisoner, and the fact that a recommendation that a person be transferred to open conditions is neither a de jure nor a de facto condition for release. As to the nature of the proceedings, he stated that the Board has specific processes in place to ensure it has all relevant information "at the earliest stage" and that

a prisoner's ability to cross examine witnesses will not impact on fairness given the inquisitorial nature of the proceedings.

63. In relation to other assistance, Mr Eadie pointed to evidence (see Mr Davison's statement, paras 64–65) that prisons provide assistance to vulnerable ISPs to ensure they understand the process. This includes an " *Easy Read* " guide and officers reading any documents to them and assisting them in preparing notes for sentence planning review meetings and Board hearings. He stated that those who cannot afford their own legal representation should be advised they can ask a family member, a friend, or a charity such as the Prisoners' Advice Service to provide support and that such persons may also be represented by a person such as the prison chaplain. He submitted that ISPs will be able to make adequate representations even without legal representation.

64. We turn to the application of the first of the three factors to which we have referred, the importance of the issues at stake. The Lord Chancellor's position is that the distinction now made in the Regulations between pre and post-tariff Parole Board decisions is justified because of the weight that should be given to whether the decision is dispositive and because the evidence (see Mr Davison's statement, paras 52, 53 and 58 is that 34% of ISPs were released directly from closed conditions in 2014 and 52% in 2015. Clearly pre-tariff reviews are not dispositive in the way that post-tariff reviews are, but we do not consider that it follows from that that the issues at stake are not comparatively important. The contextual approach taken in the cases and the focus on the need for effective participation in particular in *Gudanaviciene's case [2015] 1 WLR 2247* and in *Osborn's case [2014] AC 1115* suggests that the fact that the decision is only a recommendation to the Secretary of State for Justice rather than one that can direct release cannot in itself be decisive ***14*** in assessing whether fairness requires legal aid or whether the other forms of assistance and safeguards relied on by Mr Eadie suffice.

65. The evidence provides clear support for the claimants' case that important issues are at stake in pre-tariff parole decisions. Annex 1 of the March 2012 *Parole Board Hearings Guide* states that "the Home Secretary's Directions … state that most lifers should spend a period in open conditions prior to release" and "it will be unusual for an indeterminate prisoner to be released direct from closed conditions". The guide also states that open conditions are "the only true testing ground". While there is some difference of significance between a decision to move a prisoner to open conditions and a decision to release that prisoner, and while the figures for the two years relied on by Mr Davison show an increase in the proportion so released (perhaps because of the numbers of those sentenced to imprisonment for public protection with short tariffs), if prisoners with shorter tariffs are discounted one in two prisoners will be required to move to open conditions before they can have any prospect of being released. In the evidence of Sir David Calvert-Smith, then Chairman of the Parole Board, setting out the Board's position, one panel member stated of a hearing where the prisoner was unrepresented that they "took it slowly and carefully on the basis that it was potentially the most important hearing he will have: go to open and he's on the road to release; knock him back and his confidence goes out of the

window". The Parole Board's evidence to the Joint Committee on Human Rights' inquiry into the implications for access to justice of the Government's proposals to reform legal aid was to the same effect. The Board stated that

> "although these reviews do not involve a decision to release itself, most prisoners require a period in open conditions before the Parole Board can be satisfied that they are safe to release. There is in consequence, a great deal at stake for prisoners at these reviews."

66. The second of the Gudanaviciene factors is the complexity of the procedural, legal, and evidential issues. The Secretary of State's case is that the prisoner's ability to participate effectively is properly protected by the inquisitorial nature of the pre-tariff review process. To assess this, it is important to consider the degree of complexity of the questions before the Parole Board, and the extent to which the Board as presently constituted can ensure that a prisoner can participate effectively. The latter partially overlaps with the third factor, the abilities of the prisoner. In relation to both factors, the Lord Chancellor's case is that a prisoner's ability to participate effectively is properly protected by the inquisitorial nature of the pre-tariff review process. In relation to both factors, we have found the evidence of Sir David Calvert-Smith, then Chairman of the Parole Board, setting out the Board's position, of particular assistance.

67. We summarised the pre-tariff review process at paras 57–59 above. It involves risk assessment, and the documents often include psychological and sometimes psychiatric reports which may be difficult for a layperson to grapple with, and the Offender Assessment System ("OASys") assessments use acronyms and risk assessment tools which are unexplained. It is not disputed that the material that the Parole Board considers in a pre-tariff review, the issues it determines and the procedures it uses are in substance the same as those in post-tariff reviews.

68. The evidence (including that of Sir David Calvert-Smith) refers to cases involving independent psychiatric reports and the importance and indeed the necessity of these in some cases. For example, Mr Fox, a Prison Law Advisor employed by Carringtons Solicitors, referred (statement, para 6) to a case in which the prison had declined to undertake a psychological assessment for a person serving a life sentence because it did not believe it to be necessary and the Parole Board gave a negative decision because it could not accurately determine the risk factors and therefore whether all areas of risk had been explored. Again, there may be disputes as to which assessment tools are the most appropriate in a particular case: see the forensic psychological report of Julia Long exhibited to the sixth witness statement of Mr Creighton at

para 5.1ff. There may also be apparent inconsistencies between assessments of risk by the offender supervisor and the OASys risk assessment tool in the NOMS Sentence Planning and Review report about the individual. Mr Creighton (sixth statement, para 6) refers to the case of a woman whose independent psychological assessment, although provided to the prison, was not provided to the Parole Board until Mr Creighton, who was representing her pro bono, drew it to the Board's attention.

69. In themselves, such examples may be vulnerable to Mr Eadie's point that much of the evidence adduced on behalf of the claimants does no more than show that legal representations can play a role, whereas the test is whether, in the absence of legal representation and in the light of other safeguards, the procedure under consideration is inherently unfair. For this reason, as ***15** we have stated (see paras 49 and 55 above), the court should seek to draw the distinction that the authorities require it to draw by distinguishing examples which signal a systemic problem from others which, however numerous, remain cases of individual operational failure. Because we consider that the evidence setting out the position of the Parole Board in substance seeks to do that, we focus on that evidence.

70. The Parole Board's evidence to the Joint Committee on Human Rights stated that there were multiple questions as to how it was to manage its review procedures where a prisoner is unrepresented. It identified problems as to: the disclosure of sensitive information which paragraph 8 of the Parole Board Rules 2011 (SI 2011/2947) provides may be withheld from a prisoner but may be disclosed to a qualifying representative; the choice of the evidence to adduce or how to adduce the best evidence; whether it is proper for a prisoner to cross-examine a professional witness about the witness's assessment of the prisoner; how a prisoner might or would commission an independent risk assessment; the fact that only the prisoner's representatives have the victim's statement; and the expense and delay where prisoners are acting for themselves.

71. Sir David Calvert-Smith's evidence in these proceedings setting out the Board's position referred (at para 21) to the steps that the Board has taken to manage and mitigate the anticipated impact of cuts to legal aid including the preparation of guides for unrepresented prisoners. These include two " *Easy Read* " guides about the parole review and the oral hearing, articles in a widely-read newspaper for prisoners, and guidance for Board members. Sir David stated that these steps were taken in a period in which the Board had a heavy workload and in which its primary focus was to respond to what he referred to as "the challenges of Osborn ". As a result of the Supreme Court's decision in December 2014, the Board introduced what is known as the Member Case Management process. This, like the Intensive Case Management System ("ICM") it replaced, is designed to ensure that all of the relevant information on which the decision should be based is made available to the Parole Board at the earliest stage: Sir David Calvert-Smith, statement paras 12–13.

72. We have referred to the 90 pre-tariff oral hearings since January 2015. Sir David stated that

due to "glitches" in the data recording, the Board is unable to state how many hearings had concerned prisoners who were unrepresented. He referred (at paras 33–34) to information from panel members about: concerns about unrepresented prisoners; a specific hearing which was deferred because of the chair's concerns about the prisoner's ability to defend himself; and to general comments by Board members about their experiences of unrepresented prisoners.

73. The Board conducted a detailed review of five pre-tariff cases in which the prisoner was unrepresented: see paras 21, 28, 33, and 34. Two cases were deferred on two separate occasions and had not been concluded within a year of the target month of the review. In another case, following the deferral of the hearing of a person with low or extremely low cognitive abilities and an offer from the prisoner's offender manager to approach solicitors' firms, written representations were provided by a legal representative. In a third case, the hearing of a prisoner with a mental disorder, who was facing a move to a psychiatric unit and was unrepresented due to legal aid cuts was deferred at the request of the prisoner's offender manager. The deferral letter stated that it was important that every effort was made to facilitate legal representation by solicitors but, despite this, the prisoner was not represented at a hearing five months later which also had to be deferred. A third hearing was deferred in advance by the chair. The final deferral letter stated that the Secretary of State might wish to re-refer the case as an on-tariff review "presumably because that would mean the prisoner would then be entitled to legal aid". It is not clear whether this is the case to which we have referred at para 54 above.

74. Sir David's statement also refers at para 35 to the fact that the Board's operations staff "who already need to deal with high caseloads, experienced difficulties with keeping unrepresented prisoners informed about developments about their cases and seeking their views concerning witnesses or directions, disclosure or victim issues". He also stated at para 36 that in the absence of legal representation the Board is reliant upon the assistance of others to facilitate communications with prisoners and offer support and advice to them and, that it is sometimes problematic for offender supervisors within prisons to do this because the offender supervisor will often be a witness and may be providing evidence which the prisoner wishes to contest. Even if this is not so, the prisoner may not have a good working relationship with the offender supervisor. The statement also refers to the "practical barriers" a prisoner can experience in instructing other types of non-legal representatives. These include a lack of sufficient expertise, problems with ensuring appropriate disclosure of reports and access for confidential visits, and restrictions on the category of persons a prisoner can instruct.

***16**

75. We do not consider that the evidence shows that there is adequate support from staff within the prison system to provide a suitable safeguard enabling vulnerable prisoners to participate effectively in pre-tariff Parole Board hearings. Mr Taylor's evidence is that assistance can be provided through the personal officer scheme (statement, paras 10–11). There is, however, no evidence of how many of these schemes there are and in which prisons they are. While there may be a facility for personal officers schemes, it is unclear, and unlikely in the light of the evidence (see para 76 below) that prison officers have sufficient time to sit down with prisoners

to provide adequate, even if not legal, assistance.

76. Relying on the support of prison officers is in any event problematic for two reasons. First, the evidence suggests (see the third statement of Frances Crook, Chief Executive of the Howard League) that current staffing levels mean that officers have insufficient capacity to provide adequate support where it is needed. In December 2015, the then Prisons Minister confirmed plans to recruit an extra 1,700 prison officers by March 2016 but, in March 2016 there were fewer prison officers in post. In October 2016, the Secretary of State for Justice announced that she would recruit 400 additional officers and in November 2016 that a further 2,100 prison officers would be recruited. The evidence submitted by the Cambridge University Prison Research Centre to the Justice Committee in September 2016 (referred to in Ms Crook's third statement at para 8.13) stated that has been a loss of staff with the requisite skills and, alongside that, a decline in the quality and nature of prisoner staff relationships across the prison estate.

77. The second difficulty in relying on support from prison officers is that it is likely to be inappropriate for prison officers to offer advice or assistance while at the same time acting as custodians. Prisoners may be reluctant to ask for support or speak fully and frankly with their officers and, as the evidence setting out the Parole Board's position stated (see para 74 above), there are likely to be problems with assistance by the prisoner's offender supervisor.

78. It was also submitted on behalf of the Lord Chancellor that support from other prisoners is a general safeguard. At the hearing, Mr Eadie realistically did not emphasise this aspect. In any event, there is no requirement to have a formal mentoring scheme, and there is no evidence about how many prisons in fact have such a scheme or how they work in practice. Moreover, PSI 17/2015 "Prisoners Assisting Other Prisoners", which governs the formal schemes, states that there are limits as to what is appropriate for other prisoners to do. We do not consider that reliance can be placed on other prisoners for pre-tariff reviews. The issues are almost inevitably highly personal involving the prisoners' forensic history, and assessments of present and future risks. Other prisoners may be as ill-equipped as the prisoner needing help to provide the necessary assistance. Finally, there are particular issues of confidentiality in relation to the material to be considered during the hearing, and permission for another prisoner to be present may be refused on this ground: see Sir David Calvert-Smith's statement at para 34(ii).

79. We turn to the assistance for offenders with learning disabilities. The March 2015 report of a joint inspection by HMI Probation and HMI Prisons of the treatment of offenders with learning disabilities within the criminal justice system states that the report presents "a bleak picture" about the experience of offenders with learning disabilities in prison, and that the requirement to make necessary adjustments to services as set out in the Equality Act 2010 has not been given sufficient priority by either prison or probation leaders. The foreword by the Chief Inspector states that in the prisons they visited they were alarmed that there were extremely poor systems for identifying prisoners with learning difficulties which they stated was unacceptable. This report is not focused on access to processes such as pre-tariff parole hearings

but the picture it paints is of significance in considering how the system works in practice in the run of cases involving vulnerable and mentally ill prisoners. In the section on the care and treatment of individuals with learning disabilities, it is stated (at para 4.16) that while in two prisons there had been some training for relevant staff, in the remaining prisons training was limited to specific individuals such as the Disability Liaison Officer or the Equalities Officer. The report also stated (at para 4.18) that even those who informed the inspectors that they felt respected by staff often felt that staff did not fully understand their diagnosis or associated issues.

80. As to assistance for mentally ill prisoners, pre-tariff reviews are dealt with in Mr Davison's statement. However, although paras 61–82 deal with the prisoner's right to make representations and the assistance available, and paras 64–68 are concerned with prisoners who have particular vulnerabilities, there is no evidence of safeguards in place to assist mentally ill patients who are subject to a pre-tariff review by the Parole Board. Mr Taylor's statement states that the relevant PSI documents all contain provisions relating to prisoners with mental health issues and/or learning difficulties. The statement (at paras 21–24) refers to the importance of identifying such problems and supporting them in relation to matters such as health and education. But these ***17** paragraphs contain absolutely no evidence of safeguards in place to assist mentally ill prisoners in any of the processes from which legal aid has been removed. Earlier paragraphs deal with general facilities (such as a library service) to enable prisoners to represent themselves, and the assistance provided by prison staff and other prisoners. Mr Taylor's failure to deal with pre-tariff Parole Board reviews is perhaps not surprising because they are not within the scope of what he stated he would address in his statement. It is primarily concerned with the matters we have mentioned and matters such as disciplinary decisions and procedures which are available after a decision has been taken. We now turn to those.

81. The remaining safeguards relied on by the Lord Chancellor are those available after a decision has been taken: the complaints system, the PPO [6] , the IMB and an application for judicial review. It is, of course, important to look at all the protective safeguards available including post-decision protections.

82. We do not consider that the fact that many offenders have not heard of the alternative grievance redress mechanisms shows that those mechanisms are insufficient. But the March 2015 report of a joint inspection by HMI Probation and HMI Prisons of the treatment of offenders with learning disabilities, to which we have referred (at para 79 above) states (at para 4.43) that "for a prisoner with a learning disability, the task of trying to make a complaint presented a number of challenges".

83. The evidence before the court in relation to the PPO includes a July 2013 report; *Learning from PPO Investigations: Making Recommendations* . This report refers to insufficient resources being available to implement PPO recommendations. In any event, the PPO cannot require legal aid funding for an expert report to be provided in an individual case where it is needed. The

other recommendations, which include apology and internal investigation, are also insufficient to address the fundamental problem. Mr Davison's evidence (see para 74) is that the board can direct the Secretary of State to provide expert evidence where necessary but such evidence will not be independent.

84. Even if *legal aid* is not required, there is no evidence that the Parole Board can allocate resources to provide alternative assistance. In *R v Vowles [2015] EWCA Crim 45; [2015] 1 WLR 5131* , para 42 the court noted:

> "There is another aspect in which the Parole Board is further disabled from complying with its obligations to make a speedy determination, as it has no specific statutory powers to enforce its case management directions. It is difficult to see how it can properly and actively manage cases without such a power."

85. The existence of those mechanisms does not, moreover, address the fundamental problem. As Ms Kaufmann submitted, the difficulty with post-decision safeguards is that, if the fundamental problem with the original decision is one of process and participation which leaves prisoners unable effectively to put their case before the original decision-maker, he or she may also not be able to do so in one of the post-decision processes except for judicial review, for which legal aid is in principle available.

86. It is of course possible for a complaints mechanism and the other systems to correct simple operational errors in individual cases. However, even if the complaints procedure is simple and a vulnerable prisoner can effectively participate in that, or, as in the case of a judicial review, is represented, if all that happens is that the matter is sent back to the Parole Board for a fresh hearing, unless ad hoc procedures can be put into place to ensure that the prisoner can participate effectively at the fresh hearing, the problem is not addressed. Since it appears that there is no power to order that legal aid be granted in cases which satisfy Lord Dyson MR's criteria in Gudanaviciene's case, the problem will be incapable of being "put right".

87. Finally, there is judicial review. This, as the cases to which we have referred show, is undoubtedly an important means of redress for prisoners. But we accept Ms Kaufmann's submission that relying on judicial review will not, as was stated in the *Refugee Legal Centre case [2005] 1 WLR 2219* , para 7, necessarily be an answer where a system is inherently unfair. Where a decision is set aside in judicial review proceedings, although it is to be hoped that steps will be taken to ensure that the prisoner will be able to participate effectively when the decision

is reconsidered, that will not necessarily be the case.

88. The careful concluding paragraph of Sir David Calvert-Smith's evidence stated that the earlier paragraphs in his statement "may indicate that the Board does not necessarily accept that ' *the existing mechanisms are sufficient to ensure that the system is capable of delivering a fair outcome in every case* '". The italicised words are from para 24 of the judgment of the Court of Appeal granting permission in this case. Mr Eadie pointed to the fact that the italicised words do not state ***18** the test, and that Sir David did not state that the Board did not necessarily agree "that the system does have sufficient flexibility to ensure fairness in the full run of cases". Notwithstanding the legitimate forensic point made by Mr Eadie, the position of the Board as set out in Sir David's statement is in our judgment very telling.

89. In summary Sir David's evidence is: the instances of unrepresented prisoners and the difficulties were not isolated incidents (see para 24), Board staff have received feedback from Board members expressing concerns about unrepresented prisoners including (see para 27) a case in which the panel deferred the hearing due to the "intolerable situation" of the unrepresented pre-tariff prisoner who was "limited in his ability to answer questions, the outcome of which could lead him to remaining in closed conditions until the expiry of his minimum term". Sir David provided examples of ways the Board dealt with unrepresented prisoners. In one case it was (see para 33(i)) "fortunately" able to rely on an intelligent and lengthy letter from the prisoner's partner and full police and probation reports about the incident which the Board obtained and which undermined the Probation Officer's evidence. The Board itself felt it was unsatisfactory that a prisoner with mental health problems was unrepresented and unable to articulate himself or to structure his questions despite the support provided by the panel.

90. Sir David's evidence also stated (see para 38) that the Secretary of State frequently submits material in the dossier which is accompanied by a request that it be withheld from the prisoner on the ground of national security and that, in the light of a recently published training material, it is almost inconceivable that a panel member or a chair would allow such material to be part of the dossier in cases where the prisoner is not legally represented. The result would be that material that may be highly relevant to the panel's decision is not before it.

91. The evidence, in particular that setting out the position of the Parole Board, suggests that, although the Board is designed to be inquisitorial, its procedures, even when adapted to deal with unrepresented prisoners, are, given its workload and resources, not sufficient to ensure effective participation without deferrals and serious delays to hearings. The Board's staff find it difficult to keep unrepresented prisoners informed of developments about their cases and to seek their views, and there are "practical barriers" to assistance by offender managers and from other sources. The result appears to be reliance on ad-hoc arrangements in particular cases after things have gone wrong, such as securing assistance from the Bar Pro Bono Unit, rather than a system.

92. The Lord Chancellor is responsible for policy on legal aid and for the allocation of resources to it. But, for the reasons given in the authorities as to the role of the court where the issue is the fairness of a system (see para 55 above), whether a system is unfair is a question of law for the court and only a modest margin of appreciation is left to the Lord Chancellor. Bearing this in mind, for the reasons we have given in this section of our judgment, we have concluded that, despite the height of the threshold, the removal of legal aid from pre-tariff Parole Board reviews has resulted in an inherently unfair system. In summary form, our reasons are:

(1) Although decisions in pre-tariff reviews are not dispositive in the way that those in post-tariff reviews are, important issues are at stake in them. In practical terms, they affect the liberty of the prisoner in the sense that they materially affect his or her prospects of release, even if they are not directly determinative of release.

(2) Pre-tariff reviews and hearings follow the same procedure as post-tariff reviews and hearings for which legal aid remains available. Like post-tariff reviews, they also involve the assessment of risk which can be complicated. The documents often include psychological and sometimes psychiatric reports with which a prisoner, particularly one with learning difficulties or mental illness, is likely to find it difficult to grapple. It is likely to be difficult for a prisoner to identify a problem in the prison's assessments, for example in relation to which assessment tools are the most appropriate for him or her, a matter on which there have been disputes. The case may require independent expert evidence and prisoners may require assistance in dealing with undisclosed sensitive information, both of which have hitherto generally been provided by the prisoner's legal adviser.

(3) The alternatives that exist in the prison system and outside it that are identified and relied on by the Lord Chancellor to fill the gap do not provide sufficient protection in practice. The only new arrangements in the evidence appear to be the Parole Board's Member Case Management system, which was introduced to address questions identified by the Supreme Court in Osborn's case rather than the removal of legal aid from pre-tariff reviews, the " *Easy Read* " guides for prisoners, and the internal guidance for Board members. Mr Turner's statement (at paras 19–20) refers to the Shannon Trust's "Turning Page" programme, which targets illiteracy, but while ***19** helping with literacy may assist a prisoner to complete applications, the programme is not designed to assist an illiterate or mentally ill prisoner to participate effectively in the review, and does not provide any guarantee that it will in fact be able to do so in the run of cases.

(c) Category A reviews

93. To assess the risks posed by a prisoner, rule 7 of the Prison Rules 1999 (SI 1999/728), requires all prisoners to be categorised. Category A is the highest security category. It is defined as prisoners "whose escape would be highly dangerous to the public, or the police, or the security of the state, and for whom the aim must be to make escape impossible". Decisions as to

Category A status are made by the Deputy Director of Custody High Security ("DDC High Security") at Prison Service headquarters, whereas decisions as to the other security categories are made by the relevant prison. The categorisation procedure is governed by PSI 08/2013 and has three stages: (i) initial categorisation; (ii) first formal review (after three months); and (iii) annual review. Prisoners confirmed as Category A will normally have their security category reviewed two years later, and thereafter annually on the basis of progress reports from the prison. The Lord Chancellor has estimated that the annual number of Category A reviews for post-conviction prisoners is around 850.

94. The Category A Team prepares a dossier. This contains the trial record, the prisoner's previous convictions, and other relevant material. All reports are disclosed and the prisoner is invited to make representations. A Local Advisory Panel ("LAP") then considers the prisoner's categorisation and makes a recommendation to the Category A team as to whether Category A is the right Category for the prisoner. The Category A team will consider all the material, the prisoner's representations and the LAP's recommendation, and will notify the prisoner of the decision with written reasons. The DDC High Security may authorise an oral hearing, but these are rare. Where the DDC High Security decides to confirm the prisoner's Category A status, the prisoner can make further representations to the Category A team. The decision may be retaken if this raises information not previously considered.

95. Ms Kaufmann submitted that Category A conditions involve extreme restrictions on freedom and there is no clear and principled distinction between a Parole Board decision and a Category A review decision. This is because both directly affect the liberty of the subject, and decisions about Category A status, like Parole Board reviews, focus on risk. The availability of expert evidence from psychiatrists and psychologists is particularly important for Category A ISPs who deny their offending. The claimants' position is that the system in place is not capable of ensuring that those prisoners who are unable to secure a fair determination without assistance will obtain the assistance they require. The claimants also submitted that the additional restrictions placed on a prisoner's communications with the outside world and the increased frequency of searching mean that these categorisation decisions interfere with a prisoner's article 8 rights so that prisoners should be able to apply under the ECF scheme for legal aid.

96. Mr Eadie submitted that the nature of a Category A review process is such that legal representation is unnecessary. He argued that there is a clear and significant difference between the nature of the process and decision-making by the Parole Board. Citing in particular *R v Secretary of State for the Home Department, Ex p McAvoy [1998] 1 WLR 790* , he stated that this has been consistently recognised by the courts. In that case, Lord Woolf MR stated (at p 799) that "there are distinctions in the nature of the process. The result of a favourable decision on parole is that the prisoner is released. The change in categorisation does not have that effect". He also relied on *R (Williams) v Secretary of State for the Home Department [2002] 1 WLR 2264* , paras 25 and 27 in which it was said that the primary focus of a review of a prisoner's security categorisation is on the risks posed if the prisoner escapes, whereas Parole Board

reviews are concerned with the protection of the public following a release and whether this can be achieved by stringent conditions such as supervision or treatment and by supportive measures. We observe that the comparison made in Williams's case was with a post-tariff Parole Board review rather than a pre-tariff review.

97. The evidence of Mr Vince, Deputy Director of Custody for the High Security Estate (statement, paras 33, 34, 49, 53–54), was also relied on by Mr Eadie to show that the claim that, without legal aid, the review process for Category A status is inherently unfair should be rejected.. First, Mr Vince's evidence is that "determinate sentence prisoners are routinely released directly from Category A" and that, while Category A status can indirectly affect an ISP's prospects of release, he did not accept that the outcome of a Category A review is "directly determinative of the prisoner's release". Secondly, oral hearings are rare, and when they occur they are not adversarial but take the form of a conversation between the DDC High Security ***20*** and the prisoner, although the DDC may agree to a prisoner bringing a third party for support and assistance. Thirdly, prisoners can participate effectively on the basis of the reports in the Category A dossier, and a prisoner does not need an independent report for this purpose. Fourthly, Mr Vince's evidence is that, in his time in his current post, sensitive information, which cannot be disclosed to the prisoner, has never been the definitive factor in a Category A review decision. Mr Eadie also relied on the fact that prisoners dissatisfied with the outcome of a Category A review can make further representations, complain or apply for judicial review.

98. Again, our assessment starts with the first of the three factors emphasised by Lord Dyson MR in Gudanaviciene's case, the importance of the issues at stake. The decisions of a Divisional Court presided over by Rose LJ in *R v Secretary of State for the Home Department, Ex p Duggan [1994] 3 All ER 277* and of this court in *DM v Secretary of State for Justice [2011] EWCA Civ 522* suggest that the issues at stake in a review to decide whether a prisoner should be placed in Category A or remain in that category are important.

99. Duggan's case concerned whether fairness required the disclosure of reports for a categorisation review of a Category A prisoner serving a mandatory life sentence. Unlike the reports before the Parole Board when reviewing a case, in the case of categorisation reviews the reports were not disclosed to the prisoner concerned. After reviewing the evidence and the submissions, Rose LJ stated, at para 288 that "So long as a prisoner remains in Category A, his prospects for release on parole are, in practice, nil". He considered that the inescapable conclusion is that "a decision to classify or to continue the classification of a prisoner as Category A has a direct impact on the liberty of the subject". The court stated that there was "no material practicable distinction between the decision of the Parole Board in relation to the release of a life sentence prisoner and the decision of the governor that a 'lifer' should be in Category A". It held that the impact of Category A status on a prisoner's prospects of release meant that the standards of fairness required when that status is reviewed are similar to those required in the context of a Parole Board review.

100. The importance of the issues at stake in a review of Category A status was reiterated in DM's case by Gross LJ, with whom Sir Anthony May P and Sullivan LJ agreed, although it was held that, in the circumstances of that case, no oral hearing was required. Gross LJ stated, at para 25 that "Self-evidently, categorisation as a Category A prisoner has serious consequences for the prisoner". He referred to the fact that the prisoner is subject "to a more restrictive regime and higher conditions of security than prisoners in other categories" and, referring to Duggan's case, stated that "given the meaning of categorisation as a Category A prisoner, so long as he remains such, his prospects of release on parole are nil". For those reasons, he concluded that: "the decision as to continued classification of the prisoner as Category A has a direct impact on the liberty of the subject and calls for a high degree of procedural fairness …"

101. It is clear from these cases that there is a lot at stake in a Category A review, and that the decision in many cases will have an impact on a prisoner's liberty. It was accepted by counsel for the Secretary of State in Ex p Duggan that, at that time, over twenty years ago, there was no known instance of the Parole Board recommending the release of a Category A prisoner. It is not stated whether this related to all prisoners or only to a person such as Mr Duggan, who was an ISP. More recently, in Williams's case to which we referred at paras 40 and 96 above, this court, in a judgment handed down by Judge LJ, stated (at para 24) that the court had not been surprised to be told that, except for three prisoners released as part of the peace process in Northern Ireland, no Category A prisoner serving a sentence of life imprisonment has been released.

102. We have referred to Mr Vince's evidence as to the position today. It is carefully worded, and does not point to cases of direct release from Category A of ISPs. Mr Creighton's evidence (sixth statement, para 9) is that in over 20 years practicing prison law he has never acted for a prisoner serving an indeterminate or a life sentence who has been directly released on licence from Category A. We have concluded that, while, in the light of Mr Vince's evidence as to what is theoretically possible and the modern position, it may be that the precise effect of re-categorisation on the prisoner's liberty is more nuanced, there has been no change in substance.

103. We turn to the second of the factors emphasised in Gudanaviciene's case, the complexity of the procedural, legal and evidential issues. Like Parole Board hearings, Category A reviews are an area of decision-making that focus on risk and may involve consideration of what, if any, treatment is needed to address the risk. They thus involve prison and psychological risk assessment material which can, as the facts of *R (MacKenzie) v Secretary of State for Justice [2009] EWCA Civ 669* show, be complex. In MacKenzie's case a Category A prisoner who could not access the courses he needed in order to make progress while he was so classified successfully challenged a refusal to reclassify him as Category B because the decision-maker had failed to ***21*** take into account an independent report he had obtained. The prisoner contended that the risk which he posed had been materially reduced as a result of an operation surgically removing his testicles. The psychological evidence obtained by the prison and relied

on by the decision-maker concluded that it had not, but the report the prisoner had obtained supported his case. It stated that the physical effect of the surgery meant there was a high level of certainty that his risk of reoffending had been materially reduced.

104. While bearing in mind the limits of evidence based on examples unless the examples are indicative of systemic problems rather than operational failures in particular cases, we make two observations. The first is that, as in the case of risk assessments for reviews by the Parole Board, the risk assessments in categorisation decisions can be complex. Ms Bromley's statement (para 3) referred to her experience of five prisoners serving indeterminate or life sentences. One of these was a prisoner she represented pro bono at a Category A review where there was a clear divergence of opinion regarding her client's level of risk between the governor and the Category A Team. She stated that he was reclassified as Category B and that she did not consider that the prisoner, who was prone to anxiety attacks and easily intimidated, could have put his case coherently. Another witness (Mr Guedalla, second statement, paras 3–35) stated that he considered that his legal representation had been fundamental in securing the downgrading of a prisoner's status from Category A to Category B because of the legal nature of the issues which related to common law fairness and the requirement that the prisoner know the "gist" of the case put against him.

105. The second is that important papers can be missing from the dossier prepared for a prisoner's Category A review and disclosed to the prisoner, and the prisoner may not have the capacity to identify that this is so. Mr Creighton's evidence about an identified prisoner (sixth statement, para 11, cf Mr Vince's statement, paras 53–54) referred to the fact that three independent psychological reports, two Parole Board recommendations and a decision by the Secretary of State had not been included in the prisoner's dossier. The problem was discovered only after he had started to act for the prisoner on a pro bono basis. See also Ms Russo's third statement at para 3 setting out prisoners' replies to a questionnaire, although these were anonymous. Although these examples in themselves come nowhere near showing *systemic* unfairness, they indicate a real problem, and they highlight the complex nature of the procedure and the importance of adequate aid and assistance provided to prisoners to deal with their individual cases. A prisoner, particularly one who is mentally ill or otherwise vulnerable, has a real need for assistance from someone who can assess the significance of what is in the dossier and identify what is missing from it.

106. We reject the submission on behalf of the Lord Chancellor that an inability to obtain expert evidence cannot sensibly be said to render the system inherently unfair. Mr Vince stated (at para 49) that it is "rare for prisoners to obtain independent expert evidence during the categorisation process". This may be so, but it is possible to envisage circumstances where a psychologist's report is relevant and necessary in addressing the question of the risk imposed by a prisoner. Examples are provided by the cases referred to at para 68 above in the discussion of Parole Board reviews where there was a dispute as to which assessment tools were appropriate in a given case or inconsistencies between the offender supervisor's assessment of risk and that of

the OASys tool. The system makes no provision for such cases.

107. Finally, as to Mr Vince's evidence (statement, para 52) that, in his time in his current post, sensitive information, which cannot be disclosed to the prisoner, has never been the definitive factor in a Category A review decision and that "matters relating to security intelligence will not have any significant impact on the outcome of most Category A reviews". Again, while this may be so, it does not mean that sensitive information never arises or is never material or important in such reviews. Category A decisions may raise complex public interest immunity issues where material is not disclosed to the prisoner because it contains sensitive security information: see *R v Secretary of State for the Home Department, Ex p Duggan [1994] 3 All ER 277* , 282–283. These matters will therefore be relevant in *some* cases and the system relies on disclosure to the prisoner's legal representative to ensure fairness. If there is no representative to whom to disclose the information, the system is inherently incapable of being fair. This is not an individual instance of an error or errors in the system; it amounts to failing in a category of cases that rely on security intelligence, however small that category may be.

108. As to the third of the factors, we discussed the question of support from prison staff under the present system and by other prisoners in enabling vulnerable prisoners in particular offenders with learning disabilities and mental illness, to participate effectively in decision-making, and the complaints system, the PPO, the IMB and applications for judicial review when ***22** considering pre-tariff Parole Board hearings: see paras 75–88 above. Our reasoning and our conclusions in that context are also applicable in this context. There is no evidence that there is particular support available in practice for prisoners in Category A reviews: see Ms Russo's examples (statement, para 3, referred to at para 105 above), which highlight the lack of alternative support available for prisoners for Category A decisions in the absence of legal aid.

109. In our view, the removal of legal aid from the Category A review process has resulted in an inherently unfair system because: (1) decisions as to classification or continued classification of a prisoner as Category A are important decisions which affect the liberty of the prisoner in the sense that they materially affect his or her prospects of release, even if they are not directly determinative of release; (2) the reviews involve the assessment of risk which can be complicated and may require independent expert evidence and they may require assistance in dealing with undisclosed sensitive information, both of which have hitherto generally been provided by the prisoner's legal adviser; and (3) the alternatives that existed in the prison system and outside it that are identified and relied on by the Lord Chancellor to fill the gap do not provide sufficient protection in practice for those prisoners who are vulnerable, or have learning difficulties, or suffer from mental illness.

(d) Close supervision centres

110. These centres were introduced to deal with the most disruptive or dangerous prisoners,

who pose a risk to other prisoners. The categories include prisoners demonstrating repeated or escalating violence to others, carrying out or orchestrating a single serious act of violence or disorder (murder, serious assault, hostage-taking), and seriously threatening or intimidating behaviour directed at staff and/or prisoners. Mr Vince's evidence (statement, para 83) is that the numbers are small: in 2016 there were 24 referrals to CSCs of whom 11 were selected for assessment, and there were 16 "de-selection referrals".

111. Where it appears desirable, for the most part to restore order, discipline or to ensure safety, such prisoners may be removed from association and placed in a CSC under rule 46(1) of the Prison Rules . Selection into the CSC system is a five-stage process. The first stage is referral for assessment, which is designed to identify those prisoners who pose a significant risk of harm to others and to fully document those risks (PSI 42/2012, paragraph 1.2). Referral criteria include demonstrating repeated violence, a long history of disciplinary offences and repeated periods of segregation. A "Referral Pack", including six reports about the prisoner, is disclosed to the prisoner and considered by a Case Management Group.

112. The second stage is an assessment process, which usually takes four months; 12 weeks of observation and assessment, followed by four weeks for finalisation and disclosure of the reports. The third stage is a Local Assessment Case Conference. This evaluates the content of the reports and the risk presented by the prisoner and makes a recommendation to the CSC Management Committee. The fourth stage is the decision by the CSC Management Committee. The fifth stage consists of reviews and de-selection. Such decisions include a structured care and management plan. A decision under rule 46(1) can only be made for a period of up to one month but may be renewed under rule 46(2) from time to time for a like period. The prisoner is kept fully informed at all stages of the referral and placement process and is given the opportunity to make representations.

113. Ms Kaufmann submitted that prisoners in the CSC system are likely to be held for many years in restrictive conditions, which include designated cells, the effect of which is no different from segregation, for which the Lord Chancellor has accepted that ECF funding is theoretically available. The claimants' primary position is that CSC decisions are capable of engaging article 8 , meaning that prisoners can apply for ECF funding under section 10 of LASPO . Their alternative position, if the court concludes that article 8 is not engaged, is that the interests at stake, the complexity of the decision-making process, and the lack of assistance and support for prisoners who are being considered for the CSC system or are in it but wish to get out means that fairness cannot be ensured for vulnerable prisoners who are unable effectively to participate on their own. She argued that the operation of selection into the CSC system and release from it is inherently or systemically unfair because it is incapable of reacting in a manner that secures fairness across the full range of cases.

114. Mr Eadie submitted that article 8 of the ECHR is not engaged in the CSC context because the mere placement in a CSC does not automatically involve restriction on association with

other prisoners. The question whether or not an individual should be in a CSC, he maintained, is not a complex one. The process is careful and thorough, and other forms of assistance and a review are available to the prisoner. He relied on the statement in the March 2015 report, *An Announced Thematic Inspection of the Close Supervision Centre System* , by Nick Hardwick, Her Majesty's Chief ***23** Inspector of Prisons ("HMCIP") that "only those demonstrating the highest risk behaviour were selected, while others were referred to mainstream or other specialist provision …" In his further submissions on evidence he also referred to the statement in the report that it was "satisfied that prisoners with protected characteristics received individual consideration and care". We observe that the latter observation was not in the pages exhibited to Mr Vince's statement but was in the "equality and diversity" section of the report which focuses on ethnic and religious tolerance rather than issues connected with decisions about referral to CSC's or discharge from them.

115. Mr Eadie also relied on the evidence of Mr Vince (paras 93, 98, 110, and 113–116) about the disclosure of reports to the prisoner who is able to make representations on them, and assistance in understanding the report from the report writer, the prisoner's Personal Officer or another member of staff on the unit, or family, friends or an independent third party. He stated that the process is explained in an "easy to read" leaflet, *Close Supervision Centres: Information for Prisoners* , and the assessment process is by qualified staff including a senior mental health nurse and a registered senior psychologist. A prisoner may complain using the internal complaints system or the PPO and the prisoner information leaflet informs prisoners of their right to contact the IMB.

116. The claimants' primary argument is that in some circumstances placement in a CSC interferes with rights under the ECHR so that, in principle, ECF funding under section 10 of LASPO should be available in such cases but is not. This challenge, however, is not based on the personal circumstances of a prisoner who is in or is likely to be transferred into the CSC regime. For the reasons in the following paragraphs, that has led us to conclude that is not appropriate for the court to rule on the question of whether article 8 is engaged by CSCs or whether there has been an interference with the rights under article 8 .

117. Two decisions show that in a case like this the correct target of a challenge based on rights under the ECHR are individual decisions alleged to have been made in breach of those rights or the requirements of procedural fairness. The first is *R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738* , one of the cases Lord Bingham of Cornhill used to illustrate the seventh principle of the rule of law to which we referred at para 3 above. In the context of determining whether the duty of procedural fairness required by article 5.4 was infringed by the non-disclosure of material to the claimant or his legal representatives, Lord Bingham at para 19 stated that the assessment of incompatibility "is almost necessarily made in retrospect when there is evidence of what actually happened". Lord Woolf CJ at para 76 stated that "There can be an infinite variety of circumstances as to the degree of information that is withheld completely or partially without any significant unfairness being caused", and see also Lord

Rodger of Earlsferry at para 112 and Lord Carswell at para 144. The second decision is *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2011] UKSC 45; [2012] 1 AC 621* . In it, Lord Wilson JSC stated at para 59 that decisions founded on human rights "are essentially individual": see also Baroness Hale of Richmond JSC at para 69. Lord Wilson JSC did, however, recognise that it is possible that in an extreme case it can be shown that a rule or a system is incapable of application that is consistent with the ECHR in any individual case and is therefore invalid. In the light of this, absent consideration of an individual claimant's personal circumstances in a CSC, the claimants' primary argument in this case collapses into their argument that the system is inherently or systemically unfair.

118. We therefore turn to the argument that absent legal aid, the selection process for CSC units is systemically unfair, and to the factors highlighted in Gudanaviciene's case. It is common ground that placement in a CSC unit is more restrictive than placement in an ordinary prison, including a high security prison: see Mr Vince's statement, para 83. Placement does not necessarily involve segregation from others in the unit, but, given what HMCIP Nick Hardwick described as "highly restrictive" conditions, we consider that important interests of prisoners are at stake when they are being considered for referral to a CSC or for discharge from a CSC into another part of the prison estate.

119. The next factor is the complexity of the procedural, legal and evidential issues involved when a referral to or discharge from a CSC is being considered. In both cases, the risk posed by the prisoner plays a large part in the decision-making process. To that extent, the process has similarities to that when the prisoner's category is under consideration. The potential complexity is also shown by the fact that the CSC referral manual requires preparation of reports by the prisoner's Wing/Personal Officer, the Security Officer, the offender supervisor, a summary of the prisoner's psychology file and any involvement with the psychology team including assessments for programmes and courses completed or recommended, and "a brief outline of the 'prisoners' current or past contact with mental health services within and prior to custody".

***24**

120. The post-hearing submissions on behalf of the Lord Chancellor on the evidence comment "that standard documentation for the CSC process runs to 11 pages" but those eleven pages consist of the blank template forms. All, except for the first one, state that additional pages may be used if necessary. Given the nature of the information that is requested and the fact that the prisoners who are likely to be under consideration will be those who are believed to be disruptive or dangerous and who pose a risk to other prisoners, additional pages may well be necessary. This is particularly likely to be the case in relation to psychological and psychiatric assessments and the disciplinary record. Additionally, if the documentation is shorter and in summary form, it may be more important for someone qualified to assess whether all the relevant information as to risk is before the decision-maker.

121. We turn to the third of the factors, the ability of the individual to represent himself or herself without legal assistance but with the other means of assistance available. The evidence

shows that there is more individuated consideration of those in CSC units, including the allocation of a registered forensic psychologist and "intensive specialist, multi-modal psychological treatment which is bespoke to the individual prisoner": Mr Vince's statement at para 83. The small numbers involved, see para 110 above also mean that it is likely that more individual treatment is given to a prisoner. But, the absence of any independent element in the assistance given to prisoners in CSCs, to which we refer below, is of concern.

122. The importance of risk in determining when a prisoner would be appropriately placed in a CSC or remain in such a unit is also relevant to this factor. This is because the assessment of risk gives rise to similar problems to those which we have discussed in relation to Parole Board reviews and categorisation decisions particularly in relation to vulnerable prisoners: see paras 67–68, 92(2), 103–104, 106 and 109(2) above. It is important to ensure that the determination of risk is correct and some cases may require input in the form of an independent assessment by either a psychiatrist or a psychologist. There is provision for prisoners in CSCs or who are being assessed for possible transfer into a CSC to make representations, but the evidence does not identify any particular safeguards for vulnerable prisoners such as those with learning disabilities or mental illness.

123. The *Thematic Inspection* , see para 114 above contained the positive comments relied on by Mr Eadie. It also stated (see p 5) that decisions to select prisoners "were based on a clear set of published criteria and a robust risk assessment" and that "after selection a series of reviews was conducted to chart progress and review allocation decisions". But on that page it is also stated:

> "However, there was no independent scrutiny or external involvement in decision-making to promote objectivity and ensure fairness. This was particularly important given the highly restrictive nature of the units, restrictions on access to legal aid and the difficulties prisoners had in being de-selected."

124. Notwithstanding the positive reference to the detailed nature of the assessment, selection and review processes, the report also stated (at p 26) that "no external independent organisation (outside NOMS) was involved in or challenged these key decisions in a meaningful way to ensure fairness and proportionality". The report also expressed concern about the fact that, although progress reviews took place regularly, "the requirement to continue to hold a prisoner within the system was not formally reviewed on an annual basis" and "there was no process within the system to allow prisoners to appeal formally their allocation or their continued

detention in the system, which was now even more important given changes in legal aid rules". It recommended that key decisions should be open to "robust, independent scrutiny and meaningful challenge from outside the prison system" and "should also be subject to a formal appeal process that prisoners can easily access".

125. We discussed the question of support from prison staff under the present system and by other prisoners in enabling vulnerable prisoners, in particular offenders with learning disabilities and mental illness, to participate effectively in decision-making, and the complaints system, the PPO, the IMB and applications for judicial review when considering pre-tariff Parole Board hearings, at paras 75–88 above. Our reasoning and our conclusions in that context are also applicable in this context. In particular, it is noteworthy that the *Thematic Inspection* identified that "the absence of a formal appeals process meant some men had little hope of challenging the decisions which led them to being held in the restricted conditions of the CSC system". In our view, this highlights the need for a process for appealing decisions and the inadequacy of existing complaints mechanisms for appealing a decision in the specific context of CSCs.

126. Given the more detailed evidence about the assistance by prison staff and professionals working in CSCs, the question whether the removal of legal aid from this category of decision-making ***25** renders it inherently unfair is, in our judgment, more finely balanced, particularly since it is open to an individual prisoner to claim that his or her particular circumstances within a CSC engage article 8 of the ECHR so that ECF funding is available. We, however, attach importance to the fact that assessments of risk play a large part in the decision-making process. We also attach significance to the fact that the only assistance comes from those responsible for the prisoners' care in the CSC, and the absence of any independent scrutiny of key decisions as to risk, in the words of the HMCIP's review "in a meaningful way to ensure fairness and proportionality". These factors have led us to conclude that vulnerable prisoners and those with mental illness would not be able to participate effectively in the process in the run of cases concerning them.

(e) Access to offending behaviour programmes ("OBPs")

127. These accredited courses are also known as offending behaviour courses. They are provided to prisoners to assist them to reduce their risk of reoffending. They are typically delivered in groups and decisions as to access are based on risk posed by a prisoner and his or her need. The wide range of courses offered includes a "Thinking Skills Programme" and an "Integrated Domestic Abuse Programme". The completion of these courses is an important way of demonstrating risk reduction, which is necessary for moving from closed to open conditions and to eventual release. Where a particular OBP is not available at a given establishment, it may be identified as an activity to be undertaken following a transfer to a relevant establishment.

128. Eligibility for an OBP depends on publicly available criteria, including proximity to

release, likelihood of positive impact and risk of serious harm. The determination of the individual's eligibility and readiness for the OBP is carried out by the OBP's treatment manager. For higher intensity courses, treatment managers are psychologists or staff with significant experience. The offender is not required to make representations but is engaged in the process by his offender supervisor or manager. Reports and other relevant documents are disclosed to the prisoner. Disputes about OBPs may include recommendation for an inappropriate or unnecessary OBP, denial of access to an OBP or recommendation for an OBP that is necessary for progression but is not currently available at the offender's prison. The Lord Chancellor has estimated that for 2016/2017 approximately 6,900 OBP completions have been commissioned.

129. Ms Kaufmann submitted that particularly for ISPs, access to and completion of OBPs is, in the vast majority of cases, a necessary pre-condition for their eventual release and therefore being denied access to OBPs will have a significant impact on time an ISP spends in prison. The issues are complex as accessing different courses may depend on eligibility that needs to be established by expert evidence, it may require transfer to another prison or challenge to unnecessary delay or to decisions based on limited resources.

130. Mr Eadie submitted that prisoners do not need legal assistance to participate effectively in the administrative OBP process and the claimants have exaggerated what is at stake. It is rare for complex evidential issues to arise and fairness does not require *independent* expert evidence. Offenders requiring assistance can be supported by family, friends etc and challenges to cases of delay can be made.

131. There is a clear link between OBPs and a prisoner's liberty because the inability to participate in an appropriate OBP may impact negatively on a prisoner's ability to move towards release. In its *Thematic Report into the Sentence of Imprisonment for Public Protection* published by HM Inspectorate of Prisons based on prison inspections between April 2015 and March 2016, it is stated (at paras 5.17–5.18) that the quality and consistency of offender management impacted negatively on prisoners' ability to make progress towards release on licence. It was also stated (paras 5.25–5.27) that evidence from prisoners and the Parole Board suggested delays in some cases of years in accessing courses, which was having a detrimental impact upon prisoners' ability to reduce their risk and progress to release. See also Mr Kingham's evidence (statement, para 14) that the assistance he was able to give to an illiterate prisoner with significant learning disabilities who required sexual offending behaviour work but was never transferred to a prison that offered it was very limited without legal aid funding.

132. The link between OBPs and a prisoner's liberty has been recognised by the courts: see James v United Kingdom (2013) 56 EHRR 399 and *R (Kaiyam) v Secretary of State for Justice [2014] UKSC 66; [2015] AC 1344* . In Kaiyam's case the Supreme Court held (at paras 36 and 38) that article 5 of the ECHR imposed on the Secretary of State a duty to provide an ISP with "an opportunity reasonable in all the circumstances … to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public" or a duty "to facilitate the

progress of such prisoners towards release by appropriate courses and facilities". But, while the Supreme Court accepted at para 38 that article 5 ECHR can be violated by a failure to provide offending behaviour work, it does not necessarily follow that a prisoner involved in an OBP decision ***26** requires legal aid in order to participate effectively in the decision. The question is whether the link to liberty together with the other factors emphasised in the cases and summarised by Lord Dyson MR in Gudanaviciene's case is such that the lack of legal aid for this category of decision-making about the allocation of prisoners to courses is systemically unfair.

133. The evidence suggests that "for ISPs in particular, completion of an accredited programme can have a particular significance in evidencing reduction of risk": Ms Attrill, statement, para 20. But, while this is clearly relevant to, and may impact upon, the time an ISP spends in prison, the decision to accept a prisoner for a programme is one stage removed from a decision on categorisation or as to a move to open conditions. In our view, it follows that the consequences are less severe if the risk of an unfair decision being made materialises (see relevant factors in determining unacceptability of a system in *R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] 1 WLR 4620* , para 34. As Ms Attrill's evidence emphasised, OBPs are only one means of demonstrating risk reduction, and the standard of fairness required must be assessed in the light of that.

134. The process for determining which OBP may be appropriate is also less complicated than Parole Board or categorisation decisions and it is less likely that complex evidential issues will arise. We have referred to the fact that each OBP has a treatment manager who determines an individual's eligibility for the programme. There is no requirement for the prisoner to make representations during the assessment process. Ms Attrill's evidence (statement, paras 13–16) is that the process is a matter of judgment rather than adjudication. Furthermore, a lawyer is not required to apply the relevant criteria and it is rare for a point of law to arise. Ms Attrill stated (para 18) that legal representation is not necessary because

> "an offender may wish to dispute the assessment of his or her needs, the identification of particular interventions or the determination of eligibility and readiness for a specific OBP or intervention, but this does not generally involve arguments on points of law."

135. The role of the offender manager and/or the offender supervisor is also important. In *Tabbakh's case [2014] 1 WLR 4620* , para 52 Richards LJ stated that this role was the most important point in determining the lawfulness of the policy in relation to decisions as to what

licence conditions should be imposed on release. He rejected the submission that the cutbacks in legal aid made illegal the policy under which it was the offender manager who put forward the offender's concerns when discussing licence conditions at the Multi-Agency Public Protection ("MAPPA") meetings; who raised with the offender any issues arising out of those meetings; and who has responsibility for recommending to the prison governor the conditions to be included in the licence. He considered that role ensured that a prisoner's lack of opportunity to have his views on proposed licence conditions taken into account at a material stage did not render the procedure inherently unfair.

136. We accept Mr Eadie's submission that Richards LJ's observations are equally applicable to the role of a prisoner's offender manager in the OBP process. This is because OBPs are also an aspect of sentence planning in which offender managers are closely involved. In our view, what is important about the OBPs is that they are part of the sentencing planning and treatment of prisoners. The evidence (Ms Attrill, statement, paras 14–16) is that offender managers and offender supervisors ensure that the prisoner is engaged in the process and understands the reports. We consider this to be a crucial distinction from the other areas of decision-making we have considered. The role of offender managers and offender supervisors in recommending OBPs is set out in the referral and selection principles and selection guidance in the October 2015 NOMS Interventions Services, Selection and Referral Guide (Male Prisoners) v 1.0 . PSI 41/2012 obliges offender managers and offender supervisors to engage with prisoners in the sentence planning process and states (at para 2.14) that they "should work together with the offender to review the … available activities and interventions and come to a joint agreement on how the objectives in the plan will be achieved".

137. In our view, considering what is at stake, the complexity of the process, and other assistance, in particular the role of offender managers and offender supervisors, we are not persuaded that the lack of legal aid available for OBP decisions is unlawful on the ground of systemic unfairness.

(f) Disciplinary proceedings

138. Rules 51–61 of the Prison Rules 1999 , and the Young Offender Institution Rules 2000 (SI 2000/3371) (as amended) contain the formal disciplinary code for prisons and young offender ***27** institutions. All charges must be made within 48 hours of the discovery of the offence and some circumstances must be inquired into by a prison governor within 24 hours. At the first hearing, the governor must decide if the case is so serious that it is likely to justify an award of additional days, or for some other reason it would be expedient to refer the charge to an independent adjudicator. If not, the governor can continue to hear the charge. If the charge is heard before an adjudicator, legal aid is available to the prisoner, subject to means and merit.

139. PS1 47/2011 on prisoner discipline procedures reflects the decision in *R v Secretary of*

State for the Home Department, Ex p Tarrant [1985] QB 251 to which we referred at para 43 above. In cases heard by the governor, rule 54 of the Prison Rules provides that a prisoner shall be given a full opportunity of hearing what is alleged against him and of presenting his own case. The governor may impose one of the punishments under rule 55 and can decide whether the prisoner should be permitted legal representation at a hearing by the " Tarrant criteria" which are set out in PSI 47/2011 at paras 2.10–2.15. They are: (i) the seriousness of the charge and of the potential penalty; (ii) whether any points of law are likely to arise; (iii) the capacity of a particular prisoner to present his own case; (iv) procedural difficulties; (v) the need for reasonable speed in making their adjudication, which is clearly an important consideration; (vi) the need for fairness as between prisoners and as between prisoners and prison officers. Where the prison governor exercises his discretion and legal representation is permitted, criminal legal aid will be available for a disciplinary hearing.

140. Relying on the evidence of Mr Creighton (sixth statement, paras 12–13), Ms Kaufmann submitted that before the changes in the 2013 Amendment Regulations legal advice frequently involved the drafting of representations on the applicability of the Tarrant criteria for the prisoner to present to the governor at the hearing, or to support an application that the governor refer the case to an independent adjudicator. She argued that none of the mechanisms identified by Mr Taylor in his statement as available to assist and support prisoners in the disciplinary process, nor those which the Lord Chancellor asserts are generally available within the prison system, are capable of providing the assistance needed by, in particular, a vulnerable prisoner who is incapable of effectively putting his case or making effective representations as to why he needs legal assistance to do so.

141. Mr Eadie submitted that prisoners can generally participate effectively in adjudications without legal representation and the exercise of the governor's discretion whether the Tarrant criteria are met is itself subject to judicial review. Relying on Mr Taylor's evidence (statement, para 204), he maintained that there are specific safeguards in place to ensure that prisoners with a particular vulnerability are able to participate in the disciplinary process without legal advice. Thus, the governor must: ensure that the prisoner or young offender understands the process; be satisfied that the prisoner or young offender is physically and mentally fit for the process, and if he or she has any doubts then advice should be sought from healthcare. Also the prison or young offender institution should encourage young or vulnerable prisoners to request help from an advocate, for example the Advocacy Service, in relation to their case.

142. In our judgment, the consequences of those disciplinary hearings for which legal aid is no longer available and the rights at stake are less grave than in the other areas of decision-making we have considered. The possible outcomes of disciplinary proceedings where there is no legal aid include: caution, confinement to cells, exclusion from associated work, extra work, forfeiture of privileges, removal from activity/living unit, and stoppage of earnings: see table A5.8 *Punishment Outcomes by Sex, Age Group and Ethnicity* (2010–2015) published as part of the Offender Management Statistics Quarterly publication by the Ministry of Justice.

143. While we accept the claimants' evidence that Mr Creighton, for example, has acted in cases where an adjudicator has refused legal representation under the Tarrant criteria but then granted this following receipt of his representations, it does not follow that legal aid is required for the system to be capable of operating fairly. In our view, in this context the other safeguards in the system are capable of ensuring that the system is not inherently unfair. This is because a complaint or a claim for judicial review is capable of quashing the decision of the governor not to apply the Tarrant criteria in a prisoner's favour. The likely outcome of such a process would be to recommend that the governor reconsider his decision that the Tarrant criteria do not require legal representation. If judicial review exposed an error in the original decision, then in remaking the decision the governor, unlike the Parole Board, would have the power to apply the Tarrant criteria correctly, and ensure that legal aid was provided.

VI. Conclusions

144. For the reasons given in section V(b), (c) and (d) above, we have concluded that the high threshold required for a finding of inherent or systemic unfairness has been satisfied in the case ***28** of pre-tariff reviews by the Parole Board, category A reviews, and decisions as to placement in a CSC. This is particularly so in the case of vulnerable prisoners, such as those with learning disabilities and mental illness, on whom we have focused. For the reasons given in section V(e), and (f) above, we have concluded that the threshold has not been satisfied in relation to decisions about offending behaviour programmes and disciplinary procedures from which legal aid has been removed.

145. Our approach has been to consider the application of the principles and factors identified in the decisions of the appellate courts which we discuss in section IV to each of the categories. Those factors are: the importance of the issues at stake; the complexity of the procedural, legal and evidential issues; and the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity, and the other assistance that is available.

146. We emphasise that we recognise that there may be safeguards other than legal aid and advice that will prevent inherent or systemic unfairness by enabling a prisoner to participate effectively in a category of decision-making. The government's decision to remove legal aid from the five categories of decision-making that are the subject of these proceedings by the 2013 Amendment Regulations was made because it considers that there were adequate alternative means in place to ensure prisoners can participate effectively in areas in which support has hitherto been provided by legal advice and legal representation. The consequence is that almost no changes have been introduced to replace the gap left by the removal of legal aid. We have concluded that, at a time when (see paras 75–76 above) the evidence about prison staffing levels, the current state of prisons, and the workload of the Parole Board suggests that the

system is under considerable pressure, the system has at present not got the capacity sufficiently to fill the gap in the run of cases in those three areas.

147. This application for judicial review will be granted to the extent indicated.

Claim allowed in part.

Alison Sylvester, Barrister

Appendix

Evidence by or in support of the claimants and the defendant

(i) Evidence by the claimants

Name of witness	*Firm/organisation*	*Date of evidence*
Simon Creighton	Partner and Director, Bhatt Murphy Solicitors (claimants' solicitors)	26 November 2013, 25 February 2014, 22 June, 2 July, 6 November 2015 and 29 November 2016
Laura Janes	Consultant solicitor and legal co-director, Howard League for Penal Reform	25 February 2014, 22 June and 6 November 2015
Deborah Russo	Managing Solicitor, Prisoners' Advice Service	22 June and 4 November 2015
Frances Rachel Crook	Chief Executive, Howard League for Penal Reform	29 November 2016

(ii) Evidence in support of the claimants ***29**

Name of witness	*Firm/organisation*	*Date of evidence*
Christopher Sheffield OBE	Trustee of Howard League, formerly HM Prison Service (governing governor of HMP Manchester)	22 November 2013
Prof John Podmore	Professor at the University of Durham, formerly HM Prison Service (governing governor of HMPs Belmarsh, Brixton and Swaleside)	26 November 2013
John Turner	Solicitor and Director of Kyles Legal Practice LLP, Chair of the Association of Prison Lawyers	25 February 2014 and 6 November 2015
Rachel Chapman	Legal adviser and consultant, Broudie Jackson Canter Solicitors	2 November 2015
Peter Conchie	Consultant solicitor, Bobbetts Mackan Solicitors and Advocates	2 November 2015
Samuel Genen	Solicitor, Ahmed Rahman Carr and Lound Mulrenan Jefferies Solicitors	2 November 2015
Judge John Samuels QC	Chairman of the Criminal Justice Alliance, Trustee of Howard League, formerly Circuit Judge and member of Parole Board	2 November 2015
Kushal Sood	Solicitor and Co-ordinator of Trent Centre for Human Rights	3 November 201

Anita Bromley	Consultant solicitor, Broudie Jackson Canter Solicitors and Cartwright King	4 November 2015
Rikki Garg	Consultant advocate, Scott-Moncrieff & Associates Ltd	4 November 2015
Katherine Bekesi	Solicitor, Scott-Moncrieff Solicitors	5 November 2015
Stefan Fox	Former prison law advisor, Carringtons Solicitors	6 November 2015
Daniel Guedella	Solicitor, Birnberg Peirce and Partners	N/A and 30 November 2016
Dean Kingham	Solicitor and Head of Prison, Criminal and Public Law Departments, Swain and Co Solicitors	N/A

(iii) Evidence by the Parole Board

Name of witness	*Firm/organisation*	*Date of evidence*
Sir David Calvert-Smith	Chairman, Parole Board	2 February 2016

(iv) Evidence by the defendant (NOMS: National Offender Management Service, Ministry of

Justice) *30

Name of witness	*Firm/organisation*	*Date and subject of evidence*
Gill Attrill	Head of Commissioning Strategies Group, NOMS	19 October 2016
		Offender Behaviour Programmes
Sarah Coccia	Head of Operational Security and Risk Management, NOMS	19 October 2016
		Segregation
Gordon Davison	Head of Offender Management and Public Protection Group, NOMS	19 October 2016
		Pre-tariff reviews and advice
Mark Taylor	Deputy Director of Equality, Rights and Decency Group, NOMS	20 October 2016
		Complaints system, PPO, IMB, discipline participation by prisoners in procedures
Richard Vince	Deputy Director of Custody for the High Security Estate, NOMS	20 October 2016
		Category A reviews, CSCs

(v) Evidence given to the Justice Committee and the Joint Committee on Human Rights inquiry into the implications for access to justice of the Government's proposals to reform legal aid (HL 100, HC 766, 13 December 2013)

Name of witness	*Firm/organisation*	*Date of evidence*
Chris Grayling MP	Lord Chancellor and Secretary of State for Justice	3 July 2013 (Evidence to the Justice Committee), 26 November 2013 (Evidence to the JCHR)
Nick Hardwick	HM Chief Inspector of Prisons	23 September 2013
Dr Nick Armstrong	Matrix Chambers	25 September 2013
Written Evidence	The Howard League for Penal Reform	27 September 2013
Written Evidence	Prisoners' Advice Service	27 September 2013
Andrew Sperling	Association of Prison Lawyers	27 September 2013
Written Evidence	Parole Board for England and Wales	September 2013
Written Evidence	Office of the Children's Commissioner	September 2013

Written Evidence	Children's Rights Alliance for England	September 2013

*31

Footnotes

1 Criminal Legal Aid (General) Regulations 2013, reg 12 , as amended: see post, para 24.

2 The grounds upon which permission was refused are summarised at para 29 below.

3 The consultation process which preceded the 2013 Amendment Regulations is summarised at paras 16–21 below.

4 It was submitted that the changes were ultra vires the Constitutional Reform Act 2005 .

5 The challenge thus did not claim that there was systemic unfairness, but that the circumstances of the individual claimants meant that it was unfair not to provide them with legal advice and assistance.

6 The PPO is governed by PSI 58/2010, which aims to ensure that governors, staff and prisoners are aware of how the PPO operates.