Neutral Citation Number: [2017] EWCA Civ 1003

Case No: C1/2015/1521

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
THE HON MR JUSTICE KING

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/17

Before :

LADY JUSTICE GLOSTER
(Vice President of the Court of Appeal, Civil Division)

LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF ROBERT GOURLAY

Appellant

- and -

THE PAROLE BOARD

Respondent

- -

Hugh Southey QC and **Stephen Thornton** (instructed by **Chivers Solicitors**) for the **Appellant**
Ben Collins QC (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 4 May 2017
Further written submissions: 20-22 May 2017

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This is an appeal against the Order of King J dated 2 February 2015, in which he made no order for costs in a judicial review brought by the Appellant, a life prisoner serving his sentence in closed conditions, challenging the decision of the Parole Board ("the Board") on 10 March 2014, in which, on review, the Board declined to release him or recommend his transfer to open prison conditions. The Board played no active part in the judicial review. In the event, the Appellant's claim was successful, in that King J found that the Board had acted unlawfully and he remitted the matter to the Board for reconsideration.

2. The appeal, brought with the permission of the judge below, turns on one issue, which is of some importance. Does the established practice of the High Court, to make no order for costs for or against an inferior tribunal or court which plays no active part in a judicial review of one of its decisions, extend to the Board?

3. Before us, Hugh Southey QC and Stephen Thornton appeared for the Appellant, and Ben Collins QC for the Board.

The Parole Board

4. The Board has various functions relating primarily to the assessment of the continuing risk posed by prisoners. This appeal concerns its role in relation to life prisoners, and particularly in relation to (i) the transfer of life prisoners, as they progress towards eventual release, from closed to open conditions, and (ii) the actual release of life prisoners from custody. I will focus on the functions of the Board in those particular circumstances.

5. Except in rare cases where it is considered that a "life sentence" requires a particular offender to spend the rest of his life in prison, it has been the practice to release those subject to "life imprisonment" at some stage during their sentence. Reflecting the punitive purpose of sentencing, for each such individual, a period is assessed as being the minimum time he should serve in prison by way of punishment ("the tariff"). Thereafter, he will be released on licence, but only when he has demonstrated that the risk he poses to the public has been reduced and is acceptably low.

6. Until 2003, although the trial judge would make a recommendation, the tariff was fixed by the Home Secretary, who was not in any way bound by any advice he received. Similarly, after the expiry of the tariff, the Secretary of State was responsible for deciding when, if at all, a life prisoner should be released.

7. Progressively, under the influence of the European Court of Human Rights ("the ECtHR"), decisions on both tariff and release have been taken away from the Secretary of State. Responsibility for the former has passed to the judiciary. Responsibility for the latter has passed to the Board.

8. The Board was established by section 59(1) of the Criminal Justice Act 1967 ("the 1967 Act"), as essentially an advisory board to the Secretary of State. It was required to advise upon (amongst other things) the release of life prisoners on licence whose

cases had been referred to it by the Secretary of State (section 59(3)). The Secretary of State was under no obligation to follow the advice given.

9. Section 149 of the Criminal Justice and Public Order Act 1994 constituted the Board as a body corporate; and, as such, it has the status of an executive non-departmental body. In May 2007, responsibility for the Board passed from the Home Secretary to the Secretary of State for Justice, but that status was maintained. Although it continues to have the Ministry of Justice as its sponsor – to provide funding, and to ensure that funding provided is justified – the object of that status "is to enable the [Board] to perform administrative activities free from direct governmental control" (R (Brooke) v Parole Board [2008] EWCA Civ 29; [2008] 1 WLR 1950 at [12] per Lord Phillips of Worth Matravers LCJ).

10. Section 239 of, and Schedule 19 to, the Criminal Justice Act 2003 ("the 2003 Act") re-constituted the Board, which is now established under those provisions.

11. Harking back to the Board's historical roots, section 239(2) provides:

> "It is the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners."

12. "Any matter… to do with the early release or recall of prisoners" has been construed to include matters relating to the progression of life prisoners towards release, such as transfer from closed to open conditions. So far as the Board's duty to advise in the context of such transfer decisions is concerned:

    i) The duty arises only where the Secretary of State refers a particular prisoner for consideration by the Board. It is generally recognised that, for a life prisoner, a key step in his progression towards eventual release is his re-classification from a category C closed conditions prisoner, to a category D open conditions prisoner; but, in respect of such a matter, the Secretary of State has an open discretion as to whether to make a reference (R (Gilbert) v Parole Board [2015] EWHC 927 (Admin) at [56])).

    ii) Having referred a matter to the Board, the Secretary of State (through the National Offender Management Service ("NOMS")) is entitled to make submissions to the Board with regard to his own view on transfer. Thus, the Secretary of State has two roles to play: as the general sponsor of the Board, and as a potential representor or "party" before the Board in respect of a particular case.

    iii) However, as pre-2003, the advice by the Board in relation to a transfer is not binding on the Secretary of State, who is required to take into account all relevant factors, including the Board's advice, but come to his own decision (R (Harris) v Secretary of State for Justice [2014] EWHC 3752 (Admin) at [30]). Nevertheless, in practice, if, having properly considered the matter, the Board considers the risk posed by the prisoner renders transfer to open conditions inappropriate, it is unlikely that the Secretary of State will decide otherwise, the assessment of such risks being the Board's primary statutory function.

13. This part of the statutory scheme reflects the general law relating to the classification of prisoners. Section 12(2) of the Prison Act 1952 provides that a prisoner may be lawfully confined in any prison as the Secretary of State directs. Section 47 of that Act empowers the Secretary of State to make rules about the classification of prisoners. Rule 7 of the Prison Rules 1999 (SI 1999 No 728) gives the Secretary of State a very broad discretion in classifying prisoners.

14. Section 239(6) of the 2003 Act provides that:

> "The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions… ; and in giving such directions the Secretary of State must have regard to –
>
> (a) the need to protect the public from serious harm from offenders, and
>
> (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

There is no objection to such directions as a matter of principle, so long as they are restricted to guidance on legally relevant matters to be taken into account. Directions that stray beyond that scope will be ultra vires (Brooke at [36] per Lord Phillips).

15. The Secretary of State has used his power under section 239(6) to give the Board directions as to how it should approach its decision-making in relation to transfers to open conditions. The relevant direction, issued in August 2014, states:

> "A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect and, in particular, on the need for the lifer to have made significant progress in changing their attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered."

I will refer to this as "the August 2014 Direction".

16. That is the position where the Board's decision concerns a progressive step towards release. Where its decision rather concerns whether the prisoner should in fact be released on licence, the position is different. Section 28 of the Crime (Sentences) Act 1997 provides for the following scheme.

i) After the expiry of his tariff, a prisoner may require the Secretary of State to refer his case to the Board at various specified times, but essentially upon expiry of the tariff and then every two years (section 28(7)).

ii) The Board may direct a prisoner's release if, and only if, his case has been referred to the Board by the Secretary of State; and it "is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined" (section 28(6)).

iii) Where the Board gives a direction that the prisoner be released, then the Secretary of State must comply with that direction (section 28(5)).

17. Therefore, whether the decision is in respect of merely a progressive step towards release or the actual release of the prisoner, the Board's task is the same: adopting similar procedures, it assesses the risk posed by the offender and decides whether he is ready for the next step. However, the effect of the Board's decision is substantially different. In the former case, the Secretary of State not only can but must make his own decision on all available material including the Board's decision, which is only way of recommendation only; whereas, with regard to release, he must accept and act upon the Board's decision. In respect of the decision to release a life prisoner on licence after the expiry of his tariff, the "primary decision-maker" is thus not the Secretary of State, but the Board (see R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350 at [26]).

18. There is no mystery as to why that is so. Article 5(1) and (4) of the European Convention in Human Rights provide that:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court…
>
> …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In this judgment, references to "article 5(4)" are to that article of the European Convention on Human Rights. Under article 5(4), following expiry of the tariff, a life prisoner (who is then being detained solely until the risk he poses to the public has been assessed as being appropriately low to allow release) is entitled to take proceedings *before a court* to determine whether his detention is still lawful, i.e. whether his risk is still so high that he has to be detained to protect the public. Following the 2003 Act, it is the function of the Board to act as such a "court".

19. Whilst there have been cases which have tested the proposition in respect of particular aspects of the Board's procedures, the ECtHR has confirmed that, in principle, the Board is able to satisfy the requirements of a court for these purposes. In Weeks v United Kingdom (1987) 10 EHRR 293, the ECtHR said this about the Board and those requirements:

> "The 'court' referred to in article 5(4) does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. The term 'court' serves to denote 'bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case…

> but also the guarantees' – 'appropriate to the kind of deprivation of liberty in question' – 'of [a] judicial procedure', the forms of which may vary from one domain to another. In addition, as the text of the article 5(4) makes clear, the body in question must not have merely advisory functions but must have the competence to 'decide' the 'lawfulness' of the detention and to order release if the detention is unlawful."

20. The Court therefore identified three characteristics of a "court" for these purposes, namely (i) independence from the executive, (ii) appropriate guaranteed judicial procedures and (iii) a decision-making, as opposed to merely advisory, function. Mr Southey emphasised the last criterion by reference to Van de Hurk v Netherlands (1994) 18 EHRR 481, a case concerning the Dutch Industrial Appeals Tribunal, in which the ECtHR said (at [45]):

> "… the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a 'tribunal'".

21. In Weeks, the ECtHR observed that there was nothing to preclude a specialised body such as the Board being considered as a "court" within the meaning of article 5(4) provided that it fulfilled the conditions it identified; and it went on to hold that, on the basis of the evidence before it, the Board did indeed satisfy them so far as release decisions were concerned.

22. From time to time, there have been challenges to the Board on the basis that it has not satisfied those conditions, both general (e.g. Brooke) and relating to specific aspects of its procedures (e.g. Osborn v Parole Board [2013] UKSC 61, which concerned the circumstances in which the Board were required to hold oral hearings). Those challenges highlight the fact that the Board is a "court" for the purposes of article 5(4), and that is precisely why prisoners are entitled to expect that it has the independence, impartiality and processes appropriate for a court and compliant with the requirements of both articles 5(4) and 6(1) of the ECHR and the common law (see West at [26]). Although Mr Southey complained about various matters which, he suggested, showed an inappropriate relationship between the executive and the Board, save in respect of the residual role of the Secretary of State to determine some non-release decisions (to which I shall come in due course), there is no issue before this court about the independence and impartiality of the Board generally.

23. On 1 April 2013, the Board published a "Litigation Strategy", which, for the purposes of this appeal, has not materially changed. That emphasised that the Board "is not an agent or servant of the government"; and so, for example any proceedings against the Board should not be served on the Treasury Solicitor in accordance with CPR rule 6.10.

24. Having referred to article 5(4) (which, it says, "most Parole Board reviews engage"), under the heading, "Statement of General Purpose", the Litigation Strategy states as follows (all emphases in the original):

> "It is an established principle of common law that the role of judicial decision-making bodies as defendants in judicial

> review proceedings is not, save in exceptional cases, to contest the proceedings. [There is then reference to R (Davies) v HM Deputy Coroner for Birmingham [2004] EWCA Civ 207; [2004] 1 WLR 2739 ("Davies"): see paragraph 28 below.] The role of the court is simply to provide the reviewing court with relevant information where necessary….
>
> The judicial body may explain matters relating to its jurisdiction, practice or procedure ([Davies]). It might also provide factual information about a case. Unless the court or tribunal plays an adversarial role in proceedings, it should not be liable for costs.
>
> The Parole Board will decide on a case by case basis whether it should defend a judicial decision. As a statement of general purpose:
>
> - In any form of litigation, the Parole Board will first consider whether it wishes to concede. Where it decides not to:-
> - The Parole Board **will not** normally seek to defend a decision of a panel to refuse early release or recommend a prisoner's transfer to open conditions.
> - The Parole Board **will** normally defend other types of judicial decision, and all administrative decisions.
> - The Parole Board **will** defend private law claims for damages."

Costs: The Relevant Law

25. Under CPR rule 44.2(1) and (4), the court has a general discretion as to any costs order it makes, having regard to all the circumstances including the conduct of the respective parties; but rule 44.2(2)(a) provides that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". That general rule applies to a public law claim in the Administrative Court as much as to a claim made in any other part of the justice system (see R (M) v Croydon London Borough Council [2012] EWCA Civ 595 at [52] per Lord Neuberger of Abbotsbury MR (as he then was)). Therefore, where someone challenges the decision of an arm of government, and is successful, he can expect to obtain a costs order in his favour; and, subject to giving suitable notice (e.g. in the form of a pre-action letter) and exhausting alternative remedies etc, that is so even where the decision-maker takes no part in the claim.

26. However, the courts have long recognised the need for a different approach where the decision challenged is that of an inferior court or tribunal, over which the High Court has a supervisory jurisdiction; and the challenge comes by way of judicial review only because of the absence of a statutory right of appeal. A court or tribunal is usually required to provide reasons as part of its decision; and, in such cases, as in the case of

an appeal, it does not usually seek to justify its own decision over and above those reasons. Relying upon those reasons, it does not usually seek to play any active part in the claim.

27. Often, the court or tribunal determination challenged will have been made following a *lis* between competing parties, usually an individual affected by the initial administrative decision on the one hand and the arm of the executive that made the decision on the other. When a dissatisfied party seeks to challenge the determination of the court or tribunal by way of judicial review, the other party to that *lis* will be an interested party in that claim; and will have an opportunity to make submissions in support of the decision, in a similar way to the respondent to an appeal. Where that other party plays an active part in the judicial review, it is likely that it will have a costs order made against it as an interested party, if the challenge is successful. Consequently, the question of costs against the court or tribunal itself arises only infrequently; because, usually, the court or tribunal plays no part in the case and there is another party which is a more appropriate target for a costs order.

28. However, the circumstances in which a cost order against a court or tribunal is appropriate did arise before this court in Davies, in which Brooke LJ (with whom Longmore LJ and Sir Martin Nourse agreed) took the opportunity "to state authoritatively the way in which the court exercised their discretion [in relation to orders for costs] in these matters in the past, and to identify what are the governing principles today". In Davies, the central issue was thus as to the nature of the established practice of the High Court – and whether that practice required reconsideration.

29. Following a magisterial review of the relevant authorities, at [45], Brooke LJ set out factors which were new, or had assumed a new importance, since some of those authorities had been decided, including the advent of the Civil Procedure Rules 1999. The general discretion of the court in relation to costs and the general rule that an unsuccessful party should be ordered to pay a successful party's costs, found in the CPR (see paragraph 25 above), each reflect the pre-CPR position. However, Brooke LJ referred to the specific obligation set out in CPR rule 44.4(1)(a) that the court must take into account the conduct of the parties, which would include any studious neutrality of a court or tribunal; and to the emphasis on justice and fairness in CPR rule 1.1 which obliges the court to consider whether a source of public funds is available to indemnify the applicant for the expense of pursuing court proceedings to correct an administrative decision that had an adverse impact upon his rights (see [45(1) and (6)]). He said (at [45(6)]) that, at least in respect of article 2 of the ECHR, which that case concerned, "it would appear unjust that a private citizen should have to be put to heavy expense in order to oblige the state to perform its duty properly". However, in respect of a legally aided claimant, he said this (at [44(7)]):

> "The very heavy pressures on the funds available to the Legal Services Commission no longer make it possible to justify the refusal of a costs order on the basis that one public fund would simply be paying another. *I do not consider, however, that it is appropriate to take into consideration the fact that the remuneration of counsel (and particularly leading counsel) on a legally aided appeal of this kind is now extremely low (by the standards of the private sector market) and that counsel and*

> *solicitors would financially benefit from a costs order in their favour*. There is nothing in the Costs Rules to suggest that the financial welfare of a party's lawyers is a legitimate consideration when a court makes an order as to costs." (emphasis added).

30. Brooke LJ set out his conclusions in [47], as follows:

> "(1) The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings.
>
> (2) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event.
>
> (3) If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application.
>
> (4) There are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (3) above, so that a successful applicant… who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner (or other inferior tribunal) has gone wrong in law, and there is no other very obvious candidate available to pay his costs."

31. It is noteworthy that the principles set out by Brooke LJ were not new, those propositions being expressly confirmation of the "established practice" of the courts. However, Davies is now regularly cited for the general proposition that, if a decision of a court or tribunal is challenged by way of judicial review, it will not be liable for the costs of the claim unless it has behaved improperly or unreasonably or takes an active part in the proceedings. That is reflected in the standard form of Acknowledgement of Service in judicial review proceedings which, in section A (tick box in form), a court and tribunal defendant can indicate that it does not intend to make a submission in relation to the claim, i.e. it does not intend to take an active part.

32. Paragraph (3) of Brooke LJ's conclusions has given rise to a considerable amount of debate as to the level of participation by a court or tribunal that is required to amount to active participation such that it may have a costs order made against it; but that is

not in issue in this case, in which it is common ground that the Board played no active part in the claim at all.

33. The sole ground relied upon by Mr Southey is that the principles set out in Davies as applicable to courts and tribunals do not apply to the Board.

The Facts

34. The Appellant was born on 1 February 1966. In 1991, whilst living in Scotland, he was convicted of three offences of rape, and was sentenced to nine years' imprisonment. On his release, he moved to Dorset. In 2000, he was found guilty of raping another woman and, on 5 June 2000, he was sentenced to life imprisonment with a tariff of six years and two months, later reduced on appeal by a year. That tariff expired on 1 August 2005.

35. By 2013, he had progressed from a high security category A prison to a category C prison; but, he continued to deny that he had committed any offence. In view of that denial, he was ineligible for any treatment programme designed to reduce the risks posed by sex offenders.

36. At a Board review, commenced in 2013, the Appellant sought his release or, in the alternative, transfer to a category D open prison. On 10 March 2014, the Board determined the review, negatively in respect of both requests. The Appellant remained in prison, and in closed conditions.

37. On 7 April 2014, solicitors on the Appellant's behalf wrote a letter before claim to the Board, in respect of its failure to release the Appellant or recommend his transfer to open conditions. It was said that the Board's decision was unlawful because it was based solely upon the Appellant's denial and consequent ineligibility for a sex offenders' treatment programme. The letter sought the quashing of the review results, and a new review by the Board at an oral hearing. That letter met with no response; and, on 24 July 2014, judicial review proceedings were commenced, challenging "the decision of the Parole Board refusing release and not recommending open conditions". The Board was the only Defendant.

38. On 29 August 2014, the Board filed an Acknowledgement of Service in which, in section A, it indicated that it was a court and tribunal and did not intend to make a submission in relation to the claim. The boxes relating to the intention to contest the claim, and for courts and tribunals which intend to make a submission, were left unticked. The Board neither filed nor served anything further.

39. On 9 September 2014, permission to proceed was granted, on the papers, by Her Honour Judge Belcher sitting as a Judge of the High Court. In her observations, she said that, in the absence of any response to the letter before claim or the claim itself (either of which, she said, might have assisted the court in considering the issues involved), it was hard to conclude other than that the issues raised by the Appellant were reasonably arguable.

40. The Board continued to play no part in the claim. On 6 November 2014, it notified the court that it was adopting a "neutral stance"; and it did not appear at the substantive hearing before King J on 24 November 2014. In his judgment ([2014]

EWHC 4763 (Admin)), King J indicated that the only challenge pursued was to the Board's decision not to recommend the Appellant for transfer to open conditions (see [1]). He allowed the claim, essentially on the basis that the Board had erred in proceeding on the basis that the Appellant's denial of the offences was, in itself, determinative of the issue (see [33]-[34]). He remitted the matter to the Board for a new review at a fresh oral hearing.

41. At the hearing before King J, the Appellant sought his costs. The judge directed that written submissions regarding costs be made and, on the basis of those, on 2 February 2015, he declined to make an order for costs in favour of the Appellant, instead making no order for costs. His core reasoning is found in paragraphs 9-10 of his decision.

> "9. The first and critical issue is whether for the purpose of the exercise of the court's discretion as to costs, the [Board] is to be treated as a court or tribunal or at least a 'judicial decision making body' (if that be different) when making the decision under challenge. There can be no doubt that it is exercising a judicial capacity when making its decision on a Review whether or not to direct the release of a prisoner. That decision is binding upon the Secretary of State. I accept the point made by the [Board] as to the engagement of article 5(4) in this regard. The Decision made in this case was however in two parts. The first went to the question of the [Appellant's] release. The second, consequent upon the decision not to release, went to the question of whether to recommend to the Secretary of State the [Appellant's] transfer to open conditions within the prison estate. Such recommendation is not binding on the Secretary of State. It was only this aspect of the [Board's] Decision (the decision not to recommend transfer) which was under challenge in this claim.
>
> 10. I accept that a theoretical distinction could be drawn between the two different stages of the decision-making process which the [Board] undertook in this case. I accept it is arguable that at this stage of considering transfer while still maintaining the prisoner's detention, article 5(4) is not engaged and the [Board] ceases to be acting in a judicial capacity but in reality in the process before the [Board] when the prisoner appears on a Review the question as to transfer is so bound up with the question of the prospects of the ultimate release of the prisoner, that I consider it artificial to characterise the [Board] as acting in a judicial capacity one moment and then not the next. On any view in my judgment the [Board] is acting in at least a *quasi* judicial capacity throughout."

42. On the basis of that analysis, the judge considered that he should approach the costs application in accordance with the established practice of the court as set out in Davies. Although he thought it was regrettable that the Board had not responded to the letter before claim, it did not make itself an active party in the litigation; nor, he

considered, was there any improper or unreasonable behaviour on the Board's part. The appropriate course was thus no order for costs.

43. It is that order that is now challenged.

The Grounds

44. Mr Southey – in my view, properly – conceded that this court is bound by Davies. Although it seemed to me that at times he came painfully close to doing so, he unconditionally accepted that he could not argue before this court that Davies was not still good law. The only ground upon which he relied was that the principles and practice set out in that case, and expressly applied by King J below, simply do not apply to the Board when it performs its function of making recommendations to the Secretary of State in respect of the transfer of a prisoner to open conditions.

45. In support of that proposition, he submitted the following.

    i) The Board does not fulfil the necessary criteria to be a "court or tribunal" for the purposes of Davies, because the relationship of the executive and the Board is closer than it should be. In support, Mr Southey relied upon the August 2014 Direction which the Secretary of State had given to the Board in respect of how it should approach its decision-making in relation to transfers to open conditions (see paragraph 15 above).

    ii) When one of its decisions is challenged, the Board cannot properly maintain a "neutral stance", as it purported to do in this case. The Board has the power to review its own decisions, and, therefore, it is always open to the Board to concede such a challenge. Furthermore, under its own policy (in the form of the Litigation Strategy: see paragraphs 23-24 above), upon receipt of a challenge, it will "first decide whether it wishes to concede". If, having considered the matter, it decides not to concede, that same policy indicates that it will "not normally seek to defend a decision… to refuse early release or recommend a prisoner's transfer to open conditions". However, where, in those circumstances, the Board fails to engage with the claim, that will put the prisoner to proof in respect of his claim. As I understood his case, Mr Southey submitted that that was tantamount or, at least, analogous to contesting the claim, and the Board should be liable for the prisoner's costs.

    iii) In support of the contention that, in these circumstances, for costs purposes the Board should be treated as contesting the claim, Mr Southey submitted that Davies is a policy-based decision, and there are now sound policy reasons why the Board should be encouraged positively to consider and, in appropriate circumstances, concede a judicial review claim. He submitted that Davies now had to be read in the light of M, which signalled a new approach to costs in public law cases. Mr Southey particularly relied upon the judgment of Lord Neuberger in M at [52], in which he emphasised that public law claims are:

> "… subject to the CPR, and a successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claim. The court's duty to protect individuals from being

> wronged by the state… is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public law bodies should make no difference."

Those observations apply to all public law claims. Applying Davies, as opposed to M, to the Board's decision in the circumstances of this case would undermine this new approach.

iv) In addition (and still in relation to relevant policy), Mr Southey submitted that the new approach to costs in M was designed to encourage the compromise and settlement of claims against public bodies. Putting a prisoner to proof in a judicial review claim in the circumstances of such a claim as this would delay the correction of errors, and increase the cost (and, notably, the public cost) of doing so. In any event, the Board, as a specialist body, is likely to be of assistance to the court in properly determining a challenge to one of its decisions (as observed by Judge Belcher, when giving permission to proceed here). These factors give extra force to the contention that the Board should be encouraged to engage and concede claims in appropriate cases by way of the threat of an adverse costs order in the event they do not engage with a claim ultimately lost.

v) Furthermore, many of the strands of justification put forward for having a different approach to costs in the case of courts and tribunals do not apply to the Board. Whilst there has been a historic concern that courts and tribunals should not be an active party to litigation, there are good reasons why it would be helpful for the Board to be a party to a challenge to one of its decisions (see (iii) and (iv) above). The historic concern over the possibility of the decision-maker having to pay costs out of his or her own pocket has been alleviated in the case of the Board since the Criminal Justice and Public Order Act 1994 which constituted the Board as a body corporate (see paragraph 9 above).

vi) Davies proceeded on the basis that the fact that a claimant judicially reviewing a court or tribunal is legally aided – and, hence, his legal representatives are paid at lower rates – is irrelevant (see [45(7)]). However, following R (E) v Governing Body of JFS [2009] UKSC 1; [2009] 1 WLR 2353 ("JFS") (notably at [25] per Lord Hope of Craighead, referred to with approval by Lord Neuberger in M), that is or may be now a relevant factor. Indeed, it is a factor of even more weight since JFS, because, since 2009, both the ability to obtain costs for work done has reduced (see, e.g., Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015 No 898)) and, where work is covered, the rates have reduced (see, e.g., Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 (SI 2013 No 2877)). Therefore, it is now particularly important that, where a claim is properly brought against a court or tribunal with the benefit of legal aid, the claimant's legal representatives receive "full" remuneration by means of an order for costs against the court or tribunal.

vii) In all the circumstances, Mr Southey submitted, the scope of Davies should be restricted; and, where the Board is a defendant to a judicial review, the usual costs regime of M, and not the principles set out in Davies, should apply

viii) In this case, the only decision challenged was the Board's decision not to transfer the Appellant to open conditions. If, contrary to his primary submission, the Board is independent, impartial, and acting as a court or tribunal for the purposes of Davies when it makes decisions in respect of release, Mr Southey submitted that it does not do so when it makes decisions in respect of transfer to open conditions. Those decisions are only recommendations to the Secretary of State, and not final in the sense of binding on him. As such, they do not fulfil the necessary criterion of finality to make them judicial; and Davies has no application.

Discussion

46. Mr Southey made his submissions with his usual vigour; but I do not find them persuasive.

47. As I have already indicated (paragraph 22 above), although Mr Southey complained about various matters (notably, the August 2014 Direction quoted at paragraph 15 above), leaving aside the Secretary of State's continuing role in determining transfer issues, there is no issue before this court as to the independence and impartiality of the Board. It is therefore unnecessary to address his complaints further; although I would say that, on the evidence before this court, I would be wholly unpersuaded that the Board lacks the necessary attributes required of a court or tribunal by article 5(4) and the common law. Generally, following Brooke and subject to specific failings which have been subsequently addressed (e.g. the non-availability of oral hearings, addressed following Osborn: see paragraph 22 above), the courts have accepted the Board is sufficiently independent from the executive and impartial such that it has the characteristics of a court for article 5(4) purposes.

48. I do not consider that the August 2014 Direction is outwith the scope of the section 239(6) power of the Secretary of State to give directions, as it merely confirms the self-evident need for the Board, when considering a transfer to open conditions, to balance the benefits to the prisoner against the risks to the general public; whilst emphasising the need for evidence of a reduction of the risk that led to him being imprisoned in closed conditions in the first place. As a policy, I see nothing unlawful in that. It is noteworthy that King J considered that the Board erred in failing properly to consider the risk-benefit balance in the Appellant's case.

49. I am unimpressed by the argument that the Board cannot properly maintain a "neutral stance" to a judicial review challenge to one of its decisions. Mr Southey submitted that, as the Board has the power to review its own decisions and a policy that it will at an early stage consider conceding any judicial review claim brought, when it chooses not formally to concede the claim, that is tantamount to contesting the claim; or, at least, the Board should be treated as if it had actively contested the claim, because its conduct will have resulted in the prisoner having to expend time and effort in proving his case. In either event, the Board's conduct should be marked by an adverse costs order.

50. However, it is clear that a party does not in fact actively contest a claim simply because he does not concede it. In relation to the distinct issue of whether such a party should be treated as actively contesting a claim in the circumstances of this case, the Board has a power, not an obligation, to review any decision its makes. Such a

power is now common in tribunals (see, e.g., sections 9 and 10 of the Tribunals, Courts and Enforcement Act 2007 which confer such a power on both First-tier and Upper Tribunals), and even the courts (see, e.g., CPR rule 52.24(5), under which a decision of a court officer exercising the jurisdiction of this court may, upon request, be reviewed by a single judge). Such a power does not detract from the judicial nature of the reviewable decision; nor does it mean that Davies is not applicable where such a decision is judicially reviewable and reviewed (although, in accordance with usual principles, the Administrative Court may decline to entertain the claim unless and until the alternative of review has been sought). Davies is regularly applied to such claims; and, in my view, rightly so.

51. Nor do I consider there to be any force in the argument that, in the case of the Board, the fact that it has a policy – set out in its Litigation Strategy – that, upon receipt of a claim, it will positively consider whether to concede a judicial review is material to this issue. Where a court or tribunal that has the power to review its own decision receives a judicial review claim, it may – and in practice, in most cases, no doubt will carefully – consider the claim, including whether it should concede it and change the earlier decision on review. To a large extent, therefore, the Litigation Strategy makes explicit what would, in any event, otherwise be implicit. However, in my view, it does not convert a power into an obligation to review; nor does it vary the application of the Davies principles by making it the rule that the Board should pay the prisoner's costs of the claim if, following the review, it decides neither to concede nor actively to contest the claim. There is no logical reason why it should do so.

52. In this case, as Mr Collins accepted, there is no evidence that the Board did positively consider conceding the claim, even when the pre-claim letter was received. If that were indeed the case, it was both unfortunate and contrary to the policy as set out in its own Litigation Strategy; but, in my judgment, immaterial to the issue in this case. There is nothing to suggest that, had the Board positively considered that issue when it should have done, its decision neither to concede nor contest the claim would have been any different. Nor, with any force, did Mr Southey suggest that it would have been.

53. Mr Southey submitted that the position with regard to costs in judicial review of the decisions of courts and tribunals had changed since Davies, notably in M.

54. This issue was recently considered by this court in R (Gudanaviciene) v First-tier Tribunal (Immigration and Asylum Chamber) [2017] EWCA Civ 352, the facts of which were materially similar to the facts of this case, the claimant judicially reviewing a non-appealable decision to refuse an adjournment by the First-tier Tribunal. The tribunal played no active part in the claim; although it seems that, initially, as in this case, the claimant pursued the ground that the tribunal played some active part in the claim, merely by failing to concede the claim and failing to complete a consent order to that effect. However, permission was refused on that ground, and not renewed; the only ground of appeal pursued being "that the approach to costs subsequent to relief being obtained should be less restrictive [than that set out in Davies] and closer to the approach taken in [M]".

55. In Gudanaviciene, Longmore LJ (who, of course, was a member of the constitution in Davies), with whom David Richards LJ and Moylan J (as he then was) agreed, firmly rejected the proposition that M had affected Davies in the way contended or, indeed,

in any way. In his view, M did not, in reality, constitute a new approach at all, merely deciding that no order for costs in a public law claim may not be the appropriate order where, as a result of some settlement or compromise, there has been some degree of success. It was only in that limited situation that M broke new ground. However, that had no relevance to the different question of whether a party that is wholly successful should obtain an order for costs against the other party.

56. In respect of claims for costs against courts or tribunals, Longmore LJ continued (at [35]):

> "… [T]here are good reasons why M makes no mention of claims for costs against tribunals. Any consideration of the topic would have to take into account not only the stream of authority of which Davies is only the culmination but also the novelty of the idea that any tribunal should, as a matter of normal course, be liable for paying the costs of setting aside one of its orders if the party against whom proceedings are brought does not seek to defend the tribunal's order. The proposition for which Mr Drabble [Counsel for the Appellant Claimant] contends might apply to appeals just as much as to judicial review, at any rate if the tribunal were joined as a party to the appeal. The present case is only brought by way of judicial review rather than by way of appeal to the Upper Tribunal because it is excluded [by statute]. It would be a serious step to say that in any undefended appeal or judicial review, the tribunal would be at risk as to costs and any such conclusion cannot be implied into the decision of M. If such a step is to be taken, it cannot be by a court of coordinate jurisdiction with the court which decided Davies."

57. Gudanaviciene is binding upon this court; but, even if it were not, I would gratefully and unreservedly adopt both the analysis and conclusions of Longmore LJ. In my respectful view, they are clearly right. M did not materially affect the approach of the courts to costs orders in public law cases involving a court or tribunal, i.e. the principles and application of Davies; and, in particular, the encouragement given by M to the early settlement of public law cases by the threat of costs sanctions has no application to judicial review claims against courts or tribunals.

58. The principle that, unless it has acted improperly or has actively participated in the challenge, a court or tribunal is not required to pay the costs of rectifying one of its orders – whether by way of judicial review or appeal – is therefore well-settled. It is a principle supported by many strands of public policy; and it has been well-established since Davies. It is a principle which cannot be undermined in the case of a particular court or tribunal simply because one of the historic concerns that it sought to address is absent, e.g. where, as here, the relevant judicial decision-maker has an indemnity against costs. Nor is the fact that the active intervention of a court or tribunal in a judicial review might be of assistance to the Administrative Court judge who has to deal with the application. As Brooke LJ indicated in [47(3)] of Davies, it is open to a court or tribunal to make a neutral submission to the Administrative Court in response to a claim against it, e.g. correcting uncontroversial facts (such as elements in the chronology) or identifying the parts of the statutory regime or authorities that are

relevant to the claim, without incurring a potential costs order against it. Equally, it is always open to the Administrative Court to ask for assistance from the tribunal in respect of such matters, whilst making clear that a response to the request will not involve a potential costs order, either way. But the fact that specialist courts and tribunals might assist in this way is no reason for overriding the principle in Davies, and generally imposing a costs order upon them if they do not actively participate in the claim against them and the claim is successful.

59. Nor do I consider that JFS assists Mr Southey's cause. He particularly relied upon the observations of Lord Hope of Craighead DPSC at [25] that, in a public law claim costs context:

> "… [T]he consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded…".

Whilst he did not do so consistently, during parts of his submissions, Mr Southey sought to draw from this the broad proposition that, when the court is considering costs orders in public law claim, the fact that the claimant is publicly funded is a relevant factor.

60. However, the comments of Lord Hope have to be seen in their context. In JFS, the publicly-funded claimant had succeeded before this court, but the respondent had been given permission to appeal. The Legal Services Commission indicated that it would only continue to fund the claimant if a protective costs order were made. It was the application for such an order that was before the court. The claimant did not seek an order that each side should be liable for its own costs in any event; and Lord Hope's observations were made in that context. At [25], he referred to the judgment of Scott Baker LJ in R (Boxall) v Waltham Forest London Borough Council (2000) 4 CCLR 258 at [12], where, in declining to make an order that each side bear its own costs, Scott Baker LJ said (at [12]) that the fact that claimants were legally aided was immaterial when deciding what, if any, costs order to make where they were successful. Lord Hope then continued by stressing that, "It is, of course, true that legally aided litigants should not be treated differently from those who are not"; but, he said, the court should be slow to make a prospective order that each side must bear their own costs in a high costs case where one or both parties are publicly funded because, if a publicly funded party were to win, that would have a significantly adverse effect on that party. Lord Hope made clear that, if such a forward-looking order had been requested in that case (presumably at the behest of the Legal Aid Commission), it would have been refused; because, as I understand it, he considered it would have placed the claimant and his legal representatives in a *worse* position than had there been a privately-funded arrangement, because of the restriction on their ability to obtain higher *inter partes* rates from the other side. In the context of high cost cases, Lord Hope was anxious to re-enforce the proposition that the fact that a party is publicly-funded must be ignored, not to diminish it.

61. In my view, those observations have no relevance to a backward-looking order for costs in a case such as this. In determining the issue of costs against a court or tribunal, whether the claimant is publicly-funded is irrelevant. For the reasons given

in Davies (and, subsequently, consistently re-iterated by the courts, including by Lord Hope in JFS), in considering costs orders in public law claims, the court is bound to ignore the fact that the party seeking a costs order is publicly-funded. That is equally applicable when the court is considering making no order for costs as against a defendant court or tribunal: that fact has no relevance to, or impact on, the question of whether or not there should be no order for costs.

62. In his submissions in reply, Mr Southey appeared to accept that; but was anxious that a publicly-funded claimant was not placed in a worse position that if privately-funded. He referred to Davies at [47(7)], where Brooke LJ referred to the earlier practice of making no order for costs in publicly-funded public law cases, on the basis that any order would simply result in the transfer of money from one part of the public purse to another without any substantive effect. As Brooke LJ made clear, that is no longer a sound basis for making no order for costs. But that is not now the basis of such practice: as I have explained, following Davies, the source of funding is immaterial to the principle that, where a court or tribunal has not acted improperly and has taken no active part in the claim, the appropriate course is to make no order for costs. The principle is now based upon other strands of public interest.

63. I understand that that means that, where a claimant applies for judicial review of a court or tribunal, and that court or tribunal takes no active part in the proceedings, unless the claimant has a costs claim against someone else (such as a party to the relevant *lis* before the court or tribunal), he will have no recourse to an *inter partes* costs order. However, as Longmore LJ emphasised in Gudanaviciene, that is no different in principle from the position where the challenge can and is made by way of statutory appeal. If the party is publicly funded, then the remuneration of his legal representatives will be restricted to that available from legal aid. If he is privately funded, then the remuneration will be restricted to that agreed between solicitor and client, which may or may not be greater than that available through public funding.

64. Therefore, in respect of decisions concerning the release of prisoners, the Board is an independent and impartial "court" for article 5(4) purposes; and is also, clearly, acting as a court or tribunal for the purposes of Davies. The principles of Davies thus apply to challenges to such decisions.

65. In my judgment, although the recommendation of the Board in relation to transfer is only advisory – the ultimate decision being one for the Secretary of State – a similar approach to the costs of challenging decisions of the Board in relation to transfer from category C to category D is appropriate. In coming to that conclusion, I have particularly taken into account the following.

    i) The principles of Davies are said to apply to challenges to the "judicial" decisions of "courts or tribunals". Although it is difficult to conceive of circumstances in which a decision that is required to be article 5(4) compliant would not fall within the category of case to which Davies applies, the converse is not necessarily true. The public policy factors that drive the difference in approach to the costs of judicial review challenges to article 5(4) compliant courts and tribunals, may make a difference in approach appropriate to some decisions which are not required to be article 5(4) complaint.

ii) We have not heard submissions on whether Davies applies to judicial reviews of (e.g.) ombudsmen who, although subject to various procedural fairness requirements, are not a court or tribunal in an article 5(4) sense – and nothing I say should be taken as expressing any view on that question – but it is noteworthy that Longmore LJ in Davies itself (at [54]) referred to the historical position in cases such as Providence Capitol Trustees Limited v Ayres [1996] 4 All ER 947 in which this court appears to have considered that no order for costs would be appropriate where the ombudsman had played no active part in the challenge, i.e. the principle of Davies applied.

iii) In respect of the hallmarks of a court for article 5(4) purposes, as identified in Weeks (see paragraph 19 above), when considering a transfer issue, the Board is independent of the executive and impartial; and adopts appropriate guaranteed judicial procedures. The only element missing is that its "decision" is only a recommendation to the Secretary of State, who is not only empowered but required to make any transfer decision himself.

iv) However, in practice, even in transfer cases, the Board is responsible for assessing the relevant risk of transfer; and, in the vast majority of cases, the Secretary of State will follow the recommendation.

v) Furthermore, whether dealing with decisions concerning release or decisions concerning transfer, the Board performs a similar function, in that it has to obtain relevant material from NOMS and the offender himself, and evaluate that material in making an assessment of the risk posed by the offender; and whether that risk is at an appropriate level for him to progress by way of transfer to a category D prison or release on licence, as the case may be. In respect of release, it has to reach its own objective judicial decision, to comply with the requirements of article 5(4). In respect of transfer, it reaches its decision in the same way, and to the same procedural standards. It has to use the same procedures for practical reasons: it is often the case that a panel is considering both transfer and release, at the same time. However, it is also required to adopt the same procedural standards, not as a result of article 5(4), but by the common law. Thus, in Osborn – which concerned the requirement for oral hearings before a panel of the Board, in respect of both release and transfer decisions – without taking any fine points between the two, Lord Reed JSC, giving the only substantive judgment, held that domestic, common law procedural fairness required an oral hearing in respect of both. Therefore, in considering transfer decisions, the Board both in practice acts, and in principle is required to act, as if it were a court or tribunal, even if article 5(4) does not require it to do so.

vi) In any event, in such cases, the offender has an alternative focus for a claim (including a costs claim) namely the Secretary of State. It seems to me that, on a challenge by a prisoner to a Board recommendation in respect of transfer, the Secretary of State is a potential interested party in each of two capacities. First, he has the right to make representations to the Board on that issue. Second, whether or not the Secretary of State follows the Board's recommendation, he has to make the ultimate decision as to whether or not to direct transfer. That decision will be amenable to judicial review, in which the Secretary of State will be a (if not, the) defendant. It will therefore likely be

open to the prisoner to make the Secretary of State a party to any claim challenging a decision in relation to transfer. The Secretary of State is not a court or tribunal for either article 5(4) or Davies purposes; and so the usual costs regime for a non-court or tribunal will apply, as explained in M; and, in appropriate cases – which, I accept, will not be all cases – the prisoner will be able to obtain a costs order against the Secretary of State.

66. For all of those reasons, in my view, the principles of Davies apply equally to decisions of the Board to make a particular recommendation to the Secretary of State in respect of transfer.

Conclusion

67. I do not consider any of the grounds have been made good. In my judgment, King J was correct to apply the principles of Davies to this case, for the reasons he succinctly gave; and he applied those principles appropriately. I would dismiss this appeal.

Lord Justice David Richards:

68. I agree.

The Vice President (Lady Justice Gloster):

69. I also agree.