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Case No: CO/8400/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2013

Before :

THE HON. MR JUSTICE MALES

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Between :

The Queen on the application of Parratt	**Claimant**
- and -	
(1) Secretary of State for Justice	
(2) Parole Board of England & Wales	
	Defendants

- -
- -

Philip Rule (instructed by **Mark Williams Associates Solicitors**) for the **Claimant**
Stephen Whale (instructed by the **Treasury Solicitor**) for the **Secretary of State**
Ben Hooper (instructed by the **Treasury Solicitor**) for the **Parole Board**

Hearing date: 18th December 2012

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Approved Judgment

Mr Justice Males :

Introduction

1. The claimant, Daniel Parratt, now aged 28, was convicted on 14 September 2007 of causing grievous bodily harm with intent. He pleaded guilty to other offences of violence arising out of the same incident, an unprovoked attack in April 2006 when he was 21 by the claimant and his brother on a group of young people in the street. It occurred after the claimant had been drinking heavily and had been ejected from a public house. He had also used cocaine. The claimant knocked one member of the group to the ground and kicked him in the head. Another, who had already been attacked by the claimant, was hit by the claimant's brother with such force that he was knocked out and fell backwards, cracking his head. This victim's injuries were life threatening and required three operations including the removal of part of his skull and its replacement by a titanium plate. That young man's life will be permanently affected by this mindless violence. The claimant had previous convictions for violence which in one case had also involved an unprovoked attack in the street. The sentencing judge observed that despite the claimant's profession of remorse, he could see no sign of genuine remorse or empathy for the victim. Nor could the author of the pre-sentence report. The claimant was assessed by the sentencing judge as dangerous within the meaning of the Criminal Justice Act 2003. He was sentenced to imprisonment for public protection with a minimum term of 3 ½ years, less the 417 days that he had already spent on remand. That minimum term expired on 24 January 2010.

2. The claimant did not enjoy life in prison, although it appears to have done him a lot of good. He has already brought one claim for judicial review, contending that he was entitled to a pre-tariff review, that is to say an assessment by the Parole Board before the expiry of his minimum term of his suitability for a transfer to open conditions. That claim was rejected by Blair J (see [2009] EWHC 3089 (Admin), [2010] 1 WLR 1848). Nevertheless, the claimant did make very good progress in prison. At his first review, held in May 2010, the Parole Board recommended a transfer to open conditions. At his next review, held in August 2011, the Parole Board directed his release and he was released in September 2011.

3. In these proceedings the claimant contends that his rights under Article 5(4) of the European Convention on Human Rights have been infringed in two respects and that he is entitled as a result to declarations and damages. Article 5(4) provides:

> "(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."

4. The claimant's first ground of claim is that there was an unlawful delay in holding the first review by the Parole Board, referred to as the "post tariff review", from January 2010 when it ought to have been held, at or about the date of the expiry of the minimum term, until May 2010, a delay of four months. He brings that claim against both the Secretary of State for Justice and the Parole Board. The Parole Board concedes liability. The Secretary of State acknowledges the liability of the Parole Board but contends that there is no liability on his part as a result of the conduct of

those for whom he is responsible. The claimant does not contend that a review in January 2010 would have resulted in his release. Indeed he accepted at the May 2010 review that release at that stage was not yet appropriate. What he does say is that the delay in holding this first review hearing caused a delay in his transfer to open conditions, which in turn meant that his release occurred later than would have been the case if the first review had taken place in January 2010. In addition to declarations the claimant claims damages for frustration and anxiety caused by the delay and for what was described in argument as the "knock-on" effect of this delay on his eventual release.

5. The second claim is brought against the Secretary of State only and is that the review period of 15 months set by the Secretary of State between the first and second reviews was excessive. After the first review, the Secretary of State determined that the next review would be held in August 2011, which was 15 months after the first review. The claimant contends that this was unlawful and that any period in excess of 12 months could not be justified. He claims damages for this delay of three months, contending once again that it caused him frustration and anxiety and, because (he says) a review held in May 2011 would have recommended his immediate release, that it unlawfully prolonged his time in prison.

6. Permission to bring these claims was granted by Collins J. Permission to bring a further claim based on the Secretary of State's refusal to permit a transfer to open conditions prior to the first review by the Parole Board was refused.

The facts

7. By September 2009 the claimant had completed various courses to promote his rehabilitation in accordance with, and in some respects going beyond, the objectives set for him in his sentence plan. He was assessed by his Offender Supervisor using the OASys system at that stage as having a medium risk of re-conviction and as posing a high risk of harm to children (apparently reflecting the fact that the group attacked by the claimant were young teenagers) and a medium risk of harm to known adults. It was noted that risks associated with his education, training and employment and also with alcohol misuse might require further assessments. Overall, the report by his Offender Supervisor was positive, stating that he had used his time in custody wisely and recommending what was described as a progressive move to an open prison. His Offender Manager considered that the claimant continued to pose a high risk of serious harm, at any rate until this was tested within the community, but strongly supported a move to open conditions, noting "tangible evidence of a change in thinking and behaviour" through participation in the accredited programmes, which change needed to be tested and consolidated.

8. At that stage it was expected that the post tariff review hearing would take place in January 2010 at about the time of the tariff expiry but this hearing was deferred by one month until February 2010. One reason for this deferral may have been a delay, apparently due to staff sickness, of some 17 days in the preparation of the claimant's dossier for the hearing, although it may be that it would not have been possible to hold the hearing in January in any event. As it was, the hearing was further deferred and did not take place until 20 May 2010. This delay of four months is the subject of the claimant's first claim.

9. After permission had been given by Collins J on 30 June 2011 to bring this claim, the Parole Board conceded liability for the whole period of delay from January to May in the following terms on 12 August 2011:

> "Due to a lack of member resources, the Claimant's Parole Board hearing could not be listed until 20 May 2010. In these circumstances, the Parole Board accepts that the delay experienced by the Claimant between the date of his tariff expiry, on 21 January 2010, and this listed hearing on 20 May 2010 gave rise to a breach of the Claimant's rights under Art, 5(4) of the European Convention on Human Rights.
>
> For the avoidance of doubt the Parole Board does not accept that the Claimant is entitled to damages as a result of this breach: declaratory relief is sufficient to ensure 'just satisfaction'."

10. I see no reason to doubt that this lack of resources was the effective cause of the delay after February and, in all probability, that it was at least a contributing factor in the deferral from January to February.

11. At the oral hearing before a panel of the Parole Board on 20 May 2010 the claimant pressed initially, perhaps somewhat unrealistically, for his immediate release. In the course of the hearing, however, he withdrew this application and sought instead a recommendation that he be transferred to open conditions.

12. The panel gave its decision on 25 May 2010. It noted that it was faced with conflicting OASys assessments, but concluded that there was a medium risk of reconviction and of harm to a known adult. It was impressed by the claimant's good behaviour in prison, his application to his sentence plan and the thought which he had given to resettlement on release, which included cutting off his links with his former drinking and drug using companions, although it considered that some aspects of the claimant's learning from the courses he had undertaken appeared to be superficial. Overall the panel recommended the claimant's move to open conditions.

13. The Secretary of State accepted that recommendation on 4 June 2010 and at the same time determined that the claimant's next hearing before the Parole Board would take place in August 2011. That was 15 months after the first hearing and 20 months after expiry of the tariff. The Secretary of State's letter identified the claimant's principal risk factors, the progress made in prison, the support by report writers for a move to open conditions and the reasoning and conclusion of the panel. It continued:

> "The review period will allow you:
>
> - To undertake ROTL's and home leave;
>
> - To enable you a period of testing, to put into practice and consolidate the offending behaviour work and strategies that you have developed whilst in closed conditions;

- To put into practice and apply good thinking skills;

- To enable you to work on a risk management plan with the aid of your Offender Manager to begin to work towards a new drug and alcohol free lifestyle, put into practice and continue relapse prevention strategies and include the completion of any programmes or booster work to assist with this, as deemed appropriate by treatment managers;

- To remain adjudication free;

- To allow you to prepare a robust and fully tested release, resettlement and risk management plan to include accommodation and employment, to allow a steady reintegration back into the community and build a strong network of support both professionally and personally in the community.

Your next parole review process will be undertaken in accordance with the Generic Parole Process, a new centrally monitored process. Your review process is expected to take 26 weeks to complete, as it involves the preparation of reports and co-ordination of various parties, including the Public Protection Casework Section, the Prison Service, National Probation Service and the Parole Board. Your review will commence in March 2011, and the month for your oral hearing by the Parole Board is August 2011.

The review period is made up of the following:

- 2 months to enable you to transfer to an open prison establishment.

- 6 months Generic Parole Process

- 7 months to allow for testing and consolidation. This will also enable you to fully test your release plan and allow for gradual re-integration into community."

14. This decision, setting the review period at 15 months, is the subject of the claimant's second claim.

15. The claimant does not challenge the need in setting the review period to allow for a period of two months for his transfer to an open prison. The Generic Parole Process referred to in the Secretary of State's letter is described in Prison Service Order 6010. The claimant does not quarrel with the need to allow six months for completion of that process, which is standard. His complaint is concerned with the seven months allowed for the process of testing and consolidation. He maintains that this could

either have been shorter or that it could have run in parallel with the Generic Parole Process and did not need to wait until that process had been completed before it could begin, and that in any event compliance with Article 5(4) required that the total period between reviews should be no more than 12 months.

16. The testing and consolidation process involved release of the claimant into the community on temporary licence. There are several different types of such release, such as supervised activities outside the prison boundary, day release and overnight release. Generally, a life sentence prisoner (which includes a prisoner serving a sentence of imprisonment for public protection) will only be released on temporary licence if he is in an open prison and he must normally spend a certain length of time in open conditions before becoming eligible for release on temporary licence. Those eligibility periods are set out in paragraph 4.3.3 of Prison Service Order 6300 and vary according to the time remaining before the next Parole Board review on the date when the prisoner arrives in the open prison. For example, a prisoner arriving with more than 12 months before his next review must normally spend two months in open conditions before undertaking supervised activities outside the prison boundary, six months before being eligible for day release and nine months before being eligible for overnight release, while the periods of eligibility for a prisoner arriving with between nine and 12 months before his next review are shorter.

17. The claimant was immediately discontented with the Secretary of State's decision and on 16 June 2010 his solicitors contended in a pre-action letter that the interval of 15 months was too long and that the next hearing should be brought forward. The Secretary of State, however, declined to do this, maintaining that the review period of 15 months was appropriate to enable the claimant fully to test his release plan and to allow for gradual reintegration back into the community. On 5 August 2010 this claim for judicial review was issued.

18. Meanwhile on 22 July 2010 the claimant was moved to an open prison. At that stage he had 13 months before his next review and accordingly the periods of eligibility *prima facie* applicable to him were those indicated at [16] above. If the Secretary of State had set the review period at 12 months, the claimant would have had 10 months, or perhaps slightly less, before his next review and the shorter eligibility periods before he could begin release on temporary licence would have applied. In the event, however, the claimant's first day release on temporary licence was in October 2010 after only three months in open conditions, which was substantially less than the six months eligibility period for a prisoner with more than 12 months before the next review on his arrival in an open prison. It was even less than the four months eligibility period for a prisoner with up to 12 months before the next review. It is apparent from this that the eligibility periods set out in paragraph 4.3.3 of PSO 6300 could be applied with flexibility, as the paragraph itself indicates, and that they were so applied in the claimant's case. By January 2011 the claimant was out of the prison on six days a week, either working or attending a cognitive skills booster course.

19. On 25 January 2011 the claimant's Offender Supervisor wrote a report which included the latest OASys assessment of the claimant as posing a medium risk of serious harm to the public which needed to be tested in the community. It concluded:

> "At this stage Mr Parratt has not been fully tested whilst on ROTL although his progress in prison has been very good.

> Therefore I am unable to recommend release on licence at this time however, an addendum report, prior to the oral hearing will be able to furnish more up to date information."

20. Although this report indicated that the claimant would be eligible for overnight release from 22 January 2011, which was six months after his arrival in the open prison, this did not in fact take place until March 2011. It is not apparent why not, but it does appear that the prison was continuing to deal with the claimant with some flexibility and was not adhering rigidly to the eligibility periods set out in paragraph 4.3.3. There is therefore no evidence to suggest that overnight release was deferred as a result of the fact that the claimant's next review was not to be until August 2011. On the contrary there is no reason to doubt that such overnight release took place as soon as those responsible for the claimant considered that he was ready and were able to make suitable arrangements.

21. On 18 March 2011 the claimant's Offender Manager wrote an assessment report for the Parole Board hearing due to take place in the following August. She observed that the claimant had successfully undertaken every course which was available to him including the cognitive skills booster course and she anticipated that a report would be available by the time of the August hearing to assess his response to the course. She noted that he had spent two overnight releases on temporary licence with family friends who represented good role models and with whom he planned to live on release. She expressed the view that the risk of the claimant re-offending was low and that it was now unlikely that he would cause serious harm to others unless there were to be a relapse into alcohol and drug misuse (which had of course been a major reason for the claimant's offending in the first place). Her ultimate recommendation was expressed as follows:

> "It is perhaps unfortunate that the administrative demands of the parole process require reports some months ahead of any oral hearing. As such, at the time of writing, Mr. Parratt has had time to complete just two ROTLs and I see that some prison based report writers view this as too few upon which to base a recommendation for release. Whilst I acknowledge the limitations this places on any assessment, evidence can, in this case, be gathered from other sources to build a wider case for release. I consider the very positive assessments of Mr. Parratt's response to the offence focussed courses and counselling sessions he has undertaken. His behaviour both in prison and on his many day release town visits has given no cause for concern. On the contrary, he has shown himself to be responsible and reliable and amply demonstrated his level headedness when he immediately removed himself from the scene of the New Year disturbances at the prison.
>
> By the time the Oral Hearing takes place, report writers will be able to offer addenda to these reports and complete their assessments. I fully anticipate that Mr. Parratt will continue to demonstrate that he is firmly set on a path of rehabilitation and have already formed the view that the risk he presents can be (and already is) safely managed in the Community with the risk

> management plan that has been provided. It follows that I support his release with the licence conditions as outlined above."

22. It is the claimant's evidence that in early June 2011 his Offender Supervisor told him that she now supported his release on licence.

23. The review of the claimant's case by a panel of the Parole Board took place on 23 August 2011 and the panel's decision to direct his release was contained in its letter dated 30 August 2011. It is apparent that the successful overnight release visits, including the fact that the claimant had firmly turned away previous associates who called to see him at the family friends' address where he was staying, played an important part in convincing the panel that the claimant was now a much more mature and responsible person than he had been. Nevertheless, the panel also had concerns about the claimant's plans for alcohol, noting in particular that his resolve to abstain appeared to have become weaker the closer he was to release, and about a continuing need for further work on fully exploring the viewpoints of other people, including the victims of his offence. Accordingly the panel imposed additional licence requirements excluding the claimant from Farnham town centre, where the offence had occurred and he might expect to encounter his victims and prohibiting face-to-face contact with his brother and co-defendant.

24. In accordance with this direction, the claimant was released.

The issues

25. The issues for decision are as follows:

Delay from January to May 2010 in holding the post tariff review

a) Should the court entertain the claim against the Secretary of State for delay in holding the post tariff review when the Parole Board has already admitted liability?

b) If so, is the Secretary of State liable in addition to the Parole Board?

Setting the review period at 15 months

c) Was it an infringement of the claimant's Article 5(4) rights for the Secretary of State to set a period of 15 months before the second review?

Damages

d) To what if any damages is the claimant entitled? In particular, is he entitled to recover damages for (i) frustration, anxiety and stress, (ii) delay in the move to open conditions and/or (iii) delay in his eventual release?

Delay in holding the post tariff review

Should the claim against the Secretary of State be entertained?

26. In circumstances where the Parole Board has made a full admission of liability so that the claimant will be entitled to a declaration that his Article 5(4) rights have been infringed and the Parole Board will pay any damages to which the claimant can prove that he is entitled, the question arises whether I should entertain the claim against the Secretary of State for delay in the holding of the post tariff review. Mr Stephen Whale for the Secretary of State submitted that I should not. He submitted that judicial review is intended to be a practical remedy and that no useful purpose would be served by making a declaration against the Secretary of State in addition to the declaration which will be made against the Parole Board. Once the Parole Board had made a full admission of liability, further pursuit of this claim against the Secretary of State was a waste of public money in circumstances where all parties to this litigation are publicly funded.

27. I accept that submission. Although Mr Philip Rule for the claimant insisted that the Secretary of State was also liable, partly for a failure of administration in the timely provision of the claimant's dossier to the Parole Board and partly because it was the Secretary of State's responsibility to provide sufficient resources to the Board to ensure that it was able to conduct its proceedings in accordance with the claimant's Article 5(4) rights, he was unable to explain what benefit it would be to the claimant to obtain two declarations to the same effect instead of just one. Further, although he was able to point to cases where the Secretary of State had been held liable for failings of the Parole Board and to other cases where no distinction had been drawn between the liability of the Secretary of State and of the Parole Board, or where both had been held liable, there was no case cited to me where the court had to consider whether to permit proceedings to continue against one public authority for failure to comply with a prisoner's Article 5(4) rights in circumstances where another public authority had already and well in advance of the hearing made a full admission of liability covering exactly the same ground.

28. In these circumstances I consider that there has been no purpose in the further pursuit of this claim against the Secretary of State after the Parole Board's admission of liability. A declaration against the Secretary of State can provide no material benefit to the claimant. The purpose of such a declaration would be to provide "just satisfaction" to the claimant for the infringement of his Article 5(4) rights, but he will receive that satisfaction as a result of the declaration which will be made against the Parole Board and payment by the Parole Board of any damages to which he can prove that he is entitled. There is no reason to suppose, and certainly nothing in the claimant's own evidence to suggest, that a remedy against the Parole Board alone will fail to provide that satisfaction or that any purpose would be served by the grant of a further declaration against the Secretary of State. Nor is there any other good reason for deciding the claim against the Secretary of State. For example, Mr Rule does not suggest that it is necessary to do so in order to establish any important point of principle. On the contrary, his submission was that the Secretary of State is liable in accordance with well-established principles as to his responsibility for providing sufficient resources to the Parole Board to enable timely post tariff reviews to be held (citing, for example, *R (Noorkoiv) v. Secretary of State for the Home Department* [2002] EWCA Civ 770, [2002] 1 WLR 3284).

29. Accordingly, I do not propose to consider further whether the Secretary of State is liable in addition to the Parole Board in relation to this first claim.

Is the Secretary of State liable in addition to the Parole Board?

30. In view of what I have just said this issue does not arise.

Setting the review period at 15 months

The law

31. The rights under Article 5(4) ECHR of a prisoner serving a sentence of imprisonment for public protection have been considered in numerous cases including (in chronological order) *R (Noorkoiv) v. Secretary of State for the Home Department* [2002] EWCA Civ 770, [2002] 1 WLR 3284, *R (Day) v. Secretary of State for the Home Department* [2004] EWHC 1742, *R (Loch) v. Secretary of State for Justice* [2008] EWHC 2278 (Admin), *R (James) v. Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553, *R (NW) v. Secretary of State for Justice* [2010] EWHC 2485 (Admin), and *R (Guntrip) v. Secretary of State for Justice* [2010] EWHC 3188 (Admin).

32. From those cases I would summarise the principles applicable to this case as follows:

a) Article 5(4) of the ECHR creates a right to a speedy review of the lawfulness of a prisoner's detention at or about the expiry of the tariff period, so that a prisoner who no longer constitutes a danger to the public can be released.

b) Thereafter, if release is not ordered, the prisoner is entitled to periodic reviews at reasonable intervals by the Parole Board to assess his continuing dangerousness or lack thereof.

c) It is for the Secretary of State to fix the period before the next review, but his decision can be challenged by judicial review. In the event of such a challenge, it is for the court to reach its own decision as to the appropriate review period and not merely to determine whether the decision of the Secretary of State was reasonable. However, in arriving at its own decision, the court will have due regard to the view of the Secretary of State and, where applicable, the Parole Board, bearing in mind that the Secretary of State has particular expertise in these matters and is in a good position to assess all the relevant circumstances.

d) What review period is appropriate in order to comply with Article 5(4) depends on all the circumstances of the individual case, with no maximum review period prescribed by the European Court of Human Rights.

e) There is no formal legal presumption that a Parole Board review must be heard within 12 months of the last review and this cannot be regarded as a "default setting" or "benchmark". In practice, however, at least in circumstances in which the prisoner is making progress, 12 months will often represent a convenient starting point. Thus a review period of 12 months or less will generally be regarded as compliant with Article 5(4) unless there is some particular reason to the contrary, while the Secretary of State will generally have the burden of justifying by reference to the particular facts of the case a review period of more than 12 months. How heavy a burden that will be will depend on the facts of the case. The greater the period between reviews beyond 12 months, the more cogent the Secretary of State's justification for

the review period will need to be. Nevertheless there are cases where review periods substantially in excess of 12 months have been held to be justified.

f) In order to justify a review period, the Secretary of State must normally identify the progress which the prisoner needs to make before the next review and the time within which it can reasonably be expected that such progress can be properly monitored and reported on so that the Parole Board can sensibly be expected to order (or recommend, as the case may be) a change in the prisoner's status. It must be borne in mind here that in order for the Parole Board to make such an order or recommendation it will need to be satisfied that doing so will not involve unacceptable risk to the public.

g) Failure to conduct a review in accordance with these principles does not of itself make further detention unlawful, but it does constitute a breach of a prisoner's Article 5(4) rights and this will entitle the prisoner to an appropriate remedy.

33. In *R (NW) v. Secretary of State for Justice* [2010] EWHC 2485 (Admin) Dobbs J posed a number of questions which it will often be useful to ask. Has the need for monitoring and progress been identified? Has a period of time for this been specified? Has a sensible timetable been prepared for the various stages to be completed before the Parole Board could realistically order (or recommend) a change in status? Has the Secretary of State approached the task of setting the review period with flexibility and considered whether a shorter period is possible and appropriate in the circumstances of the case? I bear these questions in mind in applying the principles set out above to the facts of this case.

Application of the principles

34. The review period set by the Secretary of State in this case was a period of 15 months from the last Parole Board hearing. At one point of his argument Mr Rule for the claimant submitted that the starting point for calculating the review period should not be May 2010 which was the actual date of the last hearing but January 2010 which was when that hearing ought to have taken place. A less extreme version of this submission was that the Secretary of State wrongly failed to have regard to the four month delay in holding the previous hearing in determining what would be a reasonable review period before the next hearing.

35. I reject both variants of that submission. The Secretary of State's duty was to set a reasonable review period having regard to the progress which the claimant needed to make before the next review. What that period should be had to be assessed as matters stood as at May 2010. At that point the claimant needed a certain amount of time in open conditions and on temporary licence in order to demonstrate that he had made the necessary progress for his safe release and to enable that progress to be monitored over a reasonable period. The fact that the claimant's last review had taken place later than it ought to have done, in breach of the claimant's Article 5(4) rights, was irrelevant to the assessment of what was an appropriate review period as at May 2010. Likewise (and contrary to Mr Rule's further submission) the fact that the claimant had not had a pre-tariff review, to which in any event he was not entitled (see the decision of Blair J referred to at [2] above), was completely irrelevant to the setting of the review period in May 2010.

36. Mr Rule submitted further that any review period for the claimant in excess of 12 months was excessive, and in particular (as indicated at [15] above) that the period of seven months allowed for testing and consolidation, in particular by release on temporary licence, could run in parallel with the six months allowed for the Generic Parole Process. Since he did not challenge the reasonableness of allowing two months for transfer to an open prison (which as it happens was borne out by events) his submission had to be that both the Generic Parole Process and whatever testing and consolidation was required, including the preparation of any necessary reports, could be completed within ten months. He submitted that it was plain that the claimant's progress was impressive and that, particularly in view of the support of his Offender Manager, only a short period would be required before the claimant was ready for release.

37. Since the review period set exceeded 12 months, I accept that it is for the Secretary of State to justify that period with appropriate reasons. However, this is not a case where the review period exceeded 12 months by a significant margin and the cogency required of the Secretary of State's reasoning must be viewed accordingly.

38. It is apparent from the Secretary of State's decision letter (set out at [13] above) that the review period set was in no way arbitrary, but was calculated having regard to what the claimant would need to do in order to persuade the Parole Board that it was safe to order his release. It is apparent too that the writer of the letter had considered carefully the content of the Parole Board's decision of 25 May 2010. The letter acknowledged the good progress which the claimant had made, but was also realistic as to what remained to be done. The progress which the claimant would need to make was identified, as was the fact that this would need to be demonstrated over a reasonable period of time and carefully monitored. The letter recognised that reintegration into the community would inevitably be a gradual process, and that building a strong network of professional and personal support would take time. It recognised also that in order to satisfy the Parole Board, the claimant would need to prepare a release plan, including in particular a strategy for a new drug and alcohol free lifestyle, and to demonstrate that he was able to stick to it once the constraints of prison life were removed and the claimant was exposed to the temptations of liberty. It was also realistic in recognising that, even once the claimant had achieved his objectives, the process of writing reports to satisfy the Parole Board would itself take some time.

39. In my judgment it is necessary to bear in mind in determining the reasonableness of the review period set by the Secretary of State in June 2010 that the claimant had taken part in and been convicted of a vicious and life-threatening attack and that the Parole Board would need to be satisfied that it was safe to order his release because the risk which he presented by the time of the next review was no more than minimal. This was in the context of the sentencing judge's assessment of the claimant as dangerous (ie as posing a significant risk of serious harm to the public from the commission of further specified offences of violence), an assessment made in September 2007 less than three years previously. In this context the difference between a review period of 12 months which Mr Rule accepts would have been reasonable and the actual review period of 15 months is relatively insignificant.

40. I consider, paying due regard to the views of the Secretary of State but reaching my own conclusion, that to provide for a period of 15 months in order to enable the

claimant to have the best prospect of persuading the Parole Board to order his release was justified, and accordingly that the decision to set this review period involved no breach of the claimant's Article 5(4) rights. It was by no means clear that the claimant would be ready for release in 12 months time and to have set too short a review period could ultimately have operated to the claimant's disadvantage. This is so, in my judgment, regardless of whether the claimant is correct to assert that the seven months allowed for testing and consolidation could begin to run before the six months allowed for the Generic Parole Process had been completed, a matter which was in dispute on the evidence. Further, although Mr Rule was able to point to the opinion of the claimant's Offender Manager in May 2010 that she "could easily be persuaded that [the claimant] could be managed with licence conditions in the community", the panel itself did not share that view and it was their decision, not the Offender Manager's, which mattered. Indeed, even the claimant did not ultimately contend for release at that stage (see [11] above).

41. Accordingly this claim for breach of the claimant's Article 5(4) rights must be dismissed.

Damages

The law

42. The principles applicable to the award of damages in circumstances such as the present were set out by Laws LJ in *R (Sturnham) v. Parole Board* [2012] EWCA Civ 452, [2012] 3 WLR 476 at [22]:

> "In the light of all these observations on the learning I would venture to describe the principles which are to be applied for the resolution of the damages issue in this case in the following way. (1) Damages are only to be awarded where that is necessary to afford just satisfaction under section 8(3) of the 1988 Act. (2) In an article 5.4 delay case the Convention right will ordinarily be vindicated and just satisfaction ordinarily achieved by a declaration. The focus of the Convention and of the court is on the protection of the right rather than compensation of the claimant. (3) But if the violation involves an outcome for the claimant in the nature of a trespass to the person, just satisfaction is likely to require an award of damages. The paradigm of such a case arises where the claimant's detention is extended by reason of the delay. Another case might be where the delay occasions a diagnosable illness in the claimant. (4) Other cases where the outcome or consequence of the delay is stress and anxiety, but no more, will not generally attract compensation in the absence of some special feature or features by which the claimant's suffering is materially aggravated. I consider that Ouseley J's decision in the *Guntrip* case can only be supported on the footing that it was such an exceptional case. The Strasbourg court's observation in *Silver v. United Kingdom* (1983) 13 EHRR 582, para 10, which was concerned with prisoners' correspondence is worth noting:

> 'It is true that those applicants who were in custody may have experienced some annoyance and sense of frustration as a result of the restrictions that were imposed on particular letters. It does not appear, however, that this was *of such intensity* that it would in itself justify an award of compensation for non-pecuniary damage.'
>
> The words 'of such intensity' were emphasised not by the court but by Stanley Burnton J quoting that observation in *R (KB) v. South London and South and South West Region Mental Health Review Tribunal* [2004] QB 936, paragraph 71."

43. Laws LJ continued at [24]:

> "In the present case neither proposition (3) nor proposition (4) above applies. The case is not made exceptional on its facts by the possibility that a timely decision would or might have led to an earlier transfer to open conditions."

44. In my judgment this further observation is to be read together with and as an explanation of the statement of principles at [22] set out above and is not merely, as Mr Rule submitted, an observation specific to the facts of that particular case of no general application. It amounts, therefore, to a ruling that in the absence of some additional feature damages will not be awarded where the consequence of the delay in holding a review is a delay in a prisoner being transferred to open conditions.

45. The decision in *R (Sturnham) v. Parole Board* and in the related case of *R (Faulkner) v. Secretary of State for Justice* [2011] EWCA Civ 349, [2011] HRLR 23 have now been appealed to the Supreme Court and judgment is awaited. Mr Rule invited me to defer my decision on damages until after the Supreme Court has given judgment. However, I do not consider that it would be just to do so when it is not known when that judgment will be delivered. I say that for two reasons. First and principally, at an earlier stage of this case the defendants sought to stay the proceedings until after the decision in *R (Sturnham) v. Parole Board*, but the claimant successfully resisted that stay. Second, these proceedings have already been considerably delayed and it seems to me that it would be in the interests of all parties, not least the claimant, to bring them to a conclusion so that the claimant, who has now been released, can put them behind him and concentrate on rebuilding his life in the community.

46. Accordingly I apply the principles stated by the Court of Appeal in *R (Sturnham) v. Parole Board*, by which I am bound. Mr Rule suggested that these principles were stated *per incuriam* because relevant Strasbourg authority was not cited to the Court of Appeal. That is a submission which has no doubt been made to the Supreme Court, but is not one which a first instance judge can entertain.

Application of the principles – delay in holding the post tariff review

47. I consider first whether the Parole Board is liable in damages for the delay in holding the post tariff hearing. The damages claimed for this admitted breach of the claimant's Article 5(4) rights consist of damages for (i) frustration, anxiety and stress, (ii) delay in the move to open conditions and/or (iii) delay in his eventual release.

48. In the light of *R (Sturnham) v. Parole Board*, the first two of these claims must fail. There are no additional or exceptional features here to justify such an award. In particular, the absence of a pre-tariff review is not such a feature and there is no evidence of any diagnosable mental illness.

49. In principle the claimant is entitled to recover damages if he can prove that the delay in holding the post tariff hearing caused a delay in his eventual release -- the "knock-on" effect. In other words, if the first review had been held in or about January 2010, would the claimant have been released any earlier than September 2011? In order to prove that he would, the claimant would need to show that (1) a review held in January 2010 would have recommended his immediate transfer to open conditions, (2) the Secretary of State would have accepted that recommendation, and (3) by the time of the next review, held some time in the first few months of 2011, the Parole Board would have been satisfied that the claimant had made sufficient progress to justify ordering his immediate release.

50. Similar claims for damages have been considered in other cases but in each of them the conclusion was that there were too many imponderables to make it possible to say that the failure to hold a speedy hearing had extended the time which the prisoner had had or would have to spend in custody (see *R (Downing) v. Parole Board* [2008] EWHC 3198 (Admin) at [27], *R (Biggin) v. Secretary of State for Justice* [2009] EWHC 1704 (Admin) at [34], and *R (Degainis) v. Secretary of State for Justice* [2010] EWHC 137 (Admin) at [11]). The present case is different in one respect in that it is now known that the claimant was in fact released in September 2011, whereas in the three cases cited the prisoner was still in custody when the claims were heard, but in my judgment that is not a difference in principle. The fact that the claimant in this case was considered to be ready for release in September 2011 does not necessarily mean that he would equally have been ready at a review held some months earlier. It remains to consider the facts of the case and to determine whether the claimant has proved on the balance of probabilities that he would have been released earlier if the post tariff review had been held in January 2010.

51. In my judgment, and in agreement with the submissions of Mr Ben Hooper for the Parole Board, there are too many imponderables to enable such a conclusion to be reached in this case even on the balance of probabilities. A review held in January 2010 might well have recommended the claimant's transfer to open conditions, but the Secretary of State was not obliged to accept that recommendation and even if he did, it is not clear when that transfer would actually have taken place. There is also considerable doubt as to what review period would have been fixed for the next review. If it had been held too early, the Parole Board might well have concluded that the claimant was not yet ready for release, thus delaying his eventual release, perhaps by another year. As it was, it is apparent that even in August 2011 when the panel did order the claimant's release, some reservations remained.

52. I conclude, therefore, that the claimant is not entitled to damages from the Parole Board for the four month delay in holding his post tariff review.

Application of the principles – setting the review period

53. In view of my decision on liability, the claimant's claim for damages as a result of the fixing of the review period at 15 months does not arise.

54. I should record, however, that I am not satisfied that a review held in May 2011 would have resulted in the claimant's release. Thus, even if I had awarded a declaration, I would not have made an award of damages for loss of liberty.

55. Mr Rule submitted that by April or May 2011 the claimant had achieved everything necessary for his release, but in my judgment this submission is not borne out by the evidence. In particular, the claimant's Offender Manager did not consider that he was already ready for release by January 2011 (see [19] above); he did not begin to undertake overnight release visits until March 2011 and there is no reason to suppose that these would have begun earlier if his next review had been in May ([20] above); his Offender Manager's March 2011 report did not say that he was ready for release, but rather expressed the view that he would be ready by August, although the writer recognised the risk that others might take a different view of the time required to demonstrate such readiness ([21] above); there is no positive evidence that the claimant's Offender Supervisor was prepared to support his release before June 2011 ([22] above); and the panel (whose decision it was) had real concerns even in August 2011, especially as to the claimant's plans with regard to alcohol, which had been a critical factor in his offending and, as a result, imposed additional licence conditions ([23] above).

Conclusion

56. There will be a declaration that the claimant's rights under Article 5(4) were infringed by the delay of the Parole Board from January to May 2010 in holding the claimant's post tariff review. All other claims, including the claims for damages, are dismissed.

Postscript

57. No doubt it is right and proper, in an appropriate case, to award damages to a prisoner whose period in custody has been prolonged as a result of unlawful conduct by a public authority. There is, however, some irony in the particular circumstances of this case that the claimant is seeking to recover compensation for exposure to a regime from which he has so clearly benefited – having, as he now has, an opportunity to live a much more fruitful and fulfilling life than seemed likely at the time he committed his offence. That this is so is, of course, very welcome. However, and despite the inevitable focus in the course of these proceedings on the claimant's human rights, it is, I hope, legitimate to spare a thought also for the main victim of his offence whose life has been permanently blighted. The claimant has not said that it is his intention to use any damages he might be awarded to compensate this victim for the serious and permanent injuries which he and his brother caused and, since the claimant has not said so, I infer that it is not his intention to do so, despite the genuine remorse which he is said to feel. In view of my decision that no damages are payable, the point does not arise. Had it done so, however, I would have hoped that some mechanism might be found to enable the claimant's victim to seek compensation from the claimant out of any damages payable to him. Looking at the matter in the round, that would seem to me to be what "just satisfaction" would require in circumstances such as these.