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

CO/363/2011

Royal Courts of Justice
The Strand
London
WC2A 2LL

Monday 28 February 2011

B e f o r e:

MR JUSTICE BURNETT

The Queen on the application of

P A

Claimant

- v -

GOVERNOR OF HER MAJESTY'S PRISON LEWES

Defendant

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(Official Shorthand Writers to the Court)

Miss Elizabeth Prochaska (instructed by Prisoners Advice Service) appeared on behalf of the Claimant

Miss Rosemary Davidson (instructed by the Treasury Solicitor) appeared on behalf of the Defendant

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J U D G M E N T
(As Approved by the Court)

Monday 28 February 2011

MR JUSTICE BURNETT:

1. This is an application for judicial review of a decision of Governor Robin Eldridge taken originally on 19 November 2010 refusing to release the claimant from prison on home detention curfew. The decision was affirmed by the Governor in the light of further representations and evidence on 22 December 2010 and 27 January 2011 (the last following the issue of these proceedings).

2. The claimant is a 25 year old man who suffers from a condition known as social phobia. It is defined in the World Health Organisation International Classification of Diseases as:

> "Fear of scrutiny by other people leading to avoidance of social situations. More pervasive social phobias are usually associated with low self-esteem and fear of criticism. They may present as a complaint of blushing, hand-tremor, nausea or urgency of micturition, the patient sometimes being convinced that one of the secondary manifestations of their anxiety is the primary problem. Symptoms may progress to panic attacks."

3. On 7 October 2009 the claimant was sentenced to a total of three years' imprisonment for two offences: inflicting grievous bodily harm on one of his children (younger than six months old at the time) and cruelty to the same child. The claimant is due for release on licence, after serving half of his sentence, on 7 April 2011. He became eligible for home detention curfew from 24 November 2010.

4. Section 246(1) of the Criminal Justice Act 2003 provides:

> "Subject to subsections (2) to (4) below, the Secretary of State may:
>
> (a) release on licence under this section a fixed-term prisoner other than an intermittent custody prisoner at any time during the period of 135 days, ending on the day on which the prisoner will have served the requisite custody period."

The requisite custody period in the claimant's case is one-half of the three year sentence imposed in the Crown Court. None of the exceptions to the exercise of this power, set out in subsections

(2) to (4) applies to the claimant. These powers had their origins in earlier release schemes dating back to the late 1990s.

5. The discretionary power conferred on the Secretary of State is in practice exercised by prison governors on his behalf, subject to the policy guidance set out in Prison Service Order 6700 and relevant Prison Service Instructions. Paragraph 2 of that order provides that all prisoners serving sentences of more than three months but less than four years will be eligible for home detention curfew unless they fall within specified categories, which are not relevant for the purposes of this claim. Prison Service Instruction 31/2003 identified a list of offences for which it was presumed that home detention curfew would not be granted unless exceptional circumstances existed. The purpose of establishing such a list was to maintain public confidence in the scheme. It is common ground that the claimant's offending fell within the list presumed unsuitable for inclusion in the home detention curfew scheme. The maintenance of public confidence in the scheme is unquestionably a proper factor which may be taken into account in the exercise of the statutory power to release on home detention curfew. One category presumed unsuitable is that of prisoners convicted of sexual offences, for example. This prison instruction required any such case to be referred to headquarters if the Governor thought exceptional circumstances existed, together with a list of specific documentary requirements. That goes to emphasise the public confidence issues in play. Otherwise the application of the policy to presumed unsuitable prisoners was found in paragraphs 33 and 34 of Prison Service Instruction 31/2003. They are headed: "Prisoners with current convictions for non-sexual presumed unsuitable offences". They continue:

> "33. A decision that there are exceptional reasons to release a prisoner on HDC, who would otherwise be presumed unsuitable, must only be taken by the Governing Governor, subject to the normal risk assessment procedures. The Home Secretary has made it clear that the reasons for release in these circumstances must be exceptional. Exceptional reasons will not include the level of risk the offender poses. Prisoners presumed unsuitable may indeed be judged as presenting a low risk of re-offending or of breach. It is likely that only a very few 'presumed unsuitable' prisoners, nationally, will be released on HDC. It is impossible to give guidance on what will constitute an exceptional reason to release because such cases will be, by definition, exceptional. As a rule of thumb, such cases will stand out.
>
> 34. There will be no need to refer these exceptional cases to HQ for approval. The decision rests with the Governing Governor. However, details of any such cases must be sent to the HQ policy team with reasons why release was granted. The HQ policy team will be available for advice if necessary."

6. From these paragraphs the following factors governing the exercise of the Secretary of State's discretion may be extracted:

(1) there was to be a risk assessment;

(2) a low risk of re-offending was not itself sufficient to find exceptional circumstances;

(3) very few prisoners presumed unsuitable for release would in fact be released on home detention curfew;

(4) an exceptional case would stand out.

7. Despite the reluctance in 2003 to spell out any further the indicia of exceptionality, Prison Service Instruction 31/2006 (implemented at the end of that year) did so. Its main purpose was to explain differences between the early release schemes under the Criminal Justice Act 2003 and the earlier legislation. However, it said this:

> "19. **Exceptional Circumstances and Presumed Unsuitable Offences:**
>
> Guidance on the interpretation of exceptional circumstances is contained in paragraph 33 of PSI 31/2003.
>
> The Director of Operations .... wrote to all Governing Governors on 20 May 2004 setting out a particular set of factors which would amount to one example of exceptional circumstances.
>
> Following consultation with Ministers, the Chief Executive of NOMS advised that the following features would also amount to exceptional circumstances.
>
> * The likelihood of re-offending on HDC is extremely small; **and**
>
> * The HDC applicant has no previous convictions; **and**
>
> * The applicant is infirm by nature of disability or age or both.
>
> This interpretation should be used when determining whether an HDC application is exceptional. However, Governors may continue to exercise their discretion as described in the PSI 31/2003 and there may be other cases, which feature different factors from those above, which the Governor considers to be exceptional."

Thus, whilst exceptionality remains at large for the purposes of the exercise of discretion, the combination of the three features identified in paragraph 19 would amount to exceptional circumstances. The corollary is that if only two out of three of those features are present, exceptional circumstances would not be established.

8. The claimant has no previous convictions. The likelihood of re-offending has been judged to be low. The question, as it developed in the exchanges to which I shall shortly refer, became whether the claimant's mental illness (that is to say his social phobia) was such as to result in his being "infirm by nature of disability". The claimant's short submission is that his social phobia is such that the only conclusion which the Governor could properly and lawfully reach was that he is indeed infirm by nature of that disability, and so entitled as a matter of law to release on home detention curfew.

9. The claimant has had the assistance of the Prisoners Advice Service in connection with his application for early release on home detention curfew. I should pay tribute to the constructive and friendly way in which the Prisoners Advice Service and the Governor of the prison have worked in testing the policy against the facts of the claimant's case.

10. On 22 September 2010 the Prisoners Advice Service wrote to the Governor. The letter referred to the claimant's social phobia and to his earlier (but now resolved) conditions of agoraphobia and Attention Deficit Disorder. These two latter conditions have fallen out of consideration.

11. A large volume of supporting material was attached to the letter of representations. The letter identified the criteria set out in paragraph 19 of Prison Service Instruction 31/2006 and then went on to examine the material relevant to a consideration of each of the three criteria. The third criterion was dealt with in this way:

> "c) *Suffers from a physical or mental illness*
>
> We attach an extract from a psychiatric report of Dr Duncan Angus from 2008, and a report from his counsellor, which confirm [PA's] diagnosis of a recognised mental illness, being a moderate to marked social phobia. Ms Watkinson's report remarks upon the deterioration in [PA's] social phobia in custody. Due to his acute anxiety and group situations, [PA] cannot participate in activities involving other prisoners such as exercise, education classes, offending behaviour work or association, and struggles with simple tasks such as leaving his cell to collect his food.
>
> Ms Watkinson supports his release on HDC on the grounds that it will both prevent further deterioration of his phobia, and provide an opportunity for him to undertake Cognitive Behavioural Therapy, which is the next stage of counselling he requires in order to address his mental illness."

12. Whilst not being a matter of criticism, it is striking that the letter did not deal with the question whether the claimant was infirm by reason of his disability. It dealt, as a matter of fact, with the existence of his mental illness and prayed in aid a matter which would normally have no bearing on the question whether someone is infirm, namely that the mental condition might improve outside prison. The letter went on to deal with a number of "additional factors" that provide an insight into the claimant's general condition. He had recently completed a parenting course and gained a grade A. This was extremely important to him for the purposes of family proceedings relating to continuing contact with his children, including the child he had injured. He had been pursuing educational courses in his cell, but was unable to attend offending behaviour groups because of anxiety which resulted from joining group sessions. He wished to undertake cognitive behavioural therapy upon release.

13. A notable feature of the claimant's case was referred to: although he could have gone to open conditions, he had remained in a closed establishment at his own request. This is because in a closed establishment arrangements could be made to keep the claimant separated, by and large, from other prisoners. He is in a single cell. He collects his food from the canteen area relatively quickly and takes it back to his cell to consume it. He moderates his activities to ensure that he rarely runs into other prisoners. The letter said this:

> "[PA] therefore cannot benefit from a progression to open conditions which forms the usual resettlement path towards release. In the circumstances, we submit that HDC provides a suitable resettlement alternative."

The summary found at the end of the letter brought together the various points made in the long representations in this way:

> "In summary, we submit that if [PA] is released on HDC there is a negligible chance of him re-offending, due to the one-off nature of his offence, which was out of character, the maturity of his children, the natural restrictions on his ability to travel out of his family home due to his social phobia, and his trustworthiness to adhere to licence conditions as demonstrated by the 20 months he spent on bail successfully abiding by the conditions of his licence and family contact order. HDC will also provide him with an opportunity to undertake further counselling work to progress his rehabilitation and prepare himself for reuniting with his children, which will be to the benefit of his children and his family as a whole .... Conversely if [PA] remains in prison until his CRD, he is likely to stagnate or even regress in terms of his rehabilitation, since he cannot undertake group OBP work and further time in custody is likely to lead to further deterioration in his already fragile mental state.

> Finally, due to [PA's] mental health problems and the anxiety he feels regarding this application, we ask you to communicate the decision to ourselves and not directly to [him] ...."

14. The Governor, Mr Eldridge, asked Colin Fordham, the probation manager at the prison, to consider the representations together with available material and to report. His recommendation was that the claimant did not merit release under the exceptional circumstances criteria. Mr Fordham's report was produced on 15 November 2010. He considered all the material provided by the Prisoners Advice Service, which had included, for example, a statement from the claimant's mother, together with a good deal of material generated during his time in prison. It included the following: the prison and probation records (including OAsys reports), material from the prison Inreach Team, liaison with Gwyneth Watkinson (the counsellor with the Chaplaincy Team), liaison with Glen Hocken of the Chaplaincy Team, liaison with residency staff over the claimant's behaviour and welfare, and letters of support from the claimant's father, mother, brother and sister, together with various letters of support from friends of the claimant. He also sought advice from the NOMS HDC Team.

15. Mr Fordham identified the content of paragraph 19 of Prison Service Instruction 31/2006. He also referred to the general principles applicable to early release on compassionate grounds which, as is well-known, can result in release from custody for medical reasons. Mr Fordham concluded that the risk of re-offending was "low if the claimant does not have unsupervised access to his children". He went on to consider the third criterion, that is "infirm by nature of disability". He noted the 2008 medical report from Dr Angus. He recited the claimant's dealings in prison with the various medical teams. There had been concern about self-harm and suicidal ideation at the time of his arrival in prison, and also in early 2010. There was no further medical input within prison after March 2010, which coincided with a time when the claimant indicated that he would undertake some cognitive behavioural therapy with Gwyneth Watkinson. Mr Fordham obtained an up-to-date description from Ms Watkinson dated 9 November 2010 which said this:

> "[PA] was referred to me by the Inreach Team at the Lewes Prison. They asked me to assess [PA] and see if I could help him with his sociophobia, which in turn would help him with his interactions with others, especially his family.
>
> I offered [PA] Cognitive Behavioural Therapy as I felt it would be the most useful therapy to help with the sociophobia. It looks at finding the person's fears and worries and then looking at coping strategies to help him get over them.
>
> [PA] found the process very difficult, especially when he was taken out of his comfort zone, and he would not allow himself to try and look beyond the immediate discomfort for the possibly long-term gain. I had to accept that his reluctance to try the

exercises and therefore his acceptance of his continued situation.

In conclusion, I feel that at present [PA] is in the safest place he can be and that he is managing to cope with the regime as it gives him some stability and security."

16. Mr Fordham also had a report prepared by Glen Hocken. It, too, was dated 9 November 2010. He said this:

"[PA] has been attending the Friday morning guitar lessons in the Chapel since February 2010. I encouraged [PA] to join the group of six pupils and one teacher (1) to develop his musical ability and skill, and (2) to help him overcome his fear of mixing with other people.

[PA] has missed very few sessions as he makes a great effort to come up from the wing and participate in the group as far as he is able. His courage and confidence have grown noticeably, although he finds attending very hard for him still.

[PA] has made trusting relationships with several landing staff .... and chaplaincy staff .... Although he finds sharing the M1 landing with other prisoners difficult, he has coped and is coping with imprisonment. [PA] has stated to me: 'I am as comfortable as I can be on the M1's landing -- I wouldn't be comfortable moving from M1.04. And I am finding it very hard to cope in prison. I am only just coping. I could not cope at all if I was moved from here as I need regular contact with mum and dad. Mum cannot travel far and I cannot cope with change and am used to my routine and environment here. I am finding it hard to cope mentally due to my mental disorder."

17. Mr Fordham noted that the claimant received regular visits and support from family members and that, despite his social phobia, saw them in the normal visiting hall. He also noted that the claimant had declined to move to open conditions. His conclusion on the third criterion was stated in these terms:

"Whilst it is accepted that [PA] does have a diagnosis of sociophobia and does suffer from panic attacks, there is strong evidence that despite this he has managed to cope in custody. Due to his sociophobia he has not been able to benefit from direct offending behaviour work and any work on his offending would have to be on at 1:1 basis in the future. I do note that Gwyneth

> Watkinson's comments indicate that he has been offered CBT work here but he has not fully made use of the opportunities available to him."

18. Mr Fordham also considered whether the circumstances were such that early release on compassionate grounds would apply. In that regard Mr Fordham was concerned that if release on home detention curfew were refused, the risk of suicide might increase. However, his opinion was that any problem of that nature could be managed in prison.

19. Mr Fordham's reference to this factor in his conclusion is to my mind a recognition that even if the criteria set out in paragraph 19 of Prison Service Instruction 31/2006 did not apply, home detention curfew would, exceptionally, be appropriate for someone who would satisfy the criteria for early release on compassionate grounds.

20. The Governor took account of this report and all the materials referred to in it in reaching his initial decision. That was communicated in an e-mail dated 19 November 2010. As material, Mr Eldridge said this:

> "I have now had the opportunity to read the comprehensive documentation provided by Colin Fordham, Probation Manager, which included representations from yourself and your colleague.
>
> At one level the decision on whether or not to grant release on HDC is simple, ie [PA] does not fully meet all the criteria outlined in PSI 31/2006. However, I was prepared to explore in more depth whether there truly were 'exceptional circumstances' to justify release. In doing so, I have already considered more recent notes from two members of the chaplaincy team, Glen Hocken and Gwyneth Watkinson, which are relevant, in as much as developing the picture of how well [PA] is coping in custody and his limited engagement with CBT offered by Mrs Watkinson.
>
> These latter reports are important in response to your representations as to the impact on [PA's] mental health of continued custody. It is evident that [PA] is beginning to participate in group guitar sessions, albeit tentatively, but encouraging nonetheless. Mrs Watkinson has attempted to engage [PA] in CBT but reports that 'to date he has found it very difficult to look beyond the immediate discomfort for long-term gain'. She goes on to suggest that [PA] is in the safest place he can be and managing to cope with the regime as it gives him some stability and security. I also note that he has struck up a good rapport with some of the landing staff.

> Despite the comprehensive views submitted both in favour and against release on HDC, I am satisfied that the recommendation provided is correct and that [PA] should not be released on HDC."

21. Mr Eldridge went on to deal with the careful handling necessary to communicate the decision to the claimant. He also said that he would ensure that the claimant could remain at his prison until his release. Both these observations are features of the considerable care taken by the prison and by the Prisoners Advice Service. They also reflect the success which the prison has enjoyed in helping the claimant cope with what is described and recognised on all sides as being a very difficult time.

22. The Governor's decision, as he has confirmed in a witness statement provided in these proceedings, had two components. First, he concluded that the claimant did not satisfy the express criteria found in paragraph 19. There was no doubt from the underlying material that the first two criteria were met and also no doubt that the claimant suffered from mental illness. It is therefore plain that the Governor was indicating that he did not consider that the claimant's illness resulted in his being infirm. He expands that conclusion in paragraph 11 of his witness statement, where he says this:

> "On 19 November release on HDC was denied but in reaching that decision I was careful to consider [PA's] situation in the broadest terms, as well as the three specific elements referred to in paragraph 19 of PSI 31/2006. I therefore approached his application by first considering whether the criteria in PSI 31/2006 were met in his case. I am aware that my decisions relating to [PA's] release on HDC have been criticised as failing to consider whether or not he was 'infirm' within the meaning of PSI 31/2006. To clarify, I was particularly careful to consider whether there was evidence that [PA] was sufficiently infirm so as to warrant release under the 'exceptional circumstances' provision contained in PSI 31/2006. In doing so, I took into account the views of staff with whom he had chosen to engage, including two key members of the prison's chaplaincy team, all of whom reported that he was coping adequately. In addition I noted that he had not required the services of the establishment's mental health Inreach team since very early on in his sentence. I also consulted with Colin Fordham .... who is very experienced in the assessment and management of offenders. I concluded that the criteria in PSI 31/2006 were not met. As above, I was careful to go on to consider whether his condition nonetheless amounted to 'exceptional circumstances' .... I again concluded that there were insufficient grounds on the information available to support a finding of 'exceptional circumstances' in [PA's] case."

23. Having received Mr Eldridge's decision, Miss Orger of the Prisoners Advice Service asked him whether he would be prepared to suspend that decision while she obtained further medical evidence. Mr Eldridge agreed to do so. It was in those circumstances that Dr Procopio, a Consultant Psychiatrist, was instructed to report on the claimant. As is now apparent, Dr Procopio had earlier seen the claimant in connection with the underlying criminal proceedings and had produced a report directed towards issues that might arise in those proceedings. When seen in June 2009, the claimant described symptoms of "anxiety in social situations", but presented otherwise normally. Of the police interviews, Dr Procopio said that the claimant gave articulate and coherent answers without being influenced by leading questions.

24. On 11 December 2010 he saw the claimant in connection with early release. He reported on 15 December. He took a full history. The claimant described how he was managing in prison. He said that he was anxious and needed to be in a single cell to avoid close or casual conduct with others. He described how such contact caused panic. Dr Procopio asked how it was that the claimant could talk to prison staff, but not to prisoners. The claimant indicated that he was still anxious, but knew that the prison staff were there to protect him. He explained that he remained in his cell for all of the day. However, he attended guitar lessons, telephoned his parents, and went to the visiting hall for his parents' visits. He also went to collect his food, but did so by joining the queue for as short a period as possible before returning to his cell. Dr Procopio probed with the claimant how he could manage to do all that. The picture painted by the claimant in response to those enquiries was that it was all extremely difficult. He described, months before, having had panic attacks at the thought of having to share a cell. That possibility had evaporated as a result of the efforts made by the prison on behalf of the claimant. The claimant denied that he had any suicidal ideation. Dr Procopio described the claimant as "looking anxious and jittery". He did not maintain eye contact. His speech was low and in a monotone. Dr Procopio did not consider that the claimant was depressed, but he thought him anxious. He considered that he had a normal appetite but that, from the description given, his sleep was disturbed. There was no evidence of psychotic features, hallucinations, or any thought disorder.

25. Dr Procopio described social phobia as an anxiety disorder which presents itself when exposed to the source of the patient's fear, or in anticipation of such exposure. He considered the claimant's social phobia to be "one of the most intense and debilitating" he had seen. He believed that prison was an especially difficult environment for the claimant, first because it confines him with hundreds of people whom he does not know; and secondly, because of a lack of control over what occurs to him. He finished his report by saying this:

> "11.2 It is therefore my opinion that, from the clinical point of view, despite the positive attitude shown by the authorities, detention in prison is the worst possible environment for [PA] and should be avoided, obviously if this is compatible with other considerations that are outside my area of expertise.
>
> 11.3 If [PA] were in the community, he would spend most of the

> time, if not all the time, at home due to his Social Phobia. The advantage for his mental health would be that his levels of anxiety and distress would be greatly reduced by the fact that he would not be exposed to social situations and that he would be in control of his environment. There would also be the possibility to start treatment in an appropriate environment."

26. Mr Eldridge considered that report, but maintained his decision in a letter to Miss Orger dated 22 December 2010. He also had further input from Mr Fordham in response to criticisms to his earlier report made by the Prisoners Advice Service. Mr Fordham recognised that prison was not an ideal environment for the claimant -- indeed, not a suitable environment, as Dr Procopio had said. He noted that the medical report had focused on the suitability of prison, but noted also that the claimant's condition was managed in prison. Whilst some criticism has been advanced by Miss Prochanska on behalf of the claimant about the concentration on whether the claimant could be managed in prison, that to my mind is unfair. The focus of Dr Procopio's report was whether prison was a suitable environment for the claimant, given his social phobia. In Dr Procopio's report there was no explicit consideration of whether the claimant was "infirm".

27. In his letter, Mr Eldridge indicated that he was prepared to commission another assessment to look at the matter further. There were then logistical problems in obtaining a decision from the claimant about whether he would be prepared to see another psychiatrist. In due course the claimant decided not to see a second psychiatrist.

28. While the Governor sought a report, the process of litigation was begun with a protocol letter on 13 January 2011. The decision-making process and the litigation became inextricably linked. That caused confusion. Dr Moon was originally identified by the Governor to produce a report, but in due course Dr Ardron, Consultant Psychiatrist, reported. The context of that report is that the Governor had maintained his earlier decision by his letter of 22 December, but was prepared to revisit it for a third time. The claim was commenced on 14 January 2011. Dr Ardron reported on 25 January 2011. In the light of Dr Ardron's report, Mr Eldridge confirmed his decision yet again on 27 January 2011.

29. Dr Ardron produced her assessment from a review of reports and records together with discussions with prison staff. These were her instructions:

> "8. I have been instructed by the Governor .... to provide a report on [PA] to address whether the criteria for release under exceptional circumstances are met.
>
> 9. I have also been asked by Mr Colin Fordham .... to address the following questions:
>
> 1. To assess [PA's] risk of re-offending ...;
>
> 2. To assess the degree of disability and the

> effects on the claimant by a further period of detention including the considerations for self-harm ...;
>
> 3. To advise on the treatment options that are available to [PA] for his sociophobia, both in custody and in the community, and the availability of these;
>
> 4. To assess the wider family situation and the impact this has on [PA] ....;
>
> 5. The wider implications of any release on HDC."

Within the body of her report Dr Ardron summarised the content of the others she had seen, in particular those of Dr Angus and Dr Procopio. She had access to the claimant's inmate medical record. That demonstrated regular contact following his entry into the prison system in October 2009 until March 2010. There was none after that. She spoke to prison officers who dealt regularly with the claimant. They confirmed the pattern of behaviour recounted by Dr Procopio, but were not concerned about the claimant's mental health as a result of their dealings with him. She spoke to the chaplaincy staff, who thought that he was coping. They talked further about the guitar lessons. She was of the opinion that the claimant was not willing to help himself and also that the legal proceedings were causing anxiety.

30. Dr Ardron also spoke further to Gwyneth Watkinson. In her report Dr Ardron set out a summary of their conversation as follows:

> "67. .... Ms Watkinson told me that, like Mr Hocken, she has known [PA] from early on in his imprisonment. At first she engaged with him on a supportive basis but found that he did not want to go out from his cell. She offered him treatment with CBT at which point he stopped engaging, making it clear that he did not want to have this intervention. She has continued to see him to provide support. She has frequently had telephone calls from his mother saying that he is distressed and has gone to see him on M wing to find there is no distress. It was her opinion that he was highly dependent on his mother, and her telephone calls contributed at times to his agitation. She has also observed him in the visits centre which is an extremely noisy environment. He keeps his head lowered but is able to remain there during the visit.
>
> 68. She told me that throughout her interactions with him, he has steadfastly refused to engage even with the most simple of interventions such as working to increase eye contact. It was her opinion that [PA] did not want to address his problems."

31. Dr Ardron's conclusions included consideration of each of the three criteria set out in paragraph 19 of Prison Service Instruction 31/2006 although, as she said in an addendum to her report, dated 8 February 2011, she did not deal expressly with the question whether the claimant was infirm. That was because she had been asked to consider the degree of disability and the effects of further detention on the claimant. Nonetheless, she considered that the conclusions she had reached provided an answer to the question. In her main report she noted in particular the following:

> 1. Anxiety disorders are very common amongst the prison population.
>
> 2. Dr Angus had referred to the social phobia as being "moderate", whilst Dr Procopio thought it "intense and debilitating".
>
> 3. When outside prison the claimant had been able to use public transport and whilst inside had attended guitar lessons together with visits from his family in the ordinary visits hall.
>
> 4. The claimant had refused to continue with cognitive behavioural therapy.
>
> 5. Social phobics are encouraged to expose themselves to the situations that cause their anxiety as part of their treatment.
>
> 6. The claimant's social phobia had been appropriately managed.

Dr Ardron mistakenly believed that the claimant had refused pharmacological intervention. Her overall conclusion on this head in her report was this:

> "95. It is therefore my opinion that whilst I agree [PA's] activities are certainly limited by his social phobia, this is a common disorder which can be effectively treated whilst in prison and any disability caused by his mental disorder is not of sufficient severity to warrant exceptional circumstances being applied in his case."

32. Dr Ardron went on to consider other reasons for exceptionality. In her addendum, to which I have referred, she confirmed that her view was that the claimant was not "infirm by reason of disability". She referred to the lack of medical intervention, the fact that there was no requirement for location on the healthcare wing, and the lack of concern by staff with regular contact with the claimant as being of importance. The claimant was managing on the wing. His involvement in guitar lessons and visits to a busy visits hall suggested to her an element of choice. She thought it significant that outside prison the claimant had not used community psychiatric services. She therefore took a different view from Dr Procopio because of the

accounts given by those who have known the claimant throughout his period in hospital. The picture they painted did not match the severity of his condition as labelled in Dr Procopio's conclusion.

33. Mr Eldridge, in his re-affirmation of 27 January 2011 of his earlier decision, considered that the content of Dr Ardron's report provided further support for his earlier decision. I should note that he adopted the mistaken view about pharmacology as one of the many features of her report that provided the further support to which he referred. However, since it was only one of many such points identified as having reinforced his earlier view, in my judgment that mistake can have no significance for these proceedings.

34. In support of her submission that Mr Eldridge was obliged to conclude that the claimant was "infirm by reason of disability", Miss Prochanska has drawn my attention to the following definitions of the word "infirm" to be found in the second edition of the Oxford English Dictionary:

> "2. Of persons, with reference to physical condition: Not strong and healthy; physically weak or feeble, esp. through age; hence frequently ***old*** (or ***aged***) ***and infirm***.
>
> 3. Of persons, with reference to the mind: Not firm or strong in character or purpose; weak, frail, irresolute. Also of the mind, judgement, etc.

The origins of the use of the word "infirm" by reference to the mind, the oldest of which is identified in the notes in the dictionary as stemming from 1536, and the more recent from the mid-19th century, suggest a context firmly routed in poor judgement, lack of purpose or character. The mid-19th century examples are:

> "His judgment was the infirmest of his faculties" (attributed to Disraeli) and
>
> "He was .... infirm of purpose" (attributed to Martineau)

Miss Prochanska's submission is that the definition is wide enough to encompass the mental illness suffered by the claimant, together with its consequences.

35. Before considering whether it was open to Mr Eldridge to conclude conclusion that the claimant was not "infirm" for the purposes of the policy, it is perhaps useful to identify a number of synonyms for the word "infirm", which I take from Collins Thesaurus. They included: "ailing", "debilitated", "decrepid", "doddering", "enfeebled", "feeble" and "frail". Synonyms for the definition relating to "infirmity of the mind" include "faltering", "indecisive", "insecure", "irresolute", "shaky", "unsound", "vacillating", "wavering" and "weak".

36. In determining the meaning of "infirm by nature of disability" for the purposes of the policy, it is in my judgment correct, as Miss Davidson on behalf of the Governor has submitted, to take into account the underlying context in which the phrase arises. That context includes: (a) the prisoner concerned has committed an offence or offences which is or are presumed to make his release on home detention curfew unsuitable; (b) only in exceptional circumstances will release on home detention curfew be appropriate; (c) such exceptional circumstances will be rare, that is to maintain public confidence in the scheme; and (d) such cases are likely to stand out. That last comment from Prison Service Instruction 31/2003 suggests that the cases are likely to be obvious.

37. "Infirm" is plainly not a medical term. It is a description applied by laymen to the consequences of a condition or conditions from which the person concerned suffers including old age. In deciding whether a person is infirm, the observer will need to form a value judgment. There is no point on a hypothetical scale of disability at which an individual can with confidence be said to be infirm, when a little further down the scale he was not. There are many who would resist the label of infirmity, despite enduring disability. There are many very serious disabilities which do not necessarily lead to the conclusion that the person concerned is infirm. For example, many who are unfortunate enough to be paraplegic or to have suffered multiple amputations could not sensibly be considered infirm. It would be difficult to imagine the Para-Olympics taking place if that were so. The use of the word "infirm" in the context of the policy is not, in my judgment, concerned with the concept of indecisiveness, insecurity, lack of purpose or the like. That is not least because such characteristics usually have nothing whatsoever to do with disability.

38. In the context of this policy the word is directed towards the prisoner's condition, which may be brought about by physical or mental illness or disability. It is concerned in the sense that the word normally imports in ordinary language and which is synonymous with "ailing", "debilitated", "decrepid", "feeble" and "frail", and words to similar effect. It is right that Dr Procopio does use the word "debilitating" in describing the claimant's condition of social phobia.

39. Nonetheless, throughout the history of the exchanges of information in this case there was no real focus on the word "infirm" until right at the end of the process. The original representations did not address the question whether the claimant was infirm, and neither did Dr Procopio.

40. It is clear from his original decision that Mr Eldridge did not think that the claimant satisfied the criteria of paragraph 19 of Prison Service Instruction 31/2006. In the representations being made on behalf of the claimant there was an understandable lack of discrimination between setting out the claimant's undoubted mental illness, which results in disability in the sense that he is unable to lead a normal social life and interact with others, and whether he is infirm. Although Miss Prochanska was critical of both Mr Eldridge and Mr Fordham for this lack of focus on the word "infirm", it flowed, as is clear from the summary of the history that I have attempted to set out, from the way in which the representations were made and developed.

41. In my judgment, looking at the ordinary meaning of the word "infirm", it is impossible to

conclude that the only available answer to the underlying question: "Is the claimant infirm by reason of disability?" was: "Yes". Indeed, having read all of the material contained within the papers relating to the claimant's condition (not every part of which I have summarised in this judgment), it comes as no surprise at all that Mr Eldridge initially considered that the real question was not whether the claimant fell within the paragraph 19 criteria but whether his condition otherwise gave rise to exceptionality.

42. In my judgment the word "infirm" is not obviously apt to describe the condition of the claimant which results from his mental illness. His phobia results in disability because he finds it very difficult to mix with other people. The conditions of his imprisonment are such that his immediate anxieties are to a large extent contained and avoided. He knows that he will not be co-located in a cell with another prisoner. He organises his activities in a way which, for the most part, avoids unforeseen contact, unless he wishes it. He is apparently much less upset and concerned about contact with prison staff. He manages his guitar lessons and attends the visits from his parents. Despite the debilitating nature of his mental illness, in my judgment Mr Eldridge was fully entitled to conclude that the claimant is not infirm as a result.

43. Miss Prochanska advanced two subsidiary arguments. The first is to the effect that Mr Eldridge did not explicitly deal with the issue that the claimant decided to remain in closed conditions and so in the result he did not and could not (unless he changes his mind) progress to open conditions as a stepping-stone to release. The point was made in the original representations (and I have quoted the paragraph relating to it). It was also dealt with in Mr Fordham's report. It is, in my judgment, clear that Mr Eldridge was well aware of this point. There is no basis for the suggestion that he did not take it into account. It was a peripheral point in the original representations and not one that as a matter of law had to be dealt with in his reasons. The purpose in Miss Prochanska raising this argument was to suggest that the matter had been inadequately dealt with by the Governor, and so he should be required to consider it explicitly. I am unable to accept that submission.

44. Miss Prochanska's second subsidiary argument related to the use of Dr Ardron's report. The policy to which I referred at the outset contains a paragraph to the effect that a prisoner will be given an opportunity to comment on materials placed before the Governor making the decision on home detention curfew. That did not happen in the case of Dr Ardron's report before Mr Eldridge re-affirmed his decision for the last time. It is submitted that this amounts to a procedural irregularity and was unfair.

45. I have mentioned that the continuing decision-making process in effect collided with the litigation. The two ran side by side for some time. There was, in fact, some correspondence between the parties concerning whether Dr Ardron's report had been prepared for litigation or as originally contemplated in Mr Eldridge's letter of 22 December 2010. Given the speed at which these events were moving on both fronts, and given the important context, namely that this was an offer by the Governor to reconsider his decision yet again, it does not seem to me that the claimant can sustain any public law complaint as a result of the Governor's failure to produce Dr Ardron's report in advance of that final decision.

46. Finally, I should record that the re-amended grounds of claim raised arguments by reference to the Equality Act 2010, the Disability Discrimination Act 1995 and Articles 8 and 14 of the

European Convention on Human Rights. None of these was pursued in oral argument.

47. My conclusion is that the decision of the Governor to refuse early release on home detention curfew was lawful. In the result, this claim is dismissed.

48. Are there any ancillary matters, Miss Prochanska?

MISS PROCHANSKA: My Lord, simply in terms of the order.

MR JUSTICE BURNETT: You have public funding, have you not?

MISS PROCHANSKA: Yes.

MR JUSTICE BURNETT: Miss Davidson, I am rather assuming you will not seek costs, but I may be wrong?

MISS DAVIDSON: My Lord, you are not wrong.

MR JUSTICE BURNETT: I am not wrong, good. So the order will be: claim dismissed, and the usual public funding order for the claimant. There is an order in place, which was made some time ago, protecting the identity of the claimant.
