NEUTRAL CITATION NUMBER: [2021] EWHC 3697 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT LEEDS

Case No. CO/1533/2021

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Tuesday, 7th December 2021

Before:

HIS HONOUR JUDGE KRAMER sitting as a judge of the High Court

BETWEEN:

R (OAO BROOM)

and

THE PAROLE BOARD OF ENGLAND AND WALES & THE SECRETARY OF STATE FOR JUSTICE

MS T DASAOLU appeared on behalf of the Claimant
NO ATTENDANCE by or on behalf of the First Defendant
NO ATTENDANCE by or on behalf of the Second Defendant

JUDGMENT
(Approved 21 February 2022)

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HHJ KRAMER:

1. This is an application to quash the decision of the Parole Board of 12 January 2021, although the claim form also refers to a decision of 22 January 2021, refusing to recommend the transfer of the claimant, Mr Broom, to open conditions.
2. Permission was granted by HHJ Gosnell, who also extended time for the claim. He granted permission in relation to the Parole Board but as regards the second defendant, the Secretary of State for Justice, he refused permission on the basis that the impugned decision was not his.
3. The reason that there are two decisions identified in the particulars of claim, or two dates given for the decision, are that the decision of the Parole Board was on 12 January 2021, recommending that there not be a transfer to open conditions, but on 22 January 2021, the Secretary of State for Justice acted on that recommendation and refused transfer. However, the 22 January decision is not now the subject of this claim, permission having been refused.
4. At the beginning of the hearing, there was one procedural matter to tidy up . The judicial review claim form, at section 7, seeks the quashing of an order by the Secretary of State for Justice. However, it is perfectly apparent from the text of the application, and the fact that permission has been granted, that what is sought is quashing of the order of the Parole Board, and I gave permission for section 7 to be amended to add the words, "and the Parole Board, without need to re-serve".
5. After HHJ Gosnell refused permission as regards against the claim against the Secretary of State for Justice, HHJ Klein ordered ,on 23 August 2021, that that second defendant remain as an interested party.
6. The claimant is represented by Ms Dasaolu of counsel. The Parole Board have not attended. In their acknowledgement of service, they do not seek to defend the decision. They point out that the application to quash the decision of 22 January, which was not theirs, is misplaced On 30 July 2021, the Government legal department for the Parole Board said that they were taking a neutral stance and would not be taking part in the application.
7. The Secretary of State for Justice has not appeared. The acknowledgement of service makes the point that the decision was not that of the Secretary of State but for the Parole Board. On 29 July 2021, the Government legal department indicated that the Secretary of State remains neutral in these proceedings.
8. The absence of participation by the Board and the Secretary of State seems, in my experience, to be a common theme of applications to challenge decisions of the Parole Board. I am bound to say that its effect is that the argument tends to be all rather one-sided, which does make life more difficult for the Court because it is not the role of the Court to take on the position of the Secretary of State for Justice and, in a sense, act as devil's advocate to challenge the claim. The Court's only role is, really, to hear the arguments and investigate their strength.
9. The history of this case is as follows. The claimant, John Broom was born on 17 March 1961. He is now aged 60. He is a serving prisoner at HMP Wakefield, part of the high-security estate. He is a Category A prisoner.
10. On 4 February 1992, he was sentenced for offences of rape and buggery involving two women, one of whom, he both raped and buggered, and the other, whom he raped. These were 16 and 19-year-olds who were walking home in the early hours, and were randomly approached. He also was convicted of two indecent assaults against these women.
11. He was apprehended, and, indeed, convicted on DNA evidence. He has always denied his involvement. He was sentenced to life imprisonment for the rape and buggery, with a tariff of eight years two months and 28 days. He was given five-year concurrent prison sentences for the indecent assaults.

12. His tariff expired on 1 May 2000, over 21 years ago. It is right to add to the picture that in 1979, he had been convicted of the rape of a former girlfriend whom he had threatened with an air pistol.
13. On 17 October 2017, the Parole Board undertook a post-tariff review to examine whether he should be transferred to open conditions. That panel heard from Professor Crichton, a consultant psychologist instructed by the claimant's solicitors, and Ms Ainsworth, a prison psychologist for the defendants.
14. It was concluded at that stage, that the risk of serious harm to the public was high, and the risk of sexual violence was also high, albeit that Professor Crichton said it was medium to high at the time.
15. The conclusion of that panel was as follows:

> "The panel considered all the evidence of your legal representative's submissions. You are deemed insufficiently motivated for the Kaizen Programme. The panel considered the current assessments of risk, and gave credit for relevant offending behaviour work completed. Professor Crichton said that risk will have reduced as a result of age. In addition, you have completed a number of accredited cognitive behavioural programmes addressing many of the key risk factors, including problem solving and decision making, emotional management coping skills, and exploration of beliefs supportive of violence, the latter via CALM, and, more recently, RESOLVE.
> You have completed R&R and TSP. Both R&R, and ETS, which TSP subsequently replaced, have been extensively evaluated, and you are known to have good outcomes with men who have convictions for sexual offences".

16. Later on, it says:

> "Whilst the psychologists agree that you would benefit from completing some work looking at healthy sexual relationships, this could be done in open conditions, and it would, in fact, be beneficial for it to be done where you have the opportunity to develop healthy relationships outside a prison environment
> Both psychologists stated at the hearing that the risk you present could be managed in open prison conditions".

17. On 18 January 2018, the Secretary of State accepted that recommendation, and gave Mr Broom instruction as to what he needed to do about discussing his transfer to an open prison.
18. However, on 26 March 2018, that acceptance was withdrawn, not because of any behaviour on the part of Mr Broom between the decision of the Parole Board and the withdrawal or, indeed, his improper behaviour prior thereto, but because, according to the the letter, the correct procedure had not been followed, in that certain people who should have been , had not been consulted. Such consultation had now taken place with the result that a decision had been taken to withdraw the agreement to transfer.
19. The basis upon which that was put, was that, this is a letter informing him that he was not to be sent to open conditions:

> "The Secretary of State has considered your index offence, and the overarching consideration for the protection of the public, and has

> concluded that there is not a wholly persuasive case for moving you to open conditions at the current time.
> Your index offences demonstrate extreme sexual violence. Despite your criminal conviction, and overwhelming evidence presented to the Court, you continue to deny responsibility for those offences. Denial of guilt cannot be an absolute barrier to progression, including transfer to open conditions, but in your case, that denial and the consequent unsuitability for courses that were designed to address your risks mean that the motivation behind your offending has not been properly examined at the current time.
> The Secretary of State is not satisfied that your propensity [to] commit a sexual offence has yet been fully explored.
> Undertaking the Kaizen Programme, which does not require an admission of guilt will give you the opportunity to demonstrate through the engagement, that you have reduced your risk of sexual violence. Against that background, progress to conditions of lower security is more within your reach, with your next Category A review taking place in April 2018".

20. The review with which I am dealing is that which started on 8 September 2020, the decision being made on 12 January 2021. The hearing of 8 September was adjourned to obtain a Programme Needs Assessment, to consider transfer to open conditions. It appears that some evidence has been heard on both occasions, because the decision letter itself refers to evidence being heard over two dates.
21. The decision letter noted that there had been a change since the last review. As regards the Kaizen course, the claimant had said that he would not participate as he had done work on other courses which was suitable, and this was a course for violent sex offenders, and he was not one of those. In that view, it seems that he was supported by the Programme Needs Assessment which was ultimately conducted, because that also said that Kaizen was not suitable, but there was a recommendation that he be assessed for a Healthy Sex Programme for which he would have to be assessed.
22. On a review of that assessment, it was suggested that there was no need for him to undergo the full programme, but a bespoke six-to-eight session programme could be provided to him, supplemented by written work and reflection on his part, but this was not available in open conditions; a contrast to the position in 2017, where it appeared that some sort of Healthy Sex Programme was available in open conditions.
23. Mr Broom declined to take part in this work, saying that he would not do so unless he was transferred to open conditions,. The probation panel responded that it was not in a position to enter into that sort of bargain.
24. The conclusion of the panel is set out at paragraph eight of the decision letter, and they say this:

> "The panel considered your case afresh, and based its decision on the documentary and oral evidence presented in the hearing. The panel is satisfied on the evidence of your prison offender manager, your community offender manager, and the prison psychologists, that important core risk reduction needs to be completed before you can progress in your sentence. The Programme Needs Assessment has identified a means whereby the necessary work can be accomplished, and which does not require any admission of guilt by you. The panel

> prefer and accept the assessment of Lisa Hewitt, that this work constitutes core risk reduction, and not simply revision and consolidation, as suggested by Professor Crichton.
> There are potential benefits in a transfer to open conditions, but any such benefits are outweighed by the continuing risk you present to the public occasioned by the outstanding core risk reduction work still to be done.
> You have an opportunity to progress if you choose to engage in the suggested work designed to fully identify and address your risks.
> Release is not sought, nor recommended, and the panel make no direction for release.
> For the reasons stated in this section, the panel is satisfied that you have not reduced your risk to such extent that you meet the criteria for a transfer to open conditions.
> Accordingly, the panel make no recommendations to the Secretary of State".

25. The Secretary of State wrote, on 22 January 2021, to say that they had received this report and there was not going to be a move to open conditions, and that the next review would be set for 18 months; that is in July of 2022.
26. There are two grounds upon which this decision is challenged. The first is that, "The panel failed to take into account relevant considerations". These are considerations which it is required to take into account by the Secretary of State for Justice,. That is a ground that the decision was unlawful in not being undertaken in accordance with the way in which they were directed.
27. Ground two is that the panel's findings were not supported by the evidence. That is a straightforward *Wednesbury* unreasonableness challenge.
28. Before looking at the details of the decision, and the challenges, it is as well to look at the legal framework under which the Parole Board makes these decisions, and also the Court's approach to such challenges.
29. The approach was well summarised by HHJ Dight CBE, sitting as judge of the High Court in the Queen on the application of *Hutt v The Parole Board of England and Wales* [2018] EWHC 141(Admin). At paragraphs 10 to 12 of the judgment he said:

> "The legal framework is as follows. The Parole Board are obliged to comply with directions issued by the Secretary of State under section 239(6)(6) of the Criminal Justice Act 2003, which are headed, 'Transfer of life sentence prisoners to open conditions'.
> Paragraph 3 of the introduction to the directions states:
> 'A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect, and, in particular, on the need for the lifer to have made significant progress in changing his/her attitudes, and tackling behavioural problems in closed conditions, without which, a move to open conditions will not, generally, be considered'".

30. He goes on:

> "That is the starting point; identifying that the task which the Parole Board is obliged to undertake, is a balance of risks and benefits. Paragraph 4 requires the Parole Board to take into account all the

information which it has before it. Paragraph 7 sets out the four factors which were identified in section 1 of the decision letter in the following terms".

These are:

"The Parole Board must take the following main factors into account when evaluating the risk of transfer against the benefits:

(a) The extent to which the lifer has made sufficient progress during sentencing, in addressing and reducing the risk to a level consistent with protecting the public from harm, in circumstances where the lifer, in open conditions, would be in the community, unsupervised, under licensed temporary release.
(b) The extent to which the lifer is likely to comply with the conditions of any such form of temporary release.
(c) The extent to which the lifer is considered trustworthy enough not to abscond.
(d) The extent to which the lifer is likely to derive benefit from being able to address areas of concern, and to be tested in a more realistic environment, such as to suggest that a transfer to open conditions is worthwhile at that stage".

The judgment goes on:

11. "Therefore, it is apparent, not only that a balance has to be undertaken but that the first two of the four factors require the Parole Board to look at risk to the public, whereas the last two factors require them to look at the potential benefits to the life prisoner, and a balance has to be struck between the two."

12. "It is an error of law not to take into account the four factors in balancing risks and benefits in the way required by the directions, as is apparent from the decision of Supperstone J in *R (on the application of Hill) v Parole Board* [2012] EWHC 809 (Admin). The first point made by the learned judge in paragraph 11 of relevance to this case, is where he says:

'However, it is clear that suitability for release, and suitability for open conditions require the application of different tests. In paragraph 12, his Lordship said, in looking at the two different tests relating to the release on licence, and transfer to open conditions, by contrast, the test set out in the directions relating to the transfer of a lifer to open conditions that I have quoted is a 'balancing exercise test'".

31. In that case, the decision was quashed because certain of the factors had not been considered, as is apparent from paragraph 16, for after having referred to *Rowe v Parole Board* [2013] EWHC 3838 (Admin), where a similar problem seems to have arisen, he says:

"It is exactly the same in this case. There is the statement in section 1 of the decision letter of the test that has to be applied, and there is the conclusion in section 8 of the decision letter in which the Parole Board say they have decided that there would be no recommendation that the applicant be transferred to open conditions. There is no identification

> by the panel, expressly or otherwise, of the specific factors which should have been taken into account in the separate balancing exercise which was to have been undertaken when considering a transfer to open conditions, as opposed to the test to be applied when considering whether to release the applicant on licence".

32. The test for release on licence is not a consideration here because, in this case, we are only looking at a release into open conditions. However, what is common to the argument in this case, is that there has not been an identification by the panel of the specific factors they have to look at.

33. At paragraph 18 he said

> "In this case, there is no specific reference in the decision letter to the way in which the Parole Board have evaluated the four factors, or the material which they have taken into account in doing so. There is no reference to the benefits to Mr Hutt required by the third and fourth factors. One cannot ascertain from the decision letter, the factors which should have been addressed or the process through which the balance exercise was said to have been undertaken. There is simply a conclusion, with no reasoning with which the Court could grapple, in seeking to evaluate whether the process has been undertaken properly".

34. I was also referred to the decision of Judge Allen, sitting as Deputy Judge of the High Court on the application of *Stephens, R (on the application of) v the Parole Board and the Secretary of State for Justice* [2020] EWHC 1486 (Admin), where the decision of the Parole Board was quashed in a case concerning the refusal to recommend the transfer a life-sentence prisoner because decision, as reflected in the Board's letter, did not consider all four of the relevant factors. In particular, in that case, the second and fourth were not considered, those being: "The extent to which the prisoner is likely to comply with the conditions of any such form of temporary release" and the "benefit in addressing areas of concern and being tested in open conditions".

    That was thought sufficient to quash the decision.

35. There are, indeed, some similarities with that case and this, in that, that was the case of a life-sentence prisoner who had been convicted of murder, denying his offending, where the decision letter had said:

> "To recommend open conditions, the panel must be confident that areas of core risk have been addressed. Whilst you maintain innocence, a number of such factors have been identified but no work has been done to address these areas. Given the outstanding areas of risk, the panel could make no recommendation for progression".

    The similarity here is that Mr Broom's continual denial of the offences is said to be impeding investigation in core work concerning his motivation.

36. Having looked at the function of the Parole Board, I will just look at the function of the Court in such cases; something which I myself, have dealt with not so long ago in the case of *MacKay, R (on the application of) v the Parole Board and the Secretary of State for Justice* [2019] EWHC 1178 (Admin). There, having looked at the role of the Parole Board, and also pointed out that the Parole Board has a judicial function, as has been stated in the application

of *R (Brooke & Others) v the Parole Board* [2008] 1 WLR 1950, I said this concerning the role of the Administrative Court in reviewing a decision of the Parole Board at paragraph 35:

> "Turning to the role of the Administrative Court in reviewing a decision of the Parole Board, this was recently considered by the Court of Appeal in *Brown v The Parole Board of England and Wales* [2018] EWCA Civ 2024. Giving the judgment to the Court, Coulson LJ reviewed a number of authorities on the test for judicial review in relation to decision of the Parole Board. Again,. I am not going to go through all of the authorities, because they all appear in that decision. Coulson LJ referred, at [47] to *Alvey, R (on the application of) v the Parole Board* [2008] EWHC 311 (Admin), and the judgment given by Burnton J, at [26]. The principle which arises from that extract, is that is not for the Court to substitute its own decision for that of the Parole Board. It is they who have the task of weighing up the competing considerations, and assessing the risk".

At paragraph 36 I said:

> "Having reviewed the authorities, Coulson LJ at [51 of *Brown v The Parole Board of England and Wales* said:
>
> "The test applied by the Divisional Court in *R (DSD and NVB) v Parole Board of England and Wales* [2018] 3 WLR 829, and in all other authorities noted above is whether the decision of the Parole Board could be said to be irrational, in accordance with the classic test set out in *The Associated Provincial Picture Houses and Wednesbury Corporation* [1948] 1 KB 223 [229]'.

The only gloss upon the test which is referred to at [52] , is that, since the liberty of the claimant is at stake, any challenge must result in the Court looking at the decision with anxious scrutiny. At [53], he continued that, apart from that modification,

"I can see no basis for this Court to depart from the conventional approach to the review of Parole Board decisions. The relatively high threshold of irrationality is appropriate when the Administrative Court is reviewing the decisions of the Parole Board. It properly reflects the Parole Board's judicial function, its inquisitorial role, its specialist expertise, and the important and complex role that it performs".

37. This last consideration, that requiring the Court to give anxious consideration when a person's liberty is at stake, coupled with the fact that the Parole Board has a judicial function, must result in the standard of reasons required of the Board being higher than what has been termed, "the less exacting standards" applied to ordinary decision-making. See *R (Nottingham Healthcare NHS Trust) (on the application of) v Mental Health Review Tribunal (Northern Region)* [2008] EWHC 2445, at [18]. The latitude of expression, which is acceptable where a decision-making panel is not chaired by a lawyer, as was referred to in *R (The London Fire and Emergency Planning Authority) (on the application of) v the Board of Medical Referees* [2007] EWHC 2505 Admin, at [14], must have less application here, when the Board is carrying out a judicial function in which somebody's liberty is at stake.
38. I now turn to the grounds. The first ground is that, "The panel failed to take into account relevant considerations". I have already set out the four considerations which are to be found in the extract which I read from the case of *Hutt*.

39. I now look to how they are dealt with in the decision. At paragraph 4 of the decision letter, it is said:

> "Generally, it is noted by the report writers that your history of offending demonstrates poor consequent thinking skills, poor emotional management, propensity to use violence, poor relationships, inability to cope with stressful situations, and abuse of alcohol. Your major risk factor is problematic and deviant sexual behaviour, but this remains largely unexplored, and, therefore, cannot be precisely analysed and determined. These risk factors have previously been conveniently summarised as 'using alcohol as a coping strategy, preoccupation with sex, and interest in risky sexual behaviour, problem solving, emotional management coping skills, and beliefs supportive of violence'".

40. It is to be recalled that, the earlier June letter, that is the 2017 decision, reference is made in the conclusions of the panel to Mr Broom having completed courses to deal with key risk factors including problem solving, decision making, emotional management, coping skills and an exploration of beliefs supportive of violence and that he had undertaken a number of courses to deal with these issues which have been extensively evaluated as leading to good outcomes, and that he had done well on those courses. Indeed, the fact of his attendance on those courses, and that he is known as, "a well-behaved and polite prisoner, lacking adjudications", is noted in paragraph 5 of the decision.

41. At paragraph 6 there appear in the letter just two-and a-bit lines which deal with three of the factors. It says:

> "You are capable of engaging with your supervisors, and following instructions, as shown by your custodial behaviour. There are no concerns that you present a risk of absconding".

42. Later, in paragraph 8, at the, "Conclusions and decision of panel" the letter says:

> "There are potential benefits in a transfer to open conditions, but any such benefits are outweighed by the continuing risk you present to the public, occasioned by the outstanding core risk reduction work still to be done".

43. Ms Dasaolu argues that, as regards factor two, that is to say, "The extent to which the individual is likely to comply with the conditions of any such form of temporary release, should the authorities and the open prison assess him as suitable for temporary release"; simply to say that he is capable of engaging with supervisors and following instructions which is in a high security environment, is just an observation. There is, no identification of whether or not he is likely to comply with conditions if he were on a temporary release, and, indeed, whether he would be likely to comply, and the extent to which he will comply.

44. Accordingly, she says, on the face of the decision, that factor has not been considered at all, and if it has not been considered at all. It clearly has not been put in the balance and since the Parole Board are required to do just that, it has not done part of that which is directed.

45. I agree with Ms Dasaolu, that this factor does not appear to have been considered on the face of the decision. Thus, one cannot tell what, if anything, was taken into account in relation to Mr Broom's likelihood of complying with conditions if he were placed on a temporary release.

46. Notably, an important factor to take into account, though are not the only factor is the extent to which there is likely to be compliance. That suggests that what has to be considered is the amount of compliance, and what level of compliance would help to tip the balances in favour

of a transfer into open conditions, and what level should be regarded as something which would be not regarded of particular weight towards that end.

47. Furthermore, I agree with Ms Dasaolu, that even if one could read into this passage in the decision, though frankly I do not think one can, that the Board was saying that they were taking into account whether Mr Broom had, in the past, followed instructions and engaged with supervisors, that is the in the setting of a high-security prison. What they have to consider, however, is the response to the imposition of conditions if there were temporary release. It seems to me, that factor has not been properly identified, and has not been considered in the making of the decision.

48. The third requirement is that the Board look at the extent to which the person is considered trustworthy enough not to abscond.

49. Ms Dasaolu emphasises the use of the word "trustworthiness". She says that does not simply mean whether you are going to abscond or not, that is not the test. The question is whether you are generally trustworthy, one feature of that being that you are so trustworthy that you will not abscond. The panel have said about this, "There are no concerns that you present a risk of absconding".

50. It seems to me, that, what this particular consideration is directed at is, just as HHJ Dight CBE considered in *Hutt*, a question of public safety. Is this person likely to abscond? It is not a general assessment of trustworthiness, as to which, one of the risks to be considered is absconding. Trustworthiness is, in any event, a key to considering whether there is likely to be compliance with conditions if on temporary release, because, of course, if somebody is on temporary release, the chances to monitor what they are doing is much reduced. Therefore, trustworthiness is very important.

51. This is a factor which has certainly been identified as the Board says there is no concern that there is a risk of absconding. Whether, however, it was put into the balance or not does not appear from the decision at all. Frankly, it looks as if it was not, for under the heading of "Conclusion and Decision of Panel", what is set against the risk presented to the public, are potential benefits in transfer to open conditions. The absence of a risk of absconding cannot properly described as 'a potential benefit of a transfer to open conditions.' Therefore, it is difficult to see where, if anywhere, it has been placed in the balance.

52. The fourth factor is "the extent to which the prisoner is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment, such as to suggest that a transfer to open conditions is worthwhile at that stage". Ms Dasaolu says that Professor Crichton identified two benefits. The first being that, as Mr Broom had been in a high security setting for 28 years at the time his first report. He was, to a degree, institutionalised, and would find being in the outside world, too stressful, so, he did not think he could be appropriately managed in the community. This is paragraph 45 in his first report; "Open prison conditions would provide support and supervision, and, as such, would provide barriers to further offending". Therefore, that would be one of the benefits.

53. In addition, Ms Dasaolu says another benefit is referred to by Professor Crichton, in that, were Mr Broom to go to a less secure setting, he could benefit from revision and reinforcement of previously undertaken work which would be more effective than the repetition of previously completed courses.

54. I have just referred to the reference to benefits in the Board's conclusion. It says no more than that there are potential benefits in a transfer to open conditions. Given the standard of reasons expected of the Parole Board, namely, that the parties know what factors have been taken into account, the general catchall reference to potential benefits is insufficiently informative for these purposes.

55. The benefits identified by Profession Crichton are important in this case, as it is evident that everybody in the prison can see, as indeed can Mr Broom, that a stalemate is developing. Mr Broom's progress through the prison system, which by any description, is very slow, given that he is still a Category A prisoner, 20 years post tariff, needs careful evaluation and investigation to see what could be done to move him on. That must include the identification of the benefits of any transfer which may aid that progression, and a careful examination of their potential to break the stalemate.

56. In this decision, I cannot see any identification of the benefits, or any indication that there has been an examination of the relative merits of those benefits, and what they can achieve, and that a balancing of those benefits against the risk which was identified.

57. My conclusion on Ground 1, is that the decision to refuse the transfer to open conditions was not lawful because it failed to identify the facts relevant to factors two and four, which were, undoubtedly, information for the Board to consider and put in the balance, and it failed to put into the balance the absence of risk of absconding which they had identified, but did not make reference to in their conclusions.

58. Neither the defendant or the interested party has asked the Court to reach a conclusion as to what would have happened if these factors had been considered, and had been placed in the balance. Nevertheless, I am clear that it cannot be said that the decision would have remained the same, even if these factors had been properly identified and evaluated.

59. I also asked Ms Dasaolu to address me on the question as to the practical effect of quashing the decision, since these orders are discretionary. I asked that question because there will be a consideration of transfer in July 2022, all things being equal, and work is to begin on that in January 2022.

60. It may be said that the application has been overtaken by events. She argues, and I accept, that the refusal by the Secretary of State to accept the Parole Board's decision of 2017, has been taken as a starting point for this impugned decision. Although it is a decision afresh, they do refer to the earlier decision and they see that nothing has happened since the last decision in terms of courses. She is concerned that if this decision is to stand, it too would be taken as the starting point, would prejudice applicant given that nothing has changed since this decision, Mr Broom continues to deny the offences and will not take part in the truncated Healthy Sex Programme on offer.

61. The view may be taken that transfer to open conditions will be refused until he changes his mind, and either decides to go on the course or accepts he has been guilty of the offending, which Ms Dasaolu suggests is tantamount to saying that until he admits his offence, he will remain a Category A prisoner.

62. That last submission, it seems to me, puts the case too high. It is not said by the prison that he must accept guilt to follow the course planned for him. Indeed, the course has been designed to avoid having to deal with his denial.

63. Nevertheless, Ms Dasaolu's point that the decision will be taken as a starting point, is a good one. Thus, if it is an unlawful decision then it ought to be quashed, and the matter remitted to a reconstituted panel.

64. Ground 2, in a sense, it loses importance in view of my decision on Ground 1. The ground is that, "The panel's findings were not supported by the evidence". It is said that there are two respects in which this has happened. The first is that, "The conclusion on current risk of reoffending was not supported by the evidence". The second is that "The conclusion that the core risk reduction work remained largely unexplored, and was not supported by the evidence". These two are interrelated.

65. In order to consider these submissions, it is necessary to look at the evidence, at least, a summary of the main features of the evidence that was before the panel. I start with the report

of Jenny Ingram. She is a chartered psychologist and registered forensic psychologist. She produced a report on behalf of the Ministry of Justice. Her report is dated 14 August 2019. At paragraph 3.3 of her report, she said:

> "While in custody, Mr Broom has maintained an exemplary prisoner record, receiving a minimal number of proven adjudications at the beginning of his sentence. There have been none recorded since 1997. He has not provided any positive drug tests and has remained on the standard IEP scheme for the majority of his sentence.
>
> There are positive notes with regard to his work ethic, and he is said to engage well with both staff and prisoners.
>
> 3.4 Mr Broom has engaged in various treatment programmes, including R&R, 2003, CALM, 2005, Thinking Skills Programme TSP, 2014, and RESOLVE in 2014. As a result of this, he has understood that he has developed insight into his difficulties, and has developed effective ways of coping.
>
> 3.5 The Sexual Violence Risk, SVR-20 Assessment, Version 2, indicates that Mr Broom is at a medium risk of sexual reoffending, and highlights a number of factors which have been empirically linked to sexual violence. These include sexual deviation; relationships, partially present, but potentially, highly relevant; broad sexual offending; extreme minimisation or denial of sex offences.
>
> In regard to the issues to be addressed, whilst Mr Broom has engaged in a number of offence-focused courses[?], in my opinion, he would benefit from exploring the elements of his sexual offending that would not have been explored in CALM, R&R, TSP and RESOLVE".

3.7:

> "From my perspective, whilst some progress has been made, elements of Mr Broom's risk behaviours remain unexplored. Fundamental to this are the problematic/deviant sexual behaviours that are not yet fully understood, but do appear linked to his offending behaviour. Without this understanding, risk management strategies will be difficult to develop.

66. In addition, at 7.8, she goes through the SVR-20 risk assessment and under the heading, "Psychosocial adjustment, sexual deviation", she says:

> "Given that Mr Broom does not admit to his sexual offending during interview, he was unable to reflect on any sexual deviant thinking at the time of the offence. Victim reports do, however, indicate that he was sexually aroused during the offences. Despite this lack of insight, collateral information does suggest a pattern of sexual deviant behaviour over time. Therefore, the item, 'sexual deviation', is rated at present, historically. A rating for the presence of any recent/recurrent last 12 months sexual deviation is omitted due to lack of information".

At paragraph 9 the says:

> "From my perspective, while some progress has been made, elements of Mr Broom's risk behaviours remain unexplored. Fundamental to this area are the problematic/deviant sexual behaviours that are not yet fully

understood but appear to be linked to his offending behaviour. As such, moving forward, it is difficult to comment on risk management strategies for the future".

At paragraph 9.1, she says:

> "The SVR-20 risk assessment contained with this report indicates that Mr Broom is at a medium risk of sexual offending, reoffending. SVR-20 risk assessment indicates that Mr Broom has some risk factors that are linked to his use of sexual offending. These include sexual deviation; relationships, partially present but potentially, highly relevant; non-sexual offending; extreme minimisation and denial of offences".

67. She recommended that Mr Broom should be encouraged to engage in a Programme Needs Assessment with a member of the psychology department. He did so and a Ms A Gaskell made an assessment which was then reported on by Lisa Hewitt, a chartered psychologist, and senior forensic and registered psychologist, in her review report dated 27 November 2020. She said that from her general knowledge of Mr Broom's case, "It is clear he has engaged well in a number of different offence-related and focused programmes." She sets those out, those being the ones that everybody else referred to and says:

> "None of these programmes however, have required him to consider or reflect specifically on his sexual interests and behaviours, and, it is my view that this is where the gaps in his insight remain".

68. It is, possibly unfortunate, but after 30 years in prison, this still seems to be the case. At 3.4, she says; "The PNA…"; this is the Programme Needs Assessment:

> …details the outstanding treatment needs within the healthy sexual interest domain, specifically, thinking about sex a lot, liking sex to include violence and other sexual interest-related offending.
>
> I concluded that the links these both have to Mr Broom's offending behaviour, and the impact on his intimate relationships, remain unexplored.
>
> In addition, the treatment needs of thinking makes sexual offending okay, and not having a close relationship with another adult, are likely to be linked to those areas within the sexual interest domain, and also require further exploration and management.
>
> It was, and remains my view, that these areas should be the focus of a future intervention with Mr Broom".

69. At 3.5, she goes on to say that Kaizen is not appropriate for him, and in referring to the Healthy Sex Programme she says:

> "Individuals who engage with Healthy Sex Programme, typically, acknowledge and accept unhealthy sexual interests that are linked to their offending behaviour. Participants also acknowledge unhealthy sexual fantasies which is either ongoing, or there is the identification of concerns that may be problematic in future. I am aware that unhealthy sexual fantasy is not an area which Mr Broom identifies as being relevant. However, an assessment for this programme, in my view,

remains appropriate to determine the specifics of the outstanding work".

And at 4.3:

> "Whilst Mr Broom has spoken openly about aspects of his lifestyle, the attitudes and believes that underpinned and drove his behaviours remained unexplored. Mr Broom is honest in his appraisal of his life because he had to develop insight into his sexual interests and why he behaved in the ways that he did. Despite reporting a fulfilling sexual relationship with his wife, I remain of the view that gaps in his insights and understanding in these key aspects of his life, require specific intervention to enable Mr Broom to manage risk upon release".

Here, she is talking about release, not open conditions.

4.4:

> "When considering the information that Mr Broom has provided, alongside the criteria for HSP, it is my view that the full HSP is not appropriate at the current time. Mr Broom does not acknowledge any past or current offence-related fantasy, and does not foresee this as being problematic for his future. I am also of the view that he understands the differences between "healthy" and "unhealthy" sex".

4.5:

> "There are key aspects of Mr Broom's lifestyle and sexual interests in which he lacks sufficient insight, and which are likely to lead specifically to the offence-related thoughts and behaviours. He needs to develop his understanding of his voyeuristic activity and his interest in underwear, and how this manifested outside of his relationship with his wife".

"In the history of this gentleman's behaviours, he accepts he engaged in voyeuristic behaviour, that is, seeking to espy other people in sexual purpose, and he found, particularly, underwear, arousing. "He is currently unable to say how his interest developed, and why he continued to engage in these behaviours".

4.6:

> "As there are specific areas of relevance identified, it is my view that that that bespoke individual work with Mr Broom could be conducted to examine the outstanding risks. At present, this is likely to be approximately six to eight sessions tailored to meet his individual needs. It should incorporate all aspects identified within the report".

She goes on to say there might need to be some additional reflection and written work.

5.1:

> "Mr Broom has not yet completed any work designed to explore, or work to manage the risks associated with the sexual offending, although

there have been no concerns regarding inappropriate sexual behaviour whilst at HMP Wakefield.
The outstanding risk factors that have been linked to his case are centred on sexual behaviours and interests".

5.3:

"It is unlikely that Mr Broom will ever change his stance in relation to the convictions that he has received, and a realistic view of what work he can possibly engage in should be considered.
I have reflected on all options available including the identification of bespoke individual work. In summary, it is my view that work should focus on his sexual interests and intimate relationships, as discussed at section 4".

She says she has got a positive relationship with Mr Broom but:

"Unfortunately, he does not wish to engage with this process. I acknowledge the frustrating circumstances Mr Broom finds himself in. I want to assist him to progress with this. He is, however, adamant, albeit politely, in his view, that he is not interested in the treatment pathway I have offered. I have encouraged him to reflect on this decision. Mr Broom is steadfast in his view that he wishes to be transferred to a Category D prison to prove himself. He feels very much that his next steps are dependent on the Parole Board's decision at the next hearing".

5.5:

"I am of the view that Mr Broom is not ready for open conditions or release at the current time due to the nature of the outstanding areas of risk in his case".

70. That was evidence given by those who have been asked to provide reports by the Ministry of Justice. Mr Broom obtained a report from Professor Crichton, who had also reported in 2017. He is a consultant forensic psychologist. He had performed the SVR-20 framework examination of Mr Broom in 2017, and he thought, having seen him in 2019, there was less evidence of attitudes that were supporting or condoning sexual offending within this period. He found there was some deterioration. The only area of deterioration he noticed was that he felt that the reintroduction of a recommendation to complete the Kaizen groupwork was being used simply as a means to keep him detained as Category A, and prevent any progression. It turned out that everybody agreed that Kaizen was not appropriate for him by the time of the 2021 review.

71. At paragraph 23, the professor says that,

"There is a substantial body of high-quality work showing that increased age is associated with significant reductions of risk. The fact that he is much older than most convicted is likely to indicate there is a sufficient reduction of risk."

Paragraph 32 identifies courses he has been on and says:

"The R&R course, and Thinking Skills Programme are problem-solving skills courses based on cognitive behavioural therapy model. There is no evidence of adequate quality to show that repetition of such courses has any additional impact on risk".

Paragraph 39, refers to paragraph 41, mentioning the benefits of reinforcement and revision when he is in a less secure setting. Paragraph 45. The other benefit of being in open conditions.

Then, at 47, he says,

"In my opinion, based on my SVR-20 assessment, Mr Broom currently presently at a moderate risk of sexual reconviction".

Paragraph 48, "I would assess the risk of harm to be high should he reoffend".

Paragraph 49, "I would assess the evidence of risk to be currently low".

Paragraph 50,

> "Mr Broom would not be likely to benefit from completion of the Kaizen group coursework. Meanwhile, there are no further mainstream groupwork courses within the offending behaviour pathway that would be likely to reduce risk or address outstanding clinical needs".

72. He suggests that his level of risk could not be managed in the community but could be in open conditions. Then there was an addendum to this because that was a 2019 report. Accordingly, on 2 September 2020, he produced an addendum, where he undertook a further SVR-20 framework test with the same result. He said the overall assessment was unchanged as to risk. There was a moderate risk of sexual violence, with a risk of serious physical harm, if such occurred, being high, although there was a low risk of imminence of risk.

    He goes on at 3.4,

    "My overall assessment of risk appears similar to that reported by Ms Ingram, based on her use of the SVR-20 V2 framework, and set out in her report".

    It is apparent from the decision that all report writers gave evidence at the hearing.

73. That was the evidence, and Ms Dasaolu says that there is a passage under the heading of "Current Risk", it is at paragraph 6 of the decision letter, which is not justified on the evidence, and it is this: "After stating that Professor Crichton using the Sexual Violence Risk-20 assessed your risk of reoffending as moderate, and the imminence of risk as being low…"; the panel went on, "…on balance, the panel prefer the opinions of the other report writers to those of Professor Crichton.
74. Ms Dasaolu argues that can't be right because Ms Ingram came up with a very similar finding that there was a medium risk of reoffending, with the imminent risk of risk of being low, and she had also done the SVR-20 test.
75. However, this submission has to be looked at, together with what is said about the undertaking, or not undertaking core risk work.
76. Ms Ingram had come up with a similar outcome for the SVR-20 risk assessment. However, when she was doing the assessment, she said the rating for sexual deviation was omitted due to the lack of information, as Mr Broom did not admit the offence. Accordingly, he was unable, in interview, to reflect on sexual deviant thinking at the time of the offences, hence the need to explore these risky behaviours in order to be able to suggest a risk management strategy for the future.
77. Professor Crichton expressed the view, and it seems he did so at the hearing because it is difficult to find it in his report or, indeed, the addendum, that, in view of the disclosures Mr Broom had made, and the courses he had completed, further work on core risk reduction was unnecessary.

78. Accordingly, when the panel say that they prefer the other report writers to the opinions of Mr Crichton, whilst it appears they are making no distinction about what is being said about risk reduction and the core risk work, it is clear they must be talking about their disagreement as to the benefits of core risk work because they clearly do not disagree with what Professor Crichton said as to the outcome of the Sexual Violence Risk-20 assessment. So much is evidence by the sentence which follows the passage as to disagreement in which they say:

> "In evidence, other report writers agree, that given your behaviour in prison, your age and probable maturity, you risk of sexual offending should be assessed at medium. The panel agrees with this assessment".

That is virtually the same assessment as Professor Crichton's assessment, and it does not seem that they were making a distinction between "moderate" and "medium". They certainly do not discuss there being a difference. Thus, whilst it may appear that this reference to Professor Crichton's SVR-20 assessment, is what has led them to preferring the evidence of one expert over the other, it does not seem to me that this paragraph can be properly read in that way.

79. Having looked in some detail at the expert evidence, what appears to be the case is that there was a conflict of expert evidence as to whether core risk work should be undertaken. Having heard from the expert witnesses on that subject, they preferred the evidence of the Secretary of State's witnesses, and there was a logic to reaching that conclusion.

80. The logic underpinning that evidence is that because Mr Broom is denying he committed the offences, it is more difficult to examine what his motivations were, and to what extent these were inspired or driven by what is described as his "deviant behaviour", and, for those reasons, that is something that will not have been adequately explored. Clearly, it will be very difficult, in any event, after this length of time, to be investigating somebody's motivation when committing an offence 30 years ago, and what part in that motivation, voyeurism and particular interest in underwear, held, or, indeed, attitudes to violent sex at the time. It is a long time ago.

81. There was evidence to support the conclusion that there was a benefit to be achieved from core risk work. The weight they gave to the evidence of Ms Ingram and Ms Hewitt, compared to that of Professor Crichton, was very much for them, and it is an area which given role of the Court in these cases, is one into which it ought not to trespass.

82. It was further argued under this ground that the panel's conclusion expressed in the words under the heading "Your risk factor"', "Your major risk factor is 'problematic and deviant sexual behaviour', but this remains largely unexplored", are factually incorrect, and, therefore, if they underpinned the conclusion of the panel, that conclusion was irrational.

83. It is the use of the word "largely" which is objected to, on the basis that the report records a number of risk factors, and a large number of courses which were undertaken which dealt with many aspects of these factors, as is apparent from the evidence of Ms Hewitt, at paragraph 3.3 of her report, and paragraph 3.5 of Ms Ingram's report, and the report of Professor Crichton.

84. However, to fix upon the word "largely" is an overliteral construction to place on this passage of the decision. The panel were particularly concerned about one area of risk; that which had been highlighted by Messrs Ingram and Hewitt; the need for Mr Broom to understand his voyeuristic activity and interest in underwear and how these manifested outside of his relationship with his wife. It was this lack of understanding which the Parole Board were concerned about, and arose from the evidence those two witnesses. There was no explanation as to what underlay the deviant behaviour, and what impact it had on the offences.

85. One of the points raised by Ms Hewitt was how it was that he kept his voyeuristic behaviour secret from his wife, which many lay people may not find surprising. Nevertheless, when the Board said that there were risk factors largely unexplored, they were, clearly, not referring to

all risk factors but the above specific risk factor to which their attention had been drawn by those two witnesses.

86. Again, there was evidence to support that factual conclusion, and, indeed, it is difficult to see what evidence there is as to what has been ascertained concerning these aspects of the deviant sexual behaviour identified. Accordingly, this, again, was a conclusion which was founded in the evidence, and cannot be criticised as being irrational for that reason.

87. My overall conclusion, therefore, is that the Ground 2 challenge which is, "Irrationality based upon facts having been found which are not supported by the evidence", cannot succeed. Having looked at the arguments, it seems to me, what I was really being asked to do, was to reach a conclusion as to what evidence should have been accepted, as opposed to reaching a conclusion as to whether there was evidence there which justified the decision which was reached.

88. Accordingly, I do not find on Ground 2, but on Ground 1 alone, as I pointed out earlier, the decision must be quashed and remitted to a fresh panel to be reconsidered.

End of Judgment.

Transcript of a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

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This transcript has been approved by the judge.