Neutral Citation Number: [2024] EWHC 855 (Admin)

Case No: AC-2023-LON-003165

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2024

Before:

DAVID PITTAWAY KC
(sitting as a Judge of the High Court)

- -

Between:

THE KING **On the application of** **MICKEY SCOTT**	**Claimant**
- and -	
1) THE SECRETARY OF STATE FOR JUSTICE **2) THE PAROLE BOARD FOR ENGLAND AND WALES**	**Defendant**

- -
- -

Philip Rule KC and Daniel Henderson (instructed by **Duncan Lewis**) for the **Claimant**
Cecilia Ivimy (instructed by **Government Legal Department**) for the **1st Defendant**
Paul Erdunast (instructed by the Parole Board) for the **2nd Defendant**

Hearing dates: 20 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DAVID PITTAWAY KC

David Pittaway KC:

Introduction

1. In this application for judicial review, which follows the Secretary of State for Justice's ("SOS") decision to recall the Claimant to prison on 1 February 2023, I am asked to consider whether the decision to recall him and the subsequent decisions made leading to his continued detention are unlawful. The Parole Board hearing had been fixed for 27 March 2024. The hearing before me is a rolled up oral hearing for permission and relief. The Parole Board was represented at the hearing but made no oral or written submissions.

Background

2. The background to this claim is that on 6 June 2016, the Claimant was sentenced to an extended determinate sentence with a custodial term of 9 years, which expires on 5 June 2025, and an extended licence period of 3 years, which expires on 8 September 2027, for serious sexual offences, including rape, committed in relation to his former domestic partners. In his sentencing remarks, on 16 June 2016, HH Judge Adkin noted that the Claimant's victims described him as *"intimidating, controlling, abusive, paranoid, jealous and violent."* He was placed on the Sex Offender's Register for life. He has previously been diagnosed with autistic spectrum disorder, ADHD and ODD.

3. On 10 September 2021, the Parole Board directed the Claimant's release on licence, commenting positively on his engagement with offending behaviour programmes, his insight into his offending, and his motivation to start afresh. Prior to his release, the Claimant had entered into a relationship with another woman, whom I shall refer to as Ms LX.

4. The Claimant was released from prison on 22 October 2021. He continued to engage well with his Community Offender Manager ("COM"), Mr Spokes, and no issues were reported in the first year of his release.

5. On 29 October 2022, the Police were called to Ms LX's house, to a report that the Claimant had left the property in anger and slammed a door causing damage. The Claimant apologised for his behaviour, and accepted a formal warning from his COM. He ended the relationship with Ms LX very shortly afterwards.

6. On 30 January 2023, the Claimant's COM received a mobile phone call from a third party, making allegations about the Claimant's aggressive and controlling behaviour in a relationship. No allegations were made of a criminal offence. The COM recommended that the Claimant be recalled to prison, and the SOS accordingly revoked his licence on 1 February 2023, on the grounds that he had breached the licence condition to "*be of good behaviour and not behave in a way which undermines the purpose of the licence period"* The Claimant was notified on 3 February 2023 of his recall, and voluntarily surrendered to custody on the same day.

7. On 9 February 2023, the Claimant was provided with a copy of the Part A Report, which formed part of his dossier. He obtained legal representation sometime in February 2023 and his case was referred to the Parole Board. On 16 March 2023, his solicitors made representations to the Parole Board and raised concerns about non-disclosure of information to the Claimant as to the reasons for his recall to prison.

8. On 9 June 2023, the Parole Board adjourned the matter and directed provision of a Part C Report. It also directed that, if required, a formal non-disclosure process be followed. On 11 July 2023, the Parole Board ordered, pursuant to Rule 17 of the Parole Board Rules 2019, that an email from the COM dated 22 June 2023 ("the Sensitive Material") be withheld from the Claimant, an approved gist provided, and the Sensitive Material itself be provided to his solicitors subject to a non-disclosure undertaking.

9. The gist provided to the Claimant stated: *"In late January 2023 the Community Offender Manager Service received information from a third party in respect of Mr Scott. This information indicated that Mr Scott had been behaving in a manner which was similar to the way in which he had behaved throughout his index offending. Although no criminal offences had been reported, reference was made to incidents of aggression and controlling behaviour on his part."*

10. The grounds given for the non-disclosure to the Claimant were that it would adversely affect the prevention of disorder or crime and the health or welfare of another person. On or about 11 July 2023 the Claimant's solicitors gave the undertaking and did not appeal the Parole Board's decision and has not challenged it in these proceedings.

11. On 13 July 2023, a further Report completed by the COM indicated that, following a thorough Risk Assessment, he was recommending the Claimant's release.

12. By 19 July 2023 a place at Highfield House Approved Premises had been secured, to which the Claimant could have been released with effect from 28 August 2023 for a period of eight weeks.

13. On 25 July 2023, further directions from the Parole Board confirmed that the case was ready to list, and that it required a non-specialist, two-member panel, and a half-day listing. The reasons noted that *"there are aspects of [the Claimant's] time in the community and the circumstances of his recall that need to be explored further in oral evidence and a full assessment cannot be made on the papers."*

14. On 31 July 2023, the Claimant's solicitors made further representations to the Parole Board, referring to new evidence, in the form of screenshots of WhatsApp messages, which they submit showed that his risk had not elevated and that the allegations made to the COM had been made maliciously. The information was obtained from the Claimant's mother, who provided two chains of WhatsApp messages, between the Claimant and Ms LX, and between Ms LX and the Claimant's mother. The Claimant maintains that the clear inference from those messages is that the allegations made by a third party were malicious, and were designed to ensure that the Claimant was recalled.

15. The Claimant's solicitors immediately passed the messages on to the Claimant's COM and the SOS's Public Protection Casework Section ('PPCS'). In light of the messages, the Claimant requested that the PPCS perform a Risk Assessed Recall Review

(‘RARR’), a review of the Claimant for suitability for executive release by the SOS directly, without the need for a full hearing before the Parole Board.

16. On 16 August 2023, the SOS (acting through a senior risk assessor in the PPCS) considered the Claimant’s representations, including the WhatsApp messages, and decided not to order release. The SOS was not satisfied that the Claimant was safe to be released, because the evidence was complex and uncertain, and there remained serious concerns about the Claimant’s risk of domestic violence. He considered the case should be further considered by the Parole Board.

17. On 22 August 2023, at the request of the Claimant’s solicitors, the SOS re-reviewed the evidence and again came to the same view. The basis for the second decision was: “*There is conflicting information that a third party has provided the Community Offender Manager and Mr Scott’s solicitor with, and PPCS are not in a position to state with confidence that this case is suitable for RARR re-release. The complexities and uncertainties of what has been said needs to be explored more thoroughly by the Parole Board.”*

18. On 31 August 2023, the SOS through the PPCS made an application to the Parole Board for an expedited hearing. The Claimant’s solicitors also wrote in support of that application.

19. The COM, referring to the WhatsApp messages, wrote that they *“may be viewed favourably in respect of [the Claimant] and which raise doubts about the validity of the allegations made against him. In light of the information retrieved from his phone (August 2023) the Probation Service no longer feels this is justified and as such an expedited parole hearing is requested. Mr Scott has been deemed unsuitable for a Risk Assessed Review (executive release) due to complexities around his recall. At this stage he is therefore just awaiting his case being listed for an oral hearing.”*

20. On 1 September 2023, the Parole Board refused the application for expedition on the grounds that the Claimant’s case does not meet the criteria for prioritisation. It also stated that the Duty Member *“understands why no executive release was granted as the circumstances of his recall do still remain somewhat unclear and in need of exploration*.” It asked for further information about a new friendship with a female who had been visiting the Claimant in prison, which it considered *“highly salient to risk.”*

21. In December 2023 the Claimant’s oral hearing was finally fixed for 27 March 2024, almost 14 months after his recall to prison.

Preliminary Application

22. At the outset of the hearing Mr Philip Rule KC applied on behalf of the Claimant for the disclosure to the Claimant of the information contained in the email from the COM, dated 22 June 2023, setting out the nature of the complaint that had been made by a third party. As set out above, the information had been withheld from the Claimant on the grounds inter alia of protecting the third party’s safety. It had, however, been provided to the Claimant’s solicitors by direction of the Parole Board on the basis of an undertaking given on or about 11 July 2023, namely that the information would not be

disclosed to the Claimant. A further undertaking in similar terms was given to Murray J in an order dated 21 December 2023 in respect of these proceedings.

23. Mr Rule KC emphasised the importance of the duty of candour, as well as submitting that the source of the complainant was already known to the Claimant as a result of texts between the complainant and the Claimant over the Christmas Holiday 2022, when Ms LX had threatened to report him to his COM. The context in which the threats were made is not entirely clear but would appear to have been made in the context of Ms LX wanting to the Claimant to rekindle their relationship. The Claimant's solicitors are also in possession of an email from Ms LX stating that it had not been her intention to have the Claimant recalled to prison. Ms LX had also contacted the COM sometime in February 2023 to the same effect.

24. Ms Ivimy on behalf of the SOS relied upon the original reasons for not disclosing the information to the Claimant, namely the safety of the third party, and on the undertakings which had been given to both the Parole Board and the Court. She accepted that whereas I was able to alter or vary the undertaking to Murray J, I could not do so in so far as the order made and undertaking given to the Parole Board.

25. Having considered the application, I concluded that I should not direct that the information contained in the COM's email of 22 June 2023 be disclosed to the Claimant. I accept Ms Ivimy's submissions that the order of non-disclosure by the Parole Board was made on proper grounds, balancing the duty of candour with the protection of the third party. If I were to make a different decision it would render the order made and undertaking given to the Parole Board nugatory. In any event the information in the email is before the Court and has been considered by both counsel. In my view, disclosure to the Claimant was not necessary for the purposes of these proceedings. I directed that if the contents of the email were going to be referred to directly in Court, then, the Court should go into private session. As it happened that did not prove to be necessary.

Legal Framework

Statutory Framework for Recall and Release

26. The SOS's power to revoke a licence and recall an individual to prison is contained in section 254 of the ***Criminal Justice Act 2003*** ('the 2003 Act'), which provides as follows:

> *(1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.*
>
> *(2) A person recalled to prison under subsection (1)—*
>
> > *(a) may make representations in writing with respect to his recall, and*
> >
> > *(b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations.*

There is also power to cancel a revocation of the licence if satisfied that the person has in fact complied with his licence conditions: section 254(2A)-(2C).

27. The SOS's power of executive re-release following recall is contained in section 255C of the 2003 Act in the following terms:

> *(1) This section applies to a prisoner ("P")—*
> > *(a) whose suitability for automatic release does not have to be considered under section 255A(2) [the Claimant's does not], or*
> > *(b) who is not considered suitable for automatic release.*
>
> *(2) The Secretary of State may, at any time after P is returned to prison, release P again on licence under this Chapter.*
> *(3) The Secretary of State must not release P under subsection (2) unless the Secretary of State is satisfied that it is not necessary for the protection of the public that P should remain in prison.*
> *(4) The Secretary of State must refer P's case to the Board—*
> > *(a) if P makes representations under section 254(2) before the end of the period of 28 days beginning with the date on which P returns to custody, on the making of those representations, or*
> > *(b) if, at the end of that period, P has not been released under subsection (2) and has not made such representations, at that time.*
>
> *(4A) The Board must not give a direction for P's release on a reference under subsection (4) unless the Board is satisfied that it is not necessary for the protection of the public that P should remain in prison.*
> *(5) Where on a reference under subsection (4) the Board directs P's release on licence under this Chapter, the Secretary of State must give effect to the direction.*

Test for Recall

28. It is not in dispute that the test to be met by the SOS in determining whether to recall an individual under section 254 is provided by the common law. It is twofold: (1) there must be reasonable grounds for believing that the individual was in breach of his licence conditions, per Sir Anthony Clarke MR at [5], ***Gulliver v Parole Board*** [2008] 1 W.L.R. 1116, and (2) it must be shown to be necessary to protect the public because of the dangers posed by the prisoner while out on licence, per Silber J at [25], ***R (Jorgenson) v Secretary of State for Justice*** [2011] EWHC 977 (Admin)).

29. In ***Jorgenson***, *Silber J said:*

> "*[25] I consider that the legal position is that when faced with a challenge to a decision to recall a prisoner because of the risk to the public for breach of a condition of his or her licence, the court should consider:*
> *:*
> > i. *Whether there is "evidence upon which he could reasonably conclude that there had been a breach":* ***R (Gulliver) v Parole Board*** *[2007] EWCA Civ 1386, [5] (Sir Anthony Clarke MR). Put slightly differently, the question "is whether the Secretary of State could reasonably have believed on the material available to him that the claimant had not conducted himself by reference to "the standard of good behaviour":* ***R (McDonagh) v Secretary of State for Justice*** *[2010] EWHC*

369 (Admin), [28] (Judge Pelling QC). If the Secretary of State cannot satisfy that test, the recall is unlawful but if he or she can, it is necessary to progress to the next questions;

*ii. Whether there is the absence of any fault on the part of the prisoner so as not to justify recall **(R (Benson) v Secretary of State for Justice** ([2007] EWHC 2055 (Admin)) because if there is not any fault, this will probably be a crucial or at least a very material consideration militating against justifying ;*

iii. Whether the decision to recall the prisoner can be justified on the basis that it is necessary in order to protect the public because of the dangers posed by the prisoner while out on licence…

*iv. Whether adequate reasons have been set out to justify that decision so that the prisoner is, in Lord Brown's words in the **South Bucks** case ([2004] 1 W.L.R. 1953), able "to understand why the matter was decided as it was and what conclusions were reached on the principal important and controversial issues", which in this case means able to understand why his is justified…*"

30. In ***R (Goldsworthy) v Secretary of State for Justice*** [2017] EWHC 2822 (Admin), at [30], Dinah Rose QC held that *"detention is justified only as a last resort, where other less severe measures have been considered and found to be insufficient to safeguard the public interest which might require detention. I note that the test applied by Silber J in **Jorgensen** was conceded by the Defendant to be correct and applied by the Court of Appeal in the case of **R (Calder) v Secretary of State for Justice** [2015] EWCA Civ 1050, paragraphs 27-28."*

31. In ***R (Benson) v Secretary of State for Justice*** *([2007] EWHC 2055 (Admin))* Collins J held:

> "*[21] It is to be noted that the statutory provision does not require recall. It gives the Secretary of State a discretion as to whether he will recall and, in considering whether he should exercise his discretion in favour of recall , it must be a material consideration to see whether there is any fault on the part of the prisoner. If he was not at fault…the Secretary of State would be hard pressed to justify a decision that the breach of the condition justified recall . He must, in my view, investigate any explanation that has been put forward in order to satisfy himself that is justified in all the circumstances.*
>
> *[22] …I am not suggesting that it is in every case necessary, even where there are factual issues, to hold any sort of hearing and indeed the provision of the Act suggests strongly that oral hearings are not required. On the other hand, it is important that a defendant knows what the allegations against him are in sufficiently detailed form so that he can make meaningful objections or put forward meaningful representations…"*

> *[23] …It may be that even if proper procedures had been adopted, by which I mean procedures such as I have indicated are appropriate, the same result could have applied. But that is not the point. The reality is, as I say, that the claimant has been deprived of a proper opportunity of putting forward and having his defence to the allegations properly considered…*"

Applicable Policy Framework

Review and Re-release of Recalled Prisoners Policy Framework

('Policy Framework')

32. The Guidance contained in paragraph 6.8.1 provides:

> "*On return to custody, all recalled prisoners have a statutory right to be informed of the reasons for their recall and their right to make representations in regard to their suitability for re-release. …The requirements set out in this Policy Framework are in place to ensure this is completed in a timely, efficient and transparent manner.*"

Listing Prioritisation Framework for Oral Hearings ("LPF")

33. The listing prioritisation includes:

> "***Exceptional Circumstances***
> *The Parole Board recognises that it needs to take a flexible approach to managing its caseload, and that there may be exceptional circumstances in particular cases which mean they should be prioritised. Where exceptional circumstances are put forward by the prisoner for higher prioritisation, the case will be put before a duty member for assessment. The duty member may direct that a case has a higher priority than would normally be indicated by the list above and/or its current due date and should accordingly receive precedence.*
> *This should only be done in rare circumstances to ensure fairness to other prisoners awaiting an oral hearing.*
> *The duty member can:*
> - *Prioritise a case for listing – this is to give a case priority in the next bulk listings exercise e.g., in three months' time.*
> - *Expedite a case – this is to list the case as soon as possible perhaps with a freshly commissioned panel at short notice.*
>
> *Circumstances need to be sufficiently exceptional to warrant a case being given a higher priority in the listings process than a standard case. The first consideration is whether it would be appropriate to prioritise a case before considering an expedited listing. Both routes can have significant consequences for other prisoners in that their reviews may be unfairly delayed, despite their case having similar merits to the case being considered for prioritisation/expedition.*
>
> *Examples of when prioritising would and/or would not be appropriate are set out in the table below:*"

Reasons to prioritise	*Reasons not to prioritise*
Case has been deferred several times and the prisoner's review has been unfairly delayed (through no fault of their own).	*A determinate sentence recall prisoner has less than 26 weeks until their sentence expiry date.*
Serious concerns over the prisoner's mental health.	*Requests for prioritisation solely on the grounds of positive Report recommendation.*
A complex release plan is time critical, and arrangements are likely to fall apart if the case is unduly delayed.	*A case has been adjourned/deferred once before (even if the current situation is not the prisoner's fault).*

Examples of when expediting would and/or would not be appropriate:

Reasons to expedite	*Reasons not to expedite*
Terminal illness or other factors pointing towards compassionate release.	*A determinate recall prisoner has less than 26 weeks until their sentence is due to expire.*
Compassionate reasons of close family members.	*A case has been adjourned once before and the current situation is not prisoner's fault.*
The original decision is the subject of an order for reconsideration or has been quashed by the High Court.	*Requests for prioritisation solely on the grounds of positive Report recommendations (unless this is the only difference between two cases).*
Prisoner's reviews where a reconsideration application has been granted following an oral hearing.	*It is taking a while to get listed and you feel it is 'unfair' on the prisoner.*
	A member or witness cannot attend on the day due to illness.

Disclosure of information

34. Rule 17 of the ***Parole Board Rules*** 2019 provides:

> "*17(1) The SOS […] may apply to the Board for information or any Report ("the material") to be withheld from the prisoner, or from both the prisoner and their representative, where the SOS […] considers—*
>
> *(a) that its disclosure would adversely affect—[…]*
>
> *(ii) the prevention of disorder or crime, or*
>
> *(iii) the health or welfare of the prisoner or any other person, and*

(b) that withholding the material is a necessary and proportionate measure in the circumstances of the case.

[…]

(*5) Where the panel chair or duty member is satisfied that all relevant information has been served on the Board, they must consider the application and direct that the material should be—*

(a) served on the prisoner and their representative (if applicable) in full;

(b) withheld from the prisoner or from both the prisoner and their representative, or

(c) disclosed to the prisoner, or to both the prisoner and the prisoner's representative (if applicable) in the form of a summary or redacted version.

[…]

(7) If the panel chair or duty member appointed under paragraph (4) gives a direction under paragraph (5)(b) or (c) that relates only to the prisoner, and that prisoner has a representative, the SOS […] must, subject to paragraph (11) serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the prisoner's representative, provided that—

(a) the representative is—

(i) a barrister or solicitor; […] ; and

(b) the representative has first given an undertaking to the Board that they will not disclose the material to the prisoner or to any other person, other than other solicitors also responsible for that prisoner's case.

[…]

(11) Within 7 days of notification by the SOS or Board in accordance with paragraph (6), either party […] may appeal against that direction to the Board chair and notify the other party of the application to appeal."

Grounds of Judicial Review

35. There are five grounds of claim set out below. Mr Rule KC accepted that grounds 3 and 4 require permission for the claim to be made out of time.

    a. Ground 1 – The Parole Board's refusal to order expedition or prioritisation rested upon a misinterpretation of policy and/or was irrational.

b. Ground 2 – (a) The SOS's failure to direct the Claimant's re-release was irrational and/or amounted to unlawful fettering of discretion; (b) further or alternatively, the decision was not taken in a procedurally fair manner.
c. Ground 3 – The SOS's failure to disclose to the Claimant the reasons why he had been recalled was a breach of statutory duty, and/or common law obligations and/or of Article 5(2) ECHR.
d. Ground 4 – The SOS's decision to recall the Claimant in the first instance was unlawful.
e. Ground 5 – The SOS and Parole Board's failed to comply with their public law duty to complete the Claimant's Parole Board review within a reasonable time.

Ground 1 – The Parole Board's refusal to order expedition or prioritisation rested upon a misinterpretation of policy and/or was irrational

36. Mr Rule KC submits that the Parole Board's decision of 1 September 2023 wrongly proceeded on the basis that the only circumstances in which prioritisation or expedition could be ordered were those set out in the LPF. He contends that in listing cases for oral hearings, individual cases will inevitably have individual features which will mean that justice requires them to be heard more swiftly. He refers to the judgment of Collins J in ***Betteridge v Parole Board*** [2009] EWHC 1638 (Admin), where at [30] he said: "*I am glad to see that one of the measures put in place is a more flexible approach by the Board to consideration of cases which do need priority. Obviously, if it has been made clear…that a particular prisoner, once he has served his tariff, is a real candidate for immediate release, then the sooner that particular individual has a hearing the better.*"

37. He submits that is why the LPF guidance allows for any *'exceptional circumstances'* to require that a case can be properly removed from the ordinary listing framework and given particular priority. He maintains that the matters set out in the tables are examples of circumstances in which prioritisation or expedition might be ordered. Further, if it is not a misinterpretation of policy the Parole Board has fettered its discretion, and/or it is ***Wednesbury*** unreasonable.

38. The Parole Board Stakeholder Form from August 2023 stated: "*in light of the information retrieved from Mr Scott's phone (August 2023) the Probation Service no longer feels this is justified and as such an expedited parole hearing is requested. Mr Scott has been deemed unsuitable for a Risk Assessed Review (executive release) due to the complexities around his recall. At this stage he is therefore just awaiting his case being listed for an oral hearing.*"

39. Having considered the Stakeholder Response from the Parole Board Member, I do not consider that there are grounds for arguing that the Parole Board acted unlawfully in refusing the application to prioritise or expedite the oral hearing.

40. The Stakeholder Response from the Parole Board dated 1 September 2023 recorded that the Claimant did not fall into categories in the LPF guidance. The framework recognises that it needs to take a flexible approach to managing its caseload, and that there may be exceptional circumstances in particular cases which mean they should be prioritised. It provides for the case to be put before a Duty Member for assessment. It provides a table for good and bad reasons for prioritisation and expedition. It cautions that an order should be made only in rare circumstances to ensure fairness to other prisoners awaiting an oral hearing, It is accepted by Mr Rule KC that the Claimant does not come within *"the good reasons"*. Indeed, one of *"the bad reasons"* is where requests for prioritisation are based solely on the grounds of positive Report recommendations.

41. The Duty Member felt that caution should be applied before determining whether the WhatsApp messages represented *'hard evidence'* of Mr Scott not being at any fault, and felt further information should be obtained by the Probation Service, in particular a full and unedited exchange of messages between Mr Scott and his ex-partner. He requested that the COM should, in the same addendum, provide a more detailed overview of the friendship Mr Scott has with a female who has been visiting him and speaking to him on the telephone. He correctly stated that whilst it is appreciated that the COM no longer felt that recall was warranted, this was not a basis for expediting the hearing.

42. In the light of the matters set out above, I do not consider that the Duty Member misinterpreted the policy or that the decision not to prioritise or expedite the hearing was ***Wednesbury*** unreasonable.

Ground 2 – (a) The SOS's failure to direct the Claimant's re-release was irrational and/or amounted to unlawful fettering of discretion; (b) further or alternatively, the decision was not taken in a procedurally fair manner.

43. Mr Rule KC submits that the Claimant met the test for re-release under section 255C(2)-(3) of the 2003 Act. He referred me to section 255C which, it is conceded, sets out a statutory scheme for the SOS to direct release of prisoners without reference to the Parole Board and can be exercised at any time. The question to be answered on both 16 and 22 August 2023 was whether it was *"no longer necessary for the protection of the public that the Claimant should remain in prison"*.

44. He submits that on the facts of the case, where the Parole Board had decided on 21 October 2021 that it was not necessary for the Claimant to remain in prison, there was nothing subsequently that justified his continued detention. He relies upon the fact that there are only two matters, namely the incident in October 2022 and the third party's complaint to the COM could have altered that conclusion, and that that information was out of date. He submits that there was no evidence of any other concerns about the Claimant's behaviour while on licence, and no evidence of any other concern about the

Claimant's behaviour after his release from prison. He relies upon the fact that the first matter led to a written warning, which impliedly accepted that it was not necessary to recall him, and the second matter, which led to the recall, was out of date by the time of the SOS's decision. Both as a result of the disclosure of the WhatsApp messages, and the conclusion of the COM that he "*no longer feels this recall is justified*." He is also critical of the SOS's reasoning on 16 and 22 August 2023.

45. Mr Rule maintains that the SOS must exercise the power properly and fairly to assess questions of risk. He does accept that the SOS has particular expertise in assessing risk, ***R (Gilbert) v Secretary of State for Justice*** [2015] EWCA Civ 802. Sales LJ (at [71]): "*The Secretary of State and his department and its agencies are also experts in the management of prisoners in the prison estate, including assessing prisoner risk when it is relevant to the wide range of decisions which such management may involve. The statutory regime recognises this. They do not require input from the Board for every decision they have to make, including those in relation to which prisoner risk may be a significant factor*."

46. He submits that the SOS did not genuinely exercise his discretion. The reasoning provided both on 16 and 22 August 2023 relied upon the uncertainties and complexities surrounding the recall which, it was said, necessitated consideration by the Parole Board. He maintains that it was an unlawful exercise of discretion because there was already a clear case for release on its facts, which did not require reference to the Parole Board, and it is not at all clear what advantage the Parole Board could enjoy over the SOS on the question of this particular detention. Alternatively, if there was a genuine exercise of discretion it was flawed because there was not the sufficiency of inquiry into the matter before reaching a decision: ***R (Plantagenet Alliance Ltd) v SSJ and others*** [2015] 3 All ER 261, DC, at [99]-[100]. He refers to authorities which state the importance of asking the right question and obtaining the relevant information to answer it correctly. Further, he submitted that the SOS had failed to comply with his ***Tameside*** duty in that it was irrational not to at least try and examine for himself the only alleged stumbling block to the exercise of that power.

47. Ms Ivimy takes issue with the Claimant's position on release. She submits that there is a constraint on the SOS's discretion to release, in that under section 255C(3) he may not release unless he is satisfied that continued detention is not necessary for the protection of the public; the same constraint applies to the Parole Board under section 255C(4).

48. She set out that the correct approach to that statutory test has recently been explained by the Divisional Court in ***R (Dich) v Parole Board*** [2023] EWHC 945, [12] – [14]: "*The statutory test requires the Parole Board to decide if it is necessary for the protection of the public that the offender should be confined. That requires an assessment of the risk to public protection that would be occasioned by the prisoner's release. If the release of a prisoner gives rise to a public protection risk which could be avoided or reduced if the prisoner is confined, then the Parole Board may decide that it is necessary for the protection of the public that the offender should be confined*." The risk does not have to be imminent: *"If there is, generally, a risk to public protection from the release of a prisoner, and if that risk can be addressed by continued confinement, then that may be sufficient for the Parole Board to decide not to direct the prisoner's release, even if it cannot predict precisely when the risk is likely to materialise."*

49. She also relies upon the fact that the SOS does not have to determine whether the prisoner is guilty of any particular wrong-doing but whether "*it is safe for the prisoner to be released*", ***R (Roberts) v Parole Board*** [2005] UKHL 45, at [42], per Lord Woolf CJ, which she submits is a question of judgment, and at [12] per Lord Bingham "*whether or not it is safe to release a prisoner … cannot be ascertained with scientific accuracy. It calls for an exercise of informed and experienced judgment*." The preventative nature of the power is underscored by the fact that there is no need to prove any breach of licence condition to justify continued detention, ***R (Gulliver) v Parole Board*** [2007] EWCA Civ 1386, para 21 and ***R (Keiserie) v SSHD for Justice*** [2019] EWHC 2252 (Admin) para 30.

50. Ms Ivimy submits that the SOS did not delegate or fail to exercise his power to release the Claimant. He exercised his statutory power and he reached a decision, on all the material before him, that he was not satisfied that it was safe to release him. It was a matter for him whether to conduct further investigations. His conclusion that, given the complexities and uncertainties in the evidence and continuing concerns about risk, the matter should proceed to consideration by the Parole Board was taken, having regard to the specific facts of the case and, in particular, the fact that the Parole Board could explore risk and insight with the Claimant at an oral hearing.

51. She also relies upon the lawfulness of the approach being adopted by the SOS as being underscored by the context of domestic abuse. The courts have recognised that the specific nature of domestic abuse risk is acute, commonly following a pattern of more minor incidents leading to escalating violence, ***Kurt v Austria***, (2022) 74 EHRR 6, (GC) para 175.

52. She submits that it was a matter for the SOS whether he chose to conduct additional inquiries before reaching a conclusion, and his decision in relation to that can only be impugned on grounds of rationality, ***R (Campaign Against Arms Trade) v SSHD for International Trade*** [2019] EWCA Civ 1020, paras 58-59. His decision that release should be explored further by the Parole Board, in exercise of its powers, was manifestly rational.

53. On the facts, Ms Ivimy maintains that the SOS acted rationally, in that he had before him the Claimant's dossier and representations, including the WhatsApp evidence provided by him from his own phone. Nevertheless, the Claimant had been assessed to pose a high risk of domestic violence to known adults, had engaged in an aggressive and controlling manner in a domestic context whilst on licence, in a manner which she described as *"offence paralleling."*

54. In my view, the SOS's decision not to re-release the Claimant and refer his case to the Parole Board cannot be impugned as unlawful on the grounds put forward by Mr Rule KC, either that the exercise of discretion was flawed or that the decision was irrational.

55. The decision of the Senior Risk Assessor communicated on 22 August 2023, following a re-review of the case stated: "*Mr Scott has been assessed as unsuitable for RARR at this time for the following reasons: PPCS have re-assessed this case for suitability of re-release. There is conflicting information that a third party has provided Community Offender Manager and Mr Scott's solicitor with, and PPCS are not in a position to state with confidence this case is suitable for RARR re-release. The complexities and uncertainties of what has been said, needs to be explored more thoroughly by the Parole*

Board. PPCS's final decision taking into account the risks posed by Mr Scott, and considering all information in the dossier, including information recently received from the solicitor, is that this case should be further explored by the Parole Board. This will also provide Mr Scott with an opportunity to answer the panel's questions about his risk, and the extent to which he has insight into his offending."

56. In my view, the SOS was entitled to conclude that there was conflicting information between the complaint made and the content of the two sets of WhatsApp messages, and consider that, on the information before him, and the known risks associated with the Claimant's behaviour, the matter should be considered by the Parole Board. He also placed reliance upon the Parole Board's capacity to ask the Claimant questions about both risk and insight into his offending.

Ground 3 – The SOS's failure to disclose to the Claimant the reasons why he had been recalled was a breach of statutory duty, and/or common law obligations and/or of Article 5(2) ECHR

57. Mr Rule KC submits that there are two distinct periods (a) the long period during which no reasons at all, including any gist of any reasons, were provided to the Claimant; and (b) the period since the provision of a gist, during which time the Claimant has been denied the fuller details contained within the email dated 22 June 2023. He identifies the period between 3 February 2023 and sometime after 12 July 2023 during which he submits that the Claimant was not provided with any substantive reasons for his recall. Between those two dates, whilst the SOS was well aware of all of the details of the basis for his recall he submits that no redacted information or gist was supplied. He maintains that the SOS withheld the information in breach of (a) the statutory duty, (b) the policy, (c) the common law, and (d) Article 5(2) ECHR.

58. As to (a), he submits that section 254(2)(b) of the 2003 Act is clear that "*on his return to prison, [the person] must be informed of the reasons for his recall and of his right to make representations*." On any view, he maintains that a failure to provide any reasons whatsoever at the time of his return to prison was a breach of that duty.

59. As to (b), he submits that the Policy Framework provides that "*on return to custody, all recalled prisoners have a statutory right to be informed of the reasons for their recall and their right to make representations in regard to their suitability for re-release*" That policy, he submits, was also breached by the failure to provide reasons.

60. As to (c), he maintains that the common law also places emphasis upon the natural justice and procedural fairness that underpins the need for the disclosure of reasons. Lord Diplock in ***O'Reilly v Mackman*** [1983] 2 A.C. 237 at p.279G, identified the first "*fundamental right accorded by the rules of natural justice*" as being "*to have afforded to [the individual] a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it*". The Claimant had no such opportunity, in the particular context explained by Silber J in ***Jorgensen*** (supra).

61. As to (d), he submits that Article 5(2) requires that the Claimant should have been informed promptly of the reasons for his detention, ***van der Leer v Netherlands*** (1990) 12 E.H.R.R. 567 at [27]-[28]. Article 5(2) requires reasons to be provided which are

sufficient for the person to understand the legal and factual grounds for his detention; the ultimate purpose is that they should be sufficient to enable the individual "*if he sees fit, to apply to a court to challenge its lawfulness*", ***Fox, Campbell and Hartley v UK*** (1991) 13 E.H.R.R. 157 at [40]-[41]. He submits that the Claimant was not provided promptly with sufficient reasons, contributing to a further deprivation of his liberty and to the personal impact on him.

62. Mr Rule KC submits that while the Claimant was informed of the licence condition he had breached and the references in the Part A Report that he was behaving in *"a threatening, violent and controlling manner in a domestic context"* this was inadequate. He contends that it is an important public and statutory duty that a person deprived of their liberty be given an explanation that fulfils the purpose of the duty to provide reasons.

63. Ms Ivimy submits that Claimant does not advance any argument that there was a breach of the duty to provide reasons during period (b). She submits that it is common ground that s. 255(4)(b) imposes a duty on the SOS to inform a prisoner who has been recalled *"of the reasons for his recall and of his right to make representations."* The reasons provided should be adequate, in the sense that the prisoner understands why the recall is justified: ***R (Jorgensen) v SSHD for Justice*** [2011] EWHC 977 (Admin), [25(iv)]. The scope of the duty must be informed by the nature of the issue being considered, determining whether recall is justified, and whether a prisoner should be re-released. The SOS and Parole Board are not engaged in an exercise to prove any particular wrongdoing whilst on licence but are evaluating risk.

64. Where a party has the right to make representations, fairness requires that the person affected "*is informed of the gist of the case which he has to answer*." ***R v SSHD for Home Department ex p Doody*** [2004] 1 AC 531, [560F-G]. Any duty to disclose information in support of reasons must be balanced against competing public interests: "*fairness does not require the disclosure of information which could compromise the safety of an informant, the integrity of prison security or other overriding interests. It will be sufficient to inform the prisoner in more or less general terms of the gist of the reasons for seeking the authority of the SSHD.*" ***R (King) v SOS for Justice*** [2015] UKSC 54, [103] per Lord Reed.

65. Applying those principles, Ms Ivimy submits that the SOS provided a copy of the Part A Report to the Claimant on 9 February 2023 shortly after his detention. It explained in the Part A Report that the public protection concern was risk of domestic violence. It also set out the information relied on. It refers to the incident in October 2022, and provided an outline of additional information relied on, explaining that the Claimant was alleged to have behaved in a threatening, violent and controlling manner in a domestic context. The source of the information was not disclosed on the grounds that it would place the source of the information at risk of serious harm. The Parole Board subsequently ordered disclosure of the information to the Claimant in the form of an approved gist which is in substantially the same terms as the outline provided in the Part A Report.

66. There is a dispute about whether Article 5(2) applies.

67. Mr Rule KC maintains that the original sentence created a detention authorised generally by Article 5(1), but the procedural protections of Article 5(2) for example

require that a detained person who has been recalled and so is only required to be detained by executive power, not sentencing itself, is given sufficient reasons to enable him to challenge the detention. He submits that since his release date, he has the right to challenge a decision to detain him.

68. Ms Ivimy submits that the legal basis under Article 5(1) for detention of a determinate sentence prisoner is the original sentence of the court, ***Brown v Parole Board for Scotland*** [2018] AC 1, [58] Lord Reed JSC. She maintains that recall of a determinate sentence prisoner and an extended sentence prisoner during the currency of his custodial term does not fall within Article 5(4): ***R (Youngsam) v Parole Board*** [2019] EWCA Civ 229 [18] [35], ***R (Whiston) v SOS for Justice*** [2015] AC 176.

69. Having considered both sets of submissions on the application of Article 5(2) in this case, I prefer Ms Ivimy's submissions that Article 5(2) is an integral part of Article 5 and has no free-standing application in the context Mr Rule KC submits.

70. I am asked to grant an extension of time for applying to judicially review the failure to give adequate reasons. In my view there was a continuing obligation to provide adequate reasons after recall, which continued at least until the non-disclosure order was made and an undertaking was given to the Parole Board on or about 11 July 2023 regarding the disclosure of the email from the COM dated 22 June 2023. I note that the email, which was presumably compiled from the COM's notes of the telephone call with the third party, was not prepared until 22 June 2023.

71. In my view, it would, however, have been open to the Claimant to have challenged the adequacy of the reasons at the outset by way of judicial review, or indeed, subsequently before 11 July 2023. I note that no appeal was lodged against the non-disclosure order made by the Parole Board. I consider that the application was brought too late and I refuse to grant an extension of time. It is highly relevant that the claim for judicial review was not issued until 24 October 2023, following the Letter before Claim dated 19 September 2023.

72. If I am wrong in not granting an extension of time to bring the claim, I am satisfied that the Claimant was given adequate reasons for his recall to prison in February 2023. Whilst the Claimant maintains that he did not know the reason for his recall from the outset, the revocation of licence by the SOS stated that he had breached the conditions of his licence to be of good behaviour and not behave in a way which undermines the purpose of the licence period.

73. The reason given was that: *"in view of the offences for which you were originally sentenced, the risk suggested by your offending history and your behaviour as described in the Report completed by the Community Offender Manager Service, and which is attached, the Secretary of State revokes your licence and recalls you to prison."* Receipt of the Part A report is signed by the Claimant on 9 February 2023.

74. The Part A Report completed on 1 February 2023, paragraph 19 stated: "*Information was then received on 30/01/2023 which was of concern. However, information available implies that Mr Scott has resorted to similar behaviours within relationships to those displayed in the index offending. There are concerns that Mr Scott has not fully addressed his domestic violence related offending. There is an indication that he has behaved in a violent and controlling manner. This has included threatening behaviours*

and damage being caused to a variety of items. Such concerns are based upon the police call-out dated 29/10/2022 and the subsequent information which has been received. Given the information that is now available, there are concerns regarding the risk that he poses to both past and future partners."

75. Paragraph 24 stated: "*Mr Scott had completed BBR in custody and it was hoped that he had largely addressed his domestic violence related offending. That said, he had continued to be managed as a 'high risk' offender in the community. The information recently received now suggests that he has not addressed his problems in this area. There is reference to controlling behaviours and evidence of criminal damage. There are concerns that such behaviours are similar in nature to his index offending. Should he remain in the community, there are concerns that his behaviour will continue and indeed escalate.*"

76. In my view, the information which was contained in the Part A Report referred to above satisfied the minimum of the information that the Claimant was required to be given in the period between 3 February 2023 and on or about 11 July 2023 when he was provided with the gist. I have already said the wording of the gist provided was in a similar form to the information in the Part A Report. It satisfied the requirements in section 254(2)(b) of the 2003 Act, the Policy Framework, common law and, if I am wrong on the interpretation, Article 5(2).

77. It was, in my view, sufficient information upon which the Claimant was able to make representations. Whilst it did not detail individual occasions after the formal warning in October 2022, it did outline that the Claimant had not fully addressed his domestic violence related offending, that he had behaved in a violent and controlling manner, and that it included threatening behaviour and damage being caused to a variety of items. I do not accept that there was, as Mr Rule KC submits, a wholesale failure to provide reasons.

78. I accept Ms Ivimy's submissions that any duty to disclose information in support of reasons must be balanced against competing public interests. In this case, the source of the information was not disclosed, on the grounds that it would place the source of the information at risk of serious harm. It is of some relevance that the Parole Board subsequently ordered disclosure of the information to the Claimant in the form of an approved gist, taken from the Part A Report. After 12 July 2023 the Claimant's solicitors were in possession of the email prepared by the COM dated 22 June 2023, which provided the evidential basis for the reasons given in the Part A Report.

Ground 4 – The SOS's decision to recall the Claimant in the first instance was unlawful

79. Mr Rule KC submits that the Claimant's recall was not justified. He accepts that the application is out of time, for which he needs permission, but submits that it should be seen as part of a continuum of events that occurred following his recall.

80. As set out above, I have been referred to the test in ***R (On The Application Of Adrian Jorgenson) v Secretary Of State For Justice*** [2011] EWHC 977 (Admin) where Silber J set out two factors, which I set out again in summary. The Court is required to assess objectively (1) whether there were reasonable grounds for concluding that the Claimant

had breached his licence conditions, and (2) whether his recall was necessary for the protection of the public.

81. Mr Rule KC submits that those two hurdles are not cleared by the SOS on the facts of this case tested against the information that the SOS had (or ought to have had) at the time of making the decision to recall. The burden has not been discharged to show that no measure short of deprivation of liberty was an appropriate response to the information received.

82. Ms Ivimy submits that the SOS has a wide discretion to recall a prisoner on licence. When reviewing such a decision the Court must consider the issue in two stages: ***R (Calder) v SOS for Justice*** [2015] EWCA Civ 1050. (1) the Court must consider whether the SOS could reasonably believe that there has been a breach of licence conditions. This is a low threshold, **R *(Howden) v SOS for Justice*** [2010] EWHC 2521 (Admin). It is not necessary to establish a breach of licence condition to justify recall on public protection grounds. As long as the question of necessity for public protection is considered, the SOS is not obliged to consider alternatives to recall, ***R (Jorgensen) v SOS for Justice*** [2011] EWHC 977, [47]. She submits that ***Wednesbury*** unreasonableness applies to review of recall decisions and the circumstances in which the Court will intervene are "*extremely limited,"* ***Ahmad v London Borough of Brent*** [2011] EWHC 80, [33].

83. It follows that Ms Ivimy submits that given the nature of the breach of the licence conditions, which she categorises as aggressive and controlling behaviour in the context of a domestic relationship, the Claimant's index offences, and the high risk he was assessed to pose to former and future female partners, it was self-evidently open to the SOS to take the view that recall was necessary on public protection grounds. She added that, even if subsequent information showed that had been on a mistaken basis, that would not establish that the original decision to recall was irrational or otherwise unlawful, ***R (Nodwell) v* SOS *for Justice*** [2022] EWHC 3178. She submits that there was no obligation to go behind the information provided and seek further explanations from an offender or other person, ***R (Abedin) v* SOS *for Justice*** [2014] EWHC 78 (Admin), [17].

84. In my view, the challenge to the decision to recall the Claimant is substantially outside the time for bringing proceedings for judicial review of the SOS's decision to recall the Claimant. It is relevant that the Claimant had instructed solicitors in February 2023, who were appraised of the circumstances. Whilst I accept that in March 2023 they were stating that the Claimant did not know why he had been recalled, there was information in the Part A Report, provided to the Claimant on 9 February 2023, which should have informed their consideration of the issues. Indeed, there is no reason why the Claimant could not have challenged the recall at the outset, or at any time before 12 July 2023. Their knowledge base grew substantially after 12 July 2023, when they were provided with the email from the COM dated 22 June 2023.

85. If I am wrong on this issue, I am satisfied that the decision to recall the Claimant was not unlawful. In accordance with the authorities, I am satisfied that the threshold for recall is low, ***R (Howden) v SOS for Justice*** (supra). In the context of the Claimant's history of offending, I am satisfied that both limbs of Silber J's test in ***R (On The Application Of Adrian Jorgenson) v Secretary Of State For Justice*** [2011] EWHC 977 (Admin) were met. As set out above the SOS was required to assess objectively (1)

whether there were reasonable grounds for concluding that the Claimant had breached his licence conditions, and (2) whether this was necessary for the protection of the public. I have been referred to ***R (Calder) v SOS for Justice*** [2015] EWCA Civ 1050, namely, whether the SOS could reasonably believe that there has been a breach of licence conditions.

86. I am satisfied that, whatever the background to the telephone call made by the third party to the COM, the information supplied indicated, as maintained by the SOS, that there were incidents of aggression and controlling behaviour on the part of the Claimant. In the context of a history of domestic abuse, it gave the SOS reasonable grounds to believe that the Claimant had breached his licence condition to be of good behaviour. It is relevant that, less than three months before, the Claimant had been given a written warning in October 2022, following an argument with Ms LX when he had damaged her property.

87. In considering whether recall was necessary for the protection of the public, in my view, the SOS was entitled to place reliance on the fact that the Claimant had been convicted of serious offences, including rape and assault, against two former female partners, which were committed in the context of a wider pattern of sustained domestic abuse. He had been assessed to be of high risk to former and future female partners. The information is fully detailed in the OASys assessment dated 17 February 2023, and in the sentencing remarks of HH Judge Adkin dated 16 June 2016, who considered that the threshold had been reached for an extended determinate sentence.

Ground 5 – The SOS and Parole Board failed to comply with their public law duty to complete the Claimant's Parole Board review within a reasonable time

88. Mr Rule KC submits that in the context of Article 5(4) the duty falls both on the SOS and Parole Board to ensure that relevant systems are in place to ensure that the process is conducted sufficiently swiftly (per Sullivan in ***R (Cawley) v Parole Board*** [2007] EWHC 2649 (Admin), [22]). He contends that there is a parallel obligation at common law, and that *"operational or resourcing issues (in terms of a shortage of members)"* are no answer to such a claim (per Steyn J at [30] of ***R (Adams) v Parole Board*** [2022] EWHC 3406 (Admin)).

89. He maintains that the period which has elapsed between the recall on 3 February 2023 and a Parole Board hearing on 27 March 2024, almost fourteen months later, is too long. Furthermore he adds that his case has been 'ready to list' since 25 July 2023, a delay of almost exactly 8 months thereafter. The directions ordered that the hearing be heard by a two-member panel with no specialist expertise, and with a time estimate of a half day. Mr Rule KC maintains that no reasons have been provided for a lengthy delay for which there can be no logical justification.

90. Ms Ivimy submits that the actions of the SOS and Parole Board should not be treated as a single entity. The Parole Board exercises independent judicial functions. Listing is one such judicial function: see ***R (Adams) v Parole Board*** [2022] EWHC 3406 (Admin) §28. The same is true for decisions on expedition. Actions of the Parole Board with respect to its hearings cannot simply be imputed to the SOS. The SOS applied for

expedition. She emphasises that the decisions of the Parole Board on listing are taken in its capacity as an independent judicial body.

91. I accept Ms Ivimy's submissions that the SOS and the Parole Board should not be considered as a single entity. The Parole Board exercises an independent judicial function. Whilst the Claimant's case may well have been ready since 25 July 2023, it had been subject to consideration by a Parole Board member on 16 and 22 August 2023, who, having considered the representations made both by the COM and the Claimant, had determined that it should proceed to an oral hearing. The subsequent application for prioritisation and expedition was dismissed as not falling within the criteria as set out above.

92. It seems to me that, although at first sight the delay by the Parole Board in listing the hearing appears very long, where it has found that there is no good reason for prioritising or expediting the hearing, it cannot be said that the listing of the oral hearing is outside a reasonable time.

Conclusion

93. In view of the matters set out above, I have concluded that the Claimant's claim for judicial review should be dismissed.

94. Subsequent to the provision of the draft judgement to counsel, Ms Ivimy raised an issue as to whether the identity of the third party who had spoken to the COM was sufficiently anonymised. I invited submissions from both counsel on this issue, which I have considered. I was also provided with a copy of the Parole Board's decision following the hearing on 27 March 2024. I am satisfied that this judgment in its present form does sufficiently anonymise the third party's identity and is consistent with the information contained in the Parole Board's decision, which I understand was provided to the Claimant.