Neutral Citation Number: [2024] EWHC 917 (Admin)

Case No: AC-2021-LON-001101

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2024

**Before** :

**MR JUSTICE KERR**

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**Between :**

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| **THE KING (on the application of JACKI DUFF)** | **Claimant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR JUSTICE** | **Defendant** |
| **- and -** | |
| **THE PAROLE BOARD FOR ENGLAND AND WALES** | **Interested Party** |

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**Ms Nicola Braganza KC and Ms Jodie Blackstock** (instructed by **Reece Thomas Watson Limited**) for the **Claimant**
**Mr Mark Vinall and Mr Will Bordell** (instructed by **Government Legal Department**) for the **Defendant**
**Mr Fraser Campbell** (instructed by **The Parole Board for England and Wales**) for the **Interested Party**

Hearing date: 5th March 2024

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# Approved Judgment

This judgment was handed down remotely at 10.00am on Thursday, 25 April 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

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MR JUSTICE KERR

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down remotely at 10am on 25 April 2024 may be treated as authentic.

**Mr Justice Kerr :**

## Introduction

1. The claimant, Ms Duff, is a former member of the interested party (**the Parole Board**), a statutory independent, non-departmental body, whose members are appointed by the defendant (**the Secretary of State**), on the recommendation of the Public Appointments Commission. The claimant's membership of the Parole Board was terminated by the Secretary of State in February 2021 following a hearing in November 2020 before a specially constituted panel (**the termination panel** or **the panel**).

2. The termination panel's recommendation, later in November 2020, that the Secretary of State should terminate the claimant's membership of the Parole Board, arose from a decision the claimant made in December 2019 to direct the release of a prisoner, William Pulman, while under a misapprehension that Mr Pulman had been on licence and at liberty during a period of over a year when, in fact, he had been in custody in Scotland.

3. There has been considerable delay in arranging a substantive hearing of this judicial review claim, which has been adjourned several times. It is unnecessary to go into the detail of the convoluted procedural history. After permission had been refused on the papers, it was granted on one ground only by Turner J following an oral renewal hearing. The sole permitted ground of challenge is, as formulated by Turner J:

> "The [Secretary of State]'s acceptance of the recommendation to terminate the Claimant's [Parole Board] membership was unreasonable in circumstances where: the recommendation arose from a single, isolated incident in which the Claimant was acting alone as a single member Panel, and no or no sufficient consideration was given to alternative sanctions."

## The Facts

4. The claimant is a non-practising barrister based in Birmingham. She suffers from Myalgic Encephalomyelitis, also known as Chronic Fatigue Syndrome or ME / CFS. This condition is a disability which has a significant and severe impact upon her ability to carry out day-to-day activities. It causes her to have severe cognitive dysfunction, as well as severe fatigue, pain, mobility problems, visual problems and other symptoms.

5. On 20 December 2013, Mr Pulman was sentenced to nine years' imprisonment for what the claimant described in her later release decision as "a very serious series of acts of domestic abuse over a 2 year period against your ex-partner and children". The convictions were for false imprisonment, assault and grievous bodily harm. His earlier convictions for

20 offences included 17 offences of violence, mostly actual bodily harm but including one for wounding.

6. In February 2016, the Parole Board adopted a "Code of Conduct for Parole Board Members". It included the usual requirements of probity for public office holders. At paragraph 7.1 there was an obligation to "act at all times in good faith, observing the highest standards of professionalism, impartiality, integrity and propriety". And by paragraph 8.1:

> "You must take all reasonable steps to prepare effectively for parole hearings in which you are participating as a Parole Board member. This includes reading relevant papers, directions and communications relating to a case in which you are involved."

7. On 25 October 2016, the Public Appointments Commission recommended the claimant for appointment by the Secretary of State as a member of the Parole Board for an initial three year term starting on 1 December 2016. Some adjustments have been made due to her disability. There have been both disciplinary proceedings against the claimant and discrimination claims brought by her during her time at the Parole Board. The tribunal claims are not yet concluded. I mention these matters for completeness, though they are not directly relevant.

8. On 11 October 2017, Mr Pulman was released on licence. However, a report of 17 April 2018 by an official at Barlinnie prison in Glasgow, indicates that on 9 November 2017, Mr Pulman arrived on the second flat at Barlinnie, probably as a remand prisoner. He was convicted and sentenced at Glasgow High Court on 23 March 2018, probably arising from the offences for which he had been remanded. The convictions were for six serious offences of domestic abuse and violence including relating to children. He was sentenced to or remanded in custody.

9. Not long afterwards, Mr Pulman was sentenced on 18 April 2018 to a further 38 months' imprisonment at Glasgow High Court, on pleading guilty to offences of actual bodily harm and grievous bodily harm committed against his ex-partner; and to common assaults involving his children. These are described in some of the documents as "historic" offences, probably meaning they were committed before Mr Pulman was incarcerated in December 2013.

10. In November 2018, the Parole Board and the Secretary of State agreed the contents of a document, published on 19 November 2018, bearing the title "Agreed Protocol for Termination of Membership of the Parole Board" (**the termination protocol**). By paragraph 2, membership of the Parole Board may only be terminated in accordance with the termination protocol, where a panel constituted under the protocol decides that a member is unsuitable or unfit. The grounds for termination, in paragraph 4, are incapacity; failure to comply with the "Quality Assurance Framework" or the "Code of Conduct"; conviction of a crime; or bankruptcy.

11. On 24 January 2019, the Public Appointments Commission appointed the claimant as a panel chair. At some point probably in late January 2019 (the exact date is not clear from the contemporary documents) Mr Pulman was transferred from HMP Barlinnie to HMP Grampian. Soon after his arrival, an incident or alleged incident occurred wherein Mr Pulman was said to have made "verbal threats" to "slash" prison staff and social workers. He was charged with a breach of discipline as a result. His purpose seems to have been to avoid being transferred back to HMP Barlinnie. He was restrained using thumb and wrist

locks. He denied the charge but the governor ordered him to be removed from association with other prisoners.

12. Meanwhile at the Parole Board, from 3 April 2019 a change in the terms of appointment was offered to Parole Board members, including the claimant. The purpose of the change was to address what was described in the explanatory letter as a concern that "the existing arrangements for removal did not pass the test of objective independence". That concern had been expressed by Mostyn J in *R. (Wakenshaw) v Secretary of State for Justice* [2018] EWHC 2089 (Admin). The only alteration was that a member could not be removed except in accordance with the termination protocol.

13. On 31 May 2019, Mr Pulman was released on licence from HMP Barlinnie to approved premises in Stoke-on-Trent. But on 12 June, if not before (at about the time of a vacated employment tribunal hearing listed for 5 June, involving the claimant and the Parole Board), Mr Pulman contacted his daughter via Facebook or posted a picture of her on Facebook, using the false name "William Porter". This posting led to Mr Pulman being recalled from licence, this time to HMP Nottingham.

14. On 10 July 2019, Mr Ed Bowie of the Ministry of Justice wrote to the claimant informing her that Ministers had agreed to reappoint her as a Parole Board member on the changed terms of appointment, for a five year period starting on 1 December 2019. Then on 3 September 2019, the claimant considered the case of Mr Pulman on the first of the four occasions on which she did so.

15. On that first occasion, the claimant was favourably disposed to directing his release, but (as the member case assessment directions form shows) she required further information. She directed a brief report by 17 September 2019 indicating whether any matters of concern were considered to increase risk, a risk management plan for release, details of accommodation and the date it would become available and any further licence conditions that might be appropriate, such as a requirement not to use social media.

16. The claimant then considered Mr Pulman's case on the second occasion, leading to her further member case assessment directions form dated 23 September 2019. The dossier had grown due to the recent reports, which had diligently been provided. The claimant's narrative was more detailed. This time, before mentioning Mr Pulman's recall to HMP Nottingham arising from the Facebook contact incident, the claimant included the following incorrect statement:

> "[h]e was automatically released on 11 October 2017 and managed well in the community until 12 June 2019."

17. The claimant then gave a more detailed account of Mr Pulman's conduct, as reported to her, while on licence at the approved premises in Stoke-on-Trent; and an outstanding court matter involving "fiscal charges in Scotland" (which I take to refer to procurator fiscal charges, i.e. a possible pending prosecution). His conduct on licence gave cause for concern and his account of his conduct was not wholly credible but the claimant was "persuaded that the almost 2 years he managed in the community is indicative that his risk can be managed ….. ." She directed further information about the fiscal charges in Scotland and any impact on risk.

18. On the third occasion, the claimant considered Mr Pulman's case further and issued her third member case assessment directions form, dated 4 November 2019. The dossier had again grown; there were legal representations in writing (dated 28 October 2019) on Mr Pulman's behalf, presumably supporting his release on parole. The directions form stated that these had been considered carefully. However, there was no progress because the offender manager had not provided a report about the outstanding criminal matters in Scotland and any impact they might have on the issue of risk. Nor was there a release address yet. The claimant directed that these matters should be attended to.

19. On the fourth and final occasion, the claimant considered Mr Pulman's case again and issued her member case assessment paper decision form, dated 2 December 2019 (**the release decision**). The reference to a paper decision means that no oral hearing was held. The claimant directed Mr Pulman's release on 16 December 2019. The dossier had grown to 333 pages which, the claimant said in the release decision, she had reviewed. To be clear, it is not disputed that those pages included the documents from which my account above of Mr Pulman's time in Scottish prisons is derived. That information was there to be seen in the dossier.

20. Under the heading "Risk Factors", the claimant addressed the risk of re-offending and commented:

> "It is striking to note that you have managed for almost 2 years on licence in the community without reoffending and is indicative that you perhaps learnt something from the offending behaviour work you completed prior to your release."

21. The next heading was wordy: "Evidence of change and / or circumstances leading to recall (where applicable) and progress in custody". The first sentence beneath that heading was:

> "You were automatically released on 11 October 2017 and managed well in the community until 12 June 2019. You were recalled because you had posted a picture of your previous family, including your daughter … and there was unclear evidence as to whether or not you had tagged this or not [sic]. After a concluded police investigation, there is no evidence that he [sic] did any more than post this picture with the intention that this would only have been seen by your two direct Facebook contacts."

22. Later in the release decision, the claimant addressed the outstanding Scottish criminal matters. She stated that they related to the incident which, as she recorded, "relates to the alleged threats you made to 'slash' staff members in HMP Grampion [sic]." She recorded that the charge was found proved but the penalty of one day cellular confinement was quashed on appeal. She evidently did not appreciate that the date of that incident within HMP Grampian and the disciplinary charge to which it led, fell during the period when, the claimant thought, Mr Pulman was doing well on licence in the community, rather than in custody.

23. In the conclusion and decision section at the end of the release decision, the claimant repeated her thinking that "you managed almost 2 years on licence without reoffending". The conclusion was that "your risk can be properly managed in the community". She directed Mr Pulman's release on 16 December 2019, subject to 19 detailed licence conditions, including fixed residence, curfew, reporting to staff at the approved premises, not to stay at any premises where any child is present; not to contact numerous named individuals including his ex-partner and her children without prior approval of the

supervising officer; and not to communicate through social media except with advance approval from the supervising officer.

24. It did not take long for the error to come to light. The claimant sent out the release decision at 23:49 on 2 December 2019, by email. The offender manager, Ms Samantha Owen, pointed out the error to a case manager, Ms Roopa Singh, in an email the next day. Ms Owen said that "Mr Pullam [sic] was only in the community for 6 days before he was recalled". There were also difficulties about an appropriate release address. A flurry of emails followed. A consensus quickly formed that it was not in the public interest for Mr Pulman to be released.

25. The claimant joined in that consensus when she realised the error, for which she did not accept responsibility: "on the information I had at the time of the decision, it was the right decision" but "[b]ased on the new information provided post-decision, this offender is not safe to release", she said in an email of 3 December to the Parole Board's head of legal matters, Mr Michael Atkins. His view was that the claimant was *functus officio* and could not reopen her decision. The error was too major to justify reopening the decision under the relevant slip rule.

26. On the evening of 3 December, the claimant was very worried. Mr Pulman was, she said in another email, a dangerous man. The public had to be protected from him. The claimant had relied on the information on the "cover sheet", which was wrong. The decision was "flawed and cannot stand". There should be an oral hearing and, the claimant said, "there is almost zero likelihood a panel will release him". But Mr Atkins wrote back that "the prisoner will JR [judicial review] us" and there was no power to change the decision. The debate continued.

27. In an email of 6 December, the claimant wrote at length in a more shrill tone about "nightmares last night that woke me screaming" which she then graphically described. She warned Mr Atkins and other Parole Board staff that "[i]f you choose to release Mr Pullman [sic], it is not my decision and the blood would be on your hands, not mine". She urged that the slip rule be invoked to change the decision; or that the decision should not be implemented because protecting the public "must override all other considerations". She had suggested, she said, that Mr Pulman should not be released even if that position were unlawful; "integrity would lead us to break the law and rescind this decision".

28. Under the release decision, Mr Pulman was due to be released on 16 December 2019. On that date, he was not released. The Chair of the Parole Board, Ms Caroline Corby, decided that the release decision should be treated as a nullity. To support that proposition, the Parole Board took the unusual step of issuing a judicial review claim seeking to quash the release decision. Mr Pulman's legal representatives at first contested this, but the matter was then resolved by a consent order (which I have not seen) made by a judge of this court on 18 December 2019.

29. On 23 December 2019, the Chief Executive of the Parole Board, Mr Martin Jones, wrote to the claimant saying he had obtained two assessments of the release decision and both assessors had concluded that it "was not a well evidenced defensible decision based on the evidence in the dossier" and "[y]our reasons were ineffective and did not meet the expected standard in more than one significant area". Personal feedback was offered; the Board would then consider the claimant's "learning needs".

30. The claimant responded the same day saying she had shared the release decision with another member and had "learnt a lot", had discussed the learning points with her mentor and taken on board the similar and additional issues raised by the two assessors. She added: "I … don't have any further concerns from my perspective that I feel need to be addressed as I have taken the learning on board and will apply it". She suggested the Board should look at certain "wider policy and practice issues" raised by the case.

31. Mr Pulman's case was then referred to a different single panel member who held an oral hearing on 24 January 2020 and in a written decision dated 3 February 2020 directed Mr Pulman's release on 28 February 2020, subject to stringent licence conditions, in some respects more far-reaching than those in the claimant's release decision. The dossier had grown to 454 pages. The member stated in his decision that he "accepted the recommendations of witnesses at the oral hearing".

32. On 6 February 2020, Ms Corby signed a document referring the claimant to the termination panel, with supporting written evidence, under the terms of the termination protocol. Ms Corby set out the factual history, attributed blame to the claimant for the erroneous release decision, described the case as one of "catastrophic error" and stated that she and the Board had lost trust and confidence in the claimant and had concerns about her suitability to continue as a member of the Parole Board. Mr Jones notified the claimant that day.

33. The claimant was suspended from her work as a Parole Board member but, some days later, directed to carry out some work on certain cases. She was provided with the written evidence supporting the referral, which included the judicial review documents (which I have not seen). She was formally suspended on 4 March 2020. The Secretary of State then appointed ad hoc the members of the termination panel. On 2 November, the claimant produced a 325 paragraph witness statement, setting out the history in detail from her perspective.

34. The termination panel held an oral hearing on 5 November 2020. The claimant was represented, as in this court, by Ms Nicola Braganza (now KC). She presented written and oral argument on the claimant's behalf, seeking to refute the allegation of gross negligence arising from the release decision. Through Ms Braganza, the claimant apologised for the release decision having been "badly drafted". That was the extent of the claimant's acceptance of responsibility. Ms Braganza took certain procedural points which are not now relevant because of the limited basis for granting permission to bring this claim.

35. The claimant's case was that she felt disadvantaged by her disability and stressed by ongoing disciplinary and employment tribunal proceedings; that she had felt bound to follow a policy of accepting the account on the cover sheet of the dossier and was fearful that if she were to depart from it, she could face further disciplinary action. Ms Braganza also submitted that even if there had been gross negligence, that did not mean the claimant was unfit to continue serving as a member of the Parole Board. Alternatives to termination were proposed, such as training to address learning needs, as provided for in a policy document to which Ms Braganza referred.

36. The termination panel gave its decision in writing on 19 November 2020, together with a covering note. The unanimous decision was that the release decision was "irrational"; and that:

> "no conscientious … member adopting a competent and professional approach to assessing the WP [William Pulman] dossier would have made such a release decision. It was clear from the dossier that far from living in the community on license for nearly two years, WP had in fact been in custody in a Scottish prison."

37. The cover sheet, the termination panel held, did not assist the claimant. It does not deal with sentences not under the jurisdiction of the Parole Board, such as those imposed in Scotland. The termination panel rejected the claimant's suggestion that she was bound as a matter of policy to accept the contents of the cover sheet whether or not the information stated on the cover sheet is correct. Such a policy was not proved and would abrogate the responsibility of the member to base their decisions on true information, obtained by reading the dossier.

38. The claimant, the termination panel held, "did not properly read the dossier before directing release" and "her explanation concerning the cover sheet was not true". The panel was "cautious" about recommending termination of membership based on a single error rather than a sustained course of conduct but regarded this as a case of "gross negligence"; public protection was potentially compromised and it was appropriate to recommend to the Secretary of State that he should terminate the claimant's membership.

39. In its covering note, the termination panel added that it had considered whether the claimant's conduct might have been "disposed of by other means than a referral under the protocol". The panel accepted that termination panel hearings should only be used in very rare cases and:

> "reflects that if, following [the claimant's] release decision …, senior figures at the PB had engaged in an early, open and frank discussion with [the claimant] about the case it might have been possible to resolve the issue without recourse to the termination protocol."

40. The covering note ended with a request that the Chair and Chief Executive should provide a note outlining the lessons learned from the case together with changes implemented as a result of it "in light of any process failings uncovered by this case". That note was provided on 25 November 2020 by Mr Ed Bowie but signed by Ms Corby, the Chair, and Mr Jones, the Chief Executive. The Parole Board had acted properly, they said. But three lessons had been learned, they added; and the quality assurance process would be improved.

41. The three lessons learned were, first, that a member should be given a short period to make representations before a decision to make a referral is made. Second, a "suite of policies" was being developed for cases where a member's conduct gives rise to concern. These should, when adopted, help avoid termination panel referrals. Third, members would be reminded of the obvious point that the public is entitled to expect them to uphold appropriate standards, a point already made clear in their letters of appointment and their training.

42. The claimant wrote a lengthy plea in mitigation dated 11 December 2020, addressed to the Secretary of State, asking him not to terminate her membership. She criticised the panel's covering note as being "at odds with their conclusion". In her summary at the start of the document, she made three assertions which were then developed at length in written argument.

43. The first was that the separation of powers doctrine and the principle of judicial independence meant that the executive should not override her judicial decision; if a

decision was flawed, the remedy was an appeal not interference by the executive. Second, she repeated the point that the covering note contradicted the decision. Third, she contended that the case for termination, under the termination protocol, was not made out. She apologised that "the case was poorly drafted and included a misstatement of fact" but continued to "stand by" her release decision which was "fully justified on all the material before me, which I considered with great care".

44. She pointed out that the prisoner was in fact released following the subsequent consideration of the case by another member, a point she felt the termination panel had not considered adequately or given its proper weight. Her arguments were developed at great length, but the above summary is sufficient for present purposes. She also relied on her disability and on her long and otherwise unblemished record of decision making as a member of the Parole Board.

45. On 20 January 2021, Mr Bowie of the Ministry of Justice forwarded the relevant documents to the Secretary of State (i.e. to the then Lord Chancellor, Sir Robert Buckland QC and to Minister Lucy Frazer QC). He also provided a note (cleared by other senior officials) summarising the position. The advice was that the Secretary of State should follow the termination panel's recommendation to remove the claimant as a Parole Board member. Mr Bowie and his colleagues had considered the plea in mitigation with care and noted that the claimant declined the offer to engage with the Board about its concerns, following the release decision.

46. The Secretary of State followed that advice and the recommendation of the termination panel. The claimant's membership of the Parole Board was terminated with effect from 24 February 2021, by a letter of that date written on behalf of the Secretary of State. The reasons followed those given by the termination panel and by officials. The letter concluded by informing the claimant that there was no right of appeal but that she could seek a judicial review.

47. The claimant then did exactly that and the matter was delayed for various reasons which it is unnecessary to go into here. Eventually, as I have said, permission was granted by Turner J following an oral hearing, on the single ground of challenge on which submissions were made to me. I come next to those submissions and then to my reasoning and conclusions.

## Submissions of the Claimant

48. For the claimant, Ms Braganza KC submitted that a single finding of gross negligence is not enough to justify a termination of membership of the Parole Board. Mistaken discharge of a judicial function could not be a disciplinary matter, she said. She relied on Mostyn J's emphasis in *Wakenshaw* (cit. sup.) on judicial independence, at [30], first enshrined in statute in the Act of Settlement 1701, providing that judicial tenure of office endured during good behaviour and could be removed upon an address of both houses of Parliament (the provision now in section 11(3) of the Senior Courts Act 1981).

49. Ms Braganza then referred me to the Privy Council's decision delivered by Lord Hope in *Durity v AG of Trinidad and Tobago* [2008] UKPC 59 at [24], applying the reasoning in *Sirros v. Moore* [1975] QB 118 (an immunity from suit case), per Lord Denning MR at pp.136-7: judges must be free in thought and independent in judgment when acting judicially. While misconduct could include the conduct of a judicial office holder while exercising a judicial function, applying the misconduct label too readily to the judicial

function will damage judicial independence. This was a case where that learning must be applied, Ms Braganza argued.

50. She referred to the Judicial Conduct Rules 2023, to which I added mention of the July 2023 Guide to Judicial Conduct (published on the website of the Judiciary of England and Wales). A distinction is drawn, she noted, between a judge's personal behaviour and their judicial decisions or judgments. The latter if made in good faith cannot be misconduct and that was the position here, she submitted. Furthermore, the error was a single mistake which should have led to a finding of additional learning needs rather than termination of membership.

51. The claimant did not dispute, Ms Braganza explained, that her reasoning was "irrational" (the word used by the termination panel) in the sense that it was founded on a material mistake of fact, as happened in *R (Mackay) v Parole Board and SSJ* [2019] EWHC 1178 (Admin) (per His Honour Judge Kramer, at [39]). Other Parole Board decisions had been held to be irrational, some successfully challenged on judicial review by the prisoner or (in *R (DSD) v Parole Board* [2019] QB 285 (per Sir Brian Leveson, Jay and Garnham JJ at [159]-[163]) victims or their relatives.

52. Ms Braganza submitted that in that line of cases, decision makers at the Parole Board had erred in ways not dissimilar to the claimant's error here; yet in those cases, the remedy was to quash the decision on judicial review and no one suggested those who took the erroneous decisions in those cases had committed misconduct. They were exercising a judicial function, but doing so in a wrong way, just as the claimant did here. Indeed, this is the first case ever of a Parole Board member being removed for misconduct.

53. Next, Ms Braganza submitted that no reasonable consideration had been given by the termination panel to a lesser sanction than termination of membership. It was not enough to find that gross negligence was made out. The question whether the member was to be considered unfit and unsuitable to hold the office of Parole Board member was a separate and subsequent question, but was not considered separately. Paragraph 15 of the termination protocol refers to "other action or sanction" in the event that termination is not decided upon.

54. Ms Braganza submitted that the termination panel did not refer to this possibility but, rather, mentioned in its covering letter the possibility that recourse to the termination procedure might have been avoided completely if there had been an open and frank discussion at an early stage. This indicates that the panel mistakenly considered it had a "binary option" either to terminate or not terminate the appointment and fettered itself by overlooking the other options referred to at the panel hearing, such as temporary removal from the rota, being required to undergo coaching, mock panels, mentoring, two member panels, practice observation and the like.

55. Furthermore, the claimant submitted that matters going in her favour by way of mitigation were ignored and were not, as they should have been, balanced against the misconduct as it was found to be. These were matters the panel was entitled and to an extent bound to take into account. Ms Braganza's skeleton argument included an analysis of the following positive points that could be made about the claimant's decision in Mr Pulman's case.

56. The claimant was not, she pointed out, unaware that Mr Pulman had allegedly threatened a social worker at a prison in Scotland. She sought further information about the incident,

albeit she must have misunderstood the timing. She was aware, likewise, of the recall to HMP Nottingham arising from the Facebook post after the claimant had been released on licence. The claimant analysed that incident in the final release decision and properly took it into account. She addressed the appropriate licence conditions to protect the public. The outcome could not have been "wrong" because the same outcome was decided upon in February 2020.

57. Other factors Ms Braganza reproached the panel for not taking into account were the claimant's disability, the stress she was under because of ongoing disciplinary and tribunal proceedings and her assurances that she had learned lessons by speaking to a colleague and considering the points made by the two quality assurance assessors. The combination of these factors and the panel's omission to address them properly made its decision so unreasonable that no reasonable termination panel could have decided to recommend the highest sanction of termination.

58. Finally, Ms Braganza repeated the criticism that the panel's covering note indicating that recourse to the termination protocol might have been avoided, contradicted the conclusion that termination was the only appropriate response to the misconduct found. The Secretary of State had failed to give reasonable consideration to the point that an early, open and frank discussion leading to informal resolution would have been preferable to invoking the formal process. These considerations also rule out any high likelihood that the outcome for the claimant would have been the same had the flaws in the decision not been present.

## Submissions of the Secretary of State

59. For the Secretary of State, Mr Mark Vinall reminded me in written argument that the principal task of Parole Board members is to undertake risk assessments of prisoners to determine whether they may safely be released into the community and, if so, on what terms. That assessment is informed by a dossier about the prisoner prepared by the "Public Protection Casework Section" of the Ministry of Justice (see rule 16 of the Parole Board Rules 2019). The Parole Board must consider "any documents given to it by the Secretary of State" and "any other oral or written information obtained by it" before reaching its decision: Criminal Justice Act 2003, section 239(3).

60. Mr Vinall likened the degree of skill exercised by a Parole Board member to that required of a passenger aircraft pilot or the driver of the Manchester to London express: *Alidair Ltd. v. Taylor* [1978] ICR 445, per Lord Denning MR at 451, endorsing observations of the Employment Appeal Tribunal that in such cases a single mistake can lead to a major disaster and thus may alone justify dismissal. I interject that the claimant too regarded the responsibility for deciding upon release as a heavy one; in her emails, she made the point in graphic terms that release of the wrong man at the wrong time can have catastrophic consequences.

61. The present proceedings are not in the nature of an appeal, Mr Vinall emphasised. The test is not the same as in statutory professional discipline appeals to this court from bodies such as the General Medical Council or the Solicitors' Regulation Authority. The threshold is the higher one of irrationality and there is no scope for challenging findings of fact including, importantly in this case, the finding that the claimant's assertion of a policy of treating information on the cover sheet of a dossier as binding, was not true.

62. Mr Vinall submitted that the claimant's invocation of judicial independence was misconceived. The claimant was not dismissed because of her judicial reasoning but because she had incompetently failed to prepare the case properly by reading the dossier. She had agreed at the termination panel hearing that it was important to read the dossier before making the decision and that a member who did not do so might be grossly negligent; but had insisted that she had read the dossier properly, evidence the termination panel rejected.

63. Failing to read the case papers properly was not a judicial decision but, rather, a failure to act judicially, Mr Vinall contended. The present case fell within what Lord Hope said in the *Durity* case, giving the judgment of the board of the Privy Council, at [25]:

> "[N]o judge is immune from disciplinary measures taken to control things said or done that amount to an abuse of the judicial function or to a failure to act judicially. The public interest and the reputation of the judicial arm of the public service demand that misconduct of that kind must be capable of being dealt with. Cases where the office is liable to be brought into disrepute as a result of the improper conduct of its office holder … will fall into that category."

64. While a single incident can, as the termination panel found in this case, lead to termination of membership for gross misconduct, there were two further features that pointed towards termination: the claimant's only explanation being rejected as factually untrue; and her lack of insight by declining to engage in a dialogue with management after being confronted with the views of the two quality assurance assessors. The latter feature was highlighted in the advice from officials to the Secretary of State to accept the panel's recommendation.

65. While in the claimant's long letter pleading in mitigation, she did apologise for poor drafting and including a misstatement of fact, she continued to insist that she had read the dossier and made no mention of any lesser sanction than termination. Rather, her focus was on persuading the Secretary of State that the panel's decision was a wrong interference with her judicial independence and that the covering note supported her case that the termination protocol should not have been invoked at all.

66. The Secretary of State accepted, through Mr Vinall, that there was no express consideration of any lesser sanction in the termination panel's written decision and recommendation, nor in the termination letter written on the Secretary of State's behalf. However, the panel was clearly not labouring under the misapprehension that it had only a binary choice between termination or imposing no sanction at all. The panel cannot have been unaware of paragraphs 14 and 15 of the termination protocol, permitting other sanctions than termination, nor of the clear written submissions of Ms Braganza suggesting a lesser sanction than termination of membership.

67. The contention that the panel failed to have regard to matters of personal mitigation advanced by the claimant is not well founded, Mr Vinall submitted. The claimant relied on the point that Mr Pulman was released in February 2020; that the claimant suffers from CFS/ME; that termination would mean she would lose her career and have serious financial consequences for her; and that she had a long and good record of past service on the Parole Board.

68. These matters, said Mr Vinall, were of little or no relevance and did not meet the high threshold for being mandatory relevant considerations. Hardship is an inevitable consequence of membership being terminated. In any case, the matters of personal

mitigation were developed in detail in the claimant's letter pleading in mitigation, the whole of which was considered carefully by Mr Bowie and other officials, as was made clear in their advice to the Secretary of State; and by the latter himself, as stated in the letter of termination, dated 24 February 2021.

69. As for the claimant's criticism based on the "covering note" and her assertion that the termination protocol should not have been invoked, the Secretary of State submitted that the covering note should be read in its context. First, the termination panel proceedings had lasted much longer than had been anticipated and the claimant was suspended for most of that period. The delay itself had caused the claimant additional stress and, as she said in her witness statement before the panel, had exacerbated the symptoms of her CFS/ME. Second, she might perhaps not have advanced such a far-fetched defence had the issues been confronted early on.

70. Finally, Mr Vinall submitted that if the Secretary of State's challenged decision were flawed on the basis that lesser sanctions or personal mitigation should have been considered, that would be a flaw without any impact on the highly likely outcome for the claimant, which would have been the same. The court should therefore, applying the test in section 31(2A) of the Senior Courts Act 1981, grant no relief and leave the decision intact.

## Submissions of the Parole Board

71. For the Parole Board, Mr Fraser Campbell relied on a skeleton argument making similar points to those made by the Secretary of State. He endorsed the points made by Mr Vinall and added some further points, the main ones being, in my summary, the following.

72. The case was not one where a judicial decision had been made on a flawed basis. The panel's use of the word "irrational" to describe the decision did not mean that it was merely flawed in the sense of being susceptible to quashing. The misconduct was not preparing the case properly and therefore acting in an unjudicial manner. A decision might be liable to be quashed and also demonstrate misconduct, for example if (in a very extreme case) the result were determined by tossing a coin or reading tarot cards.

73. The only question for the court, Mr Campbell submitted, is whether the claimant's membership was terminated in accordance with the termination protocol. A single instance of professional incompetence could be enough to justify termination, if it was likely to undermine public confidence in the Parole Board's activities and bring it into disrepute. Competence and diligence are two of the six "Bangalore" principles of 2002, now found in the Guide to Judicial Conduct of July 2023 (at page 8, footnote 5).

74. Both the termination panel and the Secretary of State were entitled to take the view that the single error was so serious that termination was appropriate. The Parole Board had convened the panel hearing in order to advocate termination. The termination panel was not bound in law to reject the Parole Board's case that termination should ensue.

75. The cases in which prisoners (or, in *DSD*, victims or their relatives) had succeeded in securing quashing orders in respect of Parole Board decisions, were not in point, Mr Campbell submitted. Those were not necessarily cases where misconduct had occurred merely because the decisions were quashed. Even if there were misconduct in any of those cases, that is irrelevant to this case as there is no permission to bring a challenge on the

basis of inconsistency of treatment of the claimant compared with that of other Parole Board members.

## Reasoning and Conclusions:

76. On the sole permitted ground of challenge, the court has to decide whether the Secretary of State's acceptance of the recommendation to terminate the claimant's membership of the Parole Board was (in the public law sense) "unreasonable" because the recommendation arose from a single, isolated incident where the claimant was acting alone as a single member panel; and because no or no sufficient consideration was given to alternative sanctions.

77. I will address the claimant's submissions about judicial independence first. In my judgment, the claimant's handling of Mr Pulman's case does not fall within the scope of the protection accorded to judicial acts done in good faith. I accept the submission of the Secretary of State and the Parole Board that the allegation of gross negligence against the claimant was an allegation of a failure to act judicially, not of error in the course of carrying out a judicial act.

78. The case is not, in my judgment, comparable to a case such as *Sirros v. Moore* [1975] QB 118, where a judge was held immune from suit for ordering the detention of the plaintiff. The immunity applied to acts done in the course of exercising his judicial functions in good faith, albeit mistakenly. *Sirros* is the most complete exposition of judicial immunity in the modern era. The grounds of the Court of Appeal's decision are not entirely uniform. The case was factually and analytically difficult and I need not analyse it fully for present purposes.

79. For Lord Denning MR the test was honest belief in jurisdiction; "so long as he honestly believes it to be within his jurisdiction, he should not be liable" (p.136D-E). The judge had, said Lord Denning at 137B-C, "no jurisdiction to detain Sirros … The Divisional Court were right to release him on habeas corpus. Though the judge was mistaken, yet he acted judicially and for that reason no action will lie against him."

80. For Buckley LJ, the question was whether the act is done *coram judice* (exercising a judicial function) (139E-140B); the judge is not immune if he "purports to do something demonstrably outside his jurisdiction … . He must have acted reasonably and in good faith in the belief that the act was within his powers." (140B). Buckley LJ therefore asked himself (at 141A-B) whether the judge's mistaken belief that he had jurisdiction was "(a) … due to a justifiable ignorance of some relevant fact or … (b) due to a careless ignorance or disregard of some such facts, or (c) due to a mistake of law relating to the extent of his jurisdiction?"

81. He held that the judge would be immune from suit in a case falling within (a), but not if the case were within (b) or (c). However, on the facts, he held (144E) that the judge was immune from suit because "when the judge directed the detention of Mr Sirros, he was acting within his jurisdiction, although he adopted an erroneous course of procedure".

82. Ormrod LJ aptly referred to the different senses in which the word "jurisdiction" is used and (at 150C-D) preferred "the strict sense" in the context of the case: the judge "acts outside his jurisdiction when he exceeds the limits imposed on his court; but not when, having jurisdiction over the subject matter, he assumes a power which has not been given

to him". The claim must fail, he said, because (150E-G) "[t]he acts complained of were done by the judge, acting in his capacity as a judge, in good faith, though mistakenly"; or because "the judge had power (jurisdiction) to cause the plaintiff to be lawfully detained in custody".

83. It is reasonable to recognise some equivalence between cases in which a judge will be held immune from suit and circumstances in which the judge cannot be guilty of misconduct. The Privy Council did so in the *Durity* case, in the judgment of the Board delivered by Lord Hope at [24]-[25]. The need to protect judicial independence is the imperative in both cases. The essence of the distinction drawn in *Durity*, a disciplinary case, was between judicial acts done mistakenly and a failure to act judicially.

84. As Lord Hope said, while "[a]n error of judgment, honestly made in the performance of the judicial function, must not be treated as misconduct" ([24]); "no judge is immune from disciplinary measures taken to control things said or done that amount to an abuse of the judicial function or to a failure to act judicially"; including cases "where the office is liable to be brought into disrepute as a result of the improper conduct of its office holder … An assertion that what was done was done in good faith will not always be an answer … ." ([25])

85. Examples of cases falling into the latter class were debated at the hearing before me. Deciding a case on the toss of a coin would be an extreme example. I would add as further examples a judge who fails to attend court to hear a case or takes too long to produce a written judgment. The distinction is clear in principle.

86. I accept that applying it to the facts in a particular case may not always be easy. But here, the termination panel's findings were, in my judgment, clear findings of misconduct. They found that the claimant had been grossly negligent because she had not read the dossier properly and thus had failed to prepare the case properly. I see no discernible interference with judicial independence by visiting those failures with disciplinary action. She did not misinterpret the facts or draw a wrong conclusion from them. She failed to ascertain what they were.

87. I do not think the cases such as *Mackay* and *DSD* in which judicial review challenges to Parole Board decisions succeeded, are of assistance to the claimant. In those cases, the court was not required to decide whether the decision maker had erred in a manner that did, or did not, amount to misconduct. The issue in those cases was whether the decision should stand or be quashed. The reasoning of the court in some of the cases (in particular, *DSD*) included criticism of the ways in which decisions were made; but what consequences should follow for the decision maker was not a matter before the court.

88. Next, I consider the submissions about the claimant's work on the Pulman case and the treatment of that issue by the panel and subsequently the Secretary of State. Like the panel, I accept that the mistaken belief that Mr Pulman was not in custody from October 2017 to June 2019, was an isolated error. The panel was "cautious" about recommending termination based on a single incident, but decided to do so to avoid eroding public confidence in the Parole Board's ability to protect the public and the risk that its work could be brought into disrepute.

89. I accept also that the panel's decision does not include express consideration of a lesser sanction than termination of membership. I do not agree with Ms Braganza that the

members must have been under the misapprehension that they had a binary choice between termination and recommending no sanction at all. It defies plausibility to suppose that they were unaware of the provisions in the termination protocol permitting lesser sanctions; or that they blinded themselves to and turned a deaf ear to Ms Braganza's submissions suggesting a lesser sanction.

90. Their reasoning is quite brief, but need not be set out at greater length than required to inform the claimant why they decided to recommend termination. As Mr Campbell pointed out, there is no "reasons" challenge. They were aware that the claimant's record of decision making was otherwise unblemished. The reference to being cautious about deciding to terminate membership based on a single instance of gross negligence implies awareness of that point. The findings (i) that the error was made and its nature and (ii) that the claimant's explanation of it was not true, adequately support the conclusion that termination should follow.

91. I also accept the submission of the Secretary of State and the Parole Board that the former took into account the points made in the claimant's plea in mitigation letter and by officials (through Mr Bowie). That letter included reliance on matters of personal mitigation and a limited form of apology, but made no mention of a possible lesser sanction than termination and a willingness to engage in a process of mentoring, coaching or training. In the note of advice to the Secretary of State from officials, it was pointed out that in the email correspondence at the time, the claimant had declined to engage in such a process.

92. The claimant's long witness statement in the termination panel proceedings did include matters of personal mitigation: that she was aware Mr Pulman was alleged to have threatened a social worker and sought better information about the incident; her disability; the stress of ongoing disciplinary and tribunal proceedings; her assurances that she had learned lessons; and her untainted record of decision making in many other cases. Both the termination panel and the Secretary of State were made aware of those matters.

93. Ms Braganza says they must have overlooked them but I am unable to agree that they did, or that they were of great weight or were mandatory relevant considerations. The termination protocol is quite a short and simple document. It is not, or was not in 2019, supplemented by an accretion of adopted policy documents and guidance. The stark question was whether the claimant's error and her response to its discovery were so serious that only termination of membership would meet the gravity of the case. The Parole Board was arguing for that proposition.

94. The panel and the Secretary of State were, in my judgment, not bound to reject it. There was no procedural document requiring the panel to go through specific stages in its reasoning and to record the outcome of doing so in its decision. There was nothing comparable to the "Indicative Sanctions Guidance" encountered in appeals to this court against decisions of the tribunals in disciplinary proceedings against doctors, brought by the General Medical Council. That process involves considering possible sanctions in ascending order of gravity. There is nothing like that here. Indeed, the termination panel is not the decision maker at all; it only recommends and the Secretary of State decides.

95. Finally, I do not accept that the Secretary of State's decision is vitiated by a failure to consider the panel's covering note suggesting that an early and frank dialogue might have avoided the need to operate the formal termination process. The claimant suggested that means the claimant would have undergone some process as part of an informal resolution,

such as counselling, training or mentoring. That is one possibility; another would be voluntary resignation, a possibility not suggested by any party.

96. In my judgment, the covering note is something of a red herring. It does not make any sense if it is interpreted as the termination panel contradicting its own recommendation. It is not necessarily tied to the facts of the claimant's individual case. It was about learning lessons for other cases. If an early and frank dialogue might have avoided termination proceedings in the claimant's case, that would probably have been because the parties' positions would not have become as entrenched as they later became, a point made by Mr Vinall in his submissions.

97. It is possible that the claimant might have avoided her appointment being terminated if she had behaved differently once the error came to light. She did not help her cause by seeking to deflect responsibility from herself and lay blame for the error at the door of others; nor by relying on the unrealistic suggestion that she was led into error by a mandatory policy of accepting at face value whatever was on the cover sheet, whether or not it was true and complete. I do not think any broader proposition can be read into the panel's covering note referring to informal dialogue. The claimant's criticism of the note is misplaced.

98. For those reasons, I reject the claimant's case under the sole permitted ground of challenge. The question whether (applying section 31(2A) of the Senior Courts Act 1981), had the conduct complained of not occurred, it is highly likely the outcome for the claimant would not have been substantially different, therefore does not arise. All I need say about it is that it would be difficult to say what the outcome would have been on the hypothesis that the Secretary of State's decision was, contrary to my view, flawed to the point of being irrational and unlawful.

99. The claim must accordingly fail and I dismiss it.