

[2024] PBRA 21

Application for Reconsideration by Pitchfork

Application

1. This is an application by Pitchfork (the Applicant) for reconsideration of a decision of a Panel of the Parole Board (the Panel) dated 4 December 2023 (the Panel Decision) not to direct the Applicant's release and not to recommend the Applicant's transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair and/or (c) it contains an error of law.
3. I have considered the application on the papers. These are:
 - (a) The Panel Decision;
 - (b) The Applicant's application for reconsideration of the panel decision dated 22 December 2023;
 - (c) The email dated 11 January 2024 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) setting out representations by the Respondent in response to the application for reconsideration; and
 - (d) the Applicant's dossier containing 1356 pages.
4. The grounds for seeking reconsideration are that the reasons in the Panel Decision to decline to recommend the Applicant's return to Category D (open) conditions and to refuse to direct the release of the Applicant are:
 - (a) irrational as they failed to take any account of the recommendations of the Applicant's Prison Offender Manager (POM) that the Applicant should be released (Ground 1).
 - (b) irrational as they failed to take into consideration all relevant considerations/give adequate reasons in relation to assessment of risk (Ground 2).
 - (c) irrational as they failed to take into consideration relevant factors in relation to risk in open conditions (Ground 3).
 - (d) procedurally unfair as the panel found that the Applicant's recall was not justified but then proceeded to find that the Applicant should not be re-released as his risk was too high (Ground 4).
 - (e) procedurally unfair as the panel over-emphasised the significance of polygraph testing within the context of a very extensive monitoring plan for the Applicant's release (Ground 5).
 - (f) procedurally unfair as the panel chose to prefer the evidence of the Community Offender Manager (COM) to that of the Psychologist (Ground 6).
 - (g) procedurally unfair as the panel has chosen not to make any recommendations or give any indications as to the nature of any programme or treatment suitable

to address the Applicant's alleged risk (Ground 7).

Background

5. The Applicant attacked LM, raped and then strangling her. His responsibility for the rape and murder of LM went undetected until after he had committed the rape and murder of DA on 15 June 1986. DA had been raped vaginally and there was also evidence that she might have been subject to buggery.
6. The Applicant's offences attracted some additional notoriety because he was identified as the killer of DA by the early application of DNA analysis in 1987 to identify DA's killer. The police had sought blood samples from males in the area in which the Applicant lived, but he had attempted to evade liability by getting someone else to impersonate him. The Applicant has admitted his liability for the offences against LM and DA before pleading guilty to them.
7. The Applicant has given various explanations as to why he had committed the rapes and murders of LM and DA which were the consequence of *"the attention and power which he craved from the exposure offences and [his] developing belief that he could 'do anything to his victims'"*. His explanation of the murder on LM was that it was *"prompted by a desire to hurt someone that day due to issues he was having with his wife, and 'a need to murder'"*. He gave a similar explanation for the murder of DA which he committed as a result of problems with his wife and the ending of an affair and in consequence *"he was exceptionally angry and perceived women to be dominating everything"* so that *"when he came across his victim, he was overtaken by a desire to hurt and make someone pay"*.
8. The Panel considered that the murder of DA was *"the final chapter in the 15-year-cycle of ever escalating serious and sexual and violent offending by [the Applicant]"*.
9. On 22 January 1988, the Applicant, who was then 27 years old, was sentenced for these offences to life imprisonment with a tariff of 30 years less time spent on remand, but the tariff was reduced on appeal to 27 years and 242 days.
10. The Panel did not consider it necessary to consider much of the Applicant's sentence history until the time when he was released in 2021.

Release of the Applicant to Approved Premises

11. The Applicant was released to approved premises (AP) on 1 September 2021 subject to extensive licence conditions including one *"not to remain in the company of any lone female who is not known to [him]...except where that contact is inadvertent and not reasonably avoidable in the course of lawful daily life"* (the lone female condition).
12. There was also a condition in the licence requiring the Applicant to comply *"with any instruction given by [his] supervising officer requiring [him] to attend polygraph examination and to participate in polygraph sessions and examinations as instructed by or under the authority of [his] supervising officer and to comply with any instruction given ...during a polygraph session by the person conducting the polygraph"* (the polygraph condition).
13. The Panel explained that the polygraph condition was required as there were *"concerns*

as to how transparent, forthcoming and honest [he] was with professionals and the difficulties they had in getting from him any real idea of what was actually going on in his head – whether, for example he really did no longer continue to have deviant/unhealthy sexual thoughts as he claimed [as] the concern generally was that there could be more going on under the surface than he was prepared to reveal, which could not otherwise be detected”.

14. It was regarded as “essential” to have the polygraph condition because “*[the Applicant’s] self-reporting could not be relied on and there was evidence of him saying different things to different people*”. The Applicant was in open conditions since 2017 until Releases on Temporary Licence’s (ROTLs) had been suspended in 2020 because of Covid, and during his period there “*he had generally shown himself able to abide with the conditions imposed on him*”. There were, however, “*occasions when [the Applicant’s] propensity for deception was a concern and when his attitude towards his COM was hostile and uncompromising*”. The Applicant’s relationship with his current COM “*has been strained by his impatience with [these] restrictions ... and [the] delay in meeting his requests for them to be relaxed*”.
15. The Applicant’s resettlement began reasonably successfully and remained so until 14 October 2021 which was when the polygraph tester (PT) was to conduct the first of the two polygraph tests. The PT asked the Applicant if he had spoken to any lone females to which the Applicant replied that he had just done so in the car park outside the Probation Office in “*just a passing conversation*” explaining to the female where she might get a better view of the ships as he was “*trying to be helpful*”.
16. According to the Panel, concern over this conversation was increased when the polygraph test produced an “*inconclusive*” result which suggested, but was “*not conclusive of the proposition that [the Applicant] was not properly submitting to the polygraph testing process*”, and in consequence a further test was arranged for the following month.
17. In the meantime, the Applicant was asked by his COM about his encounter with the sole female which he had disclosed and which is described in paragraph 15 above. According to the Panel, the Applicant gave details which were “*different in some respects to those details he had given to [the PT]*” and this “*indicated to [the COM] a breach [by the Applicant] of two conditions in his licence agreements, to be of good behaviour and not to behave in a manner which undermines the purpose of the licence period*”. The Applicant was sent a warning letter to this effect on 25 October 2021 (the first warning letter).
18. On 5 November 2021, a further incident occurred in which it was suggested that the Applicant had acted in breach of the good behaviour licence condition again by becoming angry and aggressive when he was kept waiting. He denied that he had shouted at his COM, but having heard the evidence of the AP Manager about this, the Panel was “*quite satisfied that he did so*” and that he behaved in the manner complained of in the second warning letter given to him on 8 November 2021.
19. On 15 November 2021, the PT attempted a second polygraph examination of the Applicant and the result was “*No Opinion*”, but the PT produced what the panel described as “*cogent evidence that [the Applicant] was deliberately seeking to undermine the testing process, by controlling his breathing which is a recognised and well-publicised mechanism for defeating the effectiveness of the test*”. The Applicant had denied to the PT that he had done this, but he admitted to the Panel that he

consciously altered his breathing as *"a way to manage his anxiety"*. He has contended that the explanation for any irregularity *"must be his attempts to deal with the stress of a disagreement with his GPS tag providers earlier that day and/or that sometimes his breathing just slows naturally"*. Given this second *"no result"* of the polygraph examination, the PT proposed a further polygraph test scheduled for December 2021.

20. After the report that the Applicant had appeared to have deliberately sought to undermine the test process, the matter was referred by the COM to her superiors – including MAPPA (Multi-Agency Public Protection Arrangements) - and it was decided to recall the Applicant for *"breaches of his licence to be of good behaviour and specifically to comply with polygraph testing"*. It was said that *"he had used countermeasures on the 15 November to subvert the test, that he had shouted at his COM on 5 November and that he had engaged in 'aimless' walking (a behaviour which was a precursor to his offences), spending time in forest/park areas, on occasions wearing a hi-vis jacket claiming to litter pick"*.
21. It became clear after the Applicant had been recalled that *"the polygraph testing condition had been unlawfully imposed on [the Applicant], and could not then or [at the time of the panel hearing] be properly attached to his licence conditions"*. Until March 2022, the Secretary of State and the Applicant's legal representative had not been aware of these facts and *"so any breach of [the polygraph testing] condition could not be used per se to justify [the Applicant's recall], although evidence of [the Applicant's] conduct in relation to the testing process was and remains of some relevance to the...assessment of [the Applicant's] future risk"*.
22. The Panel was therefore *"not satisfied that [the Applicant's] recall can properly be considered justified"*, although it was *"quite satisfied that [the COM] and her superiors acted in good faith (and ignorant of the illegality of the polygraph condition)"*. The Applicant's conduct towards his COM *"was less than acceptable"*, but *"prior to recall, it had for the most part been dealt with by that first warning letter"*. The Panel was *"unable to conclude that [the Applicant's] behaviour at this second test, given all the other restrictions that were in place to regulate [the Applicant], necessarily meant that his risk had elevated to such an extent that he was no longer manageable on licence and that he had to be recalled"*.

The Panel's View of the Current Risk Posed by the Applicant

23. The Panel considered that the Applicant's risk factors included *"negative attitudes towards women, anger, the enjoyment of causing fear in females, a need to be in control, deviant fantasies, inability to regulate his emotions, wanting to punish others (namely women), sexual preoccupation, sexual entitlement, enjoyment of and seeking sexual violence (including rape fantasies), grandiosity, risk taking, poor problem solving and grievance thinking, difficulties in relationships both intimate and social, and social isolation"*.
24. Report writers and the prison psychologist had considered that *"[the Applicant's] psychopathology had changed, and some traits previously exhibited have not been seen for a long time"*. The Panel noted that in the three years between 2017 and 2020 before the pandemic *"very little of concern emerged on 17 ROTLs to AP"* and *"the intimate friendship, which had developed between [the Applicant] and [his female friend] over the last few years, has been sustained"*. It was also noted that these positive factors do not provide an answer to the unknown concerns relating to the Applicant's *"psychosexual functioning"*. So the panel considered that there was *"a stark*

absence of current information regarding [the Applicant's] sexual attitudes, beliefs, thoughts, and behaviours, and the extent to which the ideation which caused [the Applicant] once to do as he did still persist. [The Applicant] denies the presence of any markers (sexual or otherwise) that parallel his offending, but he is unable to identify when this change occurred or what it was that caused it".

25. The Panel were also concerned as to whether the Applicant "can build a confident relationship with his COM (whoever that may be) and be adequately and confidently managed on licence". It was recorded that on two occasions, the Applicant has "battled with and shown considerable disrespect for his COM and indicated considerable grievance thinking towards her as he did towards her predecessor".
26. It was pointed out that concerns about the Applicant "[extended] to his clear inability to understand why disclosures such as that which he made in respect of the contact with the woman outside the Probation Office caused the concerns they do, and why the protracted and inconsistent explanations he has since given for that event do nothing to encourage confidence that he has the skills to manage his risk".
27. The Panel concluded that:
- (a) "[It] does not consider that [the Applicant] was open and honest with it".
 - (b) "[The Applicant] did nothing in his evidence to suggest that as a result of this recall he has undertaken any effective self-reflection or analysis as to his own responsibility in triggering the recall".
 - (c) When questioned by the Secretary of State's representative, the Applicant "appeared to concede that his recall was justified but he failed to demonstrate any proper understanding as to why that might be".
 - (d) Although the Applicant continues to deny seeking to undermine the second polygraph test by using countermeasures to do so, the Panel (who found the evidence of the PT "compelling and had viewed for themselves the video recordings of both tests") was "quite sure that he did exactly that" i.e. seeking to undermine the second polygraph test by using countermeasures to do so.
 - (e) In the absence of an admission by the Applicant for doing so or a credible explanation for doing so, "the panel considers that this reinforces the conclusion that [the Applicant] cannot be adequately trusted to commit fully to the supervisory process in the community, and provide to those supervising him the openness and honesty about all his thinking, that this requires. This is critical to risk management especially if he should have risk related or paralleling thoughts, whether these be sexually deviant in nature (a risk acknowledged by [the Prison Psychologist]) or connected to anger, grievance schemas or other risk factors".
 - (f) "There is also some indication that [the Applicant] is not sure that he can trust himself, raising questions about how sound are his internal controls". During the second polygraph test, the Applicant said that he "wanted [the Probation Service] to manage [him], giving the impression that he did not trust himself to do so".
 - (g) He had presented "evidence of grandiosity and propensity for grievance thinking" as was apparent from the evidence of the AP manager who told the Panel that when the Applicant presented himself to her on his first night at the AP after his release, he told her that "she would not have managed such a high profile case as his [case] before". The panel said that he was giving the impression that "he was more important than others in the hostel and that he enjoyed some of his notoriety". Further, the way in which the Applicant behaved to his COM on 5 November 2021 when he was annoyed about being kept waiting by her 10 days earlier shows that "grandiosity, entitlement and grievance thinking remain

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significant factors in the Applicant's functioning and obstruct his ability to share with those supervising him what he is really thinking".

- (h) The Applicant is seemingly unable to *"share matters with those [in authority] what he is really thinking"*. An example of this was that he helped a fellow foreign prisoner to write a letter and arrange some financial support. Although this was laudable, the Applicant did not comply with his duty to secure and obtain the approval of his POM *"which he knew or ought to have known was required"* and his excuse for the concealment was that *"it would be discovered anyway - did not impress"* but that was because it was intercepted by security. To the Panel, this was *"more importantly, a further example of [the Applicant] seeming unable 'to share' [matters of importance] with those with whom he most needs to communicate, and it connects to the overwhelming concern that if that which motivated the index offending remains present or should surface, [he] will not disclose it and seek help to address it"*. The Panel were concerned especially as that over a period of *"5 years [the Applicant] has failed to develop [a good relationship with his superiors] or share any such thoughts - both critical to public protection."*
- (i) There is a suggestion that the Applicant would be unable to deal independently with the challenges of release as the Applicant observed that *"while on licence he 'was in a fog' and needed guidance on what he could and could not, or should and should not, do, [which] suggested that he is not able to do independently with the challenges of release"*. The Panel considered that this *"fits' troublingly with the isolation, confusion and not knowing where he fitted in the world' which he says he felt when he committed the index offences"*.
- (j) He has been unable to foster a good working relationship with the COM supervising him on ROTL or the COM supervising him on release. Further, the Applicant's continuing grievance against the present COM suggests both *"substantial cognitive failings on his part [and that] there is no foundation for confidence that this will change"*. Further the COM observed that *"[the Applicant] does not take ownership of any of his behaviour towards her, nor of any of those other matters which triggered his recall."*
- (k) *"He deliberately sought to manipulate the polygraph testing and that he was pushing against other boundaries reasonably imposed upon him to protect the public, indicate the manipulation, and sense of power and control which accompany it, remain significant risk factors in his case."*
- (l) The Panel had *"been unable to identify an innocent explanation from [the Applicant] or others"* for his countermeasures during the second polygraph test.
- (m) The Panel was not convinced by the optimism of the prison psychologist that the Applicant had displayed no kind of behaviour either in custody or on licence to suggest that what had motivated him to offend previously no longer remained present because insofar as the Applicant has developed internal controls, he had *"broadly failed to demonstrate that this is the case."*
- (n) The COM was an impressive and thoughtful witness who had tried very hard to reach *"a working accommodation with [the Applicant] but through no fault of hers had not succeeded in doing so"*. The Panel considered that *"her professional experience and her experience in particular of working with [the Applicant] for some considerable period of time gave her a proper basis for her evidence being taken very seriously by the panel"*.
- (o) The Panel also considered that the risk of the Applicant causing serious harm to members of the public remained *"high"*.
- (p) Although the Applicant's recall was not actually justified because all parties thought erroneously that the polygraph testing condition had been validly imposed, the present position was that he does not *"represent a low risk of reoffending or of causing serious harm to a member of the public [and] his risk*

is presently too great to be manageable in the community” as “he needs to do further work...on particular risk factors which have yet to be sufficiently tackled and reduced, namely grandiosity, grievance thinking, parallels between the psychological mechanisms such as the schemas (sic) that underpinned his offending and those seemingly apparent during his release, and, more importantly, his openness and transparency about identified risks [which] represent core risk reduction work which can and should be addressed only in closed conditions”.

- (q) For the reasons set out above, despite the passage of time and the absence of previous offending on ROTLs while in open conditions or while on licence, it remained necessary for the protection of the public that the Applicant should continue to be confined and so it did not direct release.
- (r) The Applicant was not recommended for transfer to open conditions as he *“has not made sufficient progress during his sentence in committing fully to addressing and reducing his risk to a level consistent with protecting the public from harm, in circumstances where in open conditions he may be in the community, unsupervised, under licensed temporary release”.*

The Relevant Law

Parole Board Rules 2019 (as amended)

Irrationality

28. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

“The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

29. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing ‘irrationality’. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Other

30. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *“there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal’s reasoning.”* See also **R (Alconbury**

Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

31. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of craftsmanship.*"

Procedural Unfairness

32. A party seeking to complain of procedural unfairness under Rule 28 has to establish that either:
- (a) express procedures laid down by the law were not followed in the making of the relevant decision;
 - (b) they were not given a fair hearing;
 - (c) they were not properly informed of the case against them
 - (d) they were prevented from putting their case fairly; and/or
 - (e) the panel was not impartial.
33. The overriding objective is to ensure that the Applicant's case was not dealt with justly.

The reply on behalf of the Respondent

34. The Public Protection Casework Section (PPCS) in an email dated 11 January 2024 set out the Respondent's representations in response to the Applicant's reconsideration application and which will be referred in so far as is relevant in the course of this decision in respect of Ground 1 especially in paragraph 41 below.

Discussion

35. In dealing with the grounds for reconsideration, it is necessary to stress six matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
36. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
37. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
38. Fourth, when considering whether to order reconsideration, appropriate weight must

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be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

39. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.
40. Sixth, Rule 28 of the Parole Board Rules permits applications for reconsideration in respect of decisions as to whether a prisoner is suitable or unsuitable for release under rules 19 (1) (a) or (b), 21(7) or 25(1). Crucially, it does not permit reconsideration of recommendations in respect of suitability for open conditions. Accordingly, it does not permit reconsideration of recommendations and so the Board has no jurisdiction to consider the Applicant's application for reconsideration of decision relating to the recommendation for open conditions. Therefore, the claim for reconsideration of the decision refusing to recommend that the prisoner should be transferred to open conditions is rejected.

Ground 1

41. This ground is that the Panel acted irrationally as it failed to take any account of the recommendations of the Applicant's POM that the Applicant should be released. Those recommendations were not considered or referred to in the Panel Decision. Further, it is of importance to record that it is not alleged in the Respondent's representations that the Panel considered or took into consideration the POM's recommendation or that no such recommendation was made. Indeed, the case for the Respondent is that "*the Panel was not required to refer to the [POM's] recommendation in its reasons*", but it is not contended that the Panel was not required to take account of the POM's recommendation that the Applicant should be released in its reasons. In addition, it is not contended in answer to this Ground that the Panel actually did take into account that recommendation from the POM.
42. In support of the contention that the Panel was not required to refer to the POM's recommendation in its reasons, the Respondent contends that:
- (a) the Panel's decision did not have to include a recitation of every aspect of the evidence and an analysis of the extent to which it supports or contradicts the Panel's conclusion, but in Lord Brown's words in **South Bucks District Council v Porter** (No 2) [2004] UKHL 33; [2004]1 WLR 1953 the reasons "*must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'*";
 - (b) the Panel Decision achieves this as "*most of the 'principal controversial issues' in the circumstances of the case turned on the conclusions to be drawn from [the Applicant's] period on license, and thus not ones on which ... [he] as a Prison Offender Manager was particularly well placed to comment*". Therefore, it is contended that "*the Panel was not required to refer to the [POM's] recommendation in its reasons*"; and that
 - (c) the Panel did refer in the Panel Decision to the POM as explained in paragraph 27(h) above when it was explained that the Applicant wrote a letter to arrange some financial support for a fellow prisoner without complying with his duty to secure and obtain the approval of his POM to do so. This matter is not relevant to this Ground which deals with the Panel's duties in relation to its approach to the POM's recommendation.

43. A critical issue on this application is to determine whether the recommendation of the POM on the Applicant's conduct in the period after his recall to custody in November 2021 until the hearing in November 2023 would have had any relevance to the issue of whether the Applicant should have been released and that entails considering what were in Lord Brown's words the "*principal controversial issues*" in this case before the Panel. The case for the Respondent is that the "*principal controversial issues*" in this matter "*turned on the conclusions to be drawn from [the Applicant's] period on licence*" which preceded the appointment of the POM as the Applicant's POM. This related to the period which ended when the Applicant's licence was revoked in November 2021 and he was returned to custody; this period ended about 23 months before the Panel's hearing which led to the Panel Decision which is the subject of the present reconsideration application. The case for the Applicant is that the "*principal controversial issues*" in this case before the Panel were or included the Applicant's conduct and risk after his recall to custody and until the Panel Decision.

44. I have concluded that the Applicant's case is correct and that the recommendation of the POM close to the time of the Panel Decision was highly relevant on the issue of when and if it would be safe to release him. I reach that conclusion for the following three reasons which individually and cumulatively support that conclusion.

45. First, the test for the Panel was to ascertain how safe it was to release the Applicant at the time of its decision on 6 December 2023 and that entailed considering his conduct and risk at that date. Indeed, the test for release is expressed in the present tense at the date of the hearing as the Parole Board "*will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined*" (emphasis added). That was one of the "*principal controversial issues*" in this matter if not "*the principal issue*". This meant that the recommendation of the POM taking account of the Applicant's conduct in the period after he was returned to custody until the time of its decision was of crucial importance and should have been considered in the Panel Decision. Indeed, if that was not correct, a Panel dealing with a parole application by a prisoner who had behaved impeccably in custody for a number of years would be entitled to ignore a series of serious aggressive and dangerous acts committed by him in the fortnight before the decisive hearing of the Parole Board.

46. Second, there is no basis in the statutory wording or elsewhere for ignoring recommendations of the POM as at the time of the Panel's decision on whether it was safe to release the Applicant and instead to rely on the conclusions on that issue to be drawn from the Applicant's period on licence which finished 2 years before the hearing. The statutory wording does not require consideration of the issue of whether the prisoner could be safely released 2 years before the hearing.

47. A third reason why the recommendation of the POM was highly relevant in this particular case was that the Panel in its reasons had placed great weight on the Applicant's difficulties with his COM and concluded in the Panel Decision that "*over [a period of] 5 years [prior to release, the Applicant] has failed to develop [a good] relationship [with his superiors] or share any thoughts – both critical to public protection*". The Panel explained in the Panel Decision that "*[the Applicant] cannot be adequately trusted to commit fully to the supervisory process in the community, and provide to those supervising him the openness and honesty about all his thinking, that this requires*".

48. The POM's reports in the Applicant's dossier set out a totally different account of the Applicant's behaviour from that what appears in the Panel Decision. For example, the

POM's detailed report of 5 September 2023 in the dossier explains that the Applicant's behaviour while in custody has "*unsurprisingly been exemplary*", that "*wing staff speak highly of him*", that "*he is described as someone who has mastered 'Jail Craft'*", that nothing of issue has been recorded in his NOMS [National Offender Management Service] entries that would cause concern in his regular sessions with his allocated key worker, that "*positive entries [are] recorded on a regular basis regarding his engagement with staff and prisoners that he has come into contact with through his role as an insider [a trusted inmate that supports newer prisoners]*".

49. As the POM's recommendation was a material consideration in relation to what Lord Brown described as a "*principal important controversial issue*", the Panel had a duty to take the POM's recommendation into account and a further duty to give adequate reasons for its decision, but the Panel did not comply with it. Indeed, in the words of Lord Greene MR in **Associated Provincial Picture Houses v Wednesbury Corporation** [1948] 1KB 223, the Panel thereby "*neglected to take into account matters which they ought to take into account*", namely the POM's recommendation and it also failed to give adequate or any reasons for its failure to take account of the POM's recommendation or to agree with it. As a result of this failure, the decision not to release the Applicant without taking account of the POM's recommendation was irrational as in the words of the Divisional Court in the **DSD case** (which are set out in paragraph 28 above) "*the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*"
50. It follows that this ground succeeds and this application for reconsideration must be granted in respect of the claim relating to release but for the reasons set out in paragraph 40 above, the application for reconsideration must be refused in relation to the claim for reconsideration of the decision refusing to recommend that the prisoner should be transferred to open conditions.
51. Another or an alternative reason why the decision not to release is erroneous and should be ordered to be reconsidered is that the House of Lords held in **Tesco Stores v Secretary of State for the Environment** [1995] 1 WLR 759 that it is an error of law for a panel to fail take into account "*a material consideration' in reaching its decision on parole*". As the Panel in this case failed to take into account "*a material consideration*" in the form of the POM's recommendation for release, the Panel made an error of law which is a further or alternative ground for ordering reconsideration of the Panel's decision.

Decision

52. For all these reasons, this application for reconsideration must be granted in respect of the Panel Decision not to direct the Applicant's release. The claim for reconsideration of the decision refusing to recommend that the prisoner should be transferred to open conditions is rejected.
53. In those circumstances, it is not necessary to deal with Ground 2 or any other grounds.

Directions

54. I have given careful consideration to the question whether the re-hearing should be heard by the original panel. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of

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justice being seen to be done arises. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel of 3 members.

Sir Stephen Silber
12 February 2024