PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

The Prisoners' Advice Service (PAS) is a charity that provides free legal advice and information to people in prison in England and Wales. We produce this bulletin, setting out case law, Ombudsman's decisions and legislative and policy changes relevant to people in prison. The PLRB is free to serving prisoners.

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CASE REPORTS

PAROLE BOARD

R (on the application of Wells) v Parole Board, [2019] EWHC 2710 (Admin)

The case concerned a successful application for judicial review of the Parole Board decision not to direct the release of a prisoner subject to an indeterminate sentence of imprisonment for public protection (IPP).

In September 2005, the claimant was convicted of robbery and an IPP was imposed, with a minimum term of two years. This term expired in September 2007; however the claimant was not released until November 2017, having served 12 years and eight months. The claimant was recalled in January 2018 after failing to comply with his licence conditions, although he did not commit any further offences during the period of release.

In a hearing before the Parole Board in April 2019, a prison psychologist and an independent psychologist both recommended that the claimant could be released to approved premises, provided he received substance misuse support and rehabilitation, as they did not consider open conditions to be necessary or necessarily appropriate.

The claimant had completed several accredited offending behaviour programmes since his imprisonment; however he had been assessed as posing a medium risk of serious harm and reoffending when he was released in November 2017.

The Board decided that the claimant's risk could not be safely managed in the community and recommended that the claimant be transferred to open conditions.

HELD

The court held that there had been a misdirection in law as the Board had misdirected itself when evaluating the claimant's risk of reoffending. The Board appeared to have considered that it had to be satisfied that there was no risk of reoffending, which is not correct in law. The Board should have assessed whether the potential risk of the claimant reoffending was proportionate to his continued detention, ie was there a risk to life and limb from which the public needed protection by way of the claimant's continued detention. However, the Board instead considered whether the claimant would remain offence-free, which was sufficient to justify the quashing of the decision.

The claimant also argued that the Board's decision that his risk could not be safely managed in the community was irrational and that the Board failed to provide reasons for this decision. The court held that a more nuanced approach in modern public law to the Wednesbury reasonableness test was not to simply ask if the decision was irrational, but to test the decision maker's conclusion against the evidence before it and ask if that conclusion can be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needed to be applied. The court stated that the Wednesbury reasonableness test should be approached practically to ensure the conclusion follows from the evidence without any unexplained evidential gaps or leaps in reasoning. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.

The court held that both the rationality and reasons challenges succeeded in this case. The reasoning for the court's decision focused on the fact that the psychologists assessed the claimant to present a low to medium risk of reoffending, and a previous panel found no benefit to returning the claimant to open conditions, however this evidence did not appear to have been addressed

this case. The reasoning for the court's decision focused on the fact that the psychologists assessed the claimant to present a low to medium risk of reoffending, and a previous panel found no benefit to returning the claimant to open conditions, however this evidence did not appear to have been addressed by the Board when making their decision. The Board also did not place enough focus on the fact that the claimant had not been arrested for committing any violent offences whilst he was released, and there had been no allegations that the claimant had acted in a violent manner either inside or outside of custody since 2014.

The Board's decision failed to reflect the evidence before it or to explain in detail why such evidence was being ignored. Therefore the rationality and reasons challenges succeeded, the April 2019 decision was quashed and the Board was directed to reconsider the claimant's application for release, using a fresh panel, on an expedited basis.

The claimant had also argued that little consideration had been given to the fact that the claimant possessed a low level of intellectual functioning; however this point was rejected by the court.

CATEGORY A

R (Hopkins) v SSJ [2019] EWHC 2151 (Admin)

The claimant was sentenced to life imprisonment with a 16 year and 290 day minimum term. After the minimum term had expired, it was recommended by the Parole Board that the claimant, who was a Category A prisoner, be transferred to open conditions, provided he had completed all the necessary core risk reduction work. The SSJ refused to implement the recommendation, but instead but brought forward the claimant's Category A review.

The Category A Review Team (CART) analysed the claimant's reoffending risk by looking at all available information and expert evidence (such as psychology reports and offender supervisor reports) and also acknowledged that he had completed all the courses available to him. The reports were positive and did not indicate concern over risk of reoffending, with one report stating that claimant's denial was not associated with an increased risk of "sexual recidivism". However, CART remained concerned that the claimant had not admitted his offence to date, despite the Parole Board and the psychologists being aware of the claimant's non-admittance and this not affecting their view of him presenting a low risk, and refused to convene an oral hearing or recategorise the claimant.

The claimant subsequently brought an application for judicial review against the SSJ's decision to refuse an oral hearing. The application was brought on two grounds: i) CART's decision had been procedurally unfair in a common law context and ii) the defendant failed to properly or fairly apply PSI 08/2013. On the first ground, there had been a number of pointers from the PSI in favour of ordering an oral hearing: the claimant had been post tariff and hadn't had an oral hearing before, the Parole Board had initially recommended a downgrade of category, there was "significant dispute" on the expert evidence between CART and the Parole Board and expert psychologists and the claimant asserted that an impasse existed because only by admitting his guilt could the he convince CART that his risk of reoffending had been reduced.

On the second ground, many of the factors set out in the PSI had been present in the claimant's case but not been considered carefully by CART when making their decision, in particular, the fact that there had been a significant dispute on

expert materials and that an impasse existed. It was stated that CART should have given itself the opportunity to hear from both the claimant and the experts before having reached their conclusion.

HELD

The decision not to hold an oral hearing was unlawful and the judicial review succeeded.

INDEPENDENT ADJUDICATOR

R (O'Brien v Independent Adjudicator [2019] EWHC 2884 (Admin)

A prisoner at HMP The Mount, who was charged with possession of a mobile phone, sought judicial review of a decision by an independent adjudicator to refer charges on to the police, rather than decide them herself.

Background

The claimant was charged with possession of a mobile phone and attended a hearing before the prison governor at which he pled not guilty to the offence. The prison governor advised that the charge would be referred to an Independent Adjudicator (IA).

The claimant faced a further charge of unauthorised possession of a mobile phone and it was decided that both charges would be heard together. At a hearing in February 2018 the IA noted *"…As this is a second matter committed within a short space of time and the other matter is not concluded, I am going to refer both to the police."*

The claimant's representative explained to the court that the IA advised her at the first hearing that it was her policy to refer such matters to the police where there was a second charge.

The IA advised that the change in circumstances allowed her to refer the matter to the police and also meant that she was not bound by paragraph 2.25 of PSI 47/2011.

The claimant argued that (i) the defendant had no power to refer the matter to the police; (ii) the decision offends against the principle of double jeopardy; (iii) the decision was taken pursuant to an unpublished and unlawful policy and not based on the facts of the case; and (iv) there had been a breach of the Data Protection Act 1998 by virtue of his personal sensitive data being referred to the police.

The defendant did not defend the action and advised that while she wished to remai**n** neutral in the matter, she did advise that it was her intention to refer cases of possession of mobile phones to the police where there had been previous history of possession, however she used her discretion in each case and it was not a hard and fast rule that she referred each case to the police, she did so on a case by case basis. The prison governor and the SSJ were represented as interested parties.

The defendant claimed that while it isn't specifically mentioned within the Prison Rules or PSI 47/2011, IAs have always had the right to refer matters to the police, however she advised that she could not recall stating that this was her 'policy' to the claimant's representative.

HELD

The court found that the defendant acted unlawfully in referring the charges to the police. IAs have neither an express nor implied power to report matters to the police, save for in exceptional circumstances. The definition of 'adjudicator' made it clear that IAs have an express function that is limited to inquiring into a charge. IAs handle and process sensitive personal data, which they possess only to enable them to inquire into a charge. Should an IA feel that the police should be contacted in

respect of an incident then they should communicate this to the prison governor. The governor could then decide whether it would be appropriate to contact the police. An IA could not refer a matter to the police as an IA or as a normal citizen.

INQUIRIES and INVESTIGATIONS - ARTICLES 2 and 3 ECHR

Re Finucane [2019] UKSC 7

This case involved an appeal to the Supreme Court on behalf the appellant, Geraldine Finucane, who sought judicial review of a decision not to hold a public enquiry into the death of her husband, Patrick Finucane, a solicitor, who was murdered in his family home in 1989 during the period of violence in the north of Ireland.

Background

Since Mr Finucane's death, several official reports and enquiries have investigated the circumstances of the murder. These investigations were tasked with uncovering the veracity of allegations of between security forces and loyalist paramilitaries in facilitating the targeting and killing of Mr Finucane.

Nevertheless, these reviews have faced repeated accusations of deficiency in revealing the full extent of any collusion and liability on behalf of state security forces. Equally, those who had conducted previous inquests cited obstructions in accessing documents or interviewing key figures identified during the course of such investigations.

In 2003, following a case brought by Mrs Finucane, the European Court of Human Rights decided that there had not been an inquiry into the death of Mr Finucane which complied with the ECHR Article 2, and that a public inquiry was required. In 2004, the Secretary of State for Northern Ireland wrote to Mrs Finucane and made a statement in the House of Commons to the effect that the inquiry would be held on the basis of new legislation which was to be introduced shortly. This new legislation was the Inquiries Act 2005. Mrs Finucane objected strenuously to the proposal that the inquiry would take place under the new legislation and various discussions as to the terms of the inquiry took place over the years that followed. In May 2010, there was a general election and a new government was formed. Following a consultation on the form which an inquiry into the murder of Mr Finucane should take, the government decided in July 2011 that a public inquiry would not be conducted. Instead, Sir Desmond de Silva was appointed to conduct an independent review into state involvement in Mr Finucane's murder.

The arguments

Mrs Finucane argued that her rights under ECHR Article 2 and the Human Rights Act s.6 were contravened by the absence of a public enquiry into her husband's death. Mrs Finucane also claimed to hold a valid and legitimate expectation that a public enquiry would take place, in accordance with statements made by government officials that Mr Finucane's death would be investigated properly and that there would be a public inquiry.

HELD: The Supreme Court held that Mrs Finucane did have a legitimate expectation that a public enquiry would held, and declared that previous inquests had not met the requisite standard to be considered Article 2 ECHR-compliant. However, the Court stopped short of expressly ordering that such a public enquiry must now be held, stating that Mrs Finucane had not shown that the government's decision not to fulfil the promise was made in bad faith, or that it was not based on genuine policy grounds.

MA & BB v SSHD [2019] EWHC 1523 (Admin)

The case considered the timing and extent of powers and resources that the Prisons and Probation Ombudsman (PPO) should have to ensure that its investigation, into allegations of abuse at an immigration detention centre, is capable of fully discharging the Secretary of State's (SSJ) duty under Article 3 - prohibition against torture, inhumane or degrading treatment.

Background

The claimants were both detainees at the relevant immigration detention centre, who had brought a joint claim against the SSJ for failing to satisfy its obligation to undertake an effective investigation into claims of abuse at the centre. The allegations were further supported by footage recorded secretly and aired in a BBC documentary.

The Equality and Human Rights Commission (EHRC) later joined the proceedings in support of the claimants. The proceedings were adjourned pending, and following a decision by the SSJ to ask the PPO to conduct a bespoke special investigation into matters raised by the documentary.

The claimants' and EHRC's case was that the SSJ could not discharge its duty under Article 3 unless the PPO had sufficiently broad powers available to it at the outset, including: (1) an ability to compel witnesses to give evidence and produce documentation; (2) an obligation to hold at least some hearings in public; and (3) the ability to authorise funding for claimants to have proper representation so that they could take an effective part in the process. Both parties acknowledged that the PPO's usual mode of investigation would not include or encompass these elements.

The SSJ's position was that its duty under Article 3 had already been fully discharged by a number of separate enquiries undertaken by different bodies following the BBC documentary. The SSJ contended that, even if its duty had not yet been fully satisfied, the special investigation by the PPO would correct any inadequacies. The SSJ argued that it was premature for the court to hold at this stage that the PPO's current powers were insufficient or incapable of conducting an effective investigation before the PPO had even started to gather evidence. The SSJ noted that, in any event, it would be possible to extend the PPO's powers at a later date if necessary and, therefore, a "wait and see" approach should instead be adopted at this stage.

The court confirmed that an effective Article 3 investigation must (1) be independent; (2) ensure that full facts are brought to light so as to publicly expose and uncover those responsible and maintain public trust in the process; (3) provide complainants with effective access to the investigation procedure; and (4) discover and rectify any breaches or shortcomings so that lessons may be learned to minimise any risk of reoccurrence.

HELD

Power to compel witnesses: Whilst acknowledging that this power would not be necessary in all Article 3 enquiries, in this case the court held that this power should be available. Consideration was given to the egregious, repeated and widespread nature of the breaches and the fact that the investigation would need to consider the systemic failings, which would require questions of those who had committed or witnessed the breaches and general culture of the institution. A distinction was made from the approach taken in criminal trials, where inferences are made in respect of witnesses who are absent or in respect of persons that the

court has not heard evidence from, on the basis that criminal trials are not seeking to identify lessons to be learned. Strong consideration was also given to the "overwhelming probability" that perpetrators and witnesses would not attend voluntarily and, as a result, an investigation without this power would fail to be an effective Article 3 investigation.

Public hearings: The court noted that a minimum level of public scrutiny is required in all Article 3 enquiries, acknowledging that this level would vary from case to case. This requirement was necessary to ensure accountability and maintain public confidence. The PPO's proposed methodology for the investigation comprised private one-to-one meetings and open seminars, noting that public hearings were not suited to their current workings. The court had significant concerns about the prospect of key witnesses only being questioned privately and questioned whether private hearings could secure sufficient accountability and maintain public confidence in the rule of law. The court noted the purposes of the enquiry included the denunciation of those who had done wrong and exoneration of those who had not, and to provide trust and confidence in the whistle-blowing and complaints processes. The court held that the circumstances of the detainees as vulnerable persons, together with a hostile public perception against immigration detainees, meant that public vindication in this case was especially important.

However, the court stopped short of prescribing which PPO hearings should be in public; this was instead a matter and discretion of the PPO. The court held that the power should be available to the PPO and that sufficient funding should be provided for the purpose.

Victim involvement and representation: The court held that victim participation in the enquiry was necessary in order to safeguard their interests and to restore their dignity by confronting those responsible. Accordingly, the court held that the claimants must be afforded properly funded representation to enable them to review and comment on witness evidence and to direct lines of enquiry for the PPO to follow up.

Timing: The court held that there was no justification for a "wait and see" approach and that such powers and resources should be made available to the PPO immediately, to be used at the PPO's discretion.

IMMIGRATION DETENTION

R (ASK) v SSHD EWCA Civ 1239

This Court of Appeal decision concerned the appeals of two detainees, MDA and ASK. It raised significant issues regarding detention of immigrants who are suffering from mental health conditions, in particular those foreign nationals who, pending their removal from the UK, are detained in immigration removal centres (IRCs).

Background

MDA was a Somali national, who was detained pending deportation immediately following the expiration of the custodial part of a prison sentence on 4 November 2015. He had been remanded in custody in December 2014 after sexually assaulting a member of staff on the psychiatric ward. It was not until 3 February 2017 that he was released from immigration detention to be detained in a secure psychiatric hospital unit under section 2 (and, later, section 3) of the Mental Health Act 1983.

ASK was a Pakistan national who first came to Britain on a student visa in 2010. The visa was valid from 4 February 2011 to 30 October 2012 (after being extended). On 12 October 2012

ASK was exhibiting signs of aggression and was drinking excessively. Out of concern for his mental health, his brother sought medical help. ASK was detained under sections 2 and 3 of the MHA. His leave to remain expired on 30 October 2012, whilst he was detained under the MHA. ASK had overstayed his visa and was detained in Colnbrook IRC pending removal from 17 January 2013, after he was arrested by the police for refusing to leave a mental health unit. He was detained in the IRC until 23 September 2013 when he was moved to a low secure psychiatric unit.

Both ASK and MDA were disabled due to their mental health needs and both lacked capacity by reason of their mental illness to engage in important decisions relating to their continuing detention, segregation and, in the case of ASK, transfer to a mental hospital. It is important to note that, generally, those who are not otherwise lawfully in the UK cannot claim any entitlement to remain in order to continue to benefit from medical assistance. However, the SS does owe healthcare obligations to those it detains.

Legal Issues

There were a number of overlapping legal principles referred to and applicable to this case, including those set out in the Immigration Act 1971, the Mental Health Act 1983, the Mental Capacity Act 2005, the Detention Centre Rules 2001 and the Equality Act 2010, as well as the European Charter of Human Rights. The questions facing analysis by the court were whether the SSHD had acted unlawfully in respect of the detention of MDA and ASK by:

- breaching his common law duty to act fairly;
- breaching his common law duties to act rationally and consistently with the statutory purpose of the detention;
- breaching his own detention policy and his duty to promptly transfer to hospital a detainee whose mental health illness could not be managed satisfactorily within an IRC;
- breaching Article 3 of the ECHR (right to not suffer degrading treatment) or alternatively Article 8 of the ECHR (right to enjoyment of private life);
- breaching his duty under sections 20 and 29 of the Equality Act 2010 to make reasonable adjustments to prevent disadvantage to detainees who are mentally ill.

HELD

The Court of Appeal allowed the appeals on the grounds of the SSHD's breach of the Equality Act 2010. The Court granted a declaration that the SSHD had discriminated against the appellants under the Equality Act 2010 by failing to make reasonable adjustments and failed to have regard to the need to eliminate discrimination for those with mental health conditions in detention, following the earlier decision of VC v SSHD [2018] EWCA Civ 57. The Court of Appeal judgment showed that no adequate steps had been taken since VC's decision 17 months earlier.

In both cases the Court of Appeal upheld the decision regarding reasonable adjustments. Because of their mental disabilities, it seems likely that from time to time they lacked the capacity properly to engage with the detention authorities in relation to important decisions that related to them. The appellants were treated differently from those detainees who were not disabled. The Secretary of State failed to have due regard to the duty to eliminate discrimination. Further, obvious adjustments

could have been made but were not carried out including, for example, allowing ASK to make representations. There was no evidence that he had complied with the duty. It was found that the detainees did have the right to participate in the decision-making process, including challenges to decisions that were made in relation to their detention, segregation and (in the case of ASK) transfer to hospital. In the one judge's view, it mattered not that many of the decisions did not require the detainee's consent – they were nevertheless entitled to participate in them through representations.

The Court of Appeal upheld the decision that the suffering of ASK and MDA in detention was not sufficient to cross the Article 3 threshold (suffering degrading treatment), nor did it breach of Article 8 (enjoyment of private life).

UPDATES ON FRAMEWORKS & POLICIES

HMPPS is continuing to transfer guidance on aspects of prison life from PSIs to new Framework documents. Unfortunately there is no numbering system for them.

On 20 February 2020 the long-awaited Security categorisation policy framework was finally published. This had been trialled last year in a small number of prisons. The main important change, and the reason there have been so many queries as to when this would be made system-wide, is that the usual period at which a determinate sentence prisoner will be considered eligible for a move to Category D has been extended from two to three years.

The other recently published framework documents are:

- Information Security Policy - 29 January 2020
- Generic Parole Process Policy - 11 February 2020
- Recall, review and re-release of recalled prisoners - 11 February 2020
- Parole Board oral hearing administration and attendance policy - 4 November 2019
- HMPPS Finance Manual Policy - 31 October 2019
- Serious and organised crime policy - 3 October 2019
- The care and management of individuals who are transgender - 27 January 2020
- Incentives Policy - 27 December 2019
- Prisoner complaints policy - 13 February 2020

DECISIONS UNDER THE RECONSIDERATION MECHANISM

The Parole Board Reconsideration Mechanism started on 22 July 2019. We have summarised below a set of sample decisions published by the Board to illustrate the scope of the mechanism. Please be aware that all decisions are now publically available and are not anonymised.

Williams [PBRA 7]

The respondent was sentenced in April 2012 to 14 years for aggravated burglary, with a custodial sentence of nine years. In 2015 he was released on li-

cence but was recalled for failing to engage with supervision.

His later release was directed by a single person panel who considered the issue in July 2019. Included in the file was a post risk recall management report from the Offender Manager (OM). This recommended release as the respondent had committed no further offences and had been progressing well with no concerns. The panel considered the fact that there was no report from the prison in the file and no report from the Offender Supervisor (OS), but did not feel it necessary to delay the decision to obtain one, given that the OM had spoken to the respondent about his recall and there were no known concerns about his conduct in prison. The panel directed release.

The SSJ requested that the decision to release be reconsidered on the grounds of procedural unfairness, as not all relevant information was before the Board and this allowed a decision to be made based on misleading information; 14 days before the panel made its decision to release, prison staff alleged that the respondent had assaulted a prison officer. This was reported to the OM who, as a result, no longer supported release. The Parole Board was not notified of this change before the panel made its decision.

In dismissing the application, the judge acknowledged that the information relating to the alleged assault may well have changed the decision of the panel and that the Board considered the issue without all of the relevant information. As a matter of policy, the judge noted that it would be undesirable to encourage the state's inefficiencies by allowing them to remedy their mistakes, but that it would be more so to release prisoners who may pose a danger to the public. However the decision in this case is not based on policy considerations, but rather an interpretation of Rule 28 Parole Board Rules 2019, which allows parties to apply to the Board for reconsideration where a decision is irrational or procedurally unfair. The state was not arguing that the decision was irrational, but that it may have been procedurally unfair.

In making his decision, the judge determined that the panel member considered all the evidence that was before him and made appropriate enquiries, and that he was correct not to delay his decision in order to obtain a report from the OS, as there was no indication it was needed. The judge further determined that failure to put information before a panel is not grounds for procedural unfairness; concerns about the respondent posing a risk could be addressed by recall to custody and further charges, where appropriate.

Okoro

The applicant was serving an extended sentence imposed on 2 February 2016 for robbery and possession of an offensive weapon in a public place. The custodial term was set at four years, to be followed by an extended licence period of two years and six months. The applicant’s Parole Eligibility Date (PED) was 31 August 2018, and his Conditional Release Date (CRD) was 26 November 2019. The applicant, who was 16 at the time of the offences, had a disruptive childhood and a history of not being able to manage his emotions and certain aspects of his personality, and held previous convictions for robbery, including one with a knife.

In October 2018 the SSJ referred the applicant's case to the Parole Board to consider early release. Following an oral hearing on 6 August 2019, the three-member panel decided not to direct the applicant's release.

The applicant argued that the psychiatrist member of the Parole Board appeared to overstep their role as an eval-

uator of evidence in formulating an expert view about the applicant's mental health, and that the panel should have directed provision of a psychiatric report. He also argued that for the panel to form a view from information gathered within a hearing and then to rely on that to dismiss the application was inappropriate.

In addition, the applicant complained that the panel misunderstood the nature of the release plan, rather than seeking to clarify it.

The panel heard no oral evidence from a psychiatrist or psychologist witness, nor had any psychiatric or psychological reports been directed. Included in the applicant's dossier were historic reports from secure and medium secure hospitals which had successfully discharged the applicant in 2017, and a Care Plan review by Barnet, Enfield and Haringey Mental Health NHS Trust dated 16 January 2018. The applicant's legal representative did not make an application for any additional expert report to be provided.

The applicant's release plan, which involved release in the first instance to independent accommodation with ancillary support, pending confirmation of a fully funded placement in 24-hour supported accommodation, was rejected by the panel as being insufficiently robust to his risks in the community.

The judge ruled that the absence of a further psychiatric report did not amount to procedural irregularity, nor did it contribute to an irrational decision; had the applicant's legal advisor considered that a further report was necessary; she ought to have applied for one. Furthermore, the judge determined that there had been no misunderstanding by the panel regarding the applicant's risk management plan, and that it had been appropriately considered.

However, in applying the definition set out in DSD and others v The Parole Board, the judge ruled that the decision was irrational. There was nothing in the decision letter to show that the panel had applied the correct test for determining if the applicant was eligible for early release. There should have been a specific determination as to whether the applicant's risks could be safely managed in the community, specifically for the period between the date of release and the CRD (26 November 2019 - when the applicant would be entitled to be released in any event). The judge granted the application for reconsideration and directed that the case should be reviewed by a fresh panel as a matter of urgency.

Brown [PBRA 33]

This application involved a recalled IPP prisoner applying for reconsideration of the decision of a panel of the Parole Board not to instruct his release on licence.

The applicant's original tariff was set at four years and 181 days, expiring on 28 February 2015. He was released to open conditions but absconded and was therefore returned to prison. He has since been released twice and returned to prison twice...

A number of criticisms were made of the decision letter by the applicant's solicitors and the SSJ responded to one particular point raised on irrationality.

It was also contended by the applicant's solicitors that the panel took into consideration a piece of evidence (relating to correspondence with a social worker) which was never disclosed to the applicant and to which he had no opportunity to respond, and that this was procedurally incorrect. The SSJ confirmed the solicitors' statement that the piece of evidence raised was not disclosed to

the applicant due to an administrative failure.

It was also contended that the applicant's daughter should have been called to give oral evidence. The applicant's daughter had given conflicting accounts of a particular incident and the applicant's solicitors contended that she should have been called to give the account most favourable to the applicant.

The judge determined that the chain of events which led to the non-disclosure of the piece of evidence which was damaging to the applicant's case and to which the panel attached some weight, clearly amounted to a significant procedural irregularity. He stated that it was impossible to say if the disclosure would have resulted in a different decision, but, in keeping with the principle that justice must not only be done but be seen to be done, the Reconsideration Assessment panel decided that the application would be granted. All other grounds for reconsideration were dismissed. It was directed that a rehearing must be expedited and heard by a new panel (which was not to be made aware of the reasons for the reconsideration).

Green [PBRA 7]

The applicant is serving an IPP imposed in 2006 for causing grievous bodily harm with intent. The 22 month tariff set by the Court of Appeal expired in 2008. The applicant was refused release in an oral hearing on 12 July 2019.

The applicant requested reconsideration on two grounds: (i) that the manner in which the panel questioned him was procedurally unfair, and (ii) that they acted irrationally in recommending that he progress to open conditions, rather than directing his release.

The decision of the Parole Board was based upon oral evidence given by the applicant, his OS, OM and a prison psychologist. Following robust examination of the applicant, and in light of his apparent agitation and upset during and following the hearing, the panel determined that the proposed risk management plan would not adequately detect or address any negative issues that may arise following release, that the risk of his reoffending was too high and that he did not meet the test for release. However, the panel went on to conclude (based upon the evidence of all reporting witnesses that there remained no outstanding work to be completed), that progression to open conditions was appropriate in order to test the applicant's gradual reintegration into the community under the supervision of probation.

In dismissing the current application, the judge found no support for the applicant's criticisms of the panel's conduct or their decision not to direct release, and determined that upon closer examination the opinions of the report authors were more nuanced and varied than favouring release by consensus. Assessing the fairness of the proceedings, the judge determined that while parole proceedings are by their nature uncomfortable for the prisoner, the panel was correctly focussed on risk throughout, its assessment of the evidence was conducted objectively, and the decision well-reasoned and based upon sustainable findings of fact.

Panasuik [PBRA 2]

The applicant was sentenced in 2007 to discretionary life imprisonment and his four year tariff expired in 2011. The SSJ referred the case to the Parole Board for the applicant's fifth review and asked the panel to consider whether it was appropriate to direct the applicant's release. The SSJ also requested the panel consider whether, if the applicant

should not be released, he should instead be transferred to open conditions.

An oral hearing took place on 7 August 2019, and on 9 August the SSJ sent a non-disclosure application to the panel in respect of a personal statement made by the victim. This application was approved by the panel and applicant's solicitor was given the opportunity to comment on the victim's statement before the panel announced their decision.

On 12 August 2019 the panel issued their decision, which was that the applicant should not be released and they did not recommend that he be moved to open conditions.

The applicant did not challenge the decision not to release him but he did challenge their decision not to recommend that he should be transferred to open conditions. He complained that the panel acted irrationally as it preferred the view of the prison psychologist (who advised that the applicant remained a risk) to that of the two other reports provided at the applicant's hearing and that the late disclosure of the victim's personal statement to his solicitors was procedurally unfair.

The Reconsideration Assessment found that the panel was entitled to prefer the prison psychologist's report over the other reports and that the victim's personal statement did not play a part in the panel's assessment of the applicant's risks of serious harm, reoffending and absconding but only of understanding the impact of his crime.

The decision in this case also made it clear that the Reconsideration Mechanism does not apply to decisions by the Parole Board not to recommend that the applicant be moved to open conditions.

Dowe [PBRA 14]

The SSJ challenged the Parole Board's decision to release Mr Dowe. He had been released on licence after serving five years for robbery. He was then recalled following allegations of threats made against his partner and leaving his probation hostel without permission. On 25 July 2019 the Parole Board directed his release following an oral hearing.

The SSJ challenged the Board's decision as "irrational" because there was not a significant risk of harm to Mr Dowe's partner. The judge found the Board had assessed the risk of violence and serious harm and concluded that this risk could be managed under a risk management plan.

The judge found:

- The fact there had been a serious altercation between Mr Dowe and his partner was taken into account by the Board.
- The Board assessed all the evidence of risk of Mr Dow's violence or aggression to partners past and present with care.
- The Board concluded Mr Dowe and his partner were still in a relationship on the basis of Mr Dowe's evidence and the partner's visits to him in prison, although the partner's evidence was not available as she had refused to communicate with the Offender Manager (OM).
- Although a high volume of calls had been made by Mr Dowe to his partner, there was no evidence these were unwelcome or abusive.
- Mr Dowe's conduct had been excellent during recall.
- Both the OM and Offender Supervisor recommended release, although the recommendation from

the OM was stated to be "cautious".

Based on the above, the judge found the Parole Board's decision was not arguably "irrational".

The SSJ also challenged the Board's decision not to delay its final decision while more evidence was collected on the content of Mr Dowe's phone calls to his partner from prison. The judge found:

- The Board was under a duty to offer a speedy review of detention and this decision had already been deferred once in this case.
- It had been understood by the Parole Board that the contents of the calls could be important.
- The OM had already tried to get this evidence for several months but had not been able to.
- It had not been suggested to the Parole Board at the hearing that they should delay their decision while more evidence about the phone calls was collected.
- The Board concluded there was no available evidence of the content of the calls and that they would not be likely to obtain it.

Based on the above, the judge found the Parole Board's decision not to delay was not arguably "irrational".

The SSJ also challenged the Board's decision not to impose a condition of release limiting Mr Dowe's contact with his partner. The judge stated that, before imposing any licence condition that would restrict freedom, the condition must be necessary to protect against harm and be proportionate. The judge found:

- The Board had considered imposing a condition on contact with Mr Dowe's partner.
- It was considered disproportionable to limit contact because Mr Dowe had not been charged with any offence relating to his partner and the Board had already concluded Mr Dowe was still in a relationship with his partner.

Based on the above and on the evidence before the Board at the time, the judge found the Parole Board's decision not to impose a condition was not "irrational".

The SSJ also complained that Mr Dowe and his solicitor's behaviour prevented the OM from properly answering the Parole Board's questions. The judge did not agree the hearing was procedurally unfair:

- Most of the OM's evidence was in reports that had already been read by the Parole Board.
- The Board was likely to assume that an OM taking charge of serious criminals in the community would not be intimidated from getting across her points.
- The OM should have drawn the attention of the Parole Board to any feelings of restriction because it is the OM's responsibility to put forward the Secretary of state's case at the hearing if no lawyer attends. The OM did not do this.
- The OM did recommend release.

The judge came to this decision despite assuming the OM had not in fact given the full answers she would have wished to.

The judge dismissed the SSJ'S challenge to the Parole Board's decision.

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