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CO/2473/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of judgment 29 March 2023

Before :
THE HONOURABLE MR JUSTICE FRASER

- -

Between :
The King on the application of
RICHARD MATTHEWS

Claimant

- and –

THE PAROLE BOARD FOR
ENGLAND AND WALES

Defendant

- and –
SECRETARY OF STATE FOR JUSTICE

Interested Party

- -

JUDGMENT

- -

Mr Stuart Withers (instructed by **Reece Thomas Watson Solicitors**)
for the **Appellant**
Ms Rebecca Hadgett (instructed by **Government Legal Department**)
for the **Respondent**
The Interested Party was not represented and did not appear

Hearing date: 21 March 2023
Draft distributed to parties: 24 March 2023

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' advisers by email and release to the National Archive. The date for hand-down is deemed to be 29 March 2023.

Mr Justice Fraser:

1. This is a hearing for judicial review of a decision by the Parole Board on 11 April 2022 refusing to recommend the transfer of the Claimant, a serving prisoner, to open conditions. There are two grounds. On the first ground, permission to bring judicial review was granted by Eyre J on 6 October 2022; he refused permission on the second ground. The Claimant renewed his application for permission on the second ground and this was granted by Stacey J on 25 October 2022.

Introduction

2. The Claimant is a serving prisoner who was sentenced on 28 May 2008 to two sentences of imprisonment for public protection ("an IPP sentence"). IPP sentences are no longer available, although there are a number of prisoners still serving such sentences, which were passed upon them before this particular type of sentence was abolished in 2012. They are effectively life sentences, but when passed would also specify a minimum term, that period being the time that the prisoner would have to spend in custody prior to becoming eligible for release. The first offence for which the Claimant was sentenced was for conspiring to cause grievous bodily harm with intent, and for that the minimum term was specified by the sentencing judge as 6 years. The second offence was for possession of a firearm with the intention of committing an indictable offence, for which the minimum term was set at 3 years and 9 months. The minimum term set when an IPP sentence was imposed is also, sometimes, referred to as a "tariff". Both these offences by the Claimant arose in the context of serious drug dealing, and in particular the Claimant's involvement in the punishment shooting of a rival drug dealer, who had been lured to a meeting with the Claimant and other defendants. The Claimant received no separate penalty for two other offences, namely possession of a handgun, and possession of class A drugs with intent to supply.

3. The Defendant, the Parole Board for England and Wales ("the Parole Board"), was established in 1968 under the Criminal Justice Act 1967. Its present establishing statutory provisions are section 239 and Schedule 19 to the Criminal Justice Act 2003 ("CJA 2003"). As is widely known, the Secretary of State for Justice ("the Interested Party") has oversight of all the functions of the Ministry of Justice, and also fulfils the functions of the Lord Chancellor. The Interested Party has remained neutral in these proceedings, which is in accordance with the usual approach of the Secretary of State for Justice when decisions of the Parole Board are challenged by way of judicial review.

4. The Claimant became eligible for release on 18 July 2013 as he had served both of the minimum terms or tariffs set under the IPPs. This eligibility does not automatically entitle a prisoner serving an IPP sentence to be released, and his release on licence in fact took place on 2 March 2015. However, after his release, his liberty was not of considerably extended duration, due to the way of life he to which he reverted. He was arrested again on 12 April 2018 for a number of fresh offences of drug dealing, as well as suspicion of his involvement with other firearms, including a sub-machine gun found in a plastic shopping bag, together with ammunition. Unsurprisingly, given the nature of these offences, and also because he remained subject to the provisions of the two IPP sentences imposed in 2008, he was detained in custody. In respect of two of these later drug offences he pleaded guilty on 8 August 2018, these offences being conspiracy to supply class A drugs of two types, namely both heroin and cocaine. On 18 February 2019 he also pleaded guilty to possession of criminal property, namely a sum of in excess of

£38,000 in cash. On 22 February 2019 he was acquitted of the firearm offences. On the same day as his acquittal, he was sentenced to a determinate sentence of 9 years for the drug and criminal property offences. He is therefore currently in custody.

5. He becomes eligible for, though not entitled to, release on 23 August 2023, as that is the half-way stage of his 9 year determinate sentence, once time in custody prior to his sentencing is taken into account. That date is therefore what is known as his conditional release date. An important step in the sequence of release of such long-term prisoners on licence is their move to open conditions. The Claimant is currently a category C prisoner and is in HMP Highdown. His case has been reviewed by the Parole Board, and his most recent review was fixed for early 2021. What occurred thereafter is relevant to his application for judicial review, and therefore I will identify events in a little more detail than might otherwise be the case.

6. On 12 April 2021, Ms Marianne Beck, the Claimant's Prison Offender Manager submitted a report for the Claimant's parole review. This stated that he was an enhanced level prisoner, had no adjudications, had a trusted job within the prison, and had gained numerous positive entries for his work ethic. The report recommended his transfer to open conditions and stated: "In view of the progress Mr Matthews has made since returning to custody, I believe his risk can be managed in open conditions. This would give him the opportunity to demonstrate that he is managing his risk factors and make positive steps towards resettling into the community. My recommendation is therefore for Mr Matthews to be transferred to open conditions."

7. On 28 April 2021, Ms Holly Bradley, the Claimant's Community Offender Manager also submitted a report. This report also recommended his transfer to open conditions. Ms Bradley stated: "I am of the view that his risk can be effectively managed in open conditions, due to his current exemplary behaviour in custody, and open conditions would provide Mr Matthews with the opportunity to demonstrate and implement his learning from the completed accredited programmes. It will also provide Mr Matthews to make steps toward resettlement in the community while demonstrating he can manage his known risk factors."

8. The OASys assessment ('Offender Assessment System') which was attached to Ms Bradley's report was completed by her and dated 24 April 2021. This system is a diagnostic tool used in the consideration of offenders and potential re-offending. That assessment provided further reasons as to the benefits of the Claimant progressing to open conditions. These included that such a transfer would enable the Claimant to work with the resettlement team to look for secure accommodation upon release; to work closely with the education, employment and training team to improve his vocational skills to secure employment; to undergo a period of release on temporary licence; and to apply and internalise skills learnt from offender behaviour courses.

9. On 27 May 2021, the Claimant's then-solicitors sent representations requesting an oral hearing before the Parole Board. They pointed out that the Claimant would, if so transferred, "be able to obtain employment and undertake overnight releases ahead of his next parole review." On 10 June 2021, the Parole Board reviewed the submitted reports, together with the legal submissions and adjourned his case to seek further information. Thereafter, the Interested Party confirmed to the Parole Board that he sought its advice as to whether the Claimant was ready to be moved to open prison conditions, and the Parole Board directed the Claimant's case to an oral hearing.

10. The updated reports that were submitted by Ms Bradley again recommended open conditions. These stated: "My recommendation remains unchanged, that is for Mr Matthews to progress to open conditions due to him completing all core risk reduction work available to him in HMP Highdown. A move to open conditions would provide Mr Matthews would the opportunity to demonstrate and implement his learning from these risk reduction courses and accredited programmes, and to plan for resettlement into the community". There was no change from the previous recommendation by the Prison Offender Manager (who had now changed from Ms Beck to Ms Bryson) regarding his transfer to open conditions. At the oral hearing, on 7 January 2022 the Claimant appeared before a two member panel of the Parole Board. He was represented by his then-solicitors (a different firm of solicitors from those who represent him now in these proceedings). The issue before the panel was whether it should recommend the Claimant's transfer to open conditions to the Secretary of State.

11. After the panel had heard the evidence and closing submissions, it decided to adjourn the Claimant's case for further information. The reason for the adjournment was that the panel felt that it could not conclude the Claimant's case without a clear understanding of the prosecution case which led to his recall in 2018 and trial in 2019. The panel directed further evidence from his most recent trial, including an MG5, MG4, prosecution opening note, all the witness statements in the case that was brought against him, and transcripts of police interviews in relation to the drugs conspiracy and firearm matters.

12. On an unknown date after that the following documents were added to the Claimant's dossier for the panel:

    (a) Wimbledon Magistrates' Court notice of sending to the Crown Court;

    (b) the trial indictment;

    (c) the prosecution's opening note dated January 2019;

    (d) an MG4 charge sheet and an MG5 police report.

13. The prosecution opening note stated that two firearms, one of which was a sub-machine gun, together with ammunition, had been found at the Claimant's address in a Sainsbury's 'bag for life' which had the Claimant's fingerprints on it. Part of the case against the Claimant was that there was DNA found on both guns that could have been contributed to by the Claimant. However, although on 15 March 2022 closing legal submissions were sent to the Parole Board by the Claimant's then-solicitors, and these submitted that the Claimant's risk had not changed by the further documents obtained by the Defendant, a further oral hearing was not convened in order to deal with this further material. To be fair to the panel, the solicitors then acting for the Claimant did not specifically request that a new oral hearing be held to deal with the newly added documents.

The decision of 11 April 2022

14. On 11 April 2022 the panel issued its decision refusing to recommend the Claimant for a transfer to open conditions. That decision relied upon the prosecution opening note of the case in respect of the firearms offences of which the Claimant was acquitted in arriving at a number of conclusions.

"1.18. There is also information contained in the opening note about the firearms. The panel accepts that Mr Matthews was acquitted by the jury in relation to the firearms offences, and does not seek to go behind the jury's verdict. However, the panel is not required to consider whether Mr Matthews is guilty or innocent of these matters, but to consider how these allegations relate to his risk. The panel considers that these allegations are relevant to his risk of serious harm in the context of the index offences. The panel notes that a revolver and a submachine gun were found in a shoe box inside a Sainsbury's bag in Mr Matthews' flat. The bag had Mr Matthews' fingerprint upon it. On the muzzle of the revolver and on the muzzle, handle and outside of the magazine of the submachine gun, DNA was found. The CPS scientific opinion evidence was that Mr Matthews could have contributed to that result. By their verdict, it is clear that the jury could not be sure that Mr Matthews possessed these firearms and ammunition, but for the panel's purposes this is not the significant issue. What is clear is that Mr Matthews was living in a property where drugs and firearms were being stored."

15. The panel did not recommend that he be transferred to open conditions and stated in the following terms:

"4.5. The panel is not satisfied that there is evidence to indicate that his risk has reduced to a level consistent with the protection of the public in open conditions, as such the risks in open conditions outweigh the potential benefits. There is no evidence of a risk of abscond. However, the panel considers that there is significant work for Mr Matthews to complete in relation to instrumental violence and his involvement in a criminal lifestyle. This work should be completed in closed conditions as it is central to his risk of serious harm to the public. His progression is to open conditions is not recommended."

16. Also, and directly relevant to the second limb of Ground Two, the panel addressed whether a further hearing was required in respect of the contents of the prosecution note so that the Claimant could have the opportunity of dealing with those matters:

"5.1 The panel considered whether it was necessary to direct a further oral hearing, but concluded that it was not necessary. There is no request for a further hearing to address the evidence that was received following the last hearing and Mr Matthews has had the opportunity to submit representations and these have been fully taken into account."

17. After receiving the decision, the Claimant instructed fresh solicitors. On 6 June 2022 the Claimant's solicitors sent a letter of claim arguing that the panel had not properly applied the test for open conditions and had unfairly determined allegations relation to the firearms offence against him. On 16 June 2022 the Interested Party, the Secretary of State, responded that he would remain neutral to any claim and that remains his position, which has been maintained throughout these proceedings. On 23 June 2022 the Parole Board confirmed that it would take a neutral stance in relation to this claim for judicial review, which has remained the case (with the limited exception to which I refer at [22] to [24] below).

18. After permission to bring judicial review was granted by Eyre J on the first ground, and then Stacey J on the second ground, the Claimant's case was referred again by the Interested Party to the Defendant in December 2022. He is presently waiting for a decision as to whether the Defendant will grant him a further oral hearing.

19. The grounds upon which the Claimant seeks judicial review of the decision of the Parole Board of 11 April 2022 are as follows:

A. Ground One:

Did the Defendant fail to apply the Secretary of State's directions on the transfer of indeterminate sentenced prisoners in its decision dated 11 April 2022?

B. Ground Two:

(1) Did the Defendant's decision dated 11 April 2022 fail to comply with the Court of Appeal's decision in ***R (Pearce) v Parole Board*** [2022] EWCA Civ 4? If so, did that render the Defendant's decision as procedurally unfair?

(2) By not convening a further hearing to put new material to the Claimant, were the Defendant's findings made upon that material procedurally unfair?

20. By "new material" in the second limb of Ground Two, the Claimant means the prosecution opening note in the trial of the firearms offences, together with the MG4 and MG5.

21. I wish to emphasise that the court, in considering matters such as this, is not concerned with, nor is it deciding, whether the decision of the Parole Board to decline to recommend the Claimant's transfer to open conditions was right or was wrong. That is not the function of the court. Given the Claimant's background, his involvement in firearms, his participation in a punishment shooting in 2008, and then what appeared to be a reversion to his former lifestyle in 2018 following his earlier release, one can well understand why the Parole Board, when assessing risk, might properly conclude that a transfer to open conditions was not then justified or recommended. But such decisions must be taken lawfully, and without serious procedural irregularity, in other words fairly. The outcome of this application for judicial review should not be interpreted as the court expressing a qualitative opinion on what the decision of the Parole Board should have been.

22. There are two limbs to Ground Two of the application for judicial review. Part of the second ground, namely limb one, relies upon the alleged failure by the Parole Board to follow the decision of the Court of Appeal in ***R (on the application of Pearce) v (1) The Parole Board (2) Secretary of State for Justice*** [2022] EWCA Civ 4, which was handed down on 14 January 2022. This decision held that the Parole Board's Guidance on Allegations ("the Guidance") published on 11 April 2019, and since amended and re-issued in July 2021, was unlawful and misstated the law in respect of the advice given to panels regarding the use of unproven allegations in the assessment of risk.

23. The Parole Board adopts a neutral stance in relation to its decisions and will not ordinarily seek to defend one, as set out in its Litigation Position Statement of June 2021. On occasions it will, however, do so. The Parole Board sought, and obtained, permission to appeal the Court of Appeal judgment in ***Pearce*** and that appeal was heard by the Supreme Court on 9 and 10 November 2022. Judgment from the Supreme Court is awaited.

24. Due to the hiatus in awaiting that decision of the Supreme Court, the Parole Board issued an application in these proceedings to stay Ground Two pending the decision of the Supreme Court. That application was considered by Vikram Sachdeva KC sitting as a

Deputy High Court Judge on 21 February 2023, and he understandably ordered that the application be adjourned to be heard by the judge hearing the judicial review, as that judge would be in the best position to decide whether Ground Two should be adjourned or stayed. I therefore considered that application by the Parole Board for a stay first, and Ms Hadgett served short written submissions and made oral representations at the hearing to that effect. I was persuaded, on balance, that imposing a stay on the first limb of Ground Two would be the best course, and the one most consistent with the overriding objective.

25. This was for two reasons. Firstly, to decide that ground on the basis of the Court of Appeal's decision in ***Pearce*** would run the risk that, potentially within very short order, that decision would have been made on the wrong legal basis if the Supreme Court were to overturn the judgment. That could simply lead to confusion and/or further delay, and would also run the risk that the decision that ground would, in the longer term, be purely academic. Secondly, the Claimant in any event has other grounds of challenge to the decision of 11 April 2022. These are Ground One, and the second limb of Ground Two. If he were to succeed in his judicial review and therefore to obtain the relief sought on either of those, then the first limb of Ground Two would fall away. Even were he to succeed on that part of his application, it would give him nothing that he would not have already obtained in any event. That first part of Ground Two would fall away and itself become academic if either Ground One, and/or the second limb of Ground Two, were to succeed. Therefore I granted the stay (with the precise terms to be agreed by the parties) essentially so that part of the Claimant's challenge would be held in abeyance pending the decision of the Supreme Court on what the law is, so far as the Guidance is concerned. Following that decision by me to grant a stay, the Parole Board reverted to its more habitual neutral stance and took no further part in the hearing.

Ground One

26. The substance of this ground is whether the Defendant failed to apply the Secretary of State's directions on the transfer of indeterminate sentenced prisoners in its decision dated 11 April 2022. The Claimant maintains that the Parole Board did not do so. In order properly to consider this ground, it is necessary to consider the statutory regime.

27. The legal framework as it applies to the release and recall of indeterminate sentence prisoners is as follows. Section 28(5) of the Crime Sentences Act 1997 ("the 1997 Act") provides that where an indeterminate sentence prisoner has completed the "tariff" part of his sentence, it shall be the duty of the Secretary of State to release him on licence if the Board directs his release. A prisoner such as the Claimant, who is serving an IPP, is an indeterminate sentence prisoner.

28. Section 28(6) of the 1997 Act provides that the Parole Board may only direct a prisoner's release if: "(a) the Secretary of State has referred the prisoner's case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

29. Section 32 of the 1997 Act provides the Secretary of State with the power to revoke a life sentenced prisoner's licence and return him to custody. When he or she does so, the prisoner has a right to make representations (this is set out in section 32(3)(a)) and the Secretary of State is duty bound to refer his case to the Parole Board by reason of section 32(4). Indeterminate sentence prisoners periodically have their cases referred by the

Secretary of State to the Board pursuant to section 28(7)(b) of the 1997 Act for the Board to determine whether they should be released on licence.

30. Where a prisoner is not eligible for release, the Secretary of State can request the Parole Board's advice on whether a prisoner should be transferred to open conditions (s.239(2) Criminal Justice Act 2003 "CJA 2003"). However, the Secretary of State is not obliged to accept that recommendation. Section 239(3)(4) of the CJA 2003 requires the Parole Board when advising the Secretary of State on the early release or recall of prisoners to consider (a) any documents given to it by the Secretary of State, and (b) any other oral or written information obtained by it. This therefore plainly would include the prosecution opening note and the MG4 and MG5 that were obtained by the panel in this case.

31. Section 239(5) of the CJA 2003 provides that the Secretary of State may make rules with respect to the proceedings of the Board. The relevant rules for these purposes are those provided for in the Parole Board Rules 2019 (SI 2018/1038) which came into effect on 22 July 2019, and which were amended in 2022. It is not necessary to identify all the changes that were implemented in the 2019 Rules, but, inter alia, they introduced a so-called reconsideration mechanism that had not been present before.

32. Rule 6 of the Parole Board Rules provides a panel chair or duty member with wide case management powers. Rule 6(11) provides that: "the panel chair or duty member may adjourn or defer the proceedings to obtain further information or for such other purposes as they consider appropriate." This is what occurred in the instant case, when the panel understandably decided that it wished to obtain further information in respect of the serious firearm offences with which the Claimant had been charged, but acquitted.

33. Rule 24 of the Parole Board Rules sets out the oral hearing procedure. Rule 24(6) provides that: "A panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law". Rule 24(9) provides: "<u>After all the evidence has been given</u>, if the prisoner is present at the hearing, the prisoner must be given an opportunity to address the panel" (emphasis added). I pause in this explanation of the legal framework to observe that if the new material relating to the firearms offences had been before the panel at the oral hearing, the Claimant would have been provided with the opportunity to address the panel including on those matters, and I also point out in the Rules the use of the phrase "must be given an opportunity". Those words show that this is a mandatory requirement.

34. When recommending open conditions to the Secretary of State the Parole Board was required to apply directions issued pursuant to s.239(6) CJA 2003. The directions in force at the time of the decision under challenge in these proceedings were issued by the Secretary of State in April 2015. The Secretary of State revoked these directions on 6 June 2022 and replaced them with new directions, but those new directions did not apply at the time of the decision under challenge and are therefore not material to this claim for judicial review.

35. The April 2015 directions provided:

"Introduction

1. A period in open conditions can in certain circumstances be beneficial for those indeterminate sentence prisoners (ISPs) who are eligible to be considered for such a transfer.

2. Open conditions can be particularly beneficial for such ISPs, where they have spent a long time in custody, as it gives them the opportunity to be considered for resettlement leave (although there is no automatic entitlement to such leave and any decision to grant such leave will depend upon a careful assessment of risk). It is not necessary in every case, however, for an offender to spend time in open conditions in order for the Parole Board to direct their release.

3. The main facilities, interventions, and resources for addressing and reducing core risk factors exist principally in the closed prison estate. The focus in open conditions is to test the efficacy of such core risk reduction work and to address, where possible, any residual aspects of risk.

4. Prisoners who are not eligible for transfer to open conditions will be considered by the Secretary of State as to their suitability for the Progression Regime. For such prisoners, this is designed to be an alternative regime to open conditions; however, the Parole Board is not invited to advise the Secretary of State on the suitability of a prisoner for the Progression Regime.

5. A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.

Directions

6. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-

all information before it, including any written or oral evidence obtained by the Board; and

each case on its individual merits without discrimination on any grounds.

7. The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:-

a) the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release;

b) the extent to which the ISP is likely to comply with the conditions of any such form of temporary release (should the authorities in the open prison assess him as suitable for temporary release);

c) the extent to which the ISP is considered trustworthy enough not to abscond; and

d) the extent to which the ISP is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage."

(emphasis added)

36. Subject to section 239(6) of the CJA 2003 the Parole Board had a statutory duty to comply with the directions in force at the time, namely the April 2015 directions. A prisoner is entitled to require that they were complied with; ***R (Gilbert) v Secretary of State for Justice*** [2015] EWCA Civ 802, [60] per Sales LJ (as he then was). In that case the Court of Appeal heard an appeal from a decision of the Divisional Court that had held that a new policy announced in May 2014 to restrict the circumstances in which prisoners had previously absconded, or failed to comply with the conditions of a release on temporary licence, would be considered for a move to open conditions. In allowing the appeal, Sales LJ stated:

"[60] By contrast the Directions are directed to the Board, explaining how it should conduct itself within the overall framework set by the relevant statutory provisions. The Directions cannot detract from the obligation of the Board to apply the statutory test in section 28 of the 1997 Act in relation to risk in respect of any case before it. Subject to section 28, the Board has a statutory duty to comply with the Directions. Accordingly, as against the Board a prisoner is entitled to require the Board to comply with the Directions."

37. The duty to comply with the directions is therefore mandatory. The Parole Board was required to carry out a balancing exercise, in accordance with the directions, that exercise being the balancing, on the one hand, of the benefits to the prisoner of the transfer to open conditions, together with the assessment of risk on the other. Indeed, I would observe that the balancing exercise is fundamentally central to the task in which the Parole Board is engaged. Mr Withers for the Claimant submits that the Parole Board must expressly state what factors it has taken into account, and he also relies heavily upon other cases in which it has been held that where there is no express reference to that essential balancing exercise within the Parole Board's decision, the failure to do so has been found to be fatal to the legality of its decisions. These are other first-instance decisions on different facts but include ***R (Gordon) v Parole Board*** [2000] 1 PLR 275 per Smith J; ***R (Hill) v Parole Board*** [2012] EWHC 809 (Admin) per Supperstone J; ***R (Rowe) v Parole Board*** [2013] EWHC 3838 per King J; and ***R (Green) v The Parole Board*** [2017] EWHC 2612 (Admin).

38. It is not necessary to recite the different facts in each of these decisions, but the clear principle is helpfully set out by Smith J in ***Gordon*** at [38] in the following terms:

"it is not incumbent upon the Board to set out its thought processes in detail or to mention every factor they have taken into account. However, in my judgment the balancing exercise they are required to carry out is so fundamental to the decision-making process that they should make it plain that this has been done and to state broadly which factors they have taken into account".

39. That is a passage upon which I cannot improve, and I adopt and endorse it.

40. I regret to say that when one considers the decision of 11 April 2022 either as a whole, or by considering each of its separate component parts separately, it is simply not possible to conclude that this necessary balancing exercise has taken place. There is no proper separate, or any, consideration of the benefits to the Claimant at all. As stated many times before, and to adopt the words of Smith J in ***Gordon***, the panel should make it plain that this has been done and the decision should state broadly which factors they have taken into account. It is simply not possible in this case to conclude that the necessary and essential balancing exercise has been done.

41. Nor is it possible for this court to state that the Parole Board would have reached the same decision that it did, if it had properly addressed the balancing exercise and/or the main factors. I therefore find that Ground One is made out and this alone entitles the Claimant to the relief sought, namely quashing the decision of 11 April 2022.

Ground Two

42. In those circumstances, it is not necessary to consider the second limb of Ground Two in intricate detail (the first limb having been stayed as explained at [23] to [26] above). However, given its importance, and in case I am wrong about my findings on Ground One, I will do so.

43. The panel, having conducted the oral hearing, decided that it wished to consider further material, and the nature of this has been explained above at [12] above. No criticism whatsoever can attach to that decision by the panel. In order to understand it, one need only to consider the type of offences for which the Claimant was originally convicted in 2008 (together with those at the time for which he received no separate penalty, such as possession of a handgun), together with the other offences for which he was recalled and again convicted in 2019.

44. However, the material provided to the panel, in particular the prosecution opening note on the charges of which he was acquitted, was central in the decision made by the panel not to recommend his transfer to open conditions. The panel drew heavily upon the contents of that document, which detailed the offences upon which he stood trial (and of which he was then acquitted). The members of the panel were not obliged to follow slavishly the verdict of the jury in this respect, and the circumstances of that alleged offending were relevant to their assessment of risk. They were also relevant to his observance, or otherwise, of the terms of his licence upon which he was released.

45. However, given the lack of a further oral hearing, the Claimant was not given the opportunity to provide either an explanation or any further evidence addressing the concerns that the panel had, which originated in their consideration of that new material. Nor were the professional witnesses who were recommending the Claimant's transfer to open conditions given an opportunity to respond to the points which the panel considered to be important and which arose from the prosecution opening. Further, the panel used the contents of the prosecution opening as a foundation to reach an adverse conclusion as to the Claimant's credibility. These are points that ought to have been put to the Claimant in a further oral hearing. They were central planks in the panel's decision not to recommend his transfer to open conditions.

46. This failure by the panel to hold a subsequent oral hearing is not a mere technicality. The panel explained its approach in its decision in the following terms:

"5.1 The panel considered whether it was necessary to direct a further oral hearing, but concluded that it was not necessary. There is no request for a further hearing to address the evidence that was received following the last hearing and Mr Matthews has had the opportunity to submit representations and these have been fully taken into account."

47. The Parole Board has a duty to consider whether a further hearing is necessary after an initial hearing when it receives additional documents, and to provide an opportunity for a prisoner to directly address the panel's concerns: ***R (Gifford-Hull) v Parole Board*** [2021] EWHC 128 (Admin), per HHJ Cotter QC (as he then was) at [63]-[65]. I do not consider that the onus is upon a prisoner specifically to request a further oral hearing, the absence of such a request meaning that the Parole Board is not required to hold one. That would be to expect too much of a prisoner, not all of whom will be legally represented. It must be remembered that there is a high standard of procedural fairness that applies in parole cases; ***R (Osborn) v The Parole Board*** [2013] UKSC 61. Although that case concerns different circumstances in which the Parole Board did not hold an oral hearing at all, the dicta of Lord Reed (with whom all the other Supreme Court Justices agreed) in particular applies, in my judgment, to cases such as this one. In the instant case, the central features described in the prosecution opening note of the Claimant's trial on charges upon which he had been acquitted, were not put to him in an oral hearing, and he had no opportunity to meet them. Nor did he have the opportunity to address the panel about other features of that case which (understandably) the panel considered to be important, such as the fact that another of the defendants present at the property where the sub-machine was found was a person with whom the Claimant was prohibited from associating under the terms of his licence. None of these could be addressed by the Claimant because no further oral hearing was held.

48. Lord Reed stated at [81]:

"[81] Generally, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and, as was said in *West*, the importance of what is at stake. The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide…."

49. He continued at [82]:

"The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him."

50. Mr Withers submitted that not only did the Claimant not have the opportunity to address the panel's concerns, or fully give his side of the story, or provide an explanation concerning the facts contained in the prosecution opening, but also the panel's views as to these matters and the concerns they had were not put to any of the professional witnesses who were recommending transfer to open conditions. These are valid points

which, on the facts of this case, I accept. The failure to have a further oral hearing to enable this to occur was a serious procedural irregularity by the panel.

51. In my judgment therefore, the second limb of Ground Two is also made out in the Claimant's favour. This renders the first limb of Ground Two otiose and redundant, and it will not be necessary to consider it further, regardless of the decision of the Supreme Court in ***Pearce***, nor is it necessary to finalise the precise terms of the stay.

Conclusion

52. Given the success that the Claimant has therefore achieved in his application for judicial review of the decision of 11 April 2022, namely Ground One and the second limb of Ground Two being well-founded, I turn to the question of relief.

53. In all the circumstances, the decision of the Parole Board dated 11 April 2022 was reached unlawfully and the process contained a serious procedural irregularity. The decision was reached in significant breach of procedural fairness. It must therefore be quashed, and the Claimant is entitled to an order that it is. This matter must be remitted to the Parole Board for fresh consideration.

54. Part of the relief advanced by the Claimant in the written submissions was to seek consideration by "a fresh panel". There is nothing in the material before me that suggests that such a requirement should, in this case, be imposed upon the Parole Board by the court; to be fair to Mr Withers, when I explored the point with him at the hearing he did not press it to any appreciable extent. I therefore recite it purely for completeness, and I consider that it can be left to the good offices of the Parole Board to ensure that this matter is promptly reconsidered, either by the same panel or by a new panel, as suits the Defendant. That reconsideration ought, however, to be expedited, in view of the Claimant's conditional release date.

55. Costs is a topic that has not yet been addressed. Submissions are invited from both the Claimant and the Defendant, in the unlikely event that these cannot be agreed within 14 days of the date of this judgment being handed down.