

[2022] PBRA 57

## Application for Reconsideration by the Secretary of State In the Case of TC

### The Application

1. This is an application by the Secretary of State for reconsideration of the decision of a panel of the Parole Board ('the Board') which on 30 March 2022, after an oral hearing on 15 and 16 March 2022, issued a provisional decision to direct the release on licence of TC ('the Respondent'). The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration ('reconsideration panels').
3. In this decision references to 'the panel' or 'the 2022 panel' are to the panel whose decision is the subject of this application. Other panels are referred to as 'the 2013 panel' or 'the 2019 panel'.

### The Background

4. The Respondent is aged 40 and is serving a sentence of imprisonment for public protection for causing or permitting the death of a child. The sentence was imposed on 22 May 2009.
5. The victim of the Respondent's offence was her own baby son (V) who lived with the prisoner, her partner (A), his brother (B), B's young partner and three of B's young children.
6. V died on 3 August 2007. He sustained a catalogue of non-accidental injuries over the previous 7 or 8 months. It was never established who was responsible for causing those injuries. The Respondent, A and B were all convicted of causing or permitting V's death: the Respondent pleaded guilty to that offence and A and B were convicted by a jury after a contested trial (they had both been charged with murder and manslaughter but were acquitted by the jury of those offences).



7. When sentencing the Respondent, the judge fixed her 'tariff' (the minimum period which she was required to serve in prison before becoming eligible for release on licence) at 5 years less the time which she had served in prison on remand. The tariff expired on 17 August 2012.
8. On 24 August 2013 she was released on licence by direction of a panel of the Board which decided that her risk of serious harm to the public could be safely manageable in the community.
9. The prisoner did not cause any harm to the public whilst on licence but her behaviour in certain respects understandably caused probation and the Secretary of State to believe that her risk was increasing. So it was that she was recalled to custody on 11 February 2015. She has remained in prison since then.
10. The matters which resulted in the prisoner's recall to custody included:
  - Attention-seeking behaviour;
  - Sexual preoccupation;
  - Inappropriate behaviour towards other residents;
  - Contacting a friend when she had been told not to;
  - Developing a potentially intimate relationship via the internet;
  - Accessing BDSM (Bondage, Domination, Submission and Masochism) material;
  - Exchanging intimate photographs; and
  - Failing to disclose contacts with a man.
11. The Respondent's case has now been considered on four occasions since her recall by panels of the Board which have had to decide whether to direct her re-release on licence. On the first three occasions the panels did not direct her re-release.
12. The present review of the Respondent's case commenced on 11 January 2021 when the Secretary of State referred her case to the Board for the fourth time to decide whether to direct her re-release on licence.
13. On 3 May 2021 a single member of the Board reviewed her case on paper and directed an oral hearing.
14. The case was allocated to the panel, which comprised a psychologist member, a judicial member and an independent member of the Board. The panel was chaired by the independent member, who had also chaired the panel ('the 2019 panel') which had conducted the Respondent's third review. He was therefore familiar with the case and in a good position to identify what changes (if any) had taken place since the 2019 panel had considered the case.
15. At the hearing on 15 and 16 April 2022, evidence was given by four professional witnesses who gave expert risk assessment evidence on behalf of the Secretary of State. Their unanimous views were that the Respondent's risk would now be manageable on licence in the community. They therefore all supported re-release on licence. The Respondent herself gave evidence, as did a number of other witnesses who described her progress and the proposals for the management of her risk if she was to be released on licence.

16. The Secretary of State's officials who gave risk assessment evidence were:

- A prison psychologist
- The officer responsible for supervising the prisoner in custody
- The officer who had previously (for about 7 years) been prospectively responsible for supervising her in the community; and
- The officer from a new specialised division of the probation service, the National Security Division ('NSD'), who would now be responsible for supervising the Respondent in the community if she were to be re-released on licence.

## **The Relevant Law**

### ***The test for re-release on licence***

17. The test for re-release on licence is whether the Respondent's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel at the start of its decision. Indeed, nowadays the test is automatically set out in the Board's template for oral hearing decisions.

### ***The rules relating to reconsideration of decisions***

18. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

19. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- a paper panel (Rule 19(1)(a) or (b)) or
- an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- an oral hearing panel which makes the decision on the papers (Rule 21(7)).

20. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational and/or (b) that it is procedurally unfair.

21. The decision of the panel in this case to direct the prisoner's release on licence is thus eligible for reconsideration. It is made on the basis of irrationality. No procedural unfairness is alleged.

### ***The test for irrationality***

22. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)** ("**the Worboys case**"), the Divisional Court set out the test for irrationality which is to be applied in judicial reviews of the Board's decisions. It stated 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."*

23. This was the test which was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review of public law decisions.
24. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Board was irrational, due deference had to be given to the expertise of the Board in making decisions relating to parole.
25. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the courts for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.
26. The Secretary of State in his representations helpfully refers to decisions of the courts or reconsideration panels of the Board which identify three specific situations in which a decision of a panel of the Board may be regarded as irrational.
27. The first of those situations is where the panel has failed to give sufficient reasons for its decision. As the Secretary of State points out, the importance of giving reasons was reiterated in **R (on the application of Stokes) v Parole Board [2020] EWHC 1885 (Admin)**. In that case the court cited the following explanation given by Lord Carnwath in **Dover District Council v CPRE Kent [2017] UKSC 79** for the need to give reasons in public law decision-making.

*'I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the [decision maker] should be disclosed... It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so to make effective the right to challenge the decision by judicial review.'*

28. It follows that a panel of the Parole Board must provide sufficient reasons to explain its logic and how its conclusion follows from the evidence put before it. There should not be an "*unexplained evidential gap or leap*": see the decision of Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)**.
29. This principle has been endorsed in decisions of reconsideration panels, including a decision cited by the Secretary of State in which HH Michael Topolski QC directed a re-hearing because the panel had failed to give sufficient reasons for its decision. He stated: "*[The Panel] had to be satisfied that there was evidence of change and reduction of risk ... in my judgment it has not in a detailed decision pointed to*

*evidence of a risk reduction in any key area. It can be said that given the circumstances that led to recall and the subsequent events in prison, the evidence pointed in a different direction ... the obligation upon the panel was to provide a decision that fully explained and fully justified their conclusions”.*

30. The other two situations referred to by the Secretary of State are (1) where the decision is '*outside the range of reasonable decisions open to the decision-maker*' (this is the familiar '*Wednesbury unreasonable*' test which has been applied for many years by the courts in public law cases), and (2) where '*manifestly disproportionate or inadequate weight has been accorded to a relevant consideration*' (see **R (Gallagher) v Basildon DC [2011] PTSR 731 at §§31, 41; De Smith's Judicial Review at §11-029.**)

### **The Request for Reconsideration**

31. The Secretary of State, in his application, advances a number of grounds, under the following headings, for reconsideration of the panel's decision:

**Ground 1:** Failure to take any, or any proper, account of a number of material considerations, namely:

(1) Willingness of the Respondent to deceive professionals specific reference being made:

- (a) Her manipulative capacity (a key risk factor)
- (b) The imminence of her risk
- (c) A recent instance of deception
- (d) The suggested irreconcilability of one of the panel's findings with the evidence
- (e) The suggested unreasonableness the panel's acceptance of the Respondent's evidence
- (f) The suggested unreasonableness of the panel's acceptance of probation's assessment of the Respondent's risk of re-offending.

(2) The Respondent's relationship with another prisoner.

(3) Insufficient weight given to the panel's own findings.

(4) Risk of non-compliance.

(5) Insufficient weight given the Secretary of State's views.

**Ground 2:** Manifestly disproportionate weight given to the purported effectiveness of 'external controls'.

**Ground 3:** Failure to provide sufficient reasons.

**Ground 4:** Irrational outcome: decision outside the range of reasonable decisions.

32. These grounds, and some of the Respondent's solicitor's responses to them, will be discussed in detail below.

## Documents considered

33. I have considered the following documents for the purpose of this application:
- The dossier provided by the Secretary of State for hearing of the Respondent's case, which contains 817 numbered pages;
  - The panel's decision;
  - The representations submitted by the Secretary of State in support of his application;
  - The response by the Respondent's solicitors; and
  - A transcript of the closing observations made by the Secretary of State's representative at the hearing.

## Discussion

34. It is convenient to discuss in turn each of the four grounds advanced by the Secretary of State in support of his application.

### **GROUND 1: Failure to take any, or any proper, account of a number of material considerations**

35. The Secretary of State identifies a number of matters of which he submits the panel failed to take any, or any proper, account. The solicitor submits that all of these matters were properly considered by the panel and that the panel was fully entitled to approach them in the way in which it did. The matters in question are as follows.

#### ***Ground 1(1) The ongoing willingness of the prisoner to deceive professionals, and the impact which that has of her imminence of risk.***

36. The Secretary of State makes a number of points under this heading. They are as follows and I will deal with them separately.

#### ***Ground 1(1)(a): since the original sentencing in 2009, the manipulative capacity of the Respondent has been identified as a key risk factor.***

37. This is correct but the Secretary of State's submissions fail to recognise that strength of a risk factor may change over time and that the evidence of the Secretary of State's witnesses showed that that had happened in the Respondent's case.

38. Risk factors are the things in an offender's life which contributed to his or her offending and/or make it more likely that s/he will re-offend. The offender's risk factors are usually identified at the time of his/her conviction and sentencing: they are then listed from that point onwards in the assessments made by professionals and the Board of the prisoner's risk to the public.

39. Once a risk factor has been identified it usually remains 'on the list' throughout the offender's sentence, but on any review of his or her case the Board will need to consider whether it remains present and if so, how strongly. If a risk factor is no longer currently present, it is often liable to resurface when the offender is exposed to the stresses and strains of life in the community.
40. It is clear that the panel in this case carefully carried out the exercise of assessing the strength of the Respondent's risk factors and that it concluded that, although deception and manipulation remained present as risk factors in her case, by the time of the 2022 review, they were present significantly less strongly than previously.
41. Thus, the panel charted the progress which the Respondent had made during her sentence in addressing the factors of deception and manipulation.
42. The panel began by referring to the trial judge's view that the Respondent was '*a manipulative and self-centred person with a calculating side and a temper*'. The Respondent had given evidence at the trial of A and B and the judge had expressly rejected parts of her evidence. In particular, he did not believe her evidence that she had been naïve or blind to what had been happening in the house where she and V were living with others. He pointed out that her actions had prevented V from being seen by Social Services. V had been the subject of an investigation by Social Services and had been placed on the Child Protection Register: the Respondent had actively deceived the authorities and had acted selfishly because her priority was her relationship with A.
43. The trial judge's view was the starting point, as faithfully recorded by the panel. The panel then made various references to deceptive or manipulative behaviour on the part of the Respondent during her sentence up to the time of the 2019 review of her case.
44. Before that review the Respondent had spent a significant amount of time in a special prison unit which provided intensive treatment in a highly specialised environment for prisoners with problematic personality traits. Many prisoners have problematic personality traits but in some cases (including the Respondent's) they are more pronounced than in others. Reports at the time of completion of the Respondent's time in the special unit showed that she had undertaken a significant amount of work there and had a better understanding of herself and her personality traits.
45. Although she had clearly made progress, she had nevertheless engaged in further deceptive behaviour. She had been in a relationship with another prisoner for 12 months without disclosing it to professionals and had denied the relationship when directly asked about it by staff. In her evidence to the 2019 panel, she had accepted that she had not been honest with staff.

46. As the 2022 panel recorded, the 2019 panel noted the Respondent's dishonesty over a long period and considered that, at best, her positive working relationship with staff had only developed in the last 12 months. The 2019 panel was concerned by her ability to hide an intimate relationship from staff within a relatively small environment. It believed that this reinforced an earlier psychological assessment which found her to be highly sophisticated in misleading others.
47. By the time of the 2019 review the Respondent had moved to another specialist unit to consolidate her learning from the previous one. The 2019 panel found that there remained a need for her to evidence consolidation of her learning, and accordingly did not direct her re-release on licence.
48. By the time of the 2022 review the Respondent had clearly, on the evidence of the Secretary of State's professional witnesses, been able to evidence further progress in addressing her tendency to be dishonest and manipulative. Apart from one matter of concern which will be discussed under Ground 1(1)(c) below, she had engaged positively and openly with the professionals. Of particular note is the fact that she had disclosed to staff, at what the 2022 panel accepted was the earliest reasonable opportunity, that she had embarked on an intimate relationship with another prisoner: as the 2022 panel noted, that was in marked contrast to her previous failures to disclose such relationships.
49. In these circumstances the panel was fully entitled to conclude (as it did) that, whilst dishonesty and manipulation remained risk factors for the Respondent, they were present significantly less strongly than had been the case in 2019.

***Ground 1(1)(b): In 2019, the Parole Board recognised the connection between the willingness to deceive professionals and the imminence of risk upon release. It was on this basis that the Parole Board, in 2019, rejected the OASys assessment that there was a low risk of future offending.***

50. It appears to be suggested by the Secretary of State that there was an inconsistency between the conclusions of the 2019 and 2022 panels and that the 2022 panel should have reached the same conclusions as the 2019 panel on the issues of imminence and risk of future offending. To see whether that is a fair criticism it is necessary to examine closely what was written by both panels in their decisions on those topics. At this point I will discuss their conclusions about imminence. Their conclusions about risk of future offending are the specific subjects of Ground 1(1)(f) and I will therefore discuss them when dealing with that ground below.
51. Imminence of risk is an important factor which a panel of the Board needs to consider. If the Respondent's risk is 'imminent' (i.e. liable to result in further

offending at any time, without warning signs), that will normally mean that his or her risk will not be safely manageable in the community.

52. The 2019 panel stated in its decision: *'... the general view at the oral hearing was that your risk would not be imminent. The panel accepted the identified risk of serious harm given the nature of your offending and identified risk factors. However, it was not satisfied that imminence of risk could be so readily predicted. Your willingness to deceive professionals on licence meant that risk could not be accurately monitored. The only way professionals could reasonably be satisfied that risk was not imminent would be if they had the confidence in you being able to be open and honest with them. It is indicated that you have found a better way to be open with staff in custody and this may well be true: however, it is yet to be tested within a less structured setting and as such the panel could not accept that risk would not be imminent upon release.'*
53. This was an entirely reasonable conclusion based on the evidence available to the 2019 panel. It should be noted that that panel clearly envisaged that a further period of testing might provide evidence of change demonstrating that the Respondent's risk was no longer imminent.
54. The 2022 panel, on the evidence available to it, was clearly satisfied that that had turned out to be the case. The panel chair was in a particularly good position, having observed the prisoner giving evidence at both hearings, to assess the nature and extent of any change. A substantial change had also been noticed, and was commented on, by the Secretary of State's expert witnesses.
55. The prison psychologist told the panel that the Respondent was better prepared for release than on the previous occasion and that she could be managed by the proposed risk management plan. She believed that there was a likelihood of openness and honesty with professionals, and that any escalation in risk would be evidenced over a period of time, with professionals being able to spot warning signs.
56. The official who had known the Respondent for the past seven years and had been responsible (or prospectively responsible) for her supervision in the community told the panel of the positive changes that she had observed in her attitude, behaviour and thinking. She said that the Respondent's communication with professionals had improved and that the management of her risk had been enhanced because the case had now been transferred to the NSD. The official from the NSD confirmed her support for release and detailed her division's management of high profile cases. That enhanced level of supervision would make it more likely that any warning signs would be picked up, and Core Group meetings would be held with professionals as and when necessary.

57. The officer responsible for the Respondent's supervision in prison believed that, if there was an increase in risk, there would be warning signs which would include unhealthy thinking and poor emotional management. It was her view that the Respondent understood the need to be open and honest and to keep a low profile in the community. She said that there had been a "huge difference" since the 2019 panel's review and that when in the specialist unit where she was now detained, the Respondent had evidenced an ability to use skills and to be open with professionals.
58. There was therefore ample evidence to justify the panel reaching a different conclusion on the issue of imminence from the conclusion which the 2019 panel had reached. There was no inconsistency between the decisions of the two panels on that issue.

***Ground 1(1)(c): Since the 2019 Parole Board decision, there has been a further incident which very clearly demonstrates a willingness to deceive professionals, namely the sending of letters in violation of the prison rules and the content of those communications, which evidences an attempt by [the Respondent] to keep her relationship with another prisoner under the radar so as not to damage her prospects with the Parole Board. The fact that that letter was written after the Parole Board review had commenced, is highly material.***

59. This incident, and the circumstances surrounding it, were thoroughly examined by the panel. To put the incident in context it is worth setting out the whole of the relevant part of the panel's decision:

*'In or around June 2021, [the prisoner] began an intimate relationship with another prisoner (X) ... The relationship with [X] was short lived, however, it was explored in detail by the panel. Within days of [the prisoner] and [X] developing feelings for each other, they kissed. The next day [the prisoner] disclosed the relationship to [the officer responsible for her supervision in custody]. The panel accepted therefore that there had been timely disclosure of the relationship, in contrast to her behaviour noted by the 2019 panel.*

*'A further concern in terms of the relationship with [X] was that [the prisoner] did not follow the prison rules in letters that she sent to [X]. Letters should be sent via the external post so that they can be monitored, however, both [the prisoner] and [X] would push letters under the doors of their cells.*

*'On 29 June 2021, [the prisoner] tried to pass a letter to [X] and this was intercepted by prison staff. A copy of it is within the dossier. This letter was around 10 days after the disclosure of the relationship and following a discussion with professionals where [the prisoner] agreed that the*

*relationship should be brought to an end. At this point, [the prisoner] and [X] were prevented from seeing each other.*

*'The letter is dismissive of staff and the concerns that were raised. It evidences a very close attachment to [X] and [the prisoner's] view that the relationship was ongoing. Any reading of the letter indicates concerns about deceptive behaviour and a prioritisation of relationships, both of which have been found to be offence paralleling behaviour.*

*'[The prisoner] said that deep feelings develop quickly in prison because it is a false environment and the prison psychologist agreed with that view. [The prisoner] accepted that her behaviour was relevant to her risk and that professionals would be concerned about how it appeared that she was prioritising the relationship with [X].*

*'She also accepted that her comments about staff, which included rude references, were wrong and she said that she had been frustrated and was "venting". [The officer responsible for supervising her in prison], who had explored the relationship with [the prisoner], said that she had reverted to offence paralleling behaviour and had thought it unlikely that the letters would be discovered.*

*'[The prisoner's key worker] told the panel that the behaviour was due to "pure frustration" at a time when "everyone was locked in" due to the Coronavirus restrictions.*

*'[The prison psychologist] had discussed the content of the letter with [the prisoner] but noted that she had disclosed what it said prior to [the psychologist] receiving a copy of it. In her view, [the prisoner] had evidenced a change in thinking because she disclosed the relationship in its early stage and had been willing to discuss it with professionals.*

*'[The prisoner] pointed out that she had provided copies of the other letters to professionals and [the psychologist] considered the whole event to have been a test of [the prisoner's] openness.*

*'In the panel's careful analysis, it is clear that [the prisoner's] relationships, particularly the speed at which they develop, will need to be monitored. It may be that relationships develop easily in custody, however, the relationship with [A] developed in a similar manner and [the prisoner] has admitted that she was besotted with him. In her letter to [X], [the prisoner] told [X] that she was "crazy about you ... I madly love you", despite the relationship having lasted only a few weeks.*

*'It may well be that [the prisoner] had hopes of the relationship continuing with [X] despite her suggested acceptance of professionals' concerns. However, there is strong evidence to show that she was willing to reflect on her position and that she was willing to listen to advice.*

*'The relationship faltered because [the prisoner] realised that [X] had not been open with her about her own offending. Again, [the prisoner] discussed matters with professionals and concluded that the relationship should end. Save for the letter to [X], there is no evidence to demonstrate*

*that [the prisoner] attempted to continue any deception or attempted to carry on the relationship in secret.*

*'The [terms of the] letter [are] perhaps of some concern, although, on balance, the panel accepted that it was more likely produced at a time of frustration and was not a true reflection of [the prisoner's] thinking.'*

60. There is no doubt that this episode revealed another example of the Respondent being less than open and honest with professionals. It was to her credit that she disclosed her relationship with X at an appropriate time, but she then, for a time, led the professionals to believe that she had ended the relationship when she had not.
61. However, the panel needed to, and did, assess the weight to be attached to this deception and the circumstances in which it took place. Other panels might have decided that it was of sufficient concern to lead to the conclusion that the Respondent's risk would not be manageable on licence in the community. This was, however, a point on which views could reasonably differ. The panel's view was shared by all four of the Secretary of State's expert witnesses, and clearly comes nowhere near being 'Wednesbury unreasonable'.

***Ground 1(1)(d): In its Decision, the Parole Board acknowledges "manipulative behaviour, impression management [and] dishonesty in an attempt to present a positive image" as areas of risk, and noted that the prisoner's self-reports cannot be relied upon" (Decision §1.19). This was (inexplicably) dealt with under "The Past" section. The Parole Board then went on to state: "the panel did not consider that there was evidence of concern in terms of manipulation, minimisation or deflection" (§1.31). That finding is irreconcilable with the evidence before the Parole Board.***

62. A careful reading of the panel's decision does not support this criticism.
63. The passage in which manipulation, impression management and dishonesty are referred to as areas of risk (i.e. risk factors) appears early on in the panel's decision. It is the passage in which the panel identified the Respondent's risk factors. Risk factors are, as pointed out above, normally identified at the start of a prisoner's sentence, though additional ones may be added to the list if they emerge later on. It is for that reason (and not 'inexplicable', as the Secretary of State suggests) that a panel's decision will usually identify the offender's risk factors early on in its decision, after reciting a summary of his or her offending.
64. Indeed, the template used by the Board for oral hearing decisions until recently included a section headed 'Risk Factors' immediately after the section headed 'Analysis of Offending' and before the section headed 'Evidence of Change ... and Progress in Custody'. That template had of course been used by the 2019 panel.

65. The new template contains fewer sections than the old one. It does not have a specific section for Risk Factors, but it makes complete sense for a panel to identify them immediately after summarising the offender's offending in the first section, which is headed 'Analysis of Offending Behaviour (The Past)'. Analysis of offending includes analysis of the factors contributing to it.
66. After summarising the Respondent's offending in this case the panel listed the risk factors identified by probation and then added others which it believed should be included in the list. Those factors had all clearly been present at the time of her offending and have all remained present (to some degree at least) throughout her sentence. They included manipulation, impression management and dishonesty along with a number of other factors identified by the panel.
67. Since this point will arise again (see paragraph 88 below) it is convenient to set out the relevant passage from the panel's decision in full:

*'OASys' [probation's offender assessment system] 'identifies risk factors as accommodation, employment & training, relationships, lifestyle, thinking and attitudes. Drugs and alcohol are identified within OASys as matters requiring attention, [the prisoner] told the panel that she did not believe drugs and alcohol were risk factors, however, following the 2019 panel's review, she had engaged further with the substance misuse service. The prison psychologist said that substance misuse was not directly related to risk and it was [the prisoner's] maladaptive coping that was a risk factor. [The prison psychologist] said that substance misuse in the future should be considered as a warning sign.*

*'In the panel's view, [the prisoner's] relationships, including the speed at which they progress and her prioritisation of them above anything else are a key area of risk. Her sexualised behaviour (including sexual preoccupation and using sex as a coping mechanism), emotional management, personality traits, low self-esteem, manipulative behaviour, impression management, dishonesty in an attempt to present a positive image, her lack of victim empathy and her anger management are additional areas of risk. [The prisoner's] self-reports cannot be relied upon and therefore external controls will be critical to future risk management.'*

68. The Secretary of State is critical of the panel's statement that "*the panel did not consider that there was evidence of concern in terms of manipulation, minimisation or deflection*". The Secretary of State suggests that that statement is '*irreconcilable with the evidence before the Parole Board*'. What the Secretary of State has failed to recognise is that that statement formed part of a later passage in its decision in which the panel was setting out its assessment of the Respondent's presentation at the recent hearing. That passage read:

*'Psychologists reviewing this case during the initial sentence period noted that [the prisoner] had a tendency to edit events and present her involvement in them in a favourable light. [There were then references to the prisoner's problematic personality traits.] In considering [the prisoner's] oral evidence, the present panel found that there was some attempt at impression management where [the prisoner] would present herself in a positive light. However, she was also willing to recognise and accept her failings. Any prisoner at a Parole review would wish to present their best evidence, and the panel did not consider that there was evidence of concern in terms of manipulation, minimisation or deflection.'*

The panel was thus drawing a distinction between the Respondent's earlier presentation and her present one.

69. The panel was perfectly entitled (and indeed bound) to set out its observation of the Respondent's current presentation, which accorded with similar observations by the Secretary of State's expert witnesses. The panel's observation formed a significant part of its assessment of the Respondent's current risk. Panels of the Board are accustomed to making that kind of observation and have the necessary expertise to do so. This panel's observation cannot fairly be criticised or challenged by those who were not at the hearing.

***Ground 1(1)(e): The Parole Board asserts that "The prisoner had expressed a willingness to work with professionals and to be open with them" (§2.16). This appears to be based on oral evidence provided by the prisoner at the hearing. The Parole Board then appears to accept all of the prisoner's evidence, including in relation to the intercepted letter, without taking any account of the overwhelming evidence as to the prisoner's proven capacity to deceive and manipulate, and the overwhelming evidence of impression-management.***

70. Again, the Secretary of State fails to recognise that a prisoner's attitudes and behaviour may change. There was certainly a great deal of evidence of a capacity to deceive and manipulate and of impression management earlier in the Respondent's sentence, but by 2022 the panel was fully entitled to find that those factors had diminished in strength and manageability.

71. It was the panel's role to decide what evidence it should accept and what it should not accept. Panels of the Board have a responsibility to assess evidence and are experienced in doing so. They should be trusted to do so responsibly and fairly, and their findings can only be overturned where they can be said to be irrational.

That is certainly not the case with the panel's assessment of the Respondent's evidence.

***Ground 1(1)(f): As a consequence of the above, the Parole Board simply accepts, without any analysis or challenge, the OASys Assessment of further offending as "low" (contrary to the approach taken by the Parole Board in 2019). At the very least, that risk assessment should have been properly interrogated, given the clear evidence of an ongoing willingness of [the prisoner] to deceive professionals, and the obvious impact that this has on the imminence of risk. This was not done.***

72. This submission is, I am afraid, based on a misunderstanding of the position in this case (and of the OASys system).
73. As explained above, OASys is the offender assessment system operated by probation. It involves assembling in a single lengthy document a wide range of information which may be relevant to the assessment of the prisoner's risk to the public. Amongst all the other information the prisoner's OASys will contain two distinct items: (1) statistical predictions of the prisoner's risk of proven re-offending of various kinds (general, non-violent, violent-type and sexual) and (2) probation's clinical assessment, based on all available information, of the prisoner's risk of serious harm to various categories of people, both in custody and in the community.
74. Statistical predictions can be useful in assessing a prisoner's risk but, being predominantly based on the number of his or her convictions, they are (as panels of the Board are well aware) of limited value in a case like this where there is only one conviction but it is of extreme seriousness.
75. A better indication of the level of a prisoner's risk of re-offending is often provided by a full psychological risk assessment by an experienced forensic psychologist. Psychologists assess risk of future offending on a scale of low/medium/high, though sometimes they may assess the risk as 'low to medium' or 'medium to high'.
76. It is normal for panels of the Board in their decisions to record (a) the statistical predictions of future offending (b) a psychologist's assessment (if there is one) of the risk of future offending and (c) probation's clinical assessments of the risks of serious harm to various categories of people. These are of course three different things. Both the 2019 panel and the 2022 panel duly recorded them in their decisions.

77. The 2019 panel recorded that (a) *'you are assessed as presenting a low risk of further general and violent offending'* (this was of course a reference to the statistical predictions), (b) the prison psychologist who had assessed the Respondent's risk on behalf of the Secretary of State for the purpose of the 2019 review had assessed her risk of future violence in the community as being at the medium level and (c) probation had assessed a high risk of serious harm towards the public (vulnerable adults), known adults and children. On the basis of the evidence available to it, the 2019 panel concluded that the statistical predictions (as quite often happens) underestimated the Respondent's risk of future offending.
78. The 2022 panel similarly recorded (a) that the Respondent *'was assessed as presenting a low risk of further general and violent offending'* (the statistical predictions) and (b) that probation had identified a high risk of serious harm to the public, known adults and children.
79. I have referred in paragraph 55 above to the panel's summary of the evidence given by the prison psychologist who had assessed the Respondent's risk for the purpose of the 2022 review. The panel might have mentioned, but did not, that in her main report (which I have read) that psychologist (noting the changes which had taken place since 2019) had assessed the Respondent's risk of future violence in the community as being at the low level, though she added that *'should risk become imminent then [the prisoner] may be of high risk to children and potentially vulnerable adults by virtue of her disattending to harm caused due to prioritising her needs above those of others.'* She did not believe that the Respondent's risk was currently imminent: there would have to be a significant change of circumstances before it became so.
80. Having noted the statistical assessments, probation's assessments of risks of serious harm and the psychologist's evidence, the 2022 panel proceeded to make its own carefully reasoned assessments of the Respondent's risks of re-offending against the three categories of people in respect of whom probation had identified a high risk of serious harm: the public (vulnerable adults), known adults and children. In each case it concluded that the risk of re-offending was low but that in the event of re-offending, the risk of serious harm would be high.
81. The panel set out in detail its reasons for those conclusions, which cannot be faulted. There is no question of the panel, as the Secretary of State suggests, *'simply accepting the OASys Assessment of risk of further offending'*, or *'failing properly to interrogate it'*. As the assessment was a purely statistical one, there was nothing the panel could do to *'interrogate'* or change it. What the panel could and did do was to make its own independent assessment of the risks.
82. Whilst the 2019 panel (on the evidence available to it) had concluded that the statistical predictions under-estimated the risk of re-offending which the

Respondent posed at that time, the 2022 panel's assessment (on the evidence available to it) coincided with the statistical predictions and with the prison psychologist's. Risk can change over time (depending on an offender's progress) and the panel was fully entitled on the evidence (including the evidence of the Secretary of State's witnesses) to find that it had changed significantly in the Respondent's case.

### **Ground 1(2) Relationship with another prisoner**

83. This ground relates to the Respondent's relationship with X. The Secretary of State submits: *'The Parole Board failed to take any, or any proper, account of the relevance of the relationship involving [X], and the content of the intercepted letter, and in particular the fact that this constitutes (i) recent evidence of deception; and (ii) recent evidence of offence paralleling behaviour.'*

84. The panel in its decision stated that *'any reading of the letter indicates concerns about deceptive behaviour and a prioritisation of relationships, both of which have been found to be offence paralleling behaviour.'* I have already dealt with the recent evidence of deception and will not repeat my comments here.

85. The Secretary of State criticises the panel for not attaching more weight to the offence-paralleling behaviour in its assessment of risk. However, it is important to note that the behaviour said to have been paralleled by the Respondent's recent behaviour was the prioritisation of relationships, and specifically the prioritisation of the Respondent's own needs and those of her partner over those of any children for whom they had been or might be responsible (see the 2013 decision quoted by the panel in the 2022 decision, and the 2022 panel's own list of risk factors).

86. In assessing the risk of future offending, the panel stated, obviously correctly, that *'the primary risk in this case is the risk to children who might be in [the prisoner's] care. The likelihood of such a situation developing is remote because it is unlikely that [the prisoner] would ever be afforded an opportunity to care for children again.'*

87. In this context the offence-paralleling behaviour, whilst not insignificant, does not carry the weight suggested by the Secretary of State. Nor did the Secretary of State's four risk assessment experts suggest that it should stand in the way of a direction for release on licence.

### **Ground 1(3) Insufficient weight given to the panel's own findings**

88. The 'findings' referred to here are in fact the list of risk factors identified by the panel at an early point in its decision (see paragraphs 63-7 above where I

explained the Secretary of State's misunderstanding about what the panel was recording).

89. In his submissions on this topic, the Secretary of State makes a point which I have already dealt with. He submits that: *'At the very least, these views required the Panel to properly test the assessment that there is a low risk of further offending, in the same way that the Parole Board Panel did in 2019.'*

90. I have explained in paragraphs 72-82 above the Secretary of State's misunderstanding about the statistical 'low risk' assessment, and how the panel (correctly) dealt with it.

**Ground 1(4): Risk of non-compliance and the serious harm which would result from it**

91. The panel examined the proposed release and risk management plan carefully and in depth. It concluded that with the enhanced monitoring and supervision afforded by NSD management of the case, the level of external control in place and the improved likelihood of engagement and compliance by the Respondent, the plan would be likely to be effective. That was also the view of the Secretary of State's expert witnesses.

92. The panel recognised that was a risk, as had been the case when she had previously been on licence, that the Respondent's compliance would falter. However, the panel's conclusion - again shared by the Secretary of State's expert witnesses - was that *'compliance in itself'* [I think 'compliance' must be a typo for 'non-compliance'] *'would be unlikely to lead to a rapid escalation in risk, and warning signs could be spotted.'*

93. The Secretary of State now advances a different view from those of his expert witnesses. He points out that the key active risk relates to relationships; offence-paralleling behaviour can occur rapidly; such behaviour is difficult to monitor; and very serious risk of harm could follow as a result of non-compliance.

94. Whilst serious harm could conceivably result from non-compliance, I share the view of the panel, the expert witnesses and the Respondent's solicitor in his representations that that is a remote possibility.

95. I agree with the following points made by the Respondent's solicitor:

- a) A breach of licence conditions does not necessarily mean that an increase or imminent risk of serious harm would follow.
- b) This is important given the unlikelihood (as the panel rightly found it to be) of the circumstances of the index offence reoccurring.

- c) The Respondent's only conviction, for the index offence, involved the harm of a child.
- d) Realistically it is highly unlikely that the Respondent will ever again be able to take care of a child (especially for an extended period of time).
- e) Any access to a child (especially a lengthy period with access to a child as in the index offence) would be easy to monitor.

96. All in all, I am not persuaded by the Secretary of State's arguments on this ground. I believe that the panel's approach to the issue was the correct one. It was certainly not 'Wednesbury unreasonable'.

### **Ground 1(5) Insufficient weight given to the Secretary of State's views**

97. The Secretary of State submits: *'The Parole Board failed to take any, or any proper, account of the views of the Secretary of State, instead inaccurately giving the impression, in the Decision, that the Secretary of State supported [the prisoner's] release. That was clearly not the case, as evidenced by the Secretary of State's written submissions, and the oral submissions made by the Secretary of State's representative at the hearing.'*

98. In the light of this submission I was, at my request, provided with a transcript of the oral representations made by the Secretary of State's representative at the hearing. Having made various references to the evidence which the Secretary of State's representative wished the panel to consider (and which the panel did consider), she summed up the Secretary of State's position as follows:

*'The Secretary of State observes the continued view of all witnesses in oral evidence that [the prisoner] can be safely managed in the community and recommendations supporting release. As I said, support for release is contingent on a robust risk management plan that focuses on stringent external controls; and, as I said, will require [the prisoner] being open and honest.'*

*'As in all cases, the Secretary of State doesn't offer a view but relies on the evidence of the witnesses and, as with all cases, the Parole Board will wish to be satisfied that it is no longer necessary for the protection of the public for [the prisoner] to remain in custody. Nothing further to add, thank you, Chair.'* (My emphasis)

99. It was clear from this that there were no views of the Secretary of State which it can be said the panel failed to take into account. Instead of proffering any views held by the Secretary of State, his representative stated that he *'relied on the evidence of the witnesses'*. His witnesses were unanimous in their support of re-release on licence, which no doubt accounted for the passage in the panel's decision to which the Secretary of State now takes exception.

100. That passage reads as follows, after referring to the fact that the witnesses all supported re-release on licence: *'These people were the Secretary of State's witnesses and [the Secretary of State's representative] confirmed that the Secretary of State accepted the recommendations of his witnesses'*.
101. Whilst the Secretary of State's representative did not use those words, it is perhaps not surprising that the panel understood her expressed reliance on the evidence of his witnesses to amount to an acceptance of their recommendations.
102. Even if the Secretary of State's position would have been more accurately described as neutral, it certainly remains the fact that he was not advancing any views opposing re-release on licence. The panel cannot therefore fairly be accused of disregarding his views.
103. As the Respondent's solicitor points out, the Secretary of State does not in his submissions identify any particular 'view' of his which is said to have been ignored by the panel. That is no doubt because there was no view to which he could point.
104. Of course the fact that the Secretary of State was not arguing against re-release at the hearing is not a bar to him now seeking reconsideration of the panel's decision on the basis of irrationality, but this particular complaint of irrationality cannot be upheld.

**GROUND 2: Manifestly disproportionate weight given to purported effectiveness of external controls**

105. I do not think it is strictly accurate to speak of a panel 'giving weight to' the external controls. What the panel has to do is to decide whether the proposed release and risk management plan (including the proposed licence conditions, which are usually the principal external controls) is likely to be effective to manage the offender's risk to the public. If it is, the test for release on licence will usually be met because it is no longer necessary for the offender to be confined in prison.
106. The Secretary of State makes a number of points in support of his current contention (contrary to the views of his expert witnesses) that the Respondent's risk would not be manageable safely in the community. I will discuss these points in turn.
- 'The licence conditions are extensive, and effective monitoring is likely to be extremely difficult (at its highest, the Parole Board indicated that the plan would "be likely to be effective" (emphasis added), but does not explain why'.*
107. Of course the licence conditions are extensive, as one would expect in a serious case like this. I think the Secretary of State is overstating the difficulty in

monitoring compliance. His officials who will be responsible for the monitoring are certainly confident in their ability to do so.

108. An unfair point is being made about the panel stating its view that the risk management plan would '*be likely to be effective*'. As the Respondent's solicitor points out, no panel can ever say that a risk management plan will definitely be effective. The best a panel can ever say is that it is likely to be effective. The use of that expression does not indicate any lack of confidence on the part of the panel.

109. Contrary to the Secretary of State's submission, the panel did explain why it believed the risk management plan was likely to be effective. Its reasons were '*the enhanced monitoring and supervision afforded by the management of the case by NSD, the level of external control in place and the improved likelihood of engagement and compliance by [the Respondent]*.'

*[The Respondent] has a pattern of deceptive behaviour*

110. This is of course true but the Secretary of State, as throughout his submissions, fails to acknowledge the progress which the Respondent has made in recent years, as testified by his own witnesses.

111. The fact that the Respondent will be going to a specialist hostel is a plus rather than a minus.

*The key offence paralleling behaviour (described by the Panel as something which would "always be a risk factor") is extremely difficult to monitor, and the risk can escalate quickly*

112. I have dealt with these points above.

*The Parole Board has ordered release in circumstances where there is no definitive "move on" plan*

113. This is not uncommon. There is very rarely a definitive move-on plan when a prisoner is released on licence. It will be a matter for the Secretary of State's officials to formulate a move-on plan when the time approaches for the Respondent to leave the probation hostel. Because her case will be managed by the NSD, she will be able to remain at the hostel for a longer period (12 months) than is usual in other cases.

a) *There is an acknowledged risk of non-compliance, and the consequence of non-compliance is very significant, given the high level of risk of harm, including to children.*

114. I have dealt with these points above.

115. All in all, I am not persuaded by any of the arguments advanced by the Secretary of State under this ground.

116. Nor am I persuaded by the following comment made by the Secretary of State at the end of his arguments under this ground:

*'The Secretary of State has serious concerns that the approach adopted by the Parole Board has subverted, and undermines, the statutory test for release, which focuses on whether there is a risk to the public, and not whether there is a risk to the public that can be mitigated by extensive licence conditions: see, in particular King v Parole Board [2016] EWCA Civ 51, §31.'*

117. This is an unfair criticism of a panel which dealt (with conspicuous care and fairness) with a complex and difficult case. The panel was no doubt conscious that the case has attracted (and is likely to continue to attract) a great deal of attention in the media. I am satisfied that the panel faithfully and correctly applied the statutory test for release, knowing that in a case of this kind any decision favourable to the Respondent is likely to be unpopular with many members of the public and some sections of the media. The panel's approach to the assessment of the Respondent's risk cannot be faulted.

### **GROUND 3: Failure to provide sufficient reasons**

118. The Secretary of State submits, in relation to the matters which are the subjects of Grounds 1(1-4) above, that the panel failed to give sufficient reasons for its conclusions. I am afraid I cannot agree. The panel's reasoning was clear, and there were no significant *'unexplained evidential gaps or leaps'*.

### **GROUND 4: Irrational Outcome: The decision was outside the range of reasonable decisions**

119. The Secretary of State submits that: *'Even if there was no deficiency in the decision-making process, the Secretary of State submits that the Parole Board's decision is outside the range of reasonable decisions open to the decision-maker, having regard, in particular, the matters identified [in Grounds 1(1-4)] above, and, in particular, the timing and significance of the incident involving the relationship with [X].'*

120. As will I hope will be clear from the discussion above, I cannot agree. None of the panel's conclusions came anywhere near the threshold for 'Wednesbury unreasonableness.'

### **Decision**

121. I have carefully considered all of the arguments advanced by the Secretary of State in support of his application, but for the reasons explained in detail above, I cannot find anything in them to justify reconsideration of the panel's decision.

122. This application is therefore refused and the panel's provisional decision is now final.

**Jeremy Roberts**  
**4 May 2022**