

**[2023] PBRA 202**

## **Application for Reconsideration by the Secretary of State for Justice in the case of Genas**

### **Application**

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 2 October 2023. The decision of the panel was to direct the release of Genas (the Respondent).
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier consisting of 3226 pages; the Application for Reconsideration submitted by counsel on behalf of the Applicant; and the response by the Respondent's legal adviser.

### **Background**

4. On the 23 April 2001 the Respondent was sentenced to an automatic sentence of life imprisonment for the offence of rape. The minimum term fixed by the judge was seven years.
5. The offence of rape occurred in circumstances where the Respondent had befriended the victim. The victim was vulnerable. The Respondent coerced the victim into prostitution. The victim paid earnings from prostitution to the Respondent. In addition to the sexual offence the victim suffered violence by way of punching on the occasion of the sexual offence. The victim was also the subject of an assault occasioning actual bodily harm on a further occasion.
6. The Respondent was noted to have an extensive history of criminal offending. He had a previous conviction for rape. He had also been convicted of offences of wounding, blackmail, attempting to pervert the course of justice and making threats to kill.

### **Panel hearing background**

7. This case was first scheduled for hearing by a Parole Board panel in June 2021. There were then a number of adjournments. During the course of the review period the police had been conducting an investigation into allegations relating to the



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Respondent. Those allegations related to statements taken from victims who were engaged in prostitution during the time of the initial offending by the Respondent. The oral hearing panel determined that the outcome of those investigations might be relevant to an assessment of risk. The hearing was therefore delayed to allow the parties to consider the documents which were in the hands of the police. As noted above, as a result of these investigations the Respondent was transferred from an open prison to a closed prison. The next effective hearing was in November 2022. By that time the Applicant was represented by counsel. The panel received submissions and determined on that occasion that a fact-finding hearing should take place. The purpose of this hearing was to assess the evidence of allegations which had not led to either conviction in court or indeed to charging. At the time the Supreme Court were considering the case of *Pearce*. The panel therefore adjourned the matter awaiting guidance in relation to that particular case. The panel ordered the preparation of schedules which would enable the panel to receive evidence and reach conclusions about the allegations.

8. In April of 2023 the fact-finding hearing took place. That hearing was not completed and was adjourned until June 2023. The fact-finding hearing was then completed. The panel then issued an interim decision setting out its findings resulting from the earlier hearing. This enabled the professionals to consider their evidence in the light of these findings. The hearing took place in September 2023.

### **Request for Reconsideration**

9. The application for Reconsideration is dated 7 November 2023.
10. The grounds for seeking a reconsideration are set out below.

### **Current parole review**

11. The Respondent's tariff expired on 23 April 2008. The Respondent was detained in a closed prison until August 2016 when he was transferred to an open prison. He spent some two years in an open prison. He was then transferred back to a closed prison. The reason for the transfer was that the police were investigating the potential of further offences. Those investigations did not lead to any further charges.

### **Oral Hearing**

12. The review was conducted by a judicial Chair of the Parole Board, a psychologist member of the Parole Board and an independent third member of the Parole Board.
13. Oral evidence was given at the hearing by the Prison Offender Manager (POM), a prison instructed psychologist, a prisoner instructed psychologist, the Community Offender Manager (COM) and two police officers. The Respondent was represented by a solicitor. The Applicant was represented by counsel.
14. A dossier consisting of 3163 pages and further material consisting of 1244 pages was considered by the panel.

### **The Relevant Law**



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15. The panel correctly sets out in its decision letter dated 2 October 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

*Parole Board Rules 2019 (as amended)*

16. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).
17. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

*Irrationality*

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

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

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

*Procedural unfairness*

21. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
22. In summary a Respondent seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:



- (a) express procedures laid down by law were not followed in the making of the relevant decision;
- (b) they were not given a fair hearing;
- (c) they were not properly informed of the case against them;
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

23. The overriding objective is to ensure that the Respondent's case was dealt with justly.

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

### **The reply on behalf of the Respondent**

25. The solicitor on behalf of the Respondent provided detailed representations which I have considered.

26. So far as the issue relating to the absence of formal fact-finding is concerned. The Respondent's solicitor argues that the allegations and documentation was considerable in this case. All parties had access to that documentation and had heard evidence. It is argued that the documentation was available to all of the expert witnesses who were present at the fact-finding hearing.

27. The Respondent's solicitor indicates that the absence of findings by the panel could not have deprived the panel of critically important information on the basis that the panel had all the information before them and therefore were not deprived of any information.

28. Finally, it was argued that the fact that the recommendations of the professionals did not alter, indicated that the professionals had taken into account all matters that were relevant. It is therefore argued that the absence of formal findings had no meaningful effect upon the decision-making process of the panel.

29. So far as the second ground was concerned the Respondent's solicitor argued that the Applicant was unable to provide a wholly persuasive argument as to why the Respondent should remain in custody for the protection of the public. It was argued that an experienced panel considered the substantial amount of evidence over a substantial period of time and clearly considered the matter in some depth. For that reason it is argued on behalf of the Respondent that the criteria for release was met and appropriately argued within the decision.

### **Reconsideration grounds and discussion**

#### **Ground 1**



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30. The panel's decision contains errors of law and/or was irrational on the basis that (i) the panel declined to make factual findings about unproven allegations and (ii) did not determine whether there was a "serious possibility" that allegations had happened.

## Discussion

31. As indicated in the summary above, this was a case where the panel, having been invited to do so by the Secretary of State, made an assessment of various allegations which had been investigated by the police.
32. The allegations fell into various categories. Some of the allegations arose in circumstances where the Applicant had been tried in relation to allegations of rape but some of the counts on the indictment had resulted in either acquittal or a decision by the Crown *not to proceed*. This resulted in the counts being left on an indictment with the usual criteria.
33. The second category of allegations arose in circumstances where a trial had been scheduled, however, subsequently a decision had been made by the judge that both allegations (one of false imprisonment and one of rape) be left on the file.
34. The remainder of the allegations related to 9 victims and 24 potential offences. None of these offences had been tested by way of a court hearing.
35. As indicated above the panel had been provided with a schedule of the allegations. The panel appropriately gave both parties an opportunity to comment upon the allegations.
36. The approach to allegations in parole hearings was addressed in some detail by the Supreme Court in **R (Pearce) v Parole Board of England and Wales [2023] UKSC 13** (*judgment 5 April 2023*). Following the judgement, the Parole Board issued substantial guidance under the heading *Guidance on Allegations; September 2023 V 2.0*.
37. The relevant reference within the case of Pearce is cited in full below.

*"Paragraph 87: We summarise our conclusions as follows:*

*(i) There is no general legal rule that in making a risk assessment the Board must adopt a two-stage process of making findings of fact on the balance of probabilities and then treating only those matters on which it has made findings of fact as relevant to the assessment of risk.*

*(ii) The Board's task is to address whether the safety of members of the public requires that the prisoner should remain confined. In so doing, the Board must have regard to the consequences of its decision on the interests of the prisoner, and the hardship he may suffer if he no longer needs to be confined in order to protect the public.*

*(iii) There is no rule of substantive fairness, akin to a legitimate expectation, which requires the Board to have regard only to found facts in its assessment of risk.*

*(iv) What procedural fairness requires of the Board in its impartial performance of its statutory remit is determined by the statutory terms of that remit and the wider legal context of the common law.*



*(v) If weight is to be given to an allegation of criminal or other misbehaviour in the risk assessment, the Board should first attempt to investigate the facts to enable it to make findings on the truthfulness of the allegation. If, as may often be the case despite its efforts to obtain the needed information, the Board is not able to make such a finding, it should investigate the facts to make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner which is relevant to the assessment of risk.*

*(vi) In some circumstances, however, the Board may not be able to make findings of fact as to the truth of an allegation either because of an inability to obtain sufficiently reliable evidence or because it would be unfair to expect the prisoner to give an answer to the allegation when he is facing criminal or prison disciplinary proceedings in relation to that allegation. (vi) In some circumstances, however, the Board may not be able to make findings of fact as to the truth of an allegation either because of an inability to obtain sufficiently reliable evidence or because it would be unfair to expect the prisoner to give an answer to the allegation when he is facing criminal or prison disciplinary proceedings in relation to that allegation.*

*(vii) In such circumstances the Board, having regard to public safety, may take into account the allegation or allegations and give it or them such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true. But the Board must proceed with considerable caution in this exercise because of the consequences of its decision on the prisoner. Procedural fairness requires the Board to give the prisoner the opportunity to make submissions about how the Board ought to proceed. There may be circumstances where, because of the inadequacy of the information available to the Board, it concludes that it should not take account of an allegation at all. There may also be circumstances where the information is less than would be desired but the allegation causes sufficient concern as to risk that the Board treats it as relevant. Its assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality.*

*(viii) Thus, a failure to make findings of fact where it was reasonably practicable to do so or an irrational reliance on insubstantial allegations could be a ground of a successful public law challenge."*

38. Taken shortly the guidance and the decision in *Pearce* require panels to determine whether an allegation might be potentially relevant. A potentially relevant allegation may be disregarded, however the panel must in those circumstances indicate a good reason for doing so.
39. Panels are required to investigate potentially relevant allegations that have not been disregarded and make findings of fact where they are able so to do. A panel may only make a finding of fact where there is a reasonably sufficient body of information on which it can properly make such a finding. That finding of fact should be on the balance of probabilities. Additionally, the parties must have an opportunity to test and make submissions about the information.
40. Of importance is the fact that a panel may be assisted in connection with its assessment of risk by collateral information and allegations which may not necessarily impact on the decision relating to the central allegation. For example, a panel may find insufficient evidence to support a rape allegation but may be able to secure material and information which might prove or disprove the presence of an associated risk factor. In the case of the example of a rape allegation there may be





evidence of hostile behaviour or violence. That evidence may be insufficient to support a finding, on balance, of rape but may be sufficient to support a concern about a risk of serious harm through violence.

41. Within the Parole Board guidance are a number of issues which it is suggested a panel should consider before reaching a conclusion about an allegation under investigation. Those matters go to the credibility and circumstances of the evidence being considered, and importantly also require panels to fairly and reasonably consider any evidence by a prisoner or any other witness who may be challenging the allegation.
42. Where no finding of fact (on balance) either in relation to a central allegation or (if relevant) in relation to collateral allegations, is possible, the panel should make an assessment as to whether there is a *serious possibility* that any particular allegation may be true (either the central allegation or any collateral allegations).
43. In circumstances where a panel is considering "*serious possibility*" a panel should act with extreme caution. The panel remains bound to act fairly and reasonably when embarking upon such a decision. The panel should also consider with care the amount of weight that can be applied to the decision. The panel would be at liberty to place no weight or take no account of the allegation if it were felt that to do so would lead to unfairness. The panel are obliged to have regard both to public safety and must also have regard to the consequences, in terms of fairness, of any decision upon the prisoner.

*The current application*

44. Turning to the evidence in this case, as indicated above, the panel appropriately undertook an assessment of the allegations which had been presented by the Secretary of State's representative. That assessment was conducted by scheduling a separate fact-finding hearing. The panel indicated that it would make findings upon the evidence and provide the parties with those findings in advance of the hearing, this enabled the professionals, and the parties to make use of the findings in submissions within the hearing itself.
45. The panel's approach was to consider each of the scheduled allegations. As noted above allegations in relation to two victims had been before a Crown Court. The remainder had been investigations by the police with no further action taken.
46. The panel noted that there had been a trial in relation to two victims (hereinafter called victim A and victim B).
47. The indictment contained fifteen counts. Eleven counts on the indictment related to victim A and four to victim B. Four counts of rape were alleged in relation to victim A. Seven counts of associated offences were included. The Respondent was convicted (in relation to victim A) of one offence of rape and one offence of indecent assault, one offence of assault occasioning actual bodily harm and one offence of living on the proceeds of prostitution.



48. In connection with victim B the rape allegation did not result in a conviction and was ordered to remain on the file. There were convictions in relation to victim B in connection with living upon the proceeds of prostitution and indecent assault.

49. The panel were invited by the Secretary of State to consider the allegations which had resulted in either acquittal or the jury failing to reach a verdict. The panel were entitled to consider these allegations in accordance with the case of *Pearce* above and the *Guidance on Allegations*. The panel having considered these allegations made the following determination:

*"In the light of the jury's decision and their ability to assess the evidence and the live witnesses, the panel do not consider it appropriate to make findings on those allegations that resulted in not guilty verdicts, but rather on the matters left on the file or never the subject of charges."*

50. The Panel were clearly concerned about the fact that a jury had considered (within a trial) the counts on the indictment which led to either acquittals or failure to agree. The panel were also conscious of the fact that the jury had had the opportunity to consider rape allegations and the associated offences with the advantage of observing the witnesses in the trial and hearing their evidence first hand.

51. These were understandable and important factors to consider. However, the panel in reaching the determination appear to have focused entirely upon the allegation of rape which was before the jury. The panel appear therefore to have focused solely upon the central aspects of the allegations namely the charge of rape (and the central aspects of the other associated charges).

52. Of note is the fact that it was unclear if the panel had considered whether there was sufficient information and material upon which to reach a determination on the matters which had led to acquittals or non verdicts. In essence the panel had not recorded whether they had determined that there was sufficient information to make a finding on balance (but viewed it as inappropriate so to do) or whether the panel considered that (regardless of whether it was appropriate) they had determined that there was insufficient evidence and material upon which to make a finding of fact.

53. The panel's wording, namely "*do not consider it appropriate to make findings*", was unhelpful as it did not answer the test which the case of *Pearce* suggests. The question to be addressed by the panel, once they had determined that the evidence was potentially relevant, was to assess sufficiency. Namely, was there sufficient information or material upon which a finding of fact on balance could be fairly made? If there was insufficient material the panel could go no further, but were obliged to note their decision. If there was sufficient information the panel were obliged to apply the process set out in *Pearce* and to consider whether a finding on balance could be made, at all times ensuring fairness to the parties. In this case it is unclear whether the decision not to make findings was based upon an assessment of the evidence presented at the fact-finding hearing, or whether the panel concluded that to make a finding would be unfair (or both).



- 54.As indicated above the panel were entitled to make an assessment of the evidence, and to reach a conclusion that there was insufficient evidence before it to make a finding, on the balance of probabilities, upon the rape allegation.
- 55.The panel were also entitled to determine, whether, on the balance of probabilities, there was evidence sufficient to make a finding upon surrounding circumstances which were relevant to risk (for example a finding in relation to threats or violence).
- 56.In reality the use of the word *appropriate* was misleading as it was both appropriate and lawful for the panel to make an assessment of the evidence presented to it, and to make findings based upon the case of *Pearce*.

*Serious Possibility*

- 57.Also of concern is the fact that the panel (if it found an inability to make a finding of fact on the balance of probabilities) failed to address whether there was a *serious possibility* that the allegations may have been true. Both the guidance and Pearce require panels to consider this aspect of any presented evidence.
- 58.In relation to a number of other allegations considered (those investigated but not charged), the panel addressed the question of these allegations and concluded, on each, as follows "*the allegation was not considered strong enough for prosecution. The panel is not able to make findings on this allegation.*"
- 59.Again, the fact that an allegation was not considered strong enough for prosecution is clearly a factor for a panel to take into account. However, an assessment of allegations should have been conducted on the basis of an analysis of the evidence before the panel at the time of the assessment.
- 60.The fact that the allegations were not strong enough for prosecution would imply that a prosecutor had determined that the allegations were not likely to reach the criminal standard of proof. The panel's task was not to make an assessment of that standard, but to assess whether the allegations, as presented to them at the fact-finding hearing, were sufficient to reach the required standard, as set out above, namely the balance of probabilities.
- 61.Again, the panel may have had in mind that the evidence presented to them at the hearing was insufficient for them to make a finding on balance. However, if this was the panel's decision, it was not recorded. Again the panel appeared not to have proceeded to consider whether there was a *serious possibility* that these allegations may have been true.
- 62.The panel did make a limited number of findings as noted in their decision, however in the main their findings were as set out above.
- 63.In the application for reconsideration the Applicant argues that these matters were not appropriately addressed by the panel.
- 64.The Applicant also argues that this is not a "*sterile legal point*" because findings by the panel may have affected the assessments by the professional witnesses and



therefore were relevant to an assessment of risk and the protection of the public in terms of the formulation of a risk management plan.

65. However in the panel's overall assessment of the evidence that they received, the panel indicated as follows:

*"The totality of the evidence the panel has considered relating to [the Respondent's] behaviour in the years leading up to his arrest point overwhelmingly to his behaving in a controlling, callous and reprehensible manner towards these vulnerable victims often desperate for money. He forcefully persuaded them against their wishes to engage in unprotected sex and other behaviour connected to his sexual proclivities and taunted them over payment. There were also instances of violent behaviour. Whilst before the panel he has shown some victim empathy, the panel concludes that he continues to minimise the enormity of his behaviour. The panel clearly needs to consider how this historical behaviour impacts on his current and future risks."*

66. Despite concluding that it could not make findings on the majority of the allegations, the quote by the panel, set out above, indicates that it is highly likely that the panel did, in fact, consider that there was a serious possibility, that either the core allegations, or the surrounding allegations were present.

67. The panel's approach however was confusing in the sense that it was not clear how the panel had applied the guidance in *Pearce* to their final conclusion.

68. In the circumstances therefore I have concluded that there was procedural unfairness in this aspect of the case. That procedural unfairness arises because, as indicated above, the panel did not apply the process set out in the case of *Pearce* and in the Parole Board guidance (which is based upon the guidance in that case), to the allegations which they considered.

69. Although I find that there was procedural unfairness in this aspect of the case, I do not find that this amounted to irrationality in the sense set out above. I note in this case that the professionals were well aware of the information concerning the further allegations. The panel noted in their decision letter that the professionals had said that they had taken account of the allegations within their recommendations and assessments. Also of note, is the fact that no professional recommended release in this case. It seems unlikely therefore that formal findings from the panel would have had any great impact upon the recommendations of those professionals.

70. Despite this comment however, the careful application of *Pearce* and the *Guidance on Allegations* is an important factor. An absence of clear findings placed some limitation on the representations that could be made by the Applicant in this case. It may also have influenced the final decision of the panel, and therefore is of importance so far as the Applicant is concerned and amounted to procedural unfairness.

## Ground 2

71. The panel did not provide adequate reasons for its findings.



72.As indicated above this was a complex case. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same. The reason for requiring adequate reasons has been explained in a number of decisions including:

- **R v Secretary of State for the Home Department ex parte Doody (1994) 1WLR 242;**
- **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
- **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
- **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

73.The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene. Without knowing the panel's reasons, the court would be unable to identify any such error, and the parties right to challenge the decision would not be an effective one. In **Wells**, Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

74.In this case evidence was received from a prison instructed psychologist, a prisoner instructed psychologist, a POM and a COM.

75.The position of the prisoner instructed psychologist was that the Respondent had completed necessary programs in connection with risk, however it was acknowledged that there were issues in relation to personality traits which had not been fully addressed.

76.The view of the prisoner instructed psychologist was that the prisoner's risks could not be safely managed in the community but could be managed in an open prison. The view of the prisoner instructed psychologist was that a period of time in an open prison would give an opportunity for various preparations to be made in connection with the potential progression to the community in the future. The prisoner instructed psychologist took the view that planning for the future was critical to the prisoner's future and success in the community. The prisoner instructed psychologist indicated that without a period in an open prison imminence of risk could increase in the community. The prisoner instructed psychologist was not therefore recommending release.

77.The position of the prison instructed psychologist was that the Respondent needed to complete further work in a closed prison. The view of the prison instructed psychologist was that the Respondent did not have insight into his personality traits and that he remained unable to accept that his past behaviour was problematic. The prison instructed psychologist believed that the Respondent minimised his actions and appeared to accept responsibility only because he felt he had to.

78.The view of the POM was that the Respondent lacked insight and minimised his behaviour. The view of the POM was that further work should be completed in



connection with behaviour, and that this work should be completed at a prison with specialist programmes to address personality issues. The POM was not recommending release.

79. The Respondent's COM had specialist knowledge of personality disorder. The view of the Respondent's COM was that the Respondent should remain in a closed prison to complete risk reduction work in connection with his personality traits. The Respondent's COM acknowledged that there was a comprehensive release plan, however the concern was that the plan focused on external controls. The Respondent's COM took the view that there were limited signs of appropriate internal controls exhibited by the Respondent.
80. It is well established that panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is the responsibility of the panel to make their own risk assessments, and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Respondent. They would be failing in their duty to protect the public from serious harm and in their duty not to incarcerate prisoners unnecessarily, if they fail to do just that. It was observed in **DSD** that Parole Board panels have the expertise to do this. However as noted above, where the panel is rejecting the recommendations and assessments of professional witnesses, it is important that they should explain clearly its reasons for doing so, and its stated reasons should be sufficient to justify its conclusions per **Wells (2009) EWHC 2710 (Admin)**.
81. The Applicant in this case argues that the panel have failed to explain its reasons. There are references within the decision to the panel's views in relation to the professional evidence. The panel chose not to schedule and address directly the reasons for rejecting the recommendations of professionals. However, the reasons appear to be as follows.
82. In paragraph 4.7 of the decision it was noted "*the panel has been troubled by the evidence from all professionals in this case in relation to their opinions as to the appropriate way forward*". Within this paragraph the panel then recited the periods of time that the Respondent had spent in open prisons and noted that there had been few concerns about his behaviour either in open or closed prisons. The panel further noted "*generally he has engaged with professionals and in the view of the panel has shown insight into his risks although there is a degree of minimisation which had been present for many years*".
83. It appears therefore that the panel took the view that the Respondent had shown insight into his risks, contrary to the views of the professionals. Whilst the panel were at liberty to adopt this view, in the light of the fact that professionals had made it clear that there was a view that the Respondent had not shown sufficient insight into his risks and that minimisation was a continuing difficulty, the panel, in my view, failed to explain, in more detail, why they took the view that the Respondent had shown insight. In particular the panel failed to point to evidence which might challenge the views of the professionals and indicate that in fact the Respondent had shown evidence of insight into his risks.



84. At paragraph 4.8 of the decision the panel noted that the prisoner instructed psychologist had, in an earlier hearing, suggested that the prisoner could be released - but in the current hearing had indicated that he should undertake a period in an open prison. That period being to refresh his rehabilitation abilities and to receive support from psychological services. The panel's comment upon this opinion was as follows:

*"when this opinion was tested in evidence it did not stand up to scrutiny. [The prisoner instructed psychologist] conceded that there was uncertainty as to whether [the Respondent] would receive support from [named psychological interventions]."*

85. The panel also took the view that other support services, which it had been suggested might be available in an open prison, (for example one-to-one work with his POM) would be limited. The panel then indicated that the prisoner instructed psychologist had apparently moved her position, and had indicated that (even without psychological support) the Respondent should remain in an open prison.

86. The panel clearly took the view that the prisoner instructed psychologist had been overly confident about the availability of support services in an open prison.

87. However, the panel again failed to explain, in detail, why this led to a decision that the Respondent should be released. The inference from the panel's conclusion was that the absence of various psychological support services in an open prison, led them to conclude that they should move to a decision to release. Again, a clear explanation of the rationale for rejecting the view of the prisoner instructed psychologist was absent.

88. At paragraph 4.9 the panel indicate that the prison instructed psychologist had recommended that the Respondent remain in closed conditions. The panel notes that an earlier parole panel had rejected that view.

89. The panel also noted that the prison instructed psychologist had initially suggested one particular regime within the prison service dealing with problems and later was suggesting a second regime offering similar interventions. The panel concluded as follows *"the panel remains unpersuaded as to how effective that work can be or how it can be tested"*.

90. Again, the panel omitted to explain its rationale behind this conclusion or why it was unpersuaded. The panel were perfectly entitled to conclude that suggested behavioural interventions might not be effective or might not be able to be tested, however, by inference, the panel were suggesting that because an intervention could not be tested or might not be effective, the recommendation should be rejected and the Respondent recommended for release. The crucial point, which was not addressed by the panel was whether or not the suggested work was necessary to manage the Respondent's risk.

91. The panel appears to have concluded that the Respondent's risk could be safely managed in the community without the suggested interventions by the prison instructed psychologist. Again, this was a perfectly legitimate position to adopt, however in the light of the firm recommendation from the prison instructed



psychologist, the panel were under a duty to explain in some detail why they concluded that the recommendation could or should be rejected.

92. In paragraph 4.10 the panel indicate that in their view the proposed risk management plan was an effective way of dealing with the Respondent's risks. The panel based their decision upon the following comment, *"there has been no recent evidence of violent behaviour or imminence of risk and he will be subject to a very rigorous set of licence conditions. He has shown willingness to comply and live a prosocial life and the panel concludes that warning signs in terms of a return to previous behaviour will be apparent and can be managed."*

93. Again in the light of the view of the professionals which indicated that the belief was that the Respondent had limited ability to deploy internal controls, the panel again in my view failed to explain in detail how they concluded that these concerns had been met.

## Decision

94. Having carefully considered these issues I am persuaded that the panel gave insufficient reasons for departing from the unanimous views of the professional witnesses and failed to explain the reasons for departing from those views. In the light of the case law in this area I therefore allow the application on the grounds of irrationality.

95. I also allow the appeal in relation to procedural unfairness as set out above. In the circumstances it is not necessary for me to make findings in relation to the other issues raised by the Applicant in this case.

**HH S Dawson**  
**30 November 2023**