

**Neutral Citation Number:** [2024] EWHC 2691 (Admin).

**Case No:** AC-2024-BMH-000106

**IN THE HIGH COURT OF JUSTICE**

**KING'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Date of hearing: 28 August 2024  
Start Time: 1403 Finish Time: 1450

**Before:**

**HIS HONOUR JUDGE RAWLINGS**  
**(Sitting as a Judge of the High Court)**

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**Between:**

**THE KING (on the application of John Dawes) Claimant**

**- and -**

**THE PAROLE BOARD FOR ENGLAND & WALES Defendant**

**-and-**

**SECRETARY OF STATE FOR JUSTICE Interested Party**

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**Stuart Withers (instructed by The Johnson Partnership Solicitors) for the Claimant**

**The Defendant and Interested Party did not appear**

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**APPROVED JUDGMENT**

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## INTRODUCTION

1. By a claim for judicial review filed on 28 March 2024, the Claimant, John Dawes, challenges the decision of the defendant, the Parole Board for England and Wales (“Defendant”) dated 27 December 2023, not release him from custody (“the Decision”).

2. The Decision is challenged on two grounds:

(a) procedural unfairness:

- (i) The Defendant after holding an oral hearing on 13 October 2023 and hearing evidence directed that further information should be provided by the police and the probation service, but when that information was received it did not hold a further oral hearing so that the Claimant could respond to that further information.
- (ii) On 15 December 2023, prior to the Decision, the Claimant’s solicitors asked the panel to direct that a new panel should decide whether the Claimant should be released. Detailed reasons for seeking recusal of the existing panel were set out in a further letter of 21 December 2023 sent to the panel, again prior to the Decision being issued. The panel failed to consider the application.
- (iii) In the alternative, the failure to deal with the application for a fresh panel amounted to the appearance of bias; and
- (iv) The Defendant failed to evaluate the allegations made against the Claimant in accordance with the Supreme Court’s Guidance in *R(Pearce) v Parole Board* [2023] AC 807 and its own published policy.

- (b) The Defendant's decision was irrational in that it states that the Claimant may be subject to further charges by the police. This was incorrect and was not supported by the material before the Defendant. The Decision is therefore vitiated by a mistake of fact made by the Defendant in making the Decision.
3. On 9 July 2024 HHJ Simon gave permission for the Claimant to bring his claim for Judicial Review on both grounds and expedited the hearing. This is my judgment on the claim.

## **BACKGROUND**

4. On 13 May 2005 the Claimant was sentenced to a 24-year determinate sentence for conspiracy to supply drugs.
5. On 16 September 2015 the Claimant was released automatically at the halfway point of his sentence.
6. On 16 August 2016 the Claimant's licence was revoked, and he was returned to custody by the Secretary of State for Justice, based upon allegations that he had committed offences against his partner Ms X.
7. On 24 October 2016 no evidence was offered by the Crown Prosecution Service in relation to the allegation that he had committed offences against Ms X.
8. On 12 January 2017 the Claimant was released on licence by the Secretary of State.
9. On 23 January 2023 a Part A recall report was completed by the probation service, requesting the revocation of the Claimant's licence. The report recorded that the Claimant was in police custody in relation to allegations of causing grievous bodily harm, stalking, and coercive and controlling behaviour towards Ms X. On the same day the Claimant's licence was revoked by the Secretary of State and the Claimant was returned to custody on 24 January 2023.
10. On 10 February 2023 the police decided to take no further action in relation to the allegations of grievous bodily harm stalking, and coercive and controlling behaviour toward Ms X.

11. On 14 February 2023 a Part B report was completed by the probation service. It recorded that the Claimant disputed the circumstances of his recall. The report concluded that the Claimant was “victim blaming”.
12. Following a referral by the Secretary of State for the Defendant to determine if the Claimant should be released again, on 31 May 2023, the Defendant’s panel (“the Panel”) directed an oral hearing and directions were made for a narrative police report to include information about the offences for which he was recalled and an updated Community Offender Manager Report. I will refer to the Community Offender Manager as the COM and their report as the COM Report.
13. On 7 July 2023 a police report was provided which, in summary said that Ms X had not provided a statement in support of her allegations that led to the Claimant’s recall in January 2023, but that there was CCTV footage of Ms X and her sister attending at the front counter at Kirkby police station to make the complaints and of the Claimant also being there and the interaction between them was captured on CCTV.
14. On 14 September 2023 the Panel issued directions for an oral hearing to proceed on 13 October 2023.
15. On 22 September 2023 the probation service provided a report for the Defendant. It recorded that the Claimant denied the allegations which led to his recall which in the view of the author amounted to victim blaming by the Claimant. The report did not recommend the Claimant’s release as the author considered that he lacked insight into the impact of his behaviour on partners. It stated that he was unable to be open and honest with professionals.
16. At the oral hearing on 13 October 2023, the Claimant’s Prison Offender Manager (“POM”) recommended his release but his COM did not. The Claimant was questioned as to the allegations which led to his recall, in January 2023, he denied any wrongdoing and gave an account of his interactions with Ms X and her sister at the police station, which was to the effect that he had not acted in an aggressive way towards Ms X/ her sister and had left the police station, when asked to do so.
17. On 13 October 2024 the Claimant’s solicitors sent closing submissions to the Panel requesting his release. The submissions, highlighted that the risk assessment provided by the Probation Service was based upon unproven allegations and submitted that whilst

the Panel were allowed to take the unproven allegations into account, the Panel should be slow to place any weight on them as there was an insufficient evidential basis to do so. Specifically, it submitted there was no independent corroborative evidence of the complaints made. The submissions said that, if the Panel were not satisfied that the Claimant met the test for release the Panel should adjourn for further information.

18. On 20 October 2023 the Panel adjourned the Claimant's case and directed a further police report/witness statements regarding all allegations made about the Claimant throughout his sentence by the 21 November 2023 and an updated COM Report, by the same date.
19. On 23 November 2023, the Claimant's solicitor complained that the police report/witness statements had still not been provided and a request was made for a case conference to discuss the reasons for non-compliance. No response was received from the Panel to the Claimant's solicitor's request.
20. On 1 December 2023 the Public Protection Casework Section requested an extension of time to serve the COM Report. In response, to that request, the Claimant's solicitor referred to the failure of the Panel to respond to their request of 23 November 2023.
21. The Panel agreed to vary the date for the COM to provide a report, in doing so the chair of the Panel commented that "the chair notes that Nottinghamshire police are seeking a charging decision for a high risk domestic incident". It is unclear where, at that time, this information came from.
22. On 8 December 2023 PC 2840 Barker provided a report on allegations relating to the Claimant from 2016 – 2023. It noted that "*Nottinghamshire Police are seeking a charging decision for a High-Risk Domestic Incident*". The report then went on to provide a summary of various offences committed by the Claimant between 2016-2022. It confirmed that no further action was to be taken in relation to the January 2023 allegations. Attached to PC Barker's report were three witness statement all relating to the 20 January 2023 allegations.
23. The COM provided a report, it was dated 6 December 2023, but raised concerns based on the police report of 8 December 2023 and the witness statements attached to it of the risk of harm the Claimant posed to Ms X. The report did not recommend the Claimant's

release. I will refer to the police report dated 8 December 2023, the witness statements attached to it and the COM Report dated 6 December 2023 as “the New Evidence”.

24. On 15 December 2023, the Claimant’s solicitor emailed the Defendant’s case manager. He informed the case manager that he was instructed to make a formal complaint about the Panel’s conduct of his case and that the Claimant sought a fresh panel to decide whether the Claimant should be released.

25. On 21 December 2023 the Claimant’s solicitor forwarded a detailed complaint to the case manager at the Defendant. It complained that:

- a. the Panel were aware, from the outset of the various allegations regarding Ms X and should have obtained the reports at a much earlier stage, in time for the oral hearing;
- b. the Panel had failed to conduct themselves in a procedurally fair way;
- c. the Panel took no action in respect of the failure to provide the police report in a timely manner;
- d. the Panel chair was wrong to note that the Police were seeking a charging decision for a high-risk domestic incident. This was incorrect based on the information before the Panel in the dossier; and
- e. as a result of all these issues an allegation was made of bias by the Panel.

26. On 27 December 2023 the Panel issued the Decision refusing to direct the Claimant’s release. The decision records that: *“The panel adjourned the case following the oral hearing to direct further information to enable the panel to make a full assessment of risk of harm..... Final submissions were submitted after the oral hearing. Following the directed information the legal representative requested 7 days to submit further submissions. In fairness to Mr Dawes the chair accepted the request. The legal representative submitted an email which the chair received on 18<sup>th</sup> December 2023. The legal representative stated that Mr Dawes wished to make a formal complaint and seek a fresh panel”*. The Panel however made no decision as to whether it should recuse itself on the grounds of bias, merely mentioning the complaint in the Decision.

27. The Decision noted that:

- (a) Nottinghamshire Police confirmed that they are seeking a charging decision for a “High Risk Domestic Incident”;
- (b) following the receipt of the New Evidence, that it was a “*significant concern that Mr Dawes had attended the police station at the same time as Ms X and referred to the Claimant acting in an aggressive and controlling way towards her when in the police station*” and that “*The additional reports received confirmed that Mr Dawes was not fully open and honest with the panel regarding his behaviour towards Ms X when he attended the police station*”.
- (c) the Panel concluded that:
  - (i) the Claimant had outstanding core risk reduction work to complete in custody;
  - (ii) the Claimant’s recall was appropriate;
  - (iii) the Claimant was not credible as he had not been “*fully open and honest with the panel regarding the incident in the police station with Ms X and her sister*”;
  - (iv) he did not meet the test for release; and
  - (v) “*The panel understands that Mr Dawes may now receive charges and that Mr Dawes will issue a complaint regarding this panel*”.

28. On 17 January 2024 the Parole Board responded to the Claimant’s complaint of 21 December 2023 and stated that the complaint was not able to be investigated.

## **REPRESENTATION**

29. Before me the Claimant was represented by Mr Withers.

30. The Parole Board, as Defendant and Secretary of State, as Interested Party have not been represented before me and both have taken a neutral stance, making no submissions in response to the claim.

## PROCEDURAL FAIRNESS

### RELEVANT LEGAL AUTHORITIES ON PROCEDURAL FAIRNESS

31. Mr Withers has referred me to a number of authorities on procedural fairness. Those authorities and the relevant legal principles that Mr Withers says they establish are as follows:

(a) in the Supreme Court case of *Osborn and Booth* [2013] UKSC 61. Lord Reed (with whom the other Supreme Court Justices agreed) said that, in relation to procedural fairness, before the Parole Board:

- (i) it is for the court considering the claim for Judicial Review to determine whether the Parole Board has followed a fair procedure, not merely to review the reasonableness of the decision-maker's judgment as to what fairness required;
- (ii) a high standard of procedural fairness is required in Parole Board cases because of the potential implications of the Parole Board's decision for the prospects of rehabilitating the prisoner and public safety; and
- (iii) procedural fairness requires that the panel should listen to persons who have something relevant to say.

(b) in *R(Grinham)v Parole Board* [2020] EWHC 2140 (Admin) Spencer J said that it only has to be demonstrated that a decision might have been different if procedural fairness had been followed [for the decision to be quashed], not that it would inevitably have been different;

(c) in *R(Pearce) v Parole Board* [2023] AC 807 the Supreme Court gave guidance as to how Parole Board panels should approach relevant but unproven allegations made about a prisoner when deciding whether to direct their release:

- (i) the panel should, where reasonably practicable to do so, make findings of fact on the balance of probabilities;



- (ii) if the panel is unable to make findings of fact in relation to the allegations then it does not have to disregard those allegations. In some cases, the number and nature of the allegations of a similar nature from independent sources might justify the panel in concluding that the prisoner had engaged in a course of conduct which indicated a risk to the public. In other cases, because of the inadequacy of the information the panel may conclude that it should not be taken into account at all; and
- (iii) the weight attached by the panel to an allegation or allegations are subject to a public law rationality challenge.

(d) following *Pearce*, the Parole Board published “Guidance on allegations” dated 23 September 2023. Note 9.1 of that guidance says that “a *panel’s reasons must include the following*:

- *Reference to any allegation arising in the Parole review and the nature/substance and the source of the allegation.*
- *Reference as to whether or not the allegation is considered relevant;*
- *An explanation as to whether the allegation has been disregarded and if so the reason why;*
- *An explanation as to whether the allegation has been taken into account and if so, it is best practice for the reasons to provide an outline of:*
  - *what finding of facts have been made;*
  - *the standard of proof*
  - *if no finding of fact has been made, details of what steps the panel has taken to investigate the allegation and the likelihood that the alleged behaviour occurred and the seriousness of the allegation; and*
  - *the relevance and weight attached to the finding (or if no finding has been made, the allegation) and how this has impacted on the panel’s assessment of risk and decision- making.”*

(e) In *R(Rose) v Secretary of State for Justice* [2017] EWHC 1826 (Admin), Karen Steyn QC (as she then was) said that it is well established that a decision maker must follow their own policy unless there is good reason not to do so, a public law principle based on fairness;

- (f) In *R(Gifford-Hull) v Parole Board* [2021] EWHC 128 (Admin), HHJ Cotter QC (as he then was) said that the Parole Board has a duty to consider whether a further hearing is necessary, after an initial hearing when it receives additional documents, and to provide an opportunity for a prisoner to directly address the panel's concerns. In *R(Matthews) v Parole Board for England and Wales* [2023] EWHC 694 (Admin), Fraser J following *Gifford-Hull* held that the failure to put further material received at an oral hearing to the Claimant amounted to a "serious procedural irregularity".

## **MR WITHERS SUBMISSIONS ON PROCEDURAL FAIRNESS**

32. As to procedural fairness, Mr Withers says that:

- (a) the Panel should have held a further oral hearing once it was in receipt of the New Evidence and it did not put the contents of the police report and witness statements, in particular, to the Claimant to obtain his account. It was unfair for the Panel to make adverse findings regarding the Claimant's credibility based on discrepancies between the Claimant's account given in oral evidence to the Panel, before the police report and witness statements were provided to the Panel. Nor was it fair to deny the Claimant a further opportunity to challenge his COM's later report, which was based on the police evidence and which did not recommend his release. It is clear following the decisions in *Gifford-Hull* and *Matthews* that the approach the Defendant took in this case amounted to a serious procedural irregularity and the decision must be quashed;
- (b) the Claimant made an application to the Panel for a fresh panel to deal with the question of his release. The Panel whilst noting the application failed to consider it and left it to be dealt with by the Parole Board's complaint's process, that approach was unlawful and procedurally unfair, depriving the Claimant of the opportunity to have a fresh panel (had the application been successful) and ultimately of any ruling on the complaint at all, as the complaints unit of the Defendant declined to deal with it, after the Panel had made the Decision;
- (c) in the alternative to (b) the failure of the Panel to deal with the request for a new panel, when seen in context of the matters complained of in the request, which included a failure to respond to the Claimant's solicitors' previous procedural requests gives rise to an appearance of bias;

- (d) the Defendant failed to act in a procedurally fair way by evaluating the allegations made against the Claimant in accordance with the Supreme Court's Guidance in *R(Pearce) v Parole Board* [2023] AC 807 and its own published policy. The Claimant's closing submissions, submitted prior to the receipt of the New Evidence, clearly set out the law, and what weight should be placed on the allegations. The Defendant's decision however fails to: (i) consider the relevance of the allegations made against the Claimant; (ii) state what findings of fact have been made against the Claimant and the standard of proof applied, in making those factual findings; (iii) if no findings of fact were made the seriousness of the allegation; and (iv) the relevance or weight attached to them. The complaint is against the way in which the Panel proceeded to determine the allegations, which must be seen in the context of the case as a whole, rather than a challenge to the rationality of the Decision; and
- (e) the Claimant's submissions and complaints clearly highlighted that the Claimant was not subject to any further charges by the police. For the Panel to state otherwise was procedurally unfair as either: (i) they failed to properly consider the Claimant's submissions/and or complaint, prior to coming to the Decision, and/or (b) it failed to ascertain the true position prior to making an adverse finding against the Claimant.

## **DISCUSSION AND DECISION ON PROCEDURAL FAIRNESS**

### **(a) Failure to give the Claimant an opportunity to respond to the New Evidence at a further oral hearing**

33. The Decision records that the Claimant's solicitors asked for 7 days to make further submissions in response to the New Evidence, which the chair agreed to and that further submissions were received on 18 December 2023 which said that the Claimant wished to make a formal complaint and request a new panel. In fact what the Claimant's solicitors asked for on 12 December 2023 was 7 days to provide an update to the Panel after taking instructions from the Claimant. The chair of the Panel responded giving the Claimant's solicitors 7 days to provide an update.

34. The short email of 15 December 2023 from the Claimant's solicitor to the Panel referring to a complaint and a request for a new panel but did not make any representations in relation to the New Evidence. The complaint and request for a new panel, to which the Decision dated 27 December 2023 refers is the short email of 15 December 2023 notifying the Panel that the Claimant wished to complain and not the more detailed complaint dated 21 December 2023.
35. In *R(Matthews) v Parole Board for England and Wales* [2023] EWHC 694 (Admin), Mr Matthews had been released on licence (having previously been convicted for firearms offences). He was re-arrested for the offences of drug dealing, possession of criminal property and firearms offences. Mr Matthews pleaded guilty to the first two offences, but was acquitted of the firearms offences. The decision of the Panel not to recommend the move of Mr Matthews to open conditions relied upon the prosecution's opening note in relation to the firearms offences received by the panel after the oral hearing. The panel decided that it was unnecessary to direct a further oral hearing to allow the Claimant to respond to the prosecution note. Fraser J said that the central feature of the prosecution's opening note on the firearms charges should have been put to Mr Matthews. Fraser J decided that the decision of the panel not to direct a further oral hearing, after the panel received the prosecution's opening note, was, having regard to the need for a high standard of procedural fairness in parole board cases, procedurally unfair because Mr Matthews had been denied a fair opportunity to respond to the content of the prosecution's opening note.
36. In my judgement the procedural unfairness in this case is not as stark as that in *Matthews*. In *Matthews*, the prosecution note upon firearms charges related to charges of which Mr Matthews was acquitted, so that there had been a determination, in that case, that Mr Matthews was not guilty of a firearms offence. In this case there has been no determination as to whether the Claimant is guilty of grievous bodily harm stalking, and coercive and controlling behaviour toward Ms X or any of those offences. Nonetheless, I consider that, in this case, the Panel acted in a way that was procedurally unfair to the Claimant, by not directing that there should be a further oral hearing, to give the Claimant an opportunity to respond to the New Evidence. I find this because:
- (a) parole board proceedings require a high degree of procedural fairness;
  - (b) the Panel in this case had a duty to consider whether there should be a further oral hearing to allow the Claimant a chance to respond to the New Evidence,

even though the Claimant's solicitors had not requested that there should be such an oral hearing after the New Evidence was provided;

- (c) it ought to have been apparent, in my judgement, to the Panel that, if the Panel was going to attribute material weight to the New Evidence (as it did) the Claimant should be given a fair opportunity to respond to the New Evidence. A fair chance would include not only the chance to put further written evidence before the Panel but also the opportunity at a further oral hearing to deal with the conclusions of the police report and content of the witness statements, to the effect that, the Claimant's conduct at the police station on 20 January 2023 and CCTV footage of his attendance at the police station, when Ms X and her sister were there, showed the Claimant acting in a coercive and aggressive way towards Ms X. The Panel considered that this corroborated the complaint which Ms X had made (but had refused to proceed with) which the Panel concluded showed that the Claimant had not been open and honest with the Panel at the oral hearing, about the incident at the police station;
- (d) the short email sent by the Claimant's solicitors to the Panel on 15 December 2023 (apparently received by the chair on 18 December 2023) clearly did not amount to written submissions in response to the New Evidence. The email was a complaint about the conduct of the Panel and a request that the Panel recuse itself from further involvement in the Claimant's case. The email confirmed that a more detailed complaint would be sent in the following week which, according to the content of the bundle, it was, on 21 December 2023, but that more detailed complaint was not considered by the Panel in the Decision dated 27 December 2023. The more detailed complaint did contain at least one submission, in respect of the New Evidence, it pointed out that the chair was wrong to say that a charging decision against the Claimant was outstanding. The Decision does not show that the Panel made enquiries as to whether the promised more detailed complaint had been received, in order to determine if it contained any information pertinent to the Decision; and
- (e) it is clear from the Decision that the Panel did place significant weight on the New Evidence and, in particular, what the police report and witness statements said happened at the police station on 20 January 2023, in deciding not to direct the Claimant's release (see paragraphs 2.13, 2.15 and the conclusion at paragraph 4.2 and 4.4, which I have already summarised).

37. Whilst I am unable to say whether the result would have been different, if the Claimant had been offered an opportunity to respond to the New Evidence at a further oral hearing. I am satisfied that the result at least might have been different and therefore the Decision should be quashed upon the basis of procedural unfairness.

**(b) Failure to deal with the Claimant's application for a fresh panel**

38. Mr Withers says that, because the Panel did not deal with the Claimant's application for a new panel, the Claimant was deprived of the opportunity to have a fresh panel if his application were successful, or to know why his application was refused, which is procedurally unfair.

39. I have already said that it appears that the Panel had seen the Claimant's solicitor's short email of 15 December 2023, when the Decision was made, but had not seen the full letter of complaint dated 21 December 2023.

40. The Decision, having mentioned receiving the email of 15 December 2023, asking for a new panel, does not deal with that request and there is no evidence, in the Decision, that the Panel made any enquiries as to whether the promised more detailed complaint had been received (although it appears it would be received by the Defendant around 6 days before the date of the Decision). Ultimately the Defendant's complaint unit refused to deal with the complaint, because it was rendered academic by the Decision.

41. In my judgement, given the need for a high standard of procedural fairness in parole board proceedings, the Panel ought to have:

(a) located and considered the promised detailed complaint (which appears to have been received by the Defendant around 6 days before the date of the Decision);  
and

(b) decided, in the light of the content of the detailed complaint, whether to recuse itself and direct that a new panel should consider the Claimant's release. The failure of the Panel to consider the request at all resulted in the Claimant not having the opportunity for the Panel to consider whether what was said in the detailed letter of complaint dated 21 December 2023 justified the Panel recusing itself and if not why not.

42. I have to consider (per Spencer J in *R(Grinham)v Parole Board* [2020] EWHC 2140 (Admin)) whether there is at least a possibility that, had the Panel considered the detailed complaint dated 21 December 2023, it would have recused itself from further involvement in the Claimant's case. If there was no such possibility, then the Panel's failure to consider the detailed complaint, would make no difference and the Decision should not be quashed on that ground
43. The leading authority upon the test for apparent bias is *Potter v Magill* [2002] 2 AC 357 in which Lord Hope said "the question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."
44. The basis on which the detailed complaint of 21 December 2023 asserted that there was apparent bias on the part of the Panel was that:
- a. the Panel were aware, from the outset of the various allegations regarding Ms X and should have obtained the New Evidence at a much earlier stage, in time for the oral hearing;
  - b. the Panel had failed to conduct themselves in a procedurally fair way;
  - c. the Panel took no action in respect of the failure to provide the police report in a timely manner, or the Claimant's solicitors request, on 23 November 2023 for a case conference to deal with issues arising from such non-compliance, followed up by those solicitors in emails to the Defendant dated 1 and 5 December 2023; and
  - d. the Panel chair was wrong to note that the Police were seeking a charging decision for a high-risk domestic incident. This was incorrect based on the information before the Panel in the dossier.
45. Notwithstanding that I only need to be satisfied that there is a possibility that the Panel would have recused itself, had it considered the detailed complaint of 21 December 2023, I do not consider that there was such a possibility, for the following reasons:

- (a) I approach the question of whether there is a possibility that the Panel would have recused itself, had it considered the detailed complaint before making the Decision, by considering myself whether there is a possibility that the appropriate test for recusal would be met by reference to the reasons given in the detailed complaint for the Panel to recuse itself. If I conclude that there is such a possibility, then I will also conclude that there was a possibility that the Panel would have come to the same conclusion;
- (b) as to the complaint that the Panel had failed to obtain the New Evidence at an earlier stage, the detailed complaint does not say that the Claimant's solicitors had suggested that the New Evidence should have been obtained, prior to the oral hearing. The solicitor suggested, in their closing submissions that the Panel could adjourn for more evidence, if the Panel were not satisfied that the Claimant should be released. Simply failing to take a step which, with the benefit of hindsight, could have been taken at an earlier stage, but which was never suggested to and rejected by the Panel, would not, in my judgment cause the fair minded observer to conclude that there was a real possibility of bias on the part of the Panel. It was open to the Panel to direct a further oral hearing at which the Claimant could be given an opportunity to address the New Evidence, after the New Evidence was received. The failure of the Panel to request the New Evidence, before the oral hearing, would not, in and of itself, prevent the Claimant from having an opportunity to address it in oral evidence. It is, as I have already found, the failure of the Panel to give the Claimant an opportunity at a further oral hearing to deal with the New Evidence, after it was produced to the Panel and the Claimant's solicitors, which was procedurally unfair to the Claimant;
- (c) the Panel taking no action in relation the failure of the police to submit their report and witness statements by the date on which the Panel had directed them to be submitted and the Claimant's solicitors request for a case conference to consider the implications of that failure, again in my judgment would not lead the fair minded observer to conclude that there was a real possibility that the Panel was biased against the Claimant. The fair minded observer might think that the Panel should have dealt with the Claimant's solicitor's application and was taking an unduly lax approach in relation to the delay by the police, but I do not consider they would regard it as an indication that there was a real possibility that the Panel was biased against the Claimant;



(d) it appears that the Panel chair was wrong to conclude that the police were seeking a charging decision in respect of a high risk domestic incident, this was, nonetheless what the police report says. The detailed letter of complaint of 21 December 2023 pointed out this error, on the part of the chair (recorded in his decision to allow the COM more time to prepare her report) but it appears, from the Decision itself, that the Panel did not see the detailed complaint which points this out, prior to making the Decision. I conclude that the fair minded observer would conclude that the Panel's belief that the police were seeking a charging decision on a high risk domestic incident was likely to be an error, rather than an indication that there was a real risk that the Panel was biased against the Claimant; and

(e) I do not consider that cumulatively, (a) – (d) would cause the fair-minded observer to conclude that there was a real risk that the Panel was biased against the Claimant.

**(c) Failure to deal with the request for a new panel gives rise to the appearance of a real risk of bias on the part of the Panel**

46. Whether the failure of the Panel to deal with the Claimant's solicitor's request for a new panel gives rise to the appearance of a real risk of bias, on the part of the Panel, needs to be considered together with the matters that the detailed complaint of 21 December 2023 referred to, which I have already concluded do not, when considered together, give rise to the appearance of a real risk of bias on the part of the Panel.

47. In my judgment, the way in which the Panel dealt (or did not deal) with the complaint does, in my judgment, give the appearance of a real risk of bias by the Panel against the Claimant, to which the four matters complained of in the Claimant's solicitor's letter of 21 December 2023 add some (but very little) weight:

(a) the Panel appears to have failed (having been told, in the Claimant's solicitors' email of 15 December 2023, that a detailed complaint would be submitted the following week) to make enquiries as to whether such an email had been received, prior to issuing the Decision. It appears that the detailed complaint, dated 21 December 2023 would have been received by the Defendant 6 days

before the Decision (dated 27 December 2023) was issued. Failing to enquire as to whether a promised detailed complaint had been received, meant that the Panel did not see the basis on which the Claimant's solicitors said that the Panel should recuse itself, before making the Decision;

(b) the Decision simply refers to the Claimant's solicitors having made a complaint and requested a new panel, but goes on to make the Decision without considering that complaint or request, inevitably making the complaint academic and preventing the Claimant from having any adjudication upon his complaint; and

(c) in my judgment, the fair-minded observer would expect the Panel, having been told that a detailed letter of complaint would be sent to them in the week before they made the Decision, to make enquiries as to whether that detailed complaint had been received. Had they made those enquiries, then, because the detailed complaint was received by the Defendant's case worker 6 days before the Decision was made I am satisfied that they would have seen the detailed letter of complaint. The fair-minded observer would also expect the Panel to deal with the application that it should recuse itself, rather than merely recording that a complaint had been received, because the Panel knew or ought to have known that once it made the Decision, the complaint and request that the Panel recuse itself would be rendered academic. For those reasons a fair-minded observer would conclude that these factors, together with the matters to which the detailed letter of complaint refers, give rise to the appearance of a real risk that the Panel was biased against the Claimant.

**(d) Not evaluating the allegations in the New Evidence in accordance with *R (Pearce) v Parole Board* [2023] AC 807 or the Defendant's own published guidance**

48. I agree with Mr Withers that the Decision fails to follow the principles set out in *R (Pearce)* and the Defendant's own published guidance, to which I have already referred:

(a) I accept that it is clear from the Decision that the Panel considered the events which the police report and police witness statements said took place at the police station to be not only relevant to its decision whether or not to release the Claimant, but of very great importance. The Panel found the police report and

witness statements to be relevant in two ways: (i) they were consistent with what Ms X said to the police about the Claimant's behaviour towards her (GBH, stalking and coercive and controlling behaviour); and (ii) they were inconsistent with what the Claimant had said at the oral hearing about the police station incident. I am not satisfied that the Panel failed therefore to consider the relevance of those matters:

- (i) at paragraph 2.13 and 2.14 it is said that the Claimant told the Panel that he had behaved reasonably when attending the police station but that the additional reports received confirm that the Claimant was not fully open and honest with the Panel (at the oral hearing) regarding his behaviour towards Ms X when he attended the police station;
  - (ii) at paragraph 4.2 that the Claimant was not open and honest with professionals regarding his relationship with Ms X because there was evidence that the Claimant had acted aggressively and in a controlling manner towards Ms X, when at the police station, there was a risk of harm which was not manageable in the community and the Claimant's recall was therefore appropriate; and
  - (iii) at paragraph 4.4 the Claimant had not been open and honest with the Panel about the incident at the police station; and
- (b) the Panel clearly accepted in the Decision that what was said in the police report and police witness statements about the incident at the police station, combined with Ms X (unofficial) complaint were to be preferred to the evidence of the Claimant, at the oral hearing as to that complaint and what had happened during the incident at the police station;
- (c) what the Panel did not do however do, as in my judgment it ought to have done, in accordance with *R (Pearce)* and the Defendant's own guidance was make clear findings of fact that the Claimant had committed the offences against Ms X that she told the police on 20 January 2023 he had committed, and that the Claimant had acted aggressively and coercively towards Ms X/her sister at the police station on 20 January 2023. Having failed to make those factual findings, it, in consequence failed to explain why it had made those factual findings and confirm that it had applied the civil standard of proof in so finding; and

(d) it is clear, from the Decision, that the Panel did attach significant weight to the contents of the police report and the police witness statements, in particular as to the incident at the police station on 20 January 2023, in deciding that the Claimant should not be released. The Panel does not however explain why it considers, absent any findings of fact made by it, that the content of the police report and witness statements were to be preferred to the evidence given by the Claimant at the oral hearing, or what steps it took to satisfy itself that the content of the police report and witness statements were to be preferred to the oral evidence of the Claimant.

**(e) It was procedurally unfair for the Panel to state that the police were seeking a charging decision on a high risk domestic incident**

49. The written submissions dated 17 October 2023 of the Claimant's solicitors did not explicitly say that the police were not seeking a charging decision in relation to any offence, but they did say that it appeared that no formal complaint was made by Ms X in January 2023.

50. The detailed letter of complaint of 21 December 2023 pointed out that the chair was wrong to say, when giving the COM an extension of time to file her report, that a charging decision in respect of a high risk domestic incident was outstanding but, as I have already noted, it appears that the Panel did not read that letter before issuing the Decision, even though it had been received by the Defendant 6 days before the Decision was issued.

51. I have already found that before issuing the Decision the Panel ought to have made inquiries as to whether the full letter of complaint, which was promised in the Claimant's solicitor's email of 15 December 2023, had been received and, had the Panel made such inquiries, then on the balance of probabilities I am satisfied that the full complaint letter dated 21 December 2023, apparently sent to the Defendant on that date would have been seen by the Panel before it issued the Decision.

52. I am satisfied that the erroneous reference in the police report to the police awaiting a charging decision on a high risk domestic incident could only be taken by the Panel to refer to the matters of which Ms X complained to the police on 20 January 2023, but which were not made the subject matter of a formal complaint by her. There is no

reference in the dossier to any other allegations that might reasonably form the basis for the police awaiting a charging decision on a high risk domestic incident.

53. I am satisfied that it was procedurally unfair for the Panel to accept the assertion, in the police report, that a charging decision was being sought by the police, given that: (a) that was new information; (b) there was nothing else in the dossier that supported that contention; and (c) it was at least inconsistent with the written submissions of the Claimant's solicitors made less than 2 months earlier, which said that it appeared that no formal complaint had been made by Ms X. I also consider that the ambiguity over this issue made it all the more important that the Panel should check whether the Defendant had received the full written complaint from the Claimant's solicitors promised for the following week in their email of 15 December 2023 before issuing the Decision (which complaint, in the event, refuted the assertion in the police report that a charging decision was outstanding).

## **IRRATIONALITY**

### **THE RELEVANT THE LEGAL AUTHORITIES ON IRRATIONALITY**

54. The authorities and legal principles taken from them which Mr Withers has referred me to in relation to the irrationality challenge are:

(a) *R(DSD) v Parole Board and Secretary of State for Justice* [2019] QB 285, the Divisional Court confirmed that decisions of the Parole Board could be quashed on the grounds of mistake of fact made by the Panel in coming to its decision;

(b) *R (Wells) v Parole Board* [2019] EWHC 2710 Singh J at paragraph 32 stated in relation to irrationality challenges against Parole Board decisions that: “A *more nuanced approach in modern public law is to test the decision-maker’s ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel’s expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.*”

(c) where the parole board has made findings of fact, which are unsubstantiated by evidence they are liable to be quashed, (*R (McKay) v Parole Board* [2019] EWHC 1178); and

(d) where the Panel's findings of fact cannot be safely justified, based on the evidence available to the Parole Board, particularly because the Parole Board has an obligation to apply anxious scrutiny, in coming to its decision, it is liable to be quashed (*R (Wells) v Parole Board*).

#### **MR WITHERS SUBMISSIONS ON IRRATIONALITY**

55. Mr Withers says that the Decision included a material mistake of fact, that the Police were seeking a charging decision for a "High Risk Domestic Incident" but it was made clear by the Claimant's solicitor's closing submissions that the Claimant was subject to no further action by the police in relation to the allegations made in 2023. This was a substantial and material error of fact which tainted the Panel's decision not to direct the Claimant's release and justifies quashing the Decision.

56. Mr Withers accepts that, even if the police were not awaiting a charging decision on a high risk domestic incident (as it appears is the case) the Decision would not be irrational if the Panel, after applying anxious scrutiny to the evidence, came to the conclusion that they were. Mr Withers says however that the Panel did not take reasonable steps to ensure that the assertion in the police report was correct and that the Decision should therefore be quashed on the basis of a material mistake of fact.

#### **DISCUSSION AND DECISION ON IRRATIONALITY**

57. I am satisfied that the Panel's apparent mistake in believing that the police were awaiting a charging decision on a high risk domestic incident was material to their decision not to release the Claimant. I have come to this conclusion because the decision gives this as one of the reasons why it was not directing the release of the Claimant.

58. I am satisfied that the Panel applying anxious scrutiny to the evidence before it ought not to have concluded that the police were awaiting a charging decision on a high risk domestic incident without first making further enquiries as to whether this was correct, particularly having regard to the fact that:

(a) there was no evidence that the police were awaiting a charging decision, other than the bare assertion in the police report, which was new evidence. The Panel

ought to have been cautious in accepting that new evidence, particularly as it was inconsistent with the Claimant's solicitors written closing submissions which said that Ms X had made no formal complaint at or following her visit to the police station on 20 January 2023;

- (b) applying anxious scrutiny, in light of the above, the Panel ought to have made enquiries as to whether the bare assertion in the police report was correct; and
- (c) more specifically, the Panel ought to have made enquiries as to whether any communication had been received from the Claimant's solicitors in respect of that new evidence and if not invited the Claimant's solicitors to comment on it, in light of it being inconsistent with their written submissions. This failure is compounded by the fact that the Claimant's solicitors said, in their email of 15 December 2023, that a detailed complaint would be submitted the following week and this complaint was received by the Defendant the following week, 6 days before the Decision was issued. That detailed communication said that the police report was wrong in its assertion that the police were awaiting any charging decision, but the Panel does not appear to have seen it before making the Decision, even though the email of 15 December, which the Chairman did receive warned them to expect that such a detailed communication would be received by the Defendant that week. I can only conclude that the Panel did not see it because it was not passed to them before the Decision was made and it did not enquire whether such a communication had been received, that was a failure of the Panel to comply with its obligation to exercise anxious scrutiny in coming to the Decision.

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