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[2023] PBRA 64

Application for Reconsideration by Shorey

Application

1. This is an application by Shorey ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 24 February 2023, after an oral hearing on 20 February 2023, issued a decision not to direct his release on licence.

2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

The Applicant and his offending

3. The Applicant is now aged 67. He is serving life sentences for the murders of two young women in July 1991 (the 'index offences'). He was aged 34 at the time of the offences and 35 when sentenced for them. He and the victims lived together in the same flat. He had at one time been engaged to be married to one of them (Ms A). It appears that he murdered Ms A as a result of some argument, and that Ms B was out of the flat but returned to find what he had done: he then murdered her too in an attempt to avoid being convicted of murdering Ms A. He strangled both victims, and strapped their bodies into Ms B's car which he then drove to a location where he left it. It was found on the following day.

4. He was convicted of both murders after a contested trial, and has maintained his innocence ever since. His appeal against the convictions was dismissed. He says that he intends to ask the Criminal Cases Review Commission, if and when he is released from prison, to refer the case back to the Court of Appeal. However, unless and until his conviction is quashed, the Board is required by law to proceed on the basis that the jury's verdicts were correct.

5. He had had one earlier conviction. In July 1976 he received a 3-month sentence for offences of child cruelty and causing grievous bodily harm to a 9-month old baby whom he was baby-sitting. He was aged 19 at the time, and was convicted after a contested trial. The prosecution case, accepted by the jury, was that he must have deliberately placed the baby's feet in a bowl of very hot water. The Applicant has maintained to this day that the baby's injuries had been caused accidentally. As in the case of the murders, the Board must proceed on the basis of the jury's verdicts.

6. During the police investigation into the murders, the police obtained a statement from Ms C, a former partner of the Applicant's and the mother of his daughter. In that statement she made a number of allegations of domestic violence against him, which he has always denied. Understandably, given the seriousness of the murder charges and the Applicant's convictions on those charges, he was never charged with any offences against Ms C, and no mention was made of her allegations in the murder trial.

7. The Applicant has provided (in the course of this review of his case by the Board) a substantial amount of evidence, the details of which it is unnecessary to go into, casting doubt on Ms C's truthfulness and reliability.

8. Ms C's allegations are referred to in the dossier provided for this review of the Applicant's case. On the state of the law which existed at the time of the panel's decision, the judgement of the Court of Appeal in the case of **R (Pearce) v Parole Board (2022) EWCA 4** meant that it was not permissible for the Board, in its assessment of a prisoner's risk to the public, to attach any weight to disputed and unproven allegations unless they were able to make a finding of fact that they are more likely than not to be true. No such finding was made by the panel in relation to Ms C's allegations.

9. Since the panel's decision an appeal to the Supreme Court against the decision of the Court of Appeal in **Pearce** has been successful and it is no longer necessary for a finding of fact to be made before a panel can attach some weight to an unproven allegation. However, the Supreme Court provided guidance about how such allegations should be approached. That guidance requires that, if the panel is considering attaching some weight to an unproven allegation it needs to go through certain steps before it can do so. Those steps will be discussed below when discussing the grounds advanced in support of this application for reconsideration of the panel's decision.

10. On his conviction for the two murders, the Applicant's minimum term ('tariff') was set at 20 years less the time which he had spent in prison on remand. The tariff expired in August 2010 but he has remained in custody, in closed prisons, throughout his sentence. The current review of his case by the Board is his sixth.

Progress up to the present review

11. The Applicant has been described as a '*model prisoner'* throughout his sentence. In the early stages of his sentence he completed two programmes of the kind designed to reduce a prisoner's risk. One was designed to improve a prisoner's thinking skills and the other was aimed at helping him to learn to manage anger. His denial of the murders made him unsuitable for further programmes designed to target violence within intimate relationships.

12. The panels of the Board which conducted the Applicant's previous reviews all decided that he did not meet the test for release on licence or the then test for a move to an open prison. The last of those panels ('the 2018 panel') explained its decision as follows:

> *"You have been in prison for a very long time and are described as a model prisoner. However as observed by previous panels your ability to function well in the present environment gives little indication of how you will behave in the community, particularly when exposed to the pressures of an intimate relationship. Your risk of serious harm to others remains high in such a situation and will remain so until the professionals can properly assess your risk factors, and until you can demonstrate positively that your risk of serious harm has been reduced. The panel is not satisfied that you meet the test for release; it does not therefore direct it. Neither is it satisfied that that you are suitable for transfer to open conditions; before that can happen, it is essential that you are seen to address your outstanding risk factors. Professionals will need to think creatively about how this might be achieved, given your continued denial. There are interventions that will not require you to admit the index offending and these should be explored."*

The present review

13. The present review by the Board commenced in April 2019. In December 2019 it was directed that the case should proceed to an oral hearing.

14. At that time, the Applicant had not yet undertaken any further risk-reduction interventions as envisaged by the 2018 panel. He had been offered one programme and, when that was discontinued, another; but he declined to undertake it. He is not to be criticised for that. Although the prison psychology team believed the proposed programme to be appropriate to meet his needs, an experienced independent psychologist instructed by the Applicant's solicitors (Dr P) provided compelling reasons why that programme was not appropriate and was unlikely to be effective in his case.

The hearings, and developments between them

15. After a significant delay (for reasons which it is unnecessary to detail) the Applicant's case was listed to be heard by a two-member panel of the Board in May 2022. Although the panel convened for that hearing, there was a successful application by the

Applicant's solicitor for an adjournment. Using the creative thinking suggested by the 2018 panel the prison psychology team had concluded that a series of 1:1 sessions with the Applicant's Prison Offender Manager (Ms W) might be an acceptable alternative to the programme which had been proposed. The hearing was therefore adjourned to enable those sessions to take place, which they did.

16. In June 2022 developments occurred which have had a significant impact on the Applicant's case. On 6 June new directions issued by the Secretary of State altering the criteria for a prisoner's transfer to open conditions came into force, followed on 28 June by a revised version of those directions.

17. The new directions stated that the Secretary of State would only accept a recommendation from the Board for a transfer to open conditions if a period in such conditions was considered essential to inform future decisions about release and to prepare for possible release on licence into the community. More significantly for present purposes he would only accept such a recommendation if *'a transfer to open conditions would not undermine public confidence in the Criminal Justice System.'* It is questionable whether the introduction of this latter criterion was lawful but that is a matter for the courts to decide, and unless and until the courts declare it to be unlawful the Secretary of State will clearly continue to apply it. The original version of the new directions invited the panel considering a prisoner's case to consider whether the '*public confidence*' criterion is met, but the revised version made it clear that the Secretary of State would make his own decision about it without any advice from the Board.

18. The Secretary of State has made it clear that he does not propose to authorise the transfer to open conditions of a prisoner serving an indeterminate sentence for an offence or offences in the '*top tier'* of seriousness. It is a reasonable assumption that the Applicant's case, involving as it does the murder of two young women (the second murder probably being motivated by a desire to avoid conviction and sentence for the first) falls into that category. Furthermore it is a case which has attracted a good deal of public interest so the Secretary of State would be likely to regard a transfer of the Applicant to open conditions as being likely to '*undermine public confidence in the Criminal Justice System'*.

19. For these reasons the professionals involved in the Applicant's case understandably regarded it as virtually inevitable that a recommendation by the panel for a transfer to open conditions would be rejected by the Secretary of State. That view will have been fortified by statistics subsequently obtained by the Applicant's solicitor: the statistics apparently show that, whereas the proportion of recommendations by the Board for open conditions which were accepted by the Secretary of State was 93% prior to June 2022, it shrank to 13% thereafter. It is highly unlikely that the Applicant's case would be regarded by the Secretary of State as falling into the small minority of cases considered by him to meet his criteria for a move to open conditions.

20. Three professionals had, until the Secretary of State's new directions and policy came into effect, been of the view that the Applicant should remain in prison but that he should be transferred to an open one. Dr P had expressed that view in reports in June 2021 and he, Dr H (an Independent Psychiatrist) and Ms W (the Prison Offender Manager who conducted the 1:1 sessions with the Applicant) had all expressed it in reports of April 2022.

21. When it became clear to Dr P and Dr H that a transfer to an open prison was effectively '*off the table'* they carried out further assessments to decide whether to recommend that the Applicant should remain in a closed prison or that he could safely be released on licence with a robust risk management plan. Both were of the latter view, which as independent experts they were able to express in their addendum reports. By that stage officials like Ms W who are responsible to the Secretary of State were prohibited from making recommendations in their reports to the Board about a prisoner's suitability for release on licence.

22. The adjourned hearing of the Applicant's case took place on 20 February 2023. It was conducted by video link. The panel by then comprised three members, the original independent chair and two new co-panellists (a psychologist and an independent member).

23. Oral evidence was taken by the panel from:

- Ms W (who had recently been replaced as the Prison Offender Manager);
- The newly appointed Community Offender Manager (Ms K);
- Dr P;
- Dr H; and
- The Applicant himself.

24. Dr P and Dr H confirmed their support for release on licence. Ms W and Ms K also supported it, but the panel disagreed. It did however make a recommendation for a transfer to an open prison which, for reasons explained above, is highly unlikely to be accepted by the Secretary of State.

25. The Applicant's solicitor now applies for reconsideration of the panel's decision not to direct release on licence.

The Relevant Law

The test for release on licence

26. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

27. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) 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.

28. Reconsideration will only be directed if one of more of the following three grounds is established:
    (a) It contains an error of law or
    (b) It is irrational or
    (c) It is procedurally unfair.

29. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
    (a) A paper panel (Rule 19(1)(a) or (b)) or
    (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
    (c) (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

30. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration.

The test for irrationality

31. 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 to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

    "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."

32. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

33. The Administrative 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 Board in making decisions relating to parole.

34. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court 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**.

35. One situation which may give rise to a finding of irrationality is where the panel has given inadequate or indefensible reasons for its decision, or for its finding on a significant fact. The giving of adequate reasons is important because, if such reasons are given, they may expose any weakness in the panel's route to its conclusions. If inadequate reasons are given the reconsideration panel (or the courts on an application for judicial review) will be left without the material to be satisfied that panel's reasoning was defensible.

The test for procedural unfairness

36. 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 from the issue of irrationality which focuses on the actual decision.

37. The kind of things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

38. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The request for reconsideration in this case

39. The Applicant's solicitor makes extensive submissions in support of the application for reconsideration of the panel's decision. The main arguments which she advanced were as follows:

    a) *"In the light of the Secretary of State's new directions and approach to applications for transfer to open conditions, such an application was no longer viable: for the panel to ignore the fact that the goalposts had been so radically moved, so as to ensure that open conditions was no longer a realistic or even possible option in the Applicant's case, rendered the entire oral hearing procedure singularly irregular. The panel ignored the relevance of the Secretary of State's new policy, and in so doing it effectively made a false pretence of conducting an objective review of the Applicant's case. To proceed in the knowledge that the legitimate expectation of a possible transfer to open conditions would be frustrated was procedurally unfair to the Applicant.*

    b) *The panel did not give sufficient weight to the wealth of evidence that, with the*

proposed risk management plan in place, the Applicant's risk of serious harm to the public would be manageable on licence in the community. The panel's recommendation for open conditions simply relied on the common practice of progressing long serving lifers as helpful to their rehabilitation, rather than their having given serious consideration to whether release with the risk management plan would be an effective alternative for the protection of the public.

c) *The panel failed to give adequate reasons for (1) overriding the views of all four professional witnesses that the Applicant's risk would be manageable on release into the community and (2) its conclusion that a period of testing in an open prison before release on licence was essential.*

d) *The panel appears to have given weight to an unproven allegation of domestic violence towards a previous intimate partner (Ms C), in contravention of the principle established in the decision of the Court of Appeal in* ***R (Pearce) v Parole Board (2022) EWCA 4."***

The Secretary of State's response to the application

40. By e-mail dated 22 March 2023 the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

41. I have considered the following documents for the purpose of this application:

(i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 527 and includes a copy of the panel's decision letter;
(ii) The representations submitted by the Applicant's solicitor in support of this application;
(iii) The e-mail from PPCS stating that the Secretary of State offers no representations in response to the application.

Discussion

42. It will be convenient to consider in turn each of the grounds submitted by the Applicant's solicitor in support of this application.

Ground 1: In the light of the Secretary of State's new directions and approach to applications for transfer to open conditions, such an application was no longer viable: for the panel to ignore the fact that the goalposts had been so radically moved, so as to ensure that open

conditions was no longer a realistic or even possible option in the Applicant's case, rendered the entire oral hearing procedure singularly irregular. The panel ignored the relevance of the Secretary of State's new policy, and in so doing it effectively made a false pretence of conducting an objective review of the Applicant's case. To proceed in the knowledge that the legitimate expectation of a possible transfer to open conditions would be frustrated was procedurally unfair to the Applicant.

43. I am afraid that this ground is based on a misunderstanding of the panel's tasks, the way in which the panel was obliged to approach them and my task on this application.

44. The panel's first task was to decide whether the test for release on licence was met, in other words whether the Applicant's continued confinement in prison was necessary for the protection of the public. If but only if the panel decided (as it did) that that test was not met would it need to go on to decide what advice it should give to the Secretary of State about the Applicant's suitability for a move to an open prison. This was the order in which the panel was required to address the issues: it was not, as the solicitor's submissions might suggest, a matter of choosing between release on licence and transfer to an open prison.

45. My task on this application is simply to decide whether any one or more of the grounds for reconsideration of the panel's decision not to direct the Applicant's release on licence have been established. If none of them has been, it is no part of my remit to make any decision or express any view about the Applicant's suitability for transfer to an open prison.

46. If I dismiss this application it will be for the Secretary of State to decide whether to accept the panel's recommendation for a transfer to an open prison. If (as seems almost inevitable) the Secretary of State decides not to do so, it may well be that the Applicant will wish to challenge that decision as being unlawful or irrational. The appropriate route to mount that challenge would be to apply to the Administrative Court for permission to apply for a judicial review of the Secretary of State's decision: that application would probably include a submission that his current directions about (and approach to) a prisoner's transfer to open conditions are unlawful. I am aware that at least one such application is currently before the Administrative Court, and letters before action have been sent in other cases. But it would be way beyond my remit to express any view about the merits or otherwise of any challenge which might be made on the Applicant's behalf in this case.

47. The solicitor refers to the Applicant having had a legitimate expectation of a possible transfer to an open prison. I doubt very much whether the courts would accept that he had such an expectation. The Secretary of State was entitled, provided that he did it lawfully and rationally, to exercise his power to decide where a prisoner should be detained and to change his policy and directions at any time.

48. It follows from the above that I cannot accept the validity of the criticisms made of the panel for proceeding in the way in which they did: it was the correct way of proceeding and there was no procedural unfairness. I can now go on to consider the grounds based on suggestions of irrationality in the panel's decision-making.

Ground 2: The panel did not give sufficient weight to the wealth of evidence that, with the proposed risk management plan in place, the Applicant's risk of serious harm to the public would be manageable on licence in the community. The panel's recommendation for open conditions simply relied on the common practice of progressing long serving lifers as helpful to their rehabilitation, rather than their having given serious consideration to whether release with the risk management plan would be an effective alternative for the protection of the public.

And

Ground 3: The panel failed to give adequate reasons for (1) overriding the views of all four professional witnesses that the Applicant's risk would be manageable on release into the community and (2) its conclusion that a period of testing in an open prison before release on licence was essential.

49. There is an overlap between these two grounds so I will consider them together. When doing so it is necessary to take into account the consequences of the Secretary of State's new policy and directions. The solicitor is correct in referring to the previous practice of progressing long serving lifers through a period in open conditions as being helpful to their rehabilitation. In the light of the Secretary of State's new policy and directions that is now not a permissible reason for a recommendation for such a move. What the panel in this case had to do was to scrutinise the evidence with great care to see (a) whether a period in open conditions is now '*essential*' (as it has to be to comply with the new directions) and (b) if not, whether the protection of the public can be achieved (without the benefit of a period in open conditions) by release on licence with a robust risk management plan.

50. For reasons which I will explain below, on careful consideration of the whole of the evidence which I have seen, I have concluded on balance that the reasons given by the panel are insufficient to justify their departure from the views of the professionals and their decisions that (a) a period in open conditions is essential and (b) the Applicant's risk to the public would not be manageable in the community if he is released on licence.

Is a period in open conditions essential?

51. I should begin with the reasons stated by the panel for its conclusion that a period in open conditions is essential. Those reasons, with my comments about them, were:

    1. *"Notwithstanding [the Applicant's] excellent custodial behaviour, the principal*

risk he poses is within a close relationship and he has not directly addressed relationship issues. He has not had the opportunity to demonstrate how he can deal with casual relationships outside the rigid structure of a closed prison."

The Applicant is a highly intelligent man. He has demonstrated throughout his sentence an ability and willingness to comply with what is expected of him. He is clearly well motivated to conduct himself appropriately when on licence and to approach intimate relationships cautiously. In open conditions (or in approved premises) he will have limited opportunities to enter into and engage in such relationships. Any problems in a future intimate relationship are not likely to arise until the relationship is breaking down. It is hard to see how '*testing*' in open conditions at this stage would have any significant effect on his risk of future intimate partner violence.

2. *"[The Applicant] has been in prison for over 32 years and the panel considers he will find transition from a closed prison directly into the community even to Approved Premises, to be a challenge that could result in him failing and being recalled."*

This might be true of some offenders but is unlikely to be true of the Applicant who has strong family support, a proven ability and willingness to comply with supervision, a strong motivation to avoid reoffending and the intelligence to overcome any challenges and avoid anything which might lead to recall.

3. *"The panel is … satisfied that [the Applicant] does not meet the release test because of concerns that within the community there could be a reactivation of the risk factors that combined when he committed the index offences and in consequence the panel is satisfied it is essential for him to undergo a period of testing in open conditions."*

There appears to be no evidence to support this somewhat speculative suggestion. It is hard to see how '*testing*' in open conditions could have any significant effect in reducing the Applicant's future risk to the public. The panel expressly accepted the unanimous views of the professionals that '*[the Applicant] does not need to undertake any further offence focused work within custody and that his core risk factors have been satisfactorily addressed'.* The combination of risk factors envisaged by the panel is unlikely to recur, and the Applicant now possesses appropriate skills to address them if they should arise.

4. *"The panel considers it is essential that [the Applicant] is given the opportunity to build a relationship with his new community offender manager and with staff in the Approved Premises identified as his release address. The panel considers this can only be achieved if he is transferred to open conditions."*

It is of course unfortunate that (as so often happens through nobody's fault and certainly not the Applicant's) there has been a lack of continuity in his Community Offender Managers, but the Applicant has consistently shown an ability and willingness to engage with professionals, and there is no reason to suppose that he will not be able quickly to build a successful relationship with his new Community Offender Manager and staff at Approved Premises.

52. In the above circumstances I am driven to conclude that the panel did not provide adequate and defensible reasons for their conclusion that a period in open conditions is essential.

Is the Applicant's risk manageable in the community?

53. I can turn now to the issue whether the panel provided adequate and defensible reasons for their rejection of the views of the professionals that the Applicant's risk of serious harm to the public would be safely manageable in licence in the community.

54. This issue needs to be viewed in the light of the following observations made by the panel in its decision.

> *"The assessment of risk for an offender who maintains innocence of the index offence is always more difficult for a panel than cases where guilt is accepted, because it precludes an investigation into the precise circumstances of the offence, the offender's mindset and motivation at the time that he or she committed the offence and an investigation as to what if anything has changed in the offender's attitude and schemas since the offence was committed. A maintenance of innocence of itself is not a reason to deny an offender progression but does make it more difficult for an offender to demonstrate he or she has changed. When maintenance of innocence is present, the panel must look for other factors to support progression."*
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> *"The panel considers there has probably been a reduction in [the Applicant's] risk as a consequence of the passage of time, his age, the experience of serving a very long sentence, the knowledge that any concerning behaviour in the community could result in him being recalled for a very long time and the fact that if and when he is released he will be subject to a life licence and supervision."*
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> *"The evidence of all the professionals was clear, they considered [the Applicant] does not need to undertake any further offence focused work within custody and that his core risk factors have been satisfactorily addressed. The panel accepts*

this evidence." [I have already referred to that observation in a different context.]

55. I have of course already referred above to the panel's reasons for concluding that a period in open conditions is essential. Those reasons are also relevant to the issue whether without a period in open conditions the Applicant's risk would be safely manageable on licence in the community. I have already stated my conclusion about the inadequacy of those reasons. I now need to consider what other reasons (if any) the panel advanced for rejecting the view of the professionals that that risk would be safely manageable on licence.

56. The only other relevant passage which I can find in the panel's decision is:

> *"If [the Applicant] had accepted responsibility for the offences it would have been possible during his sentence for him to be assessed to ascertain whether he would benefit from undertaking a psychologically informed intervention such as a Therapeutic Community. As a consequence of his maintenance of innocence, he has not undertaken any significant offence focused intervention prior to the recent one-to-one work with his prison offender manager."*

57. The panel went on to state immediately after that passage that they accepted that in undertaking the 1:1 work [the Applicant] had demonstrated an ability to engage with a professional to address aspects of his beliefs and understandings, something that had previously been lacking. This finding may be regarded as detracting, to some extent at least, from the point that the Applicant might have benefited from a psychologically informed intervention if he had been able to undertake one. That point, if it were to be accepted as a reason for keeping the Applicant in prison, would effectively mean that (assuming that he maintains his denial), it would be very difficult, if not impossible, for him ever be released into the community.

58. The point is further weakened by the panel's observation, earlier in its decision when discussing the sentence planning targets set for the Applicant by HM Prison and Probation Service after the 2018 review, that:

> *"Although [the Applicant] has not taken the recommended pathway of undertaking [the psychologically based programme which Dr P had advised against], which [the Applicant] has refused to do, he has successfully completed a one-to-one intervention with his prison offender manager that covered a large part of the work that would have been undertaken in [that programme]. In consequence [the Applicant] has at least partially and possibly fully achieved this target."*

59. The panel summarised the evidence of Ms W, who had conducted the 1:1 work with the Applicant, as follows:

> *"She said that they had fourteen 90-minute sessions, and although it was originally anticipated she would have a co-worker, this was not possible but the work was subject to the supervision of her senior probation officer. She said that the work was based on the "Toolkit for Change" material. She agreed the work had been on [the Applicant's] terms and if he had undertaking [the programme which had been one of his sentence planning targets] he would have done so with two or three other participants. She said [the Applicant] acknowledged some intimate partner abuse, such as for example locking his partner in the bathroom, but his acceptance of this kind of behaviour appeared to be minimal."*

60. I am not entirely clear what was meant by the work being '*on the Applicant's terms*': it may mean no more than that he had refused to do the programme which had been put on his sentence plan but agreed to do the 1:1 work instead. Of course it is true that the Applicant denies the murder of Ms A (the most serious intimate partner abuse possible) but the rather critical last sentence above appears to be based on the existence of a wider pattern of intimate partner abuse described in Ms C's allegations, which (for reasons which I will discuss in paragraphs 64-71 below) the panel should have disregarded altogether.

61. It should also be noted that the panel's summary of Ms W's very clear recommendation was as follows:

> *"[Ms W] did … consider that the risk management plan was sufficient for [the Applicant's] needs. She stated that she considered [the Applicant's] risk is definitely manageable in the community, that he has done all the necessary work to bring about a reduction in risk and that if he was to transfer to open conditions she did not consider that he would pose an abscond risk but did not consider time in open conditions to be essential."*

62. That leads us to the question of the risk management plan which all the professional witnesses agreed would be effective to enable the Applicant's risk to be managed safely in the community.

63. Very little mention is made of the risk management plan in the panel's decision: there is a brief summary of it (without comment) in the panel's account of Ms K's evidence. No reasons were given by the panel for disagreeing with the views of the professionals about its likely effectiveness.

64. All in all I am therefore driven to the conclusion that the panel failed to give adequate and defensible reasons for their view that the Applicant's risk would not be manageable in the community.

Ground 4: The panel appears to have given weight to an unproven allegation of domestic violence towards a previous intimate partner (Ms C), in contravention

of the principle established in the decision of the Court of Appeal in R (Pearce) v Parole Board (2022) EWCA 4.

65. I agree, for the following reasons, that the panel appear to have given weight to Ms C's allegations.

66. In the first section of their decision headed '*Analysis of Offending Behaviour'*, after referring to the two murders and the offences against the child, the panel referred to Ms C's allegations in the following terms:

> *"The PNC [Police National Computer] indicates [the Applicant] never received a warning, reprimand, or caution. There have however been concerns that he engaged in intimate partner violence."*

67. The panel then went on to describe Ms C's quite serious allegations.

68. The panel did not refer to the allegations again when they set out their conclusions at the end of their decision, but the fact that they referred to them at all (and in the section summarising the Applicant's offending) strongly suggests that they regarded them as having some relevance (unspecified) to their assessment of the Applicant's risk.

69. The panel should of course have followed the decision of the Court of Appeal in **Pearce.** '*Concerns*' (the word used by the panel) were matters to which the Board's previous guidance had indicated some weight could be attached, but the Court of Appeal in **Pearce** expressly disapproved that part of the guidance and any reliance on what the court regarded as the vague concept of '*concerns*'.

70. The panel's failure to follow the decision in **Pearce** could in itself have been sufficient to amount to irrationality (or indeed an error of law). However, there might be an argument that, since the decision in **Pearce** has now been overturned, it would not be appropriate to direct reconsideration on that ground if it were the only ground for doing so (as has been explained above, of course, it is not the only ground).

71. Although the Supreme Court held that some weight can sometimes be attached to unproven allegations without making a finding of fact, it made it clear that that should only be done if certain steps are taken. It identified those steps as follows:

> *"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."

"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."

"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. 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."

72. In this case the panel made no attempts to investigate the allegations with a view to seeing whether it was possible to make any findings of fact (either about the allegations themselves or about the surrounding circumstances). According to the solicitor they did not even ask the Applicant any questions about these matters. Furthermore it gave no reasons for relying on the allegations in the face of the evidence provided by the Applicant. It follows that, even if the law had been as now laid down by the Supreme Court, the panel's approach would have had to be regarded as irrational.

73. The panel's apparent irregular reliance on unproven allegations is of some significance because the allegations, if true, would have afforded evidence of a pattern of serious intimate partner violence as opposed to a single (albeit exceptionally serious) instance of such violence (which also involved the murder of another young woman).

74. In those circumstances I am bound to uphold this ground.

Decision

75. I have a great deal of sympathy for the difficult position in which the panel were placed in this case but for the reasons which I have explained above I must grant this application on Grounds 2, 3 and 4 (but not Ground 1) and direct reconsideration of their decision.

Jeremy Roberts

11 April 2023