Neutral Citation Number: [2021] EWHC 3160 (Admin)

Case No: CO/1219/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2021

Before :

THE HON. MR JUSTICE LANE

- -

Between :

R on the application of Mark Bousfield	**Claimant**
- and -	
The Parole Board for England and Wales	**Defendant**
-and-	
The Secretary of State for Justice	**Interested Party**

- -
- -

Ian Brownhill and Stuart Withers (instructed by **ITN Solicitors**) for the **claimant**
The **Defendant** and the **Interested Party** were not represented
Hearing date: 2 November 2021

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Approved Judgment

Mr Justice Lane :

A. FACTUAL BACKGROUND

1. The claimant is a prisoner serving an extended determinate sentence. That sentence was imposed in March 2009 and consists of a custodial period of 11 years and an extension period of three years.

2. The claimant was released from prison on 12 October 2018. On 11 December 2018, however, the police informed the probation service that there had been an incident in the car park of the Bicester Village shopping centre, involving the claimant and his partner. In the light of the information provided by the police concerning this incident, the Secretary of State for Justice recalled the claimant to prison.

3. On 19 December 2018, the claimant entered a plea of not guilty to common assault of his partner. Banbury Magistrates' Court adjourned the matter for trial. On 24 January 2019, the claimant was acquitted by Oxford Magistrates' Court of common assault.

4. The Parole Board then directed an oral hearing of the issue of whether the claimant should be released from imprisonment. The oral hearing began before a panel on 31 January 2020, continuing on 7 July and 4 December 2020. After the conclusion of the hearing, counsel for the claimant filed written closing submissions. Although invited to do so, the Secretary of State did not file any written submissions.

5. As set out in the claimant's closing submissions, his case was, in essence, that there was no evidence of an assault having taken place in the car park on 20 October 2018, even to the civil standard; that he was entitled to have applied the presumption in favour of release, which applied in cases of this kind, following the judgment of the Court of Appeal in R (Sim v Parole Board) [2003] [EWCA] Civ 1845; that the evidence before the Board did not rebut that presumption; that his risk of future violent offending had been assessed by various professionals and categorised as moderate/medium; and that any such risk could be managed on licence via a Risk Management Plan.

6. On 31 December 2020, the panel concluded that the claimant ought not to be released. That decision was maintained on reconsideration, pursuant to rule 28(1) of the Parole Board Rules 2019. At that point, the decision of 31 December 2020 became final.

7. The claimant sought judicial review of the decision that he not be released. Permission was granted on 9 July 2021 . On 26 July, the Secretary of State for Justice indicated that he would remain neutral in the proceedings and would not seek to defend the claim. As is normal in judicial reviews brought against decisions of judicial bodies, the Board has not taken an active part in these proceedings.

B. THE PANEL'S DECISION

8. The 31 December 2020 decision began by noting that the claimant's sentence expiry date (SLED) is 31 October 2022. The panel said that it could release the claimant "only if it is satisfied that it is no longer necessary for the protection of the public that you

remain confined". The panel had to consider the public protection test up to the date of the claimant's SLED. Given that the claimant was "now serving the extension part of the extended sentence, there is a presumption in favour of release as set out in R (Sim) v the Parole Board [20O3] [EWCA] Civ 1845" .

9. Under the heading "Analysis of offending", the panel summarised the offences for which the claimant had been sentenced to a total of 14 years imprisonment. The claimant had robbed minicab drivers for cash, in order to fund his drugs habit, with one of the drivers sustaining very serious injuries at the hands of the claimant.

10. Since the claimant's first release on licence, he had been convicted of a number of further offences, including possession of a offensive weapon and common assault. Now aged 45, the claimant had a total of 28 convictions dating back to June 1992, for approximately 94 offences.

11. Under the heading "Risk and protective factors" the panel noted that the claimant described himself as a lifelong addict, who had experienced cravings for drugs whilst at the Approved Premises where the claimant had resided following an earlier supervised release from prison. A medical report described him as "extremely ego-centred" with a "complete absence of victim empathy" and "narcissistic personality traits".

12. The claimant's partner had a diagnosis of bipolar disorder. Their child had been on a child protection plan since February 2019 because the local authority was concerned that his parents would expose him to situations where "he was at risk of physical and emotional harm". In October 2020, a child protection conference concluded that the child's case would be "stepped down to a child in need plan" although that decision had been put on hold in the event that a direction for the claimant's release was made. The case would be subject to a period of three months' monitoring and subsequently closed if there were no concerns.

13. Under the heading "Time on licence" the panel noted that the claimant had been released on 12 October 2018 to Approved Premises where he had resided for six weeks before going to live with the father of his partner before securing a deposit for his own tenancy.

14. The panel then examined the incident at Bicester Village car park. It noted that the claimant was alleged to have struck or pushed the partner in the face while she was holding the couple's son and that he then threw a series of punches or kicks into the rear of the vehicle where the partner and son were sitting. The panel viewed the CCTV recording of the incident.

15. A witness statement from the claimant's partner dated 31 May 2019 stated that she did not support the claimant's prosecution and did not consider herself to have been assaulted by the claimant. The panel noted that there were, however, elements of the partner's statement that were contradictory. A witness statement from the criminal barrister who represented the claimant at Oxford Magistrates' Court confirmed that the court viewed the CCTV evidence and that the partner gave evidence. In oral evidence of the panel, the claimant accepted that his hand may have made contact with his partner's face but he did not slap her. One professional witness, Ms King, said that she

had viewed the CCTV footage on small screen and remarked that the incident "will have been upsetting".

16. The panel then considered the claimant's "Progress in custody" and the evidence of the claimant's Prison Officer managers at HMP Woodhill and HMP Brixton. The panel also considered the evidence of two psychologists, Ms Hamilton, who was instructed by the claimant's solicitors, and Ms Jones, who was instructed by HMPPS. They also considered the evidence of the community offender manager, Mr Hayward. Although his earlier report recommended the claimant's release, by December 2020, Mr Hayward had changed his mind, having concluded that it would be extremely difficult to manage the claimants risk in the community; and that he was concerned about the possibility of threats to staff.

17. Under the heading "panel's assessment of current risk", it was noted that the evidence suggested a medium likelihood of general offending within two years and a medium risk of serious harm to the public. Mr Hayward assessed the claimant's risk to "known adults, that his current and future partners" as high. This was based on the claimant's previous conviction "for harassment involving your ex-wife and her new partner." Ms Hamilton assessed risk of general violence to be low to moderate in the community, assuming that the claimant remained sober. Ms Jones assessed the risk as moderate, as regards general violence and intimate partner violence upon release, although she did not consider the risk of violence to be imminent. The risk could, however, escalate if the claimant returned to substance misuse or struggled to communicate his needs. She considered that there was "an indirect risk of possible psychological/emotional harm should a child be present during an argument/confrontation between you and a partner".

18. Taking everything into account, the panel assessed the likelihood of further general violence and intimate partner violence by the claimant to be medium. It would, however, become imminent, if the claimant were to relapse to substance misuse and experienced difficulties with emotional control. The panel assessed the nature of serious harm to be high and to take the form of physical and/or psychological harm. Although to date the risk had been primarily to the public and to present partners, the panel was concerned that there was potential to cause serious harm to the claimant's own children and that potential was "high". This was despite the fact that no evidence had been adduced to show that the claimant had directly inflicted serious harm on a child "but there is the possibility of indirect harm should a child witness acts of violence and aggression between parents".

19. Under the heading "Evaluation of effectiveness of plans to manage risk", the panel noted that, with the exception of the Community Offender Manager, all the professional witnesses supported the claimant's application for release. Approved Premises had been located, where the claimant could stay for three or four months. The Approved Premises were approximately 20 to 45 minutes away from the claimant's support network. "Move-on" accommodation was unconfirmed.

20. It was proposed that the claimant be subject to licence conditions including residence at the Approved Premises, observing a night-time curfew, observing an exclusion zone, disclosing developing relationships, participation in offending behaviour programmes and drug testing, and not residing in the same household as any child under the age of 16. The panel was not satisfied that this last condition was appropriate, there being no evidence that the claimant posed a direct risk to children. However, "you could cause

indirect harm to your son if he was to witness intimate partner violence perpetrated against his mother".

21. The panel then addressed the claimant's suggestion that he could live at the premises occupied by the father of the claimant's partner. The Offender Manager had concerns, including about the lack of monitoring and support that would otherwise be provided in Approved Premises, which Mr Hayward assessed to be necessary to manage the claimant's risk.

22. The panel recorded that the claimant himself at the hearing was cautious about the prospect of being released to Approved Premises. The appellant confirmed that, if released, he would comply with all aspects of the risk management plan.

23. The panel concluded that, on the information before them, the panel could not be satisfied that the claimant's risk could be managed at the address of the father of the claimant's partner "because it does not provide the necessary monitoring and support that a placement at an Approved Premises may provide".

24. The panel then said:-

> "The panel tentatively assesses that for the duration you are residing at an Approved Premises, it is possible that your risk can be managed. However, the panel is not satisfied that your risk is manageable for the periods that you would be away from the Approved Premises and after you have moved-on from there…"

25. The next section is "Conclusion and decision of panel". Under this, the panel concluded first, that the Secretary of State did have reasonable grounds to recall the claimant to prison, based on the information from the Police about the incident at Bicester shopping village. The panel then said:-

> "to direct your release, the panel must be satisfied that it is no longer necessary for the protection of the public that you remain confined. As an extended sentence prisoner, serving the extension part of the sentence, the panel is acutely aware that the Sim test applies (as set out in section 1 of this letter) ...".

26. In view of the "physical and psychological impact of an assault", the panel concluded that "the allegation [of what had occurred at the Bicester Village car park] is relevant to risk". The panel reminded itself that it should not make a finding of guilt to the criminal standard of proof. However:-

> "The panel notes that it may need to make a finding of fact regarding the allegation when it is capable of being relevant to the parole review, it is in a position to make a finding of fact and that your case can be fairly considered. The panel must apply the 'balance of probability' test when making a finding of fact.
>
> The panel had before it CCTV footage of the alleged incident. You have confirmed that the footage shows you, your partner

> and your son. The panel is satisfied that the CCTV footage is a reliable and credible source of information and of good quality. Further, you and your partner have confirmed that your hand made contact with parts of her body although you both deny any violence or injury occurred. The incident took place in recent times, and approximately eight days after your most recent release on licence. Also, it is important to note that you have a conviction for harassment (2004) involving your ex-partner for which you were ordered to serve a 12-month period of imprisonment and made subject to a Restraining Order. Although the panel heard what professionals made of the CCTV footage, the sole purpose for doing so was to better understand, the extent to which, if at all, the incident informed their assessments and recommendations.
>
> Ultimately, the panel placed no weight on professional witnesses' evidence in relation to the CCTV footage. Instead, the panel placed weight on its own careful review of the CCTV footage, which speaks for itself. Having reviewed the CCTV, the panel finds that on the balance or probabilities (i.e. the civil test), during the course of the incident at Bicester Village car park, you employed aggression and violence against your partner and this is likely to have caused serious harm in terms of physical and/or psychological harm to your partner and son who will have witnessed the incident."

27. The panel gave credit for the claimant's engagement with projects undertaken whilst in prison. Nevertheless, the panel continued to have concerns in relation to the claimant's risk of serious offending and risk of causing serious harm. The panel was not satisfied that the claimant had "sufficient coping strategies" and that "any emerging risk factors relating to intimate partner violence… remain as yet unidentified".

28. The panel then said the following:-

> "The panel is not satisfied that your core risks have been fully explored, understood or addressed and therefore you present a continuing risk of causing serious harm, in particular, towards women with whom you are in an intimate relationship. Insofar as you have undertaken work to address your offending behaviour, the panel cannot yet be satisfied of the impact of that work on your level of risk nor that is has addressed all aspects of the risks you present. Accordingly, the panel is not satisfied that those risks can be managed as per the proposed risk management plan until your sentence expiry date, particularly given your continuing relationship.
>
> Mindful of the above, when applying the statutory test for release and the Sim test, the panel is not satisfied that it no longer necessary for the protection of the public that you remain confined. Consequently, the panel makes no direction to your release."

C. THE RECONSIDERATION DECISION

29. In his application for reconsideration, the claimant contended that the panel had misapplied the test in Sim; its finding that it was necessary to confine the claimant for the protection of the public was inconsistent with the panel's finding that his risk could be managed in Approved Premises; the panel had misdirected themselves as to the meaning of "serious harm"; there was no evidence that the incident in the car park at the Bicester Village shopping centre had caused serious harm; and the panel had unfairly made a finding of fact, concerning the unmanageability of risk after the claimant left Approved Premises, when that issue was not put to professional witnesses or the claimant at the hearing.

30. The reconsideration decision noted that rule 28(2) of the Parole Board Rules 2019 provides that 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. By rule 28(1), the only grounds of challenge on reconsideration are that the decision in question is "irrational" or "procedurally unfair".

31. So far as irrationality was concerned, the reconsideration decision noted the judgment of the Divisional Court in R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) that 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" (paragraph 116). In so deciding, due deference had to be given to the expertise of the Board's panel.

32. As for procedural unfairness, the reconsideration decision stated that there must be "some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result".

33. The reconsideration decision rejected the claimant's contention that the panel had misapplied the test in Sim. It was in particular, noted that the panel had said it was it was "acutely aware that the Sim test applies".

34. As for "serious harm", the reconsideration decision cited the passage in the decision where the panel found that the claimant had employed aggression and violence against his partner and that this was likely to have caused serious harm in terms of physical and/or psychological harm to the partner and the child. In any event, the panel had before it a wealth of evidence derived from the index offences, previous and subsequent defending, and the circumstances leading up to the three previous recalls, on which it could base a finding that the claimant posed a continuing risk of causing serious harm.

35. On the issue of procedural unfairness, the reconsideration decision noted that it was "unconfirmed" what the move-on accommodation would comprise. It was therefore unsurprising that the panel, which had to consider risk for period of around 22 months, did not find the plan "reassuring". There was, in any event, no indication that the claimant could have said anything in evidence about this matter.

D. THE CHALLENGE

36. The claimant advances three grounds of challenge. Ground 1 (error of law) asserts that, despite the fact the panel set out the correct legal test derived from Sim, its decision demonstrates that the panel did not, in fact, apply the presumption in favour of release, when considering the claimant's case. On the contrary, the panel said that it was "not satisfied that it [sic] no longer necessary for the protection of the public, that you remain confined".

37. The panel's finding, that the claimant's risk could be managed in Approved Premises, is said to be inconsistent with the panel's conclusion that the claimant ought to remain detained. As pointed out in the Parole Board Oral Hearings Guidance (updated August 2018), the Board is assessing the level of risk that the prisoner will present in the community. As such, it is central to that assessment that the Board satisfies itself that the plan in place for the supervision, monitoring and management of any residual risk is acceptable. Since the panel concluded that the claimant's risk was manageable in Approved Premises, the claimant contends that the Board could not be positively satisfied that his detention was necessary for the protection of the public.

38. Ground 1 also asserts that the panel misdirected itself as to the definition of "serious harm", in making its findings in relation to the alleged assault in the Bicester shopping village car park. Applying the definition of "serious harm" in section 224 of the Criminal Justice Act 2003, there was no evidence that the incident had caused either "death or serious personal injury whether physical or psychological".

39. Ground 2 (irrationality), submits that the panel's finding that the claimant poses a high risk of causing serious harm is irrational, there being no evidence that the Bicester Shopping Village incident caused such harm.

40. Ground 3 (procedural unfairness) states that the issue as to whether the claimant's risk could be managed beyond being in Approved Premises was never put to him or to any of the professional witnesses. At the oral hearing, the panel only heard evidence about whether the claimant could be released to Approved Premises or to the address of his partner's father.

E. LEGAL FRAMEWORK

41. Section 227 of the Criminal Justice Act 2003 provides that a court may impose an extended sentence of imprisonment where:-

> "(a) a person aged 18 or over is convicted of a specified offence…, and
>
> (b) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences…"

42. An extended sentence under section 227 comprises both the appropriate custodial term (section 227(2C)(a)) and an extension period "for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose

of protecting members of the public from serious harm occasioned by the commission by him or further specified offences" (section 227(2C)(b)).

43. The specified offences are contained in Schedule 15. Amongst the offences are those in the Offences Against the Person Act of 1861 of soliciting murder, making threats to kill, wounding with intent to cause grievous bodily harm (section 18) and malicious wounding (section 20).

44. Section 224 defines "serious harm" as "death or personal serious injury, whether physical or psychological".

45. Section 244 provides that it is the duty of the Secretary of State to release a prisoner once they have served the custodial part of their sentence. Extended determinate sentence prisoners, such as the claimant, are automatically released at the halfway point of their sentence. They serve the remaining half of their sentence in the community on licence, subject to conditions.

46. Section 254 makes provision for the recall of prisoners on licence. It provides that the Secretary of State may revoke a prisoner's licence and return them to prison.

47. Section 255C(4) provides that if the Secretary of State has not released a prisoner, upon receipt of representations made within 28 days of their recall, he must refer the prisoner's case to the Parole Board. That is what happened in the present case.

48. Section 227 was repealed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, with savings. The effect is that those in receipt of an extended sentence for certain violent or sexual offences, such as the claimant, comprise a closed class of persons, which will eventually disappear.

F. THE "SIM" PRESUMPTION

49. Reference has already been made to the judgment of the Court of Appeal in Sim. The Court held that, in the case of a person subject to an extended sentence of the kind with which we are concerned, section 3 of the Human Rights Act, 1998 requires the Board, in deciding whether to direct the release on licence of the person concerned, to direct his or her release unless the Board is positively satisfied that it is necessary for the protection of the public that he or she be confined.

50. This finds expression in the Board's Oral Hearing Guidance:-

> "2. **Release test**
>
> …
>
> *2.2.1 Determinate sentence cases after recall.*
>
> …
>
> For standard determinate recall cases the standard public protection test must be applied R (King v Parole Board) [2016]

> [EWCA] Civ 51. The panel should not solely refuse to release based on a breakdown in the supervision of a licence. However, where such a breakdown means that continued detention is necessary in order to protect the public, then refusal to release is justified. There is no presumption toward release in these cases.
>
> However, in the case of an extended sentence prisoner who is recalled "in the extension period" part of their sentence, panels are required to reverse the test, applying a presumption in favour of release. In such cases, the Board should direct release unless positively satisfied that continued detention is necessary for the protection of the public R (Sim v Parole Board) [2003] [EWCA] Civ 1845. But this presumption does not apply in any other case."

G. DISCUSSION

Ground 1

51. The first question under Ground 1 is whether the panel failed to apply the correct legal test, as set out in Sim. I observe that the reconsideration decision addressed this issue in substance, albeit not under the heading of "irrationality" or "procedural unfairness". It is a moot point whether applying an incorrect legal test, such as that relating to the burden and standard of proof, falls within the heading of "irrationality", such as to be within the scope of review under rule 28.

52. The scope of the reconsideration procedure has recently been examined by Stacey J in R (Dickins) v Parole Board [2021] EWHC 1166 (Admin). In that case, the question arose whether a decision of the panel could be reconsidered, as regards the issue of whether the panel was *functus officio*; or whether the panel's decision, if wrong on that issue, was merely an error of law rather than an irrational decision.

53. Stacey J held that the question was one of law, not irrationality:-

> "35. The first question is whether the ground for reconsideration identified in HHJ Topolski QC's Decision is an error of law, irrationality or perhaps something else? Error of law, or illegality, means "that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it," (*Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 per Lord Diplock at 410F).
>
> Irrationality (or *Wednesbury* unreasonableness) "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*CCSU* per Lord Diplock 410G). It has two limbs.

> "The first limb focuses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focuses on its outcome – whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former." (*Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 para 24 per Baroness Hale of Richmond DPSC.)

36. In considering irrationality in the context of decisions of the Board due deference must be had to the expertise of the Board in making decisions relating to parole(*R (DSD and others* [2019] QB 285*) v Parole Board* [2018] EWHC 694 (Admin)).

37. HHJ Topolski QC's concluded that the panel should have taken into account the events of 9 May 2020. Their failure to do so was the error of law in deciding that it was *functus* which rendered the decision to release irrational and could therefore be reconsidered under the r.28 procedure.

38. But in HHJ Topolski QC's judgment, all the problems stemmed from the panel's conclusion that it was *functus* which, on his analysis would be an error of law. The reason why the new material was not taken into account flowed directly as a consequence of what was said to be the error of law. It was inextricably bound up with, part and parcel if you like, of the *functus* decision. Whilst failure to take into account relevant material can be a classic ground of irrationality, where, as here, it was a direct consequence, the *sine qua non,* of a decision that the panel had no legal power to take the material into consideration, it would fall into the category of an error of law and is not an irrational decision. Even though the consequence of the *functus* decision is that relevant material has not been taken into account. I therefore find that the ground for reconsideration was an "error of law" and not either irrationality, or some other, as yet unidentified, category.

…

42. If illegality was a subset of irrationality surely it would have been expressly articulated as such in one or more authorities in the last 70 odd years? I do not read the example of Lord Greene MR in *Wednesbury* at 229: "for instance, a person entrusted with a discretion must, so to speak, direct himself properly in law […] If he does not obey those rules he may truly be said, and often is said, to be acting "unreasonably"", as meaning that an error of law is a form of irrationality. It is a reference to the exercise of a discretion within the bounds of reason and that a failure to do so

> may render it subject to challenge in law. As was made clear in the final paragraph of *Wednesbury* at 233 – 234, the focus is on the irrationality of or reasonableness of its decision "a conclusion so unreasonable that no reasonable authority could ever have come to it". See also *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374, per Lord Diplock at p.410 and *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 para 24. The issue of *functus* however is purely binary and a question of law: the act has either been performed or it has not. I therefore conclude that irrationality and illegality are separate and distinct concepts and neither is a subset of the other."

54. As Stacey J concluded, illegality is not a subset of irrationality. In fact, if anything, the converse is true. The question in construing rule 28 is, as I see it, how far the concept of "irrationality" extends, beyond Lord Diplock's classic description in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 WLR 1174 of "Wednesbury" unreasonableness (Associated Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223) as "a decision which is 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".

55. The fact that, for the purposes of rule 28, "irrationality" does extend to some extent beyond Lord Diplock's categorisation was acknowledged by Stacey J at paragraph 38 of her judgement, where she held that a failure to take into account relevant material "can be a classic ground of irrationality".

56. In similar vein, the Divisional Court in R (D and another) v Parole Board and another [2018] EWHC 694 (Admin) held at paragraphs 156 - 164 that it was irrational for the Board not to have undertaken further inquiry before directing the release on licence of a prisoner.

57. Also of relevance is the judgment of Saini J in R (Wales) and Parole Board [2019] EWHC 2710 (Admin), in which he articulated a modern approach to *Wednesbury*, which is not simply to ask "what may be a crude and unhelpful question: Was the decision irrational?"

58. According to Saini J:

> "32. 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.
>
> 33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained

> evidential gap or leap in reasoning which fails to justify the conclusion?
>
> 34.This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.
>
> 35. I should also emphasise that under the modern context-specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the Decision: see Judicial Review (Sixth Edition), Supperstone, Goudie and Walker at para.8.12.
>
> 36. Applying the above approach, I consider that both a rationality and reasons challenge succeed in this case."

59. Fortunately, the precise ambit of irrationality, for the purposes of rule 28, does not arise for decision in the present proceedings. Whether or not any failure to apply the legal test in Sim rendered the panel's decision "irrational" and so within the scope or reconsideration under rule 28, any such failure must on any view be an error of law, amenable to judicial review in this court.

60. The Board is a specialist body, tasked by Parliament with exercising judicial functions. As the case law indicates, its decisions must therefore be treated with appropriate respect by the courts. In particular, it should not readily be assumed that the Board has failed to apply correctly the law which governs those factions.

61. In the present case, as we have seen the panel gave a self- direction that "there is a presumption in favour of release" as held in Sim.

62. I am, nevertheless, satisfied that, despite its self-direction, and applying the principle of restraint just described, the panel did not actually apply the presumption in favour of release. Rather, its decision is characterised by what the Guidance describes as "standard, determinate recall cases" (see above). My reasons are as follows.

63. We have seen that the panel assessed (albeit tentatively) that for so long as the claimant would be residing at Approved Premises, his risk could be managed. At this point, the significance of the presumption becomes plain. At the very least, the panel should have gone on to examine in detail the risk management plan, reminding itself that, as earlier recorded in the decision, the Approved Premises would be available to the claimant for a significant period of time and that they were close to the claimant's support network. There was, however, no meaningful engagement with the risk management plan. In the circumstances, I conclude that, despite the references in the decision to Sim, the panel did not follow the Court of Appeal's authoritative guidance.

64. This point is put beyond doubt towards the end of the panel's decision where, despite asserting that the presumption in Sim was being applied, the actual conclusion was that "the panel is not satisfied that it (sic) no longer necessary for the protection of the public that you remain confined". I do not consider that it is possible to strip out the double negative from this passage, so as to read it as saying that the panel was satisfied that it

was necessary, for the protection of the public, for the claimant to remain confined. On the contrary, the only satisfactory construction of the passage is that the panel considered it needed to be satisfied that the claimant's continued detention was unnecessary; in other words, that it was applying the test for standard determinate recall cases.

It is not possible to conclude that the outcome would have been same, but for this error in approach. For this reason alone, therefore, the panel's decision must be quashed.

Ground 2

65. Turning to Ground 2, I also find that the panel fell into legal error in its approach to the issue of "serious harm". I accept there was no need for the decision to refer expressly to the definition of "serious harm" in the 2003 Act. Nevertheless, the decision needed to approach the issue on the basis that "serious harm" means death or serious personal injury, whether physical or psychological, occasioned by the commission of a further specified offence within the meaning of Schedule 15.

66. In this regard, it is evident that the panel placed a significance upon the events of December 2018 at the Bicester Shopping Village car park that they could not properly bear; and that the panel's conclusions concerning those events are unsustainable.

67. The panel concluded that the claimant "employed aggression and violence against your partner and this is likely to have caused serious harm in terms of physical and/or psychological harm to your partner and son, who would have witnessed the incident". There was, however, an absence of evidence to show that the claimant's partner had been caused serious harm, within the meaning of the 2003 Act. The mere finding, on the balance of probabilities, that the claimant may have assaulted his partner in the car park does not begin to support such a conclusion. Furthermore, there was also a complete absence of evidence that any psychological harm had been caused to the child of the claimant and his partner, as a result of that incident.

68. These errors mean that (even having regard to the claimant's overall history) there was nothing to underpin the conclusion in the panel's decision that "There is a possibility of indirect harm should a child witness acts of violence and aggression between parents", meaning that the claimant had a "high" potential to cause serious harm to his own children.

69. For this reason also, the decision must be quashed.

Ground 3

70. Ground 3 concerns procedural unfairness. To some extent, it touches upon the aspect of Ground 1, concerning the presumption in favour of release.

71. The evidence at the hearing was concerned with whether the claimant could be released to the home of his partner's father, as opposed to Approved Premises. Although the claimant had reservations about going to Approved Premises, since he had in the past found himself attracted to resume drug taking whilst at such premises, I am satisfied that, until receipt of the panel's decision, neither the claimant nor those advising him could reasonably have anticipated that the panel's decision would be based upon its apparent conclusion that there was a real risk of the claimant returning to his drug habit (with all that might entail) whilst he was living at the Approved Premises but not actually present there; and at some future point when he might have moved on from the Approved Premises.

72. I do not accept the suggestion in the reconsideration decision that this is something the claimant's representatives should have anticipated and so dealt with at the hearing. The risk management plan was plainly relevant, whilst the claimant was living at the Approved Premises. The plan indicated that risks could be adequately managed during this time, which would obviously include periods during the day when the claimant might be expected to be outside the bounds of the Approved Premises (it not being suggested that he needed to be under some form of house arrest there).

73. Accordingly, the decision falls to be quashed on Ground 3.

H. DIRECTING THE BOARD TO MAKE A FRESH DECISION WITHIN A SPECIFIED TIME

74. For the claimant, Mr Brownhill asked me, if I were to quash the decision, to make an order directing the Board to make a fresh decision within three months. He pointed to the fact that the claimant's SLED period ends on 31 October 2022. It is, he said, in the public interest for the matter to be re-decided promptly by the Board because, if the claimant is to be released on licence, this should happen when there is still significant time for him to benefit from continued supervision in the community.

75. In this regard, Mr Brownhill sought to rely upon R (Grinham) v the Parole Board for England and Wales [2020] EWHC 2140 (Admin). There, Spencer J noted that in two earlier cases – R (Davies) v Parole Board [2015] [EWHC] 4276 (Admin) and R (Khan) v Parole Board [2015] EWHC 2528 (Admin) - the court had ordered there to be a rehearing by the Board within, respectively, three months and six weeks. At paragraph 77 of his judgment, Spencer J identified particular urgency in the case before him, where the claimant's sentence expired some five months after the date of judgment. Spencer J accordingly ordered that a fresh oral hearing by the Board's panel had to take place some 8 weeks from the date of his order.

76. In deciding whether to make such a direction, each case will be fact-specific. I fully accept that, where the final release date is only a short time away, an order of this court may be appropriate.

77. As a general matter, however, I consider that this court should be wary of acceding to a request to order the Board to hold a hearing within a specified time. The Board is a body exercising judicial functions. As such, it can be expected to act in such a way as to give proper effect to decisions of this court. How it does so, ought normally to be left to the Board. Like any judicial authority, the Board will generally know best how to handle the (often competing) demands on its resources. Unless there are compelling

reasons, it is not for this court in effect to interfere in the case management functions of another judicial body.

78. In all circumstances, I am not persuaded to make an order of the kind sought. The Board will be aware of the desirability of holding the hearing in sufficient time before 31 October 2022.

79. ***DECISION***

The Board's decision is quashed.