Neutral Citation Number: [2023] EWHC 50 (Admin)

Case No: CO/3686/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Tuesday, 17th January 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of DEAN DOBSON) **Claimant**

- and –

SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Michael Bimmler (instructed by Duncan Lewis Solicitors) for the **Claimant**
Simon Pritchard (instructed by Government Legal Department) for the **Defendant**

- -

Hearing date: 9/12/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. This is a case about the procedural propriety and substantive justification for an adverse appeal decision concerning Release on Temporary Licence ("ROTL"). It is a case in which the judicial review Court has to decide disputed issues of fact on documentary evidence. There are also issues about whether defaults by the Defendant should in principle be reflected in any costs order, whether a delay objection can be raised at the substantive judicial review hearing, and whether "anxious scrutiny" applies.

2. ROTL is the subject of a policy (the "Policy") entitled "Release on Temporary Licence Policy Framework" implemented on 16 May 2019, replacing an earlier Prison Service Instruction (PSI 13/2015). The version of the Policy relied on by both parties in these proceedings was reissued on 17 August 2021. It explains that ROTL "facilitates the rehabilitation of offenders, by helping to prepare them for resettlement in the community once they are released" and is "intended … to reduce reoffending in the long term". The "policy outcomes" are described as including that offenders granted ROTL "will benefit from resettlement opportunities which in turn will safely prepare them for permanent release back into the community", and that offenders eligible for ROTL "will continue to undergo a thorough risk assessment", with ROTL "applied consistently and fairly and in a way which supports the resettlement of the prisoner, while ensuring the protection of the public remains central to the process". I will return later to certain procedural duties and entitlements under the Policy (§§45-50 below). The test for ROTL is identified (see the Policy at §4.1) in Rule 9(4) of the Prison Rules 1999 (SI 1999 No. 78), which provides:

> ***A prisoner shall not be released under this rule unless the Secretary of State is satisfied that there would not be an unacceptable risk of his committing offences whilst released or otherwise failing to comply with any condition upon which he is released.***

3. The Claimant is aged 52 and is a prisoner in open conditions at HMP Haverigg. He was convicted in the Crown Court in 2007 of four offences committed in September 2004, January 2006 and May 2006. He was sentenced on 19 April 2007 to an IPP sentence (that is, an Indeterminate Prison Sentence for Public Protection) with a minimum term which was reduced on appeal to 3 years 41 days, together with a Sexual Offender Prevention Order. His minimum term (tariff) expired on 30 May 2010. He seeks judicial review, with the permission of Choudhury J granted on 11 February 2022, of the decision of Deputy Governor ("DG") Bailey for the Defendant on 8 July 2021. By the impugned decision, DG Bailey rejected the Claimant's appeal by way of Complaint (30 June 2021) against the decision of Acting Deputy Governor ("ADG") Woodburn (8 June 2021). ADG Woodburn had declined to approve the Claimant's ROTL. The Claimant's case is that DG Bailey's decision was procedurally flawed and/or unreasonable. The remedy sought is to quash the decision of DG Bailey and remit the matter for reconsideration afresh.

4. Two straightforward ancillary applications were before the Court. Both parties applied for permission to adduce further witness evidence. The Claimant's application is to adduce a brief witness statement with exhibits by the Claimant's solicitor Mr Bellusci, responding to the position taken by the Defendant in raising a delay issue. The Defendant's application is to adduce a brief witness statement of Ms Fisher, responding

to the position taken by the Claimant about DG Bailey's 'second-hand' witness statement description of what happened regarding the provision of documentation in June 2021. Each party sensibly accepts that the application made by the other should be granted, and with no cost consequences. I agreed and announced at the substantive hearing that I would grant both of these applications.

BACKGROUND

The Transfer Recommendation

5. A Recommendation in the Claimant's case was made by the Parole Board in a reasoned decision on 21 October 2019, concluding as follows:

> ***The Panel accepted that for you to make further progress in developing a resettlement plan, and for your risk factors to be further tested, largely through monitoring your progress and engagement with professionals in open conditions that a recommendation for open conditions was appropriate. Therefore, the panel recommends to the Secretary of State that you are progressed to open conditions.***

The Transfer Decision

6. The Transfer Recommendation was accepted by the Defendant, by a decision dated 3 December 2019 taken by Becca Humphrey of HM Prison & Probation Service (the "Transfer Decision"). The Transfer Decision was headed "Outcome of Parole Board Review" and stated as follows (I have inserted paragraph numbering in square brackets; OPAL is Older Prisoners Activities and Learning):

> ***[1] As you know the Parole Board has recommended your transfer to open prison. [2] The Secretary of State has now considered the Parole Board recommendation, and agrees with this view for the reasons given by the Panel and considers that the following factors to affect your risk are: [2a] Sexual preoccupation; [2b] Sexual interest in children; [2c] Child abuse supportive beliefs; [2d] Predatory pursuit of sexual gratification; [2e] Difficulties solving problems; [2f] Lack of consequential thinking skills; [2g] Lifestyle and associates. [3] The panel noted that you have engaged with the Moving Forward group and work with OPAL. [4] The Parole Board were informed that you are an Enhanced prisoner on the IEP scheme, with no new adjudications. [5] The panel concluded that due to the lack of insight into your risk factors, open conditions was considered the best way to assess your progress. [6] You should now discuss options for transfer to open prison with your offender supervisor, who will arrange your move. [7] The responsibility for addressing your risk reduction rests with you. However the Secretary of State has identified from the information contained within your dossier the following further interventions in open conditions to help you address these factors. Please note that the Secretary of State cannot guarantee to place you on these specific interventions as there are limits on the availability of resources. In addition, some interventions have entry requirements and may not be appropriate for you following these assessments. In these circumstances other offending behaviour courses/interventions may be considered to help you reduce your risks. [8] It is for your offender manager or supervisor to identify relevant interventions for you as part of your sentence plan in order to address your risk of harm and risk of re-offending, subject to available resources. [9] Your review period is therefore set at 12 months and is for the following: [9a] Honestly engage with the professional staff working around you in order to identify the best ways to reduce your outstanding risks; [9b] To be tested in conditions of lesser security and abide by the rules and the regime of an open establishment; [9c] To demonstrate your ability to comply with ROTL conditions; [9d] To remain adjudication free; [9e] Maintain Enhanced status on the IEP scheme; [9f] Please note that, whilst you may apply for ROTL at any time after your arrival to open conditions, you may not be temporarily released until at least 3 months after your arrival. ROTL is not a right and will only be granted after a full risk assessment showing that it is safe for you to be trusted in the community. ROTL will only be granted for a specific***

> ***purpose, linked to your sentence plan and resettlement goals, such as employment or spending time with family. Any failure to comply with any of the conditions of ROTL may mean it is cancelled and could also mean you are sent back to closed conditions. Failure to return from ROTL will mean that in future you are ineligible to be considered for transfer to open conditions save in exceptional circumstances. [10] Your next parole review process will be undertaken in accordance with the Generic Parole Process, a centrally monitored review process. Your review process is expected to take 26 weeks to complete, as it involves the preparation of reports and co-ordination of various parties, including the Public Protection Casework Section, the Prison Service and the Parole Board. Your parole review will commence in April 2020, and the month for consideration by the Parole Board is October 2020. (6 months later). [11] You will be notified by the Parole Board nearer the time about the exact dates.***

The ROTL Risk Assessment: "Trilogy of Documents"

7. The Manuscript (handwritten) Version of the appealed decision of ADG Woodburn (8.6.21) completed a set of three documents known collectively as the "ROTL Risk Assessment". This Trilogy of Documents was: (1) a "Risk Assessment" written by the Prison Offender Manager ("POM") Carole Smith (updated on 1 June 2021) (§8 below); (2) "Board Recommendations" (dated 21 May 2021) of the ROTL Board (whose members were POM Smith and, as ROTL Board Chair, Senior Probation Officer ("SPO") Sean Carroll) (§9 below); and then (3) the Manuscript Version of ADG Woodburn's Decision (8 June 2021) (§10 below).

POM Smith's Risk Assessment

8. POM Smith's Risk Assessment (updated on 1 June 2021) was the first of the Trilogy of Documents. Under a heading "Positive Indicators for ROTL Compliance", POM Smith said this (Mr Dobson is the Claimant; ETS is Enhanced Thinking Skills; Kaizen is an accredited offender behaviour programme):

> ***Mr Dobson has maintained his innocence through-out his sentence he has not undertaken any offence focused work. He has been previously assessed for ETS and more recently the [Kaizen] programme, however he has been found unsuitable as he maintains his innocence and does not accept that he has any difficulties within his life that he needs to address. Despite Mr Dobson not completing offence focused work to reduce his risk, he has met Sentence Planning objectives in relation to obtaining and maintaining employment within the prison environment and completion of vocational courses. Despite being returned to closed condition twice - Dean has complied with [sentence] plan targets & demonstrated to the parole board his commitment to comply & has therefore been returned to open conditions. No previous ROTL compliance since arriving at Haverigg in February 2020.***

What followed, as POM Smith's "Recommendation", was this:

> ***I recommend that Mr Dobson has access to ROTL's – as his progression to open conditions was directed by the secretary of state following a parole review in October 2019. Testing, via robust release and management planning, is essential in this case. Mr Dobson has twice been returned from open conditions and the monitoring of his behaviour whilst he is gradually exposed to a greater degree of freedom on ROTL in community type situations will be extremely important. As noted in the Psychological assessment, risk management in this case depends heavily on the imposition and management of external controls – and monitoring how Mr Dobson responds to these controls and deals with difficult situations in the community is absolutely imperative.***

The ROTL Board Recommendations

9. The ROTL Board Recommendations (21 May 2021), written by SPO Carroll, were the second in the Trilogy of Documents. They followed a meeting of the ROTL Board (SPO Carroll and POM Smith) with the Claimant on 19 May 2021. In part, they record the Claimant's position. They read as follows (paragraph numbering has again been added; DD is the Claimant; EBM is Enhanced Behaviour Monitoring; RDR is Resettlement Day Release; ROR is Resettlement Overnight Release; AP is Approved Premises):

> ***[1] DD is serving an IPP sentence for serious predatory sexual offences against female children aged between 9 and 12 and pretending to be a Police Officer to establish authority and offend. He has a previous caution for possession of indecent images of children. He is assessed as posing a high risk of serious harm to children in the community. The risk would be sexual in nature and linked to what appears to be a longstanding sexual interest in children. [2] DD is also assessed as a risk to the public and staff – this is in terms of manipulative/coercive behaviour – this includes a risk to partners and potentially a risk to staff working with him. [3] DD has two returns from open conditions - there was some 'impression management' around the move back on the second occasion, but was open to challenge and was transparent about the shoplifting incident during the first spell. [4] DD has transitioned well to Haverigg – noted that he has experienced significant frustration in terms of delays to his ROTL application and also in changing POMs – potentially at odds with previous concerns, he did not apportion blame but spoke of positive relationships with his POMs. He believed EBM was useful in terms of managing targets. [5] Whilst maintains innocence he was accepting of the need for restrictions and a robust risk management plan for any period of ROTL - he could cite what such restrictions would likely involve and understood that he needed to comply. He linked the management of licence to the types of activities on EBM - linking a behaviour with a target. [6] DD had a clear plan about ROTL and structuring and stepping his community integration - this was well thought out and fairly clear. Mix of work, reintegration, practical steps (bank account) and eventually refreshing experience of AP environment. [7] Accepted the view that a testing period was necessary given previous issues with compliance in open conditions and did not challenge or attempt to reduce. [8] Approve for RDR and ROR subject to a robust period of testing. Board request for POM to meet prior to unaccompanied ROTL - seek views of supervisors and discuss any behaviours that seem odd, challenging or not ordinary. [9] The conditions set by the COM are robust and sufficient to manage the risk posed in my view. [10] Low assessed risk of abscond - progression seems very important to him and no attempt despite previous failures.***

ADG Woodburn's Decision: Manuscript Version

10. As I have explained, the Manuscript Version of ADG Woodburn's Decision (8.6.21) completed the Trilogy of Documents. It was handwritten by ADG Woodburn into the composite "ROTL Risk Assessment" document (as "page 10 of 13"). It recorded "RDR NOT APPROVED" and "ROR NOT APPROVED". In a box headed "Decision" and "Assessment by Authorising Manager", ADG Woodburn wrote:

> ***Your Parole Report stated that work should be undertaken in regards to a personality disorder pathway.***
>
> ***Risk factors have not been addressed in custody and the lack of insight into offending makes it impossible to assess the current risk that Mr Dobson poses to the public, female children in particular.***
>
> ***IPP sentence with no risk related work completed and lack of insight into the factors that led to offending makes Mr Dobson not suitable to be ROTL.***

ADG Woodburn's Decision: ROTL Decision Notice

11. The ROTL Decision Notice was completed by Ms Harrison the Case Administrator (on 14 June 2021), based on the Manuscript Version of ADG Woodburn's Decision (8.6.21). The ROTL Decision Notice, framed as addressed to the Claimant, reads:

> ***Your application for a ROTL has been fully considered on the ROTL Board on 21/05/2021.***
>
> ***The decision has been: Refused.***
>
> ***The Authorising Manager noted as follows:***
>
> - ***Your Parole Report stated that work should be undertaken in regards to the personality disorder pathway.***
> - ***Your risk factors have not been addressed in custody and the lack of insight into your offending makes it impossible to assess the current risk that you pose to the public, and female children in particular.***
> - ***You are serving an IPP sentence - no risk related work completed and lack of insight into the factors that led to your offending makes you unsuitable for ROTL at this time.***
>
> ***If you wish to appeal against the refusal of an application, you should use the complaints procedure. Please ask a member of staff to advise you on how to do this.***
>
> ***NOTES. A copy of this form must go to the offender and one copy must be retained with the Risk Assessment and Sentence Planning Documents.***

COM Heald's Report

12. One of the reports available to the ROTL Board, to ADG Woodburn and (on the subsequent appeal) to DG Bailey, was the Report of the Community Offender Manager ("COM") Felicity Heald dated 25 March 2021. COM Heald's Report identified the nature of the ROTLs being applied for and the appropriate non-standard licence conditions. It then recorded that:

> ***ROTLs are supported.***

That same support had been recorded earlier by COM Heald, in a report dated 11 November 2020, which – I was told and accept – at some stage will have become available to the Claimant as part of the parole dossier.

Significance of COM Heald and POM Smith

13. It was common ground at the hearing before me that COM Heald and POM Smith, collectively, constitute the relevant "offender manager or supervisor" being described in the Transfer Decision (§6 above) (at para [8]) as having the responsibility "to identify relevant interventions for you as part of your sentence plan in order to address your risk of harm and risk of reoffending".

Kirsty Bain's Report

14. A further report available to the ROTL Board, to ADG Woodburn and to DG Bailey was the "Psychological Risk Assessment" Report by Forensic Psychologist Kirsty Bain, for HM Prison & Probation Service, dated 25 May 2021 (and disclosed to the Claimant on that date). In its "Summary of recommendations and outcome", Kirsty Bain's Report said this (RSVP is the Risk for Sexual Violence Protocol):

> ***Mr Dobson has not completed any core risk reduction work, his behaviour in custody has been mixed, and he has been returned from open conditions on two occasions. During his time in custody, he has largely been compliant, and engaged well with the regime, although there have been concerns raised in relation to problematic personality traits, which have been discussed within this report. The outcome of the RSVP has highlighted Mr Dobson's limited insight into his risk factors, or problematic behaviours (shoplifting). Whilst consideration was given to a progressive move to release for Mr Dobson, this cannot be supported at this time. Mr Dobson's has very limited insight into his offending, meaning he relies heavily on the guidance of others in terms of his future risk management. Given the previous issues within professional relationships, it is recommended that Mr Dobson remains in open conditions to access ROTLs, and develop a positive relationship with his COM. Mr Dobson's POM and COM are also recommending that Mr Dobson accesses ROTLs. Accessing ROTLs will allow Mr Dobson to apply any learning he has achieved through his sentence, whilst being supported through this gradual reintegration into the community.***

The EBM Review: Michele Unwin's Observations

15. Another report available to the ROTL Board, to ADG Woodburn and to DG Bailey was the "EBM Case File Review by Psychology". This was a desktop review of previous relevant documents. It contained sections on "current institutional behaviour", "overview of relevant factors linked to offending" and "responsivity issues/other factors potentially impacting on this". In the latter section, the writer makes reference to the Psychological Risk Assessment report dated 31 October 2017 written by Psychologist Michele Unwin, attributing to Ms Unwin observations which:

> ***… identified that Mr Dobson's engagement was "complicated by personality disorder traits… It seems he used his manipulative and superficial interpersonal style to approach children and take advantage of them. Mr Dobson has been in custody for almost 10 years and during this time he has continued to present with a sense of grandiosity, manipulation and superficial charm that has acted as a barrier to him progressing… Mr Dobson has an ability to provide elaborate and plausible accounts of why he has not done anything that he has been accused of and his ability to do so this means that it has not been possible to understand his offending and subsequent risk". In addition, Ms Unwin conducted an International Personality Disorder Evaluation on Mr Dobson which identified he would meet the conditions for a number of criterion of Narcissist Personality Disorder and some of the criteria for Histrionic Personality Disorder…***

The Meeting of 16 June 2021

16. The decision of ADG Woodburn was discussed with the Claimant on 16 June 2021 at a meeting with SPO Carroll and POM Smith. The Claimant made what – it is accepted – were his contemporaneous manuscript notes of that meeting. He recorded the time of the meeting and who was present. His notes recorded, in quotation marks, the Claimant being told this about ADG Woodburn's decision:

> ***"haven't addressed risk factors"***
>
> ***"lack of insight into offending"***

The Claimant's contemporaneous manuscript notes also record that he was advised to send a Complaint Form (known as "COMP1") to the OMU (Offender Management Unit) addressed to DG Bailey, in order to obtain a copy of the ROTL "Board Assessment". The evidence filed on behalf of the Defendant explains that this phrase – "Board Assessment" – would have been understood by SPO Carroll and POM Smith and within the OMU to mean the Trilogy of Documents comprising the "ROTL Risk Assessment".

Contemporaneous Documents: June and July 2021

17. There are contemporaneous documents before the Court which assist in identifying events in June and July 2021. They place the meeting of 16 June 2021 and other aspects in a documented setting. They include the following, in date sequence. (1) A COMP1 Complaint by the Claimant (7 June 2021) concerning the delays in obtaining the Governor's ROTL decision following the ROTL Board meeting on 19 May 2021. (2) the Manuscript Version (8 June 2021) of ADG Woodburn's Decision (§10 above), completing the Trilogy of Documents (§7 above) comprising the ROTL Risk Assessment. (3) The ROTL Decision Notice (14 June 2021), being the typed version of ADG Woodburn's reasons, completed by Case Administrator Carolyn Harrison (§11 above). (4) A Response (14 June 2021) written by OMU Hub Manager Christine Fisher, responding to the COMP1 Complaint of 7 June 2021, and stating: "Unfortunately your application for ROTL has not been approved. Gov Woodburn has concerns in relation to ROTL, which your POM will discuss with you." (5) The Claimant's manuscript notes of the meeting on 16 June 2021 (§16 above). (6) A letter of 16 June 2021 from the Claimant to his solicitors which told them that: (a) at the meeting on 16 June 2021 SPO Carroll "read out a short passage by Gov Woodburn which ultimately said 'haven't addressed risk factors' and 'lack of insight into offending'"; and (b) the Claimant was making a Complaint (COMP1) to DG Bailey requesting a copy of the ROTL Board Assessment, because "Sean Carroll said I should do this as I am not entitled to one ordinarily". (7) A COMP1 Complaint by the Claimant (17 June 2021) to DG Bailey which stated: "After being refused all ROTLs by Gov Woodburn I have been advised to send this COMP1 to you by Sean Carroll. Please provide me with a copy of the ROTL Board Assessment I sat on 19/5/21. This is a matter of urgency and was also requested by my solicitor". (8) A Response (25 June 2021) to the Complaint (17 June 2021), written by Ms Fisher, stating: "I will generate copies of the relevant paperwork, and call you up to OMU early next week to collect it. Please use the Complaint process in the first instance to appeal your ROTL Refusal, as I am not aware that you have done this yet. Your appeal will be considered by the Gov, who will review all of the Board papers.… I will call you up to collect copies of the paperwork you have requested". (9) A COMP1 Complaint (30 June 2021) constituting the Claimant's "appeal" against the decision of ADG Woodburn (§18 below). (10) The Response (8 July 2021) by DG Bailey to the Complaint of 30 June 2021 (§19 below), rejecting the Claimant's appeal, which is the impugned decision in this judicial review claim.

The Appeal

18. The Claimant's appeal in his COMP1 of 30 June 2021 was in the following terms:

> ***On 16/6/21 I received news from my Offender Supervisor Carole Smith and Sean Carroll that Gov Woodburn had refused me all ROTLs. Sean explained that it was for the following two reasons: –***
>
> ***"Haven't addressed risk factors" and***
>
> ***"Lack of insight into offending".***
>
> ***During this emergency meeting (14:38-15:08) Sean and Carole reiterated that they still fully support my ROTLs and didn't agree with Gov Woodburn. Sean explained and advised me to appeal this decision.***

> ***I have discussed all aspects of these appalling crimes many many times with every single Offender Supervisor, Offender Manager and psychologist for the past 15 years. I have never refused to do this. I have always explained my innocence and everyone (apart from Marie Djasek – HMP Whatton, and her Hull Probation Counterpart Katrina Hill) have respected my stance and have never asked me to compromise it. I have also discussed these crimes here at Haverigg with my OSs, Marie Crane then Carole Smith during my successful EBM meetings as well as psychologists here including Kirsty Bain.***
>
> ***Gov Woodburn is clearly unaware of this. Carole Smith, Marie Crane and Kirsty Bain (as well as all of my paperwork/files etc) will confirm this.***
>
> ***Please review my ROTL application taking all of this into account and allow me to progress and move on with my life here at Haverigg and beyond.***

DG Bailey's Response: The Impugned Decision

19. DG Bailey's Response on 8 July 2021, which is the impugned decision in this claim for judicial review, rejected the Claimant's appeal in the following terms (with numbered paragraphs inserted):

> ***Mr Dobson [1] I have reviewed the recent ROTL assessment and outcome in the light of your appeal. I note that you maintain your innocence and that this is not a bar to you progressing. However, as was noted at your last parole hearing, your absolute denial of committing any offences, of having any sexual interest in female children, and of needing personal development of any kind is a significant concern, and certainly makes an assessment of the risk that you pose very problematic. [2] I am aware that the offences for which you were convicted involved seven child victims who were unknown to you and that the circumstances involved you presenting yourself as an authority figure in order to gain their trust. I also see that you have a previous conviction related to possession of indecent images of children, and also that you have been returned to closed conditions on two previous occasions. You are assessed as posing a high risk of serious harm to children. [3] Other reports highlight controlling personality traits, a lack of self-awareness and a tendency to push boundaries. The risk management plan for you in the community depends very heavily on the imposition of external controls to limit your behaviour, and this is necessary in the absence of any acknowledgment or awareness of your own risk. You have not completed any relevant offence focussed interventions. [4] Overall I can see little evidence of any significant reduction in risk. [5] Given the nature of the offences for which you are convicted, and the points I have highlighted above, I am not confident that you can be safely released on temporary licence. You will understand that my first duty is to protect the public and whilst I understand that this will be disappointing to you, I am satisfied that the assessment has been correctly conducted and the outcome is appropriate and proportionate. [6] The parole board have described the situation with you as 'an impasse' and they did not find your account or denial of your offending to be credible. I would suggest that if you are to make significant progress towards release, you will need to reflect very carefully on your situation and consider further how you can demonstrate that the risk you pose to the public has reduced.***

The Letter Before Claim

20. A pre-action Letter Before Claim dated 7 September 2021 from the Claimant's solicitors included this:

> ***The Claimant was transferred to HMP Haverigg in early 2020. It appears that he made various application for ROTL and submitted Complaint forms throughout 2020 and the beginning of 2021, but a ROTL Board was only held for him on 19 May 2021. The ROTL Board's recommendation was then submitted to the relevant Governor for final approval. On 7 June 2021, the Claimant complained that he had not been told of the outcome yet. On 14 June 2021 he was told by the OMU Hub Manager, as a response to his Complaint, that***

> ***Governor Woodburn had not approved the ROTL application due to "concerns". He was not given any details or a formal record of the decision.***
>
> ***On 16 June 2021, the Claimant had a meeting with Sean Carroll and Carole Smith (Prison Offender Manager), in which he was told orally that Governor Woodburn's concerns were that the Claimant had not addressed risk factors and displayed lack of insight into his offending. He was also advised orally that the ROTL board had recommended approval, but was overturned by Governor Woodburn. He was encouraged by the officers to ask for a copy of the Board's Assessment and was told that his maintenance of innocence ought not disadvantage him. On 17 June 2021, the Claimant submitted a Complaint, asking for his ROTL Board Assessment to be provided to him; on 25 June 2021 he was told that the paperwork was being collated and he would be called to OMU in the following week to collect it. The Claimant's letter to my Instructing Solicitors of 9 July 2021 says that he has still not received this; I am not told that he has eventually received the documentation since.***
>
> ***On 30 June 2021, the Claimant appealed internally against the ROTL refusal by way of a COMP1 form. He received a response from Governor Jo Bailey (Deputy Governor of the Prison) on 8 July 2021, which said that the Governor had reviewed his appeal and ROTL refusal, and had decided to maintain the ROTL refusal…***

DEFENDANT DEFAULT, PARTICIPATION AND COSTS

21. There was no response by the Defendant to the Letter before Claim. There was no Acknowledgment of Service ("AOS") filed by the Defendant at the permission stage. As Choudhury J recorded in his Order on 19 February 2022, this was despite the Defendant "being encouraged to do so by letter dated 30 December 2021". That letter was written by the Court. The papers filed with the Court on behalf of the Claimant in the judicial review proceedings included the following: the Response of DG Bailey (8 July 2021), the COMP1 Complaint of 17 June 2021, the Claimant's letter to his solicitors dated 16 June 2021, the Claimant's manuscript notes of the meeting on 16 June 2021, Kirsty Bain's report of 25 May 2021, and a parole dossier including the earlier Report of COM Heald (11 November 2020). The Defendant's first response to these judicial review proceedings was in Detailed Grounds of Resistance ("DGR") dated 29 July 2022, accompanied by evidence; preceded on 13 July 2022 by an application for an extension of time. The indexed "Defendant's Bundle" of relevant documents included the "ROTL Risk Assessment" (the Trilogy of Documents); and "Other Papers in the Claimant's ROTL file" including COM Heald's Report of 25 March 2021, and the ROTL Decision Notice of ADG Woodburn dated 14 June 2021. As I have mentioned, the Defendant's DGR and evidence (29 July 2022) were preceded by an application dated 13 July 2022 for an extension of time to rely on them and for permission to participate in the substantive hearing by written and oral submissions. That, then, became the first issue with which I had to deal.

22. As I have also mentioned, Choudhury J recorded in his Order granting permission for judicial review that the Defendant had not lodged any AOS, despite being encouraged to do so by letter from the Court dated 30 December 2021. He went on to record that:

> ***This is a factor that may be taken into account in due course in accordance with CPR 54.9(2).***

Under CPR 54.9(2), where a Defendant takes part in the hearing of the judicial review:

> ***… the court may take his failure to file an [AOS] into account when deciding what order to make about costs.***

The AOS default was not one which would prevent the Defendant from fully participating at the substantive hearing (I will return to default and the issue of costs). But the Defendant subsequently lost that entitlement, by virtue of further default, and so that the Court's permission to participate was required. Under CPR 54.9(1)(b), the Defendant had been entitled, notwithstanding the failure to file an AOS, to take part in the substantive hearing of the judicial review "provided he complies with rule 54.14 or any other direction of the Court regarding the filing and service of (i) [DGR] … and (ii) any written evidence". Rule 54.14 requires DGR and written evidence to be filed within 35 days after service of the order giving permission. Choudhury J's Order was sent to the Defendant's solicitors (GLD) on 21 February 2022. The 35 day prescribed time limit in CPR 54.14 was expressly embodied in a direction in Choudhury J's Order. 35 days after 21 February 2022 was 28 March 2022. The DGR, witness evidence and documentation was not provided until four months later, on 29 July 2022, and the application for an extension of time was not filed until 13 July 2022. It was also not until then that disclosure was made of relevant documentation in these proceedings. Moreover, as Mr Bimmler for the Claimant points out, all of this was in the context of a failure to respond to the Letter Before Claim of 7 September 2021 and the failure to file an AOS.

23. The Defendant's application for an extension of time, and permission to be heard, explains the Defendant's position as follows: that GLD was served with a hardcopy bundle including the sealed claim form on 3 November 2021, at the correct address for physical service of court papers on GLD; that the hardcopy bundle was scanned into the system but no steps were taken to open a new file; that no record was found of having received the Order of Choudhury J or the letter of 30 December 2021 referred to in that Order; that GLD accepts that (given that no file had been opened for the conduct of this claim) this "probably" represented a further administrative error; that it was on 5 July 2022 that senior staff became aware of the existence of the claim and a new file was opened immediately, being allocated to a case officer two days later; and that the absence of any allocation to a lawyer before that time was due to administrative oversight within GLD. An apology has, rightly, been provided: to the Court; to the Claimant; and to the Claimant's legal representatives. The Defendant's application to participate was deferred for consideration at the substantive hearing. The application contained the submission that the Court would be 'better placed to explore the issues raised by the proceedings were the Court able to consider the DGR together with witness evidence on behalf of the Defendant'. The application also said that granting it should not cause material "prejudice" to the Claimant or the timetable for the hearing.

24. Mr Bimmler for the Claimant made clear that whilst the application was – very fairly and sensibly – not resisted, that was subject only to the "caveat" that it would, in principle, be appropriate for the Defendant's defaults to be reflected when the Court comes to design the appropriate order for costs having decided the issues in the case. He and Mr Pritchard made submissions at the level of principle as to whether a modified Court Order would be appropriate. I was not at that stage making any costs order, and none was being sought: the appropriate modified order would depend on the outcome. But it was appropriate, and I was anxious, to consider, at the level of principle: whether possible options relating to modified costs orders would constitute an appropriate (and a sufficient) response to accompany an extension of time for the Defendant and permission to participate through written and oral submissions at the hearing.

25. Mr Pritchard's submission was that, in principle, it would not be appropriate for any modified costs order to be made, in the absence of any prejudice to the Claimant and in all the circumstances.

26. I cannot agree. In my judgment, Mr Bimmler's "caveat" is proper in principle and appropriate in the circumstances of this case. I explained at the hearing that I would grant the Defendant the extension of time and permission to participate in the hearing, but that in doing so I accepted, in principle, the appropriateness of reflecting the Defendant's defaults through a modified costs order. I explained that I would revisit at the end of the case, against that position of principle, the question of what costs order – in light of the Court's judgment – was appropriate and proportionate. The defaults were in not responding to a Letter before Claim, not engaging with an AOS at the permission stage, not engaging despite having been encouraged by letter from the Court to do so, not filing DGR and evidence within the prescribed timeframe in the CPR and a Court Order, and not making an application for an extension of time until a substantial period after the deadline had passed. These were all regrettable. The principles of "procedural rigour" emphasised by the Courts, explained in the Administrative Court Judicial Review Guide 2022 at §2, apply even-handedly to all parties in judicial review proceedings. The Court will always be assisted, in the interests of justice and in the public interest, in having full and balanced submissions and materials from all parties, which it is able to consider. That is a "given". But it is not a "late entry pass". Nor is the lack of identifiable "prejudice". Furthermore, the wider interests of justice and the public interest require that the right 'message' is given, understood and reinforced. I am quite sure, in the present case, that the materials belatedly disclosed by the Defendant – many of which I have already described in this judgment – did and do need to be before the Court. I am satisfied that the Court should read and hear the Secretary of State's response to this claim before making any decision. That is so, notwithstanding that no remedy in this case would involve this Court directing the Claimant's ROTL (the remedy would be restricted to quashing and remitting). That means there is no risk of the public being somehow endangered by the Court having a visibility gap. I was and remain satisfied that it will, in principle, be appropriate for the Court to be looking for an appropriate and proportionate modified costs order so as to mark the Court's disapproval of the litany of Defendant defaults.

DELAY

27. Mr Pritchard for the Defendant submits that this claim should be dismissed on grounds of delay. He accepts that there is a body of case law which narrows the potential delay objections at the substantive hearing, where permission for judicial review had been granted, to pose this question alone: whether it is appropriate to refuse a remedy (relief) on grounds of "undue delay" because relief would be "likely to cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration" (section 31(6)(b) of the Senior Courts Act 1981). Mr Pritchard accepts that, if that is the question, his delay objection cannot prevail. He accepts that the question of delay could have been raised by the Defendant at the permission stage, and was not. His answer is that there is a "jurisdictional" point because, if he is right, the claim was "filed" later than "three months after the grounds to make the claim first arose" in breach of CPR 54.5(1)(b), and there has never been an extension of time. He emphasises that section 31(6) is, by section 31(7), "without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for

judicial review may be made", and that CPR 54.5(1)(b) is such a "rule". He says that the body of case law which narrows the delay issue at a substantive hearing is distinguishable because it is concerned only with (i) section 31(6)(b) and/or (ii) a CPR54.5 question of promptness within three months (rather than filing the claim outside three months) and/or (iii) a situation where an extension of time has been granted by the permission-stage judge. Turning to the facts of the present case, Mr Pritchard submits as follows. There was a breach of the "three months" provision in CPR54.5(1)(b). The Claimant's solicitors sent an email to the Court on 7 October 2021 (within three months) attaching the judicial review bundle and seeking to commence judicial review proceedings. But that was no more than "unilateral" action constituting an "attempt" to "deliver" the papers to the Court (so as to constitute the "filing" of the claim: CPR 2.3(1)). "Unilateral" action is insufficient: see Croke v Secretary of State for Communities and Local Government [2016] EWHC 2484 (Admin) [2017] PTSR 116 §§23-24. An "attempt" is insufficient. An extension of time is necessary. None has ever been granted. Moreover, an extension of time would be inappropriate. The appropriate "criteria" for such an extension are those identified in Riverside Truck Rental Ltd v Lancashire County Council [2020] EWHC 1018 (TCC) at §101: whether there was a "reasonable objective excuse" for the claim having been commenced out of time; the presence or absence of prejudice to the defendant and third parties; and whether the public interest requires that the claim be allowed to proceed. An extension of time is inappropriate having regard to those principles; or alternatively applying the approach described in the Administrative Court Judicial Review Guide 2022 at §6.4.4.2 and fn.66. The inaptness of an extension of time is because: there was no excuse for the default; the consequences of the Claimant's solicitors' actions were foreseeable; and the length of time between 7 and 27 October 2021 (when the claim was finally properly issued) is a significant one. That is the delay objection.

28. The documents before the Court tell the following story. (1) The grounds for judicial review in the Core Bundle are dated 6 October 2021. The judicial review Claim Form (Form N461), which precedes them in the Bundle, has a box to be filled out by the Administrative Court to record: "date filed". But that box has been left blank. The Form does bear the court stamp and seal, with a date 29 October 2021. (2) There is an email from the Claimant's solicitors dated 7 October 2021 timed at 14:45 to "Administrative Court office Immediates". It is supported by a printout record of "sent items". The email is headed "judicial review claim: new issue". It states "please find attached an N461 for a new claim for … judicial review" and continues "please take the issue fee £154 from our PBA account…". The printed version of the email shows that there was an attachment to that email: a "pdf" file entitled "Dobson bundle". (3) A follow-up email, tagged to the same email of 7 October 2021, and itself supported by a printout record of sent items, was sent by the solicitors on 11 October 2021. It states: "this claim was issued on 7.10.21. However we did not have a response. Please advise". That email continues by repeating the same text as the previous email. The email print out identifies as an attachment a "pdf" bundle with the same file name as before. (4) A computerised record of items sent by "recorded delivery" contains an entry dated 13 October 2021 with a reference number for an item sent by recorded delivery to the Administrative Court. (5) A further email dated 27 October 2021, again supported by a printout record of sent items, repeats the same contents of the two earlier emails and again shows the "Dobson bundle" as a "pdf" was an attachment. The witness statement of the Claimant's solicitor Mr Bellusci adds this, by way of explanation: (a) a hardcopy bundle was sent by recorded delivery on 13 October 2021 because a 'bounceback' email had

been received from the Court on 12 October 2021 recording that the email of 11 October 2021 had "not been received" due to the "size of the attachment"; (b) the email of 27 October 2021 was sent because no sealed Claim Form had been issued by the Court even after the hardcopy bundle was sent on 13 October 2021.

29. Mr Pritchard accepts that there is no basis on which he can invite this Court to go behind either the contemporaneous documentary evidence or the witness evidence of Mr Bellusci. He does not submit that a similar 'bounceback' email was received in relation to the 7 October 2021 email as was received in relation to the 11 October 2021 email. He does not submit that the Claimant's solicitors were failing to send emails to the correct email address for the Court; nor that they failed to use the correct postal address for the Court when sending the hardcopy bundle. Mr Pritchard does submit that the appropriate inference of fact is that the pdf Bundle emailed on 7 October 2021 was also too large in size to be received by the court system, just like the bundle sent on 11 October 2021. He says the Bundle emailed on 27 October 2021 – whatever its size – can be inferred to have been received by the Court, which explains the stamp date on the claim of 29 October 2020. Mr Pritchard submits that the correct inference of fact is that the claim form was never "delivered", by being actually "received" by the Court until the email of 27 October 2021. Everything else was by way of "unilateral attempt".

30. I cannot accept the Defendant's delay objection. That is so, even if it were correct that the question is open to the Defendant at a substantive hearing, even if it were correct that the issue is a "jurisdictional" question which the Defendant is entitled to raise and the Court needs to decide, even if an extension of time is now needed, and even if the test for an extension is in Riverside §101 (reasonable objective excuse etc). The delay point would still, in my judgment, be a bad one. There is a clear, evidenced picture of action on the part of the Claimant's solicitor, within the three month period. That was followed up, properly and persistently. The single email bounceback response from the Court that was received led to prompt further action. The Claimant's solicitors used a correct email address for the Court and a correct postal address. Whether or not the bundle only finally "got through" to the Court by the email of 27 October 2021, none of that viewed fairly – including when considered from the perspective of reasonable objective excusability – involved an identifiable default of the Claimant solicitor. Nor is the period in question (at its outer limit the 20 days to 27 October 2021) substantial. There was no conceivable prejudice to the Defendant. The prospect of the claim for judicial review had been clearly ventilated in the Letter Before Claim on 7 September 2021. The Defendant had not responded to that letter. Any inactivity or delay on the part of the Claimant's representatives pales into insignificance viewed alongside the repeated defaults of the Defendant, who stands in a large default greenhouse throwing a small delay stone. If the impugned decision is lawful, the claim will fail on its legal merits. I cannot accept – in a context touching on individual liberty – that if this claim would or may succeed on its legal merits it should be dismissed on these delay grounds. This is a substantive hearing where all arguments and evidence are before the Court, and where there was rightly no suggestion of hardship, prejudice or detriment to good administration. In my judgment, for the delay argument to prevail to avoid the case being decided on its legal merits would be contrary to the public interest, good administration and the interests of justice. If an extension of time were needed, I would grant it without hesitation. That is, of itself, the end of the delay objection. But I will deal with the other key topics on which Mr Pritchard relied.

31. I do not accept that the test in Riverside at §101 was providing a set of "criteria" for an "extension of time" in every judicial review case. In that case, HHJ Eyre QC (as he then was) made very clear, under a heading at §96 that he was discussing the approach to be taken when considering an application to extend time for a judicial review challenge "to a procurement decision". He made very clear at §98 that an application for an extension of time in such a case was to be considered in the light of the principles governing the extension of time for judicial review claims generally "albeit doing so in the context of a procurement process where there is a particular public interest in the speedy resolution of disputes". He made clear at §101 itself that he was describing potentially relevant considerations "for current purposes", reflecting the contours of the facts of the individual case before him as well as the context of the procurement process, and having prefaced his description at §100 by saying he was going to set out considerations of potential relevance "in the current case". That was after saying that "a wide range of factors are potentially relevant to the question of whether there should be an extension of time in any particular judicial review claim". He had also recognised (see §100), albeit not as a narrow criterion, the observation of Woolf LJ in R (Croydon LBC) v Commissioner of Local Administration [1989] 1 All ER 1033 (at 1046g) that: although it is always essential to scrutinise with care any delay in making a claim for judicial review, the delay rules are "not intended to be applied in a technical manner" which would "deprive a litigant who has behaved sensibly and reasonably to relief to which they would otherwise be entitled", "at least as long as prejudice has not been caused". In my judgment, the Administrative Court Judicial Review Guide 2022 at §6.4.4.2 together with fn.66 stands as a helpful guide: "In considering whether to grant an extension of time the Court will consider all the circumstances, including whether an adequate explanation has been given for the delay and whether an extension will cause substantial hardship or prejudice to the defendant or any other party or be detrimental to good administration" (§6.4.4.2); "See Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5 at §38: "Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest"" (fn.66).

32. Nor do I accept the applicability – to the question whether a judicial review claim has been "filed" – of §§23-24 of the Croke case. As I read those passages, and the way in which the Court was distinguishing the earlier authority of Van Aken v Camden LBC [2002] EWCA Civ 1724 [2003] 1 WLR 684, there was a difference between the language of "filing" (Van Aken) and the phrase "the court issues a claim form" (Croke); and it was by reference to the latter that "making an application" was "not a unilateral act". The Court went on to find, in any event, that there was not even any relevant "unilateral act" since the claimant had not left the claim form at the right place by the right date. Croke does not, in my judgment, provide an answer to the phrase to which Mr Pritchard's arguments were directed: the "claim form must be filed" in CPR 54.5(1). But nor in any event do I accept that the email of 7 October 2021 with its attached Bundle – an email sent within the "3 months" in CPR 54.5(1) – constituted a failed, attempted, unilateral act. I do not consider it appropriate or justifiable to draw the adverse inference that this email was not "received by the Court" into the Court's email inbox. There is no evidence that a 'bounceback' email was received on that occasion and no basis to infer that one was. The Defendant accepts that the later email of 27

October 2021, with its own attached Bundle, was "received by the Court" into its email inbox. Nor for that matter would I accept that the hardcopy Bundle sent by recorded delivery on 13 October 2021 constituted a failed, attempted, unilateral act.

33. Nor, in any event, was I persuaded by Mr Pritchard that the delay point is one which the Defendant is entitled to take at a substantive hearing, at least in the circumstances of the present case; still less that it is a "jurisdictional" point which the Court is required to consider. In my judgment, it was for the Defendant to make this good. It failed to do so. None of the relevant case law was cited at the hearing. I am aware of the passage in the White Book 2022 at §54.5.1, citing R v Dairy Produce Quota Tribunal for England and Wales Ex p Caswell [1990] 2 AC 738, R v Criminal Injuries Compensation Board Ex p A [1999] 2 AC 330 and R (Lichfield Securities Ltd) v Lichfield DC [2001] EWCA Civ 304. There are a number of different 'moving parts' which would inform the analysis. There is the distinction between the permission stage and the substantive stage. There is the distinction between the statutory provision and the rule. There is the distinction between promptness within three months and filing the claim outside three months. There is the distinction between a permission-stage decision which expressly considers delay and one which does not. There is the distinction between a permission-stage decision which expressly grants any necessary extension of time and one which does not. It would be quite wrong in my judgment, in the absence of proper argument which identifies and addresses the relevant line of authorities, for the Defendant to prevail on this entitlement, or this "jurisdictional" point. It is sufficient to make three observations. First, that the statutory provision and the relevant rule have always, so far as I have understood it, been interpreted together with a congruent meaning. Second, that the clear policy of the law – as I see it – that delay points, beyond those within section 31(6)(b) of the 1981 Act, should in principle be raised by a Defendant or Interested Party at the permission stage, would be undermined if Mr Pritchard were correct. Third, that Mr Pritchard emailed the Court after the hearing to provide a copy of Ex p A and a Northern Ireland case Turkington v Northern Ireland Retired Police Officers Association for Judicial Review [2014] NIQB 58. I did not direct any further hearing or further round of submissions. The time for arguing the point with the relevant authorities has passed. Mr Pritchard did not in any event submit that these authorities took him home. Indeed, he accepts that in Turkington there was before the Court, at the substantive hearing, an application to set aside the grant of permission for judicial review on grounds of delay (§57). That was not the position in the present case. Nor could it be, in circumstances where the Defendant's own default is what led to the lost opportunity of raising delay at the permission stage. In all the circumstances, and for all these reasons, the Defendant's delay objection fails.

DISPUTED FACTUAL QUESTIONS

34. It is common ground in the present case that the Court not only can, but should, determine the disputed questions of fact as to whether and when the Claimant received (i) the ROTL Decision Notice completed by Ms Harrison (14 June 2021) and (ii) the ROTL Risk Assessment comprising the Trilogy of Documents completed by the Manuscript Version of ADG Woodburn's Decision (8 June 2021). It was common ground that I should decide those disputed questions of fact, on the documentary evidence before the Court, and by drawing appropriate inferences. Neither party made any application to call a witness or cross-examine any individual.

35. The judicial review Court can take the need to resolve disputed facts in its stride. It is well-established that the Court on judicial review may need to make findings of fact, whether with or without oral evidence, where to do so is key to deciding whether a ground for judicial review is made out. A paradigm of such a need is when resolving a disputed fact is key to deciding whether there has been a breach of a duty of procedural fairness (or propriety). All of that was common ground in the present case but I will interpose to add some references to recent authority: R (Talpada) v SSHD [2018] EWCA Civ 841 at §2 ("If there is a dispute of fact, and it is relevant to the legal issues which arise in a claim for judicial review, the court usually proceeds on written evidence. Since the burden of proof is usually on the person who asserts a fact to be true, if that burden is not discharged, the court will proceed on the basis that the fact has not been proved"); R (Matthews) v City of York Council [2018] EWHC 2102 (Admin) at §19 (judicial review Court resolving a factual dispute as to whether an email was received); R (Mackay) v Parole Board [2019] EWHC 1178 (Admin) at §§44-45 (judicial review Court concluding that the parole board's factual assertion, regarding the claimant's conduct at a hearing, was not supported by contemporaneous notes or witness statements); R (Olabinjo) v Westminster Magistrates Court [2020] EWHC 1093 (Admin) at §4 ("where a proper inference can be drawn from the available materials, this court can make findings of fact even in proceedings for judicial review").

36. Mr Bimmler for the Claimant invites findings of fact, on the evidence, that at no stage prior to the decision of DG Bailey on 8 July 2021 was the Claimant provided with (i) the ROTL Decision Notice or (ii) the ROTL Risk Assessment (the Trilogy of Documents) requested by COMP1 Complaint on 17 June 2021. Mr Pritchard for the Defendant invites findings of fact, on the evidence, that (i) the ROTL Decision Notice was handed to the Claimant at the meeting with POM Smith and SPO Carroll on 16 June 2021, and (ii) the ROTL Risk Assessment (the Trilogy of Documents, including the Manuscript Version of ADG Woodburn's Decision) was provided to the Claimant through the prison's internal post system by 30 June 2021 when he made his COMP1 Complaint constituting his appeal.

37. I will set out here the key points relied on by Mr Pritchard – or in any event supportive of his position – as I saw them:

    i) First, there is the ROTL Decision Notice. This document had duly been completed by Ms Harrison by 14 June 2021, as is clear on the face of the document. The function of the ROTL Decision Notice – as a "Notice" – is that it be provided to the Claimant. It states on its face that "a copy of this form must go to the offender". There is no reason to suppose that the process did not work as intended.

    ii) The ROTL Decision Notice drawn up on 14 June 2021 will have been in the hands of POM Smith and SPO Carroll when they had their meeting with the Claimant two days later, on 16 June 2021. The purpose of the meeting was to discuss the decision, as described in Ms Fisher's Response of 14 June 2021. There is no reason why POM Smith and SPO Carroll would not simply hand the Claimant a copy. They must have known he was entitled to a copy. They must have been able to see, from the Notice itself, that "a copy of this form must go to the offender". They were being supportive of the Claimant. They wanted him to be able to promote and protect his rights. They advised him to request the "Board Assessment", as is evidenced by the Claimant's letter to the solicitors of

16 June 2021 and COMP1 of 17 June 2021. Although the Claimant's notes at the meeting recorded "haven't addressed risk factors" and "lack of insight into offending" that, as his letter of 16 June 2021 to his solicitors recorded, was what the decision "ultimately said". It accurately reflected the substance of the decision which is to be found in the second of the three bullet points in the ROTL Decision Notice. It makes sense for POM Smith and SPO Carroll to make sure they had communicated the essence orally (as to which see the Guidance at §6.76: §48 below), as well as then giving the Claimant the document.

iii) The Claimant for his part must have known that POM Smith and SPO Carroll had a document containing the reasons. If he had not been provided with the written reasons on 16 June 2021, he would have been asking for them in his COMP1 Complaint on 17 June 2021. But in any event, even if the Claimant did not receive the ROTL Decision Notice on 7 June 2021, and whether or not the Claimant knew that the "ROTL Board Assessment" which he requested on 17 June 2021 contained (as the third document in the Trilogy of Documents) the written reasons for ADG Woodburn's decision, the Manuscript Version (8 June 2021) was within the ROTL Risk Assessment. The Claimant did receive that, by 30 June 2021, in light of the following.

iv) Turning to the ROTL Risk Assessment, the Response on Friday 25 June 2021 from Ms Fisher, which the Claimant accepts he received, told the Claimant: "I will generate copies of the relevant paperwork, and call you up to OMU early next week to collect it". There is a Witness Statement from Ms Fisher who sent that Response. In it, she explains the following: the relevant papers were copied and checked; she did contact the Claimant's prison workplace asking that he come and collect them; she followed up, only to be told that the workplace had been unable to locate him to pass on the message; she advised the workplace that she would put the paperwork in the "internal post" to send to him; she sealed the documents in an envelope addressed to him and placed them in the "internal post" on her way out that evening; although there is no tracking system within the prison, to record that mail sent in that way has been received, she assumed it had been; he made no further request or complaint about it. There is no reason to suppose that the process did not work as intended.

v) The Court can and should infer that, by Wednesday 30 June 2021, when he made his Complaint, the Claimant was now in receipt of the Trilogy of Documents constituting the ROTL Risk Assessment (including the Manuscript Version of the reasons). He did not say in the Complaint (30 June 2021) that he was awaiting them. Nor did he follow-up with any further Complaint. He was very familiar with COMP1 and had used the Complaint mechanism repeatedly. He had been advised on 7 June 2021 to request the "Board Assessment". He had requested it on 17 June 2021. He had then called it "a matter of urgency". He had received a Response on 25 June 2021 saying he would be contacted to collect it "early next week". That timeframe had passed. He was now making his appeal (30 June 2021). He said nothing further. That is explicable if and because he had, by then, received the documents.

vi) It is correct that the Grounds for Judicial Review record the following: that the Claimant was "given no formal record of reasons" for the decision of ADG Woodburn; that at the meeting on 16 June 2021 he was informed "verbally" of

the decision; that the ROTL records which he had sought were "not made available to him"; and that the Claimant was neither provided with written reasons for refusal nor with copies of the underlying information that was taken into account although he had expressly asked for them. All of this, however, records what the Claimant was telling his solicitors. The accompanying "Statement of Truth" is the second-hand, hearsay statement of the Claimant's solicitor. In the same way, there were the same factual assertions recorded earlier, in the Letter Before Claim dated 7 September 2021. Again, that records what the Claimant was telling his solicitors. It is not direct evidence of what happened. There is a reference in that Letter Before Claim to the Claimant having written a letter to his solicitors dated 9 July 2021 saying that he had "still not received" the documents which he had requested on 17 June 2021, but that too is recording what he was reporting to the Solicitors and (unlike the letter of 16 June 2021) has not been produced in these proceedings.

vii) Finally, it is true that there is no direct evidence which records the recollection of any individual as having actually physically handing the ROTL Decision Notice, or the ROTL Risk Assessment, to the Claimant. As DG Bailey says, of the ROTL Decision Notice, in her witness statement (28 July 2022): "[POM] Smith cannot now specifically recall whether this paperwork was handed to the Claimant at the meeting on 16 June [2021]". But that is unsurprising given the passage of time.

38. On the disputed factual issues, I cannot accept the submissions on behalf of the Defendant. I find, as facts, that the Claimant was at no stage prior to the decision of DG Bailey on 8 July 2021 provided with (i) the ROTL Decision Notice or (ii) the Risk Assessment (the Trilogy of Documents) requested by COMP1 Complaint on 17 June 2021. I find, as a fact, that the first time that those materials were provided to the Claimant was in the Defendant's bundle in these judicial review proceedings filed with the Witness Statement of DG Bailey dated 28 July 2022, provided with the DGR on 29 July 2022. That was nearly 14 months after the decision of ADG Woodburn, notwithstanding the entitlement (to which I will return) to the written reasons at the time; and nearly 14 months after the request for the ROTL "Board Assessment" on 17 June 2021 notwithstanding an entitlement (to which I will also return) to those materials (and indeed further materials) on request. It was notwithstanding the Letter Before Claim on 7 September 2021 which stated that these documents had never been received, but which pre-action letter never received a response from the Defendant. It was notwithstanding the claim for judicial review filed and served in October 2021, the Grounds for which made clear that these documents never been received, but which also never received an AOS response from the Defendant.

39. My reasons for these findings, accepting the submissions of Mr Bimmler, are as follows. I start with the meeting on 16 June 2021 and whether written reasons were handed to the Claimant.

i) There is no evidence that, when Ms Harrison on 14 June 2021 completed the ROTL Decision Notice, she or anyone else took any step which ensured that a copy of that printed form went "to the offender". Nor is there any direct evidence that Ms Harrison (or anyone else) gave a copy of that printed form to SPO Carroll or POM Smith between 14 June 2021 and 16 June 2021.

ii) There is no direct evidence from SPO Carroll or POM Smith that they handed the Claimant the ROTL Decision Notice at the meeting on 16 June 2021. There is no direct evidence that they even held in their hands the ROTL Decision Notice at that meeting, rather than the Trilogy of Documents constituting the ROTL Risk Assessment.

iii) There is clear contemporaneous evidence, in the form of the Claimant's own handwritten notes of the meeting. In those notes the Claimant recorded, in quotations, what he understood he was being told about ADG Woodburn's reasoning. These were very careful contemporaneous notes. The Claimant started by recording in those notes with whom he had met ("Sean Carroll + Carole Smith"), the date ("16/6/21") and the time ("14:38"). He ended by recording when the meeting finished ("15:08"). He carefully wrote down the two quotations, in quotation marks: "Haven't addressed risk factors" and "Lack of insight into offending". Those quotations powerfully reflect his recording, in the meeting, what he was being told, verbally. The notes go on to refer to other points which had been made in the discussion, but there are no more quotation marks used. There is no reference in those notes to being given the ROTL Decision Notice or any document. If the Claimant had been given the document, he would not have needed a documentary record of two quotes of what was said to him verbally about the reasons. If he were being given a Notice, which stated on its face that he was entitled to be given it, there is no reason why he would not have been given that Notice at the start of the discussion. He was a person well able to handle documents (cf. the Guidance at §6.76: §48 below).

iv) The fact is that, later the same day (16 June 2021), the Claimant wrote to his solicitors (§17(6) above) to say that at the meeting "Sean [Carroll] read out the short passage by Gov Woodburn which ultimately said…", followed by the two quotations. If the Claimant had – even at the end of the meeting – been given the complete reasons, in writing, in the form of the ROTL Decision Notice, he would not have been writing to his solicitors to give two direct quotations from what had been "read out", while choosing not to quote from – indeed to say nothing about – the reasons document itself with its fuller reasoning.

v) The fact is also that, two weeks later (30 June 2021), the Claimant made his appeal in his COMP1 (§18 above) saying that: "On 16/6/21 I received news from my Offender Supervisor Carole Smith and Sean Carroll that Gov Woodburn had refused me all ROTLs"; and that "Sean explained that it was for the following two reasons", followed by the same two quotations. If the Claimant had been given the complete reasons, in writing, in the form of the ROTL Decision Notice (or even in the form of the Manuscript Version in the ROTL Risk Assessment), he would not have been making his appeal by reference to two direct quotations from what had been "read out", and choosing not to quote from – indeed to say nothing about – the reasons document itself with its fuller reasoning.

vi) The Claimant's contemporaneous notes of the meeting show that POM Smith and SPO Carroll had in mind the "Board Assessment", which (on 8 June 2021) ADG Woodburn had completed by writing the Manuscript Version of the reasons. They plainly had that in mind because the notes record that the Claimant was advised to request that documentation by issuing a COMP1. When

he did so (17 June 2021), he referred to that advice. When he wrote to his solicitors (16 June 2021), he also referred to the advice. I agree with Mr Pritchard that it would have been odd – given that POM Smith and SPO Carroll were so obviously being helpful to the Claimant so far as his entitlements and documents were concerned – to be holding in their hands at the meeting the ROTL Decision Notice and not to have handed it to the Claimant, given what it said on its face about his entitlement to be given a copy. There is another explanation which makes far more sense. Both Ms Fisher and DG Bailey have stated in their Witness Statements that "ROTL Board Assessment" was understood within the prison as meaning the completed Trilogy of Documents. The Manuscript version of the reasons complete the ROTL Risk Assessment. If at the meeting on 16 June 2021 POM Smith and SPO Carroll had the ROTL Risk Assessment, completed on 8 June 2021, they would have the Manuscript Version of the reasons. If SPO Carroll was reading from that Manuscript Version, he would not have had the visual prompt of the Claimant's entitlement ("A copy of this form must go to the offender"). That note does not appear on the Manuscript Version. Further, to hand over the Manuscript Version of the reasons would have meant detaching it from the composite Trilogy of Documents of which it was the third element. POM Smith and SPO Carroll would not have handed over the entire Trilogy of Documents, since they thought the Claimant had to request this by COMP1 from DG Bailey, as they advised.

vii) The explanation which makes most sense of all of the contemporaneous documents, and of all of the known actions which took place at the time and subsequently, is that the ROTL Decision Notice was not handed to the Claimant at the meeting.

viii) The Claimant's letter to his solicitors (16 June 2021) is revealing for another reason. It records that SPO Carroll told the Claimant that he should raise a COMP1 Complaint "requesting a copy of the ROTL Board Assessment", adding that SPO Carroll had "said I should do this as I am not entitled to one ordinarily". That indicates that SPO Carroll thought that he was advising the Claimant to request documentation to which, ordinarily, the Claimant was "not entitled". In fact (as will be seen below from the Policy), the Claimant was "entitled" to request that documentation, as well as other documents considered in the decision of ADG Woodburn. This suggests that POM Smith and SPO Carroll did not in fact have an accurate picture as to the Claimant's entitlement to documents. In those circumstances, it cannot be presumed that they understood his entitlement to be provided with the written reasons.

40. I turn to whether the ROTL Risk Assessment (the Trilogy of Documents, including the Manuscript Version of ADG Woodburn's Decision) was provided to the Claimant through the prison's internal post system by 30 June 2021 when the Claimant made his COMP1 Complaint constituting his appeal.

i) There is no direct evidence that that was actually provided to the Claimant. I accept the Witness Statement evidence of Ms Fisher as an accurate and reliable description of what she did. But Ms Fisher cannot say that the Claimant actually received the documents. No other witness gives evidence of them being handed to the Claimant. I accept that Ms Fisher prepared the materials in the "early part" of the week of Monday 28 June 2021, having said in her Response on Friday 25

June 2021 that this was what she would do. I accept that she took steps for wing staff to alert the Claimant to come and collect the documents which steps were not in the event successful. There is no suggestion that this was attributable to the Claimant. I accept that Ms Fisher put the materials out for delivery through the "internal post" and that she assumed that this is what had happened. But I do not accept, on the evidence, that it did happen.

ii) I do not accept that when he wrote his "appeal" Complaint on Wednesday 30 June 2021 the Claimant had the ROTL Risk Assessment Trilogy of Documents. It would make very little (or no) sense for the Claimant to make the Complaint, in the terms that he wrote it (§18 above), if he was now holding in his hands that further documentation available.

iii) I accept that there was a letter written on 9 July 2021 by the Claimant to his solicitors, stating that the documents had not been received. I also accept that as at the time of the Letter Before Claim on 7 September 2021 the Claimant had not told the solicitors that the documents had been received. I accept that, had the Claimant's solicitors believed that further documents had been received, the solicitors could not have maintained the position advanced on his behalf – since to do so would have misled the Court – and the further documents would have been included alongside the Claimant's other documentation, in the judicial review Bundle.

iv) The letter of 9 July 2021 is significant. It is not before the Court – in circumstances where Mr Bimmler told me that privilege had not been waived in respect of that letter – but I can and do rely on the solicitors' integrity in describing an actual letter with an actual date and that it made this factual point. That has been relied on in proceedings before the High Court, in circumstances where solicitors are bound by ethical duties not to mislead the Court. This is where it is significant that Judicial Review Grounds were accompanied by a solicitor's Statement of Truth as to their factual content.

v) I accept that the letter of 9 July 2021 constitutes what the Claimant was telling his solicitors. That was either true or untrue. I can examine those alternatives. If it was untrue, it would mean that the Claimant had in his hands relevant documents that he did not use in support of his appeal, when he could have done. It would also mean that the Claimant – so meticulous in recording the timing and substance of quotes of what he was told verbally at the meeting on 16 June 2021, and making persistent and repeated documented communications by way of the series of Complaints – was choosing to hold back key materials, from his own solicitors, on which he could have relied. Not only that, but he would have been doing this at the same time as providing his solicitors with the other documentation, all of which went into the judicial review Bundle. This could be explicable only if the Claimant was painstakingly setting up a future, procedural judicial review challenge – so as to put his word against that of others – where this was perceived by him as more likely to progress his ROTL than it would be to rely on those (helpful) documents in the appeal. Having been told that he was entitled to the "Board Assessment", and having received it, he would now skilfully have chosen to make no mention of the contents of two documented, detailed and positive assessments which he had now seen. He would also have chosen to make no mention of the reasons in the Manuscript Version, which he

had also now seen as the third document in the Trilogy. I have considered this. I have borne in mind what Michele Unwin – and others – have said about "manipulation". But I find this alternative nevertheless to be inherently highly unlikely. Particularly on the part of a person whose contemporaneously documented COMP1 Complaints, and Appeal, reflected an urgent wish to progress ROTL, and whose contemporaneous communications with his solicitors clearly involved the provision of information and documentation so that they could assist. Further, it is not as though the Claimant was aware of his procedural rights. These included express entitlements to documentation under the Policy (to which I will come). Had he been aware of his procedural entitlements, he would have been requesting a wider set of documents than the ROTL "Board Assessment" which SPO Carroll had advised him to request. The Claimant did the two things he was told he could do: request the ROTL Board Assessment; and appeal.

vi) The fact that the Claimant had communicated to his solicitors on 9 July 2021 the non-receipt of the documents, in circumstances where the decision refusing his appeal was made on 8 July 2021, explains why he did not thereafter pursue the documents through further COMP1 Complaints. He entrusted matters to his solicitors, whose next step was the Letter Before Claim. It is true that the Claimant could have followed up, asking for the documents, on or after Wednesday 30 June 2021 and especially in the week of Monday 3 July 2021. He could have done so. It would have made sense to do so. But it is explicable that he did not do so. And what, by comparison, makes far less sense is that he had received the documents but pursued his appeal without using them and sought the help of his solicitors without using them.

41. There are three endnotes to this assessment of the factual position. First, it is not said by or on behalf of the Defendant that the documents were supplied at some other intermediate time between 9 July 2021 and the Defendant's filing of DGR and evidence on 29 July 2022. Secondly, the Defendant's argument that more direct evidence of the provision of documents to the Claimant in June 2021 cannot be expected after such a lapse of time rings hollow, given the Defendant's wholesale failure to respond to the Letter Before Claim on 7 September 2021, when the factual points were clearly made and when memories would have been so much fresher than they were in July 2022. Thirdly, it is not said that there is some substantial reason why the prison could not have a record-keeping mechanism to be able to show that documents are provided to a prisoner; especially when they are of such significance as these were.

PROCEDURAL UNFAIRNESS

42. The two principal issues regarding procedural fairness were formulated as follows in the parties' Agreed Issues: (1) Was the process by which the Defendant determined the ROTL application unlawful by reason of a failure to provide the Claimant with a written record of the reasons for ADG Woodburn's decision? (2) Was the process by which the Defendant determined the ROTL application unlawful by reason of a failure to provide the Claimant with specific documents? My answer to both questions is "yes". In my judgment, DG Bailey's Impugned Decision (8 July 2021) was vitiated by a material procedural unfairness, because the Claimant had (as I have found on the facts) not been provided with (i) the ROTL Decision Notice (completed by Ms Fisher on 14 June 2021) or (ii) the ROTL Risk Assessment (collated by Ms Fisher in the week commencing 28

June 2021). I will explain why I have arrived at that conclusion, and why the appropriate remedy is to quash the impugned decision.

43. Mr Pritchard invited my attention to R (X) v Secretary of State for the Home Department [2005] EWHC 1616 (Admin) at §31. That was another judicial review case about ROTL. As the Court explained, the procedure at that time involved (i) a risk assessment, (ii) a recommendation by the ROTL Board, (iii) a decision by the Prison Governor (iv) the provision of reasons and (v) the right to reapply immediately for ROTL indicating why the prisoner was dissatisfied with the reasons. The complaint was that the claimant "was not told the allegations against her and given a chance to respond before ROTL was first refused" (§31). That challenge failed. The Court observed that, although the claimant "was initially told little about the reasons for refusal, there was within quite a short time sufficient information forthcoming to enable her to make the appropriate representations" (§31). This case stands as a contrast. Here, as I will explain below, there are important procedural rights and duties prescribed by Policy. In the context of his right of appeal, the Claimant was not "within quite a short time" given the written reasons, or the ROTL Risk Assessment, to enable him to make "appropriate representations".

Procedural impropriety

44. There are good reasons why public law has conventionally approached issues of "procedural fairness" by speaking instead of "procedural impropriety", and sometimes "due process". Whatever the expression or label, what is needed is a concept which recognises that a public authority's legal duties to act in a procedurally fair and proper way may be sourced in a governing legislative, regulatory or policy framework, and not simply in common law duties of procedural fairness. In the present case, as I have indicated and will now explain, important procedural protections are – for good and articulated reasons – expressly addressed in the Policy. Moreover, as Mr Bimmler rightly submits, the Defendant is required by a basic public law duty to act in accordance with the published policy unless good reason has been given for the departure; and no such reasons have been put forward.

Process and the Policy

45. The Policy says this at §§2.4 and 2.5:

> ***Procedural justice***
>
> ***2.4 When people believe the process of applying rules (how a decision is made rather than what decision is made, and how they are treated during the process) is fair, it influences their views and behaviour – this is called 'procedural justice'. There is very robust evidence, from all around the world, showing that people are much more likely to respect and comply with rules and authority willingly when they believe the way the rules are applied is fair and just. This is true even if the outcomes of decisions are not in their favour or are inconvenient for them.***
>
> ***2.5 Research from HMPPS, and from prison services around the world, shows that when prisoners perceive authority to be used in a more procedurally just way, this is associated with significantly less misconduct and violence, better psychological health, lower rates of self-harm and attempted suicide, and lower rates of reoffending after release.***

46. The Policy says this, in the Chapter on "Requirements" (at §4.3 and §4.16):

> ***Governors must ensure that all staff are aware of and act in accordance with the ROTL principles and procedures set out in this policy framework.***
>
> ***Governors must ensure that the procedure set out in the ROTL procedure table below is followed appropriately in each case.***

47. The "ROTL Procedure Table" (at §4.19) "sets out the procedure to be followed stage by stage, the actions required, who is involved and which forms/information should be used". Stage 7 ("Notification of decision to the offender") requires this (of the "ROTL decision-maker"):

> ***The offender must be informed of the final decision through the ROTL-DEC form… The governor must ensure that offenders are given full written reasons for a refusal.***

The "ROTL-DEC form" is the ROTL Decision Notice.

48. In chapter 6 ("Guidance") the Policy says this about Stage 7 (§§6.75-6.77) (ACCT is Assessment, Care in Custody & Teamwork):

> ***Stage 7 - Notification of the decision to the offender.***
>
> ***6.75. The offender must be informed of the final decision through the ROTL-DEC form. This form should also be used to inform the offender of any significant or unexpected delay in processing the application due to the need to gather further key information. Particular care should be taken in delivering adverse news to any offender with an open ACCT.***
>
> ***6.76. Where offenders find it difficult to cope with written material, the governor must ensure that the decision is explained and any offender who is unable to read or write English must be given help to ensure that they are not disadvantaged.***
>
> ***6.77. The four principles of procedural justice are critical when communicating decisions, especially unwelcome ones. This can significantly affect people's acceptance of decisions, and respect and trust in prison staff in future, even when they do not like or agree with the outcome of the decision. The form needs to include very clear reasons about what information was considered, on what basis ROTL was refused and why (for what purpose) this rule/decision was made. The tone and language in the letter can make all the difference to someone's reaction to it. The offender affected by the decision needs to be informed who (specifically) to talk to about the decision, and what their options are from this point on.***

49. Chapter 6 continues with this, as to "Disclosure" (§6.78):

> ***Disclosure***
>
> ***6.78. The general rule is that all information that has been taken into account in reaching the ROTL decision must be disclosed to the prisoner on request, except where the decision maker determines that non-disclosure is necessary:***
>
> - ***in the interests of national security;***
> - ***for the prevention of crime or disorder, including information relevant to prison security; or***
> - ***in the interests of the health and welfare of the prisoner or anyone else.***
>
> ***In such cases those providing the information must mark it "not for disclosure to the offender" and submit alongside this an edited or, summarised version which may be disclosed to the offender, who must be advised that information has been taken into account but is being withheld.***

50. As can be seen, and as is relevant to this case, the Policy is very clear about two key things. First, the requirement, and its importance, of ensuring that the written reasons are provided. Second, the requirement, and its importance, of ensuring that the information that has been taken into account in reaching the ROTL decision must be disclosed to the prisoner on request. There is no question of any of the §6.78 derogations (or associated markings) applying in the present case.

Analysis

51. At the meeting with SPO Carroll and POM Smith (16.6.21) the Claimant was given a verbal description of the reasons for ADG Woodburn's decision (8.6.21), which description he recorded in quotation marks in his contemporaneous notes of that meeting (§16 above). The Claimant was, moreover, aware of the fact that POM Smith was supporting ROTL and that the ROTL Board had recommended ROTL. But he was not provided with ADG Woodburn's written reasons, nor with the ROTL Risk Assessment. These were his procedural entitlements, denied. They were the Defendant's procedural duties, breached. This was procedurally unfair. It was a procedural impropriety. It constitutes a clear vitiating flaw in public law.

52. And it matters. I cannot accept that what the Claimant was told, and knew, served to place him in substance in materially the same position as he would have been in, had he instead been provided with ADG Woodburn's written reasons and the ROTL Risk Assessment. In my judgment, the Court should be slow to conclude that procedural propriety – contextually applicable standards of procedural justice – does not 'really' need the disclosure to the prisoner of the written reasons; or does not 'really' need disclosure of the requested documents which were taken into account; or that it does not 'really' matter when these standards are breached. As has been seen, the Policy very clearly identifies duties to provide those materials, procedural entitlements on the part of the affected individual offender, and good reasons for those duties and entitlements. The virtues of providing these materials plainly include the significance, in principle, of the individual having those materials at the time of being able to make informed representations when invoking the right of appeal. The duties and entitlements matter, in achieving requisite standards of procedural propriety, due process, procedural fairness.

53. In the present case, both POM Smith and SPO Carroll at the meeting on 8 June 2021 were advising the Claimant that he should take the step of requesting the ROTL "Board Assessment". They would have been aware of the Trilogy of Documents which comprised that ROTL Risk Assessment. They had seen the documents. They had written two of those documents. They knew that the Claimant was aware of their support, as expressed in those two documents. But they thought he should have the documents themselves. No doubt that was so he could see the detail, make points arising from them, and discuss them with his solicitors. It is clear, moreover, that POM Smith and SPO Carroll had in mind the exercise by the Claimant of his right of appeal. The letter (16.6.21) from the Claimant to his solicitors records that:

> ***Sean [Carroll] … explained that I could appeal this decision and urged me to do so. He said I should involve my solicitor …***

In my judgment, it is highly relevant that those who were familiar with the documents were not saying 'you don't need them' or 'you have all you need'. They were urging

the Claimant to request the documents, so he would be able to pursue his appeal with the advantage of having those documents.

54. I readily accept that at common law there is a requirement of 'materiality' which features in the operation of grounds for judicial review, including procedural unfairness (or procedural impropriety). Judicial review is not concerned with a set of technical ladders for claimants and technical snakes for defendant public authorities. It is concerned with principled standards which matter. Judicial review is sometimes described as a 'discretionary' remedy. The judicial review Court is not attracted to arid technical debate. It is astute to ask questions about utility – alongside questions about futility – so that a claim obviously lacking any substance or impact can properly be denied the remedies of judicial review. The common law's carefully circumscribed materiality test is that of "inevitability". In examining the suggested public law error, it asks whether the Court can be satisfied that the public authority's decision would "inevitably" have been the same, or would "inevitably" now be the same if revisited.

55. As to the common law, Spencer J really said it all in R (Grinham) v Parole Board [2020] EWHC 2140 (Admin) at §§52-53:

> ***52. It is also clear that, once procedural unfairness has been established, it is enough to show that but for that procedural fairness the outcome might have been different. It is not necessary that the outcome would necessarily have been different: see R (Clegg) v Secretary of State for Trade and Industry [2002] EWCA Civ 519 at §30. In R (Gopikrishna) Office of the Independent Adjudicator for Higher Education [2015] EWHC 207 (Admin) at §209 it was held that "it is not necessary for the claimant to show that the decision would inevitably have been different." Quoting from the judgment of Elias J in R v Chelsea College of Art and Design, ex p Nash [2000] ELR 686, where a breach of the principles of fairness was found: "…It has been urged on me that even if there were defects in the procedure they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and only in such cases, where one can say that the breach could have made no difference…"***
>
> ***53. It is recognised in the authorities that the court has to caution itself against the suggestion that no prejudice has been caused to a claimant because the flawed decision would inevitably have been the same. For example, in R v Ealing Magistrates Court, ex p Fanneran (1996) 160 JP 409, a case concerning the Dangerous Dogs Act 1991, Staughton LJ said: "The notion that when the rules of natural justice have not been observed one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold a conviction if natural justice had not been done…. ". As it is put in De Smith's Judicial Review (8th Ed) at 8-070: "Natural justice is not always or entirely about the fact or substance of fairness. It … also has something to do with the appearance of fairness. In the hallowed phrase, justice must not only be done, it must also be seen to be done."***

56. This common law materiality principle, like some other common law principles of judicial review, has a statutory overlay, in section 31 of the Senior Courts Act 1981. The formulation in section 31(2A) is the "highly likely: not substantially different" (HL:NSD) test. There is a constitutional dimension to the way in which that overlay is to be handled, where the common law has identified a principled approach as being reflective of what the rule of law requires. And one particular problem with a 'materiality' objection in the present case – at common law or in the HL:NSD test – is that the Policy embeds received procedural entitlement as an express value of itself (procedural justice): see Policy §§2.4 and 6.77 (§48 above). In that sense, delivery of the entitlement can be said to be a key part of a prescribed "outcome", which would

necessarily have been "different". For the purposes of the present case, I can put all of that to one side. I will take materiality and HL:NSD at their most generous to the Defendant. However, having done so, I am satisfied that neither common law nor the statutory materiality test could justify the refusal of judicial review on the facts and in the circumstances of the present case.

57. I return to the question of non-provision of written reasons for ADG Woodburn's Decision. I accept that the contents of the Manuscript Version of the reasons of ADG Woodburn (completing the Trilogy of Documents in the ROTL Risk Assessment) was in substance the same as the ROTL Decision Notice. I accept that, in circumstances where the Claimant was advised that he could appeal by COMP1 Complaint, either version of those written reasons would have been sufficient in the present case, had they been provided so as to inform his appeal. I also accept that, if the Claimant's contemporaneous notes of the meeting on 16 June 2021 had involved him writing down in quotations – having been read out in full and at dictation speed – the entirety of the three bullet points in the written reasons of ADG Woodburn, there could have been no materiality in the 'no written reasons' aspect of the procedural unfairness ground of challenge. All of these are examples which show how 'materiality' could operate.

58. I am unable to accept Mr Pritchard's submission that, because the Claimant was able to write down the two quotes in his contemporaneous meeting notes of 16 June 2021 and replicate them in his COMP1 Complaint of 30 June 2021 seeking to appeal, this shows the Claimant had been given the relevant substance of the reasons for ADG Woodburn's decision of 8 June 2021. I accept that what SPO Carroll and POM Smith communicated verbally were intended to be the most important two points. I do not accept that they stood for ADG Woodburn's reasons. The Policy required that the reasons be recorded, as they were. The recorded reasons involved three bullet points, seen in the Manuscript Version (8.6.21) and in the ROTL Decision Notice (14.6.21). On the page, those three bullet points occupy some eight lines. I do not accept the characterisation of Mr Pritchard which, in essence, invited me to treat the first bullet point as a "preamble" and the third bullet point as an "endnote", treating the substance as communicated in the second bullet point. In my judgment, all three bullet points were what they purported to be: they are each important aspects that featured in ADG Woodburn's reasoning.

    i) ADG Woodburn's first bullet point relied, as a reason, on the fact that the Parole Board Report had stated that work should be undertaken by the Claimant in regards to the personality disorder pathway. That was a specific point about a specific type of work. It went beyond "haven't addressed risk factors" and beyond "lack of insight into offending". It was a statement of fact arising out of the past. It was being carried forward as one of the reasons being adopted. It was being held against the Claimant. If ADG Woodburn had been intending merely to record "factual history", by way of preamble, she would have set out many more similar historical factual points. The fact that the written reasons were not made available meant that DG Bailey had a point, which had clearly been identified in her reasons, to which reasons the Claimant was entitled, which he did not know was one of the reasons, and with which understandably he had not dealt. That failure, of itself, was capable of undermining his appeal. He could have addressed the point. And he could have relied on the undisclosed further documents in doing so.

ii) Even in ADG Woodburn's second bullet point, the description of "risk factors" not having been "addressed" in custody and the "lack of insight into offending" were specifically linked to something else: what was said to be an impossibility to assess current risk posed to the public and female children in particular. That was a specific point about a consequence that was said to arise, in reasons to which the Claimant was entitled, and with which his representations seeking to appeal understandably did not in terms deal. Again, that failure, of itself, was capable of undermining his appeal. Again, he could have addressed the point. And he could have relied on the undisclosed further documents in doing so.

iii) Similarly, ADG Woodburn's third bullet point did not merely restate "risk factors" being "unaddressed" and "lack of insight into offending". It said "no risk related work completed" which, alongside the lack of insight into the factors that led to the offending, was being said to make the Claimant "unsuitable for ROTL at this time". That was a third reason. It was not merely intended to restate the second bullet point. It referred specifically to the absence of any risk related work having been completed. It identified a consequence. Again, the same observations apply.

59. These points do not arise from some exercise of reading the reasons of ADG Woodburn in a legalistic or technical way, or as if they were the words of the statute. Rather the point is that these were straightforward and clear reasons. There were three paragraphs. They were all relevant. They could and should have been communicated in their full and complete terms so that all aspects could be addressed.

60. I return to the ROTL Risk Assessment. Having dealt already with the written reasons of ADG Woodburn, I focus on the other two documents in the Trilogy of Documents: POM Smith's Risk Assessment and the ROTL Board Recommendations. I cannot accept Mr Pritchard's submission that, because the Claimant knew that the ROTL Board recommendation supported ROTL in his case, and because he knew there had been support for ROTL from POM Smith, there was no material point which could have assisted him in representations in support of his appeal arising from his having the Risk Assessment Reports written by POM Smith (updated on 1 June 2021) or the ROTL Board Recommendation written by SPO Carroll (21 May 2021). I have already made the point that POM Smith and SPO Carroll themselves thought it was significant and important that the Claimant and his solicitors should have, and that he should therefore request, those documents. They did not think knowledge of the fact of their support was all that the Claimant should need.

i) Had the Claimant received POM Smith's Risk assessment he would have had access to a 6-page reasoned document which was up-to-date, and which specifically addressed positive indicators for ROTL compliance as well as giving a reasoned recommendation. That document explained, in an earlier passage, that the Claimant had "fully engaged with the EBM process". It explained that the Claimant had not "undertaken any offence focused work" nor the ETS nor Kaizen programme, in each case being found unsuitable in circumstances where he maintained his innocence. POM Smith's Risk Assessment recorded that the Claimant had met sentence planning objectives in relation to obtaining and maintaining employment within the prison environment. It recorded that he had met sentence planning objectives in relation to completion of vocational courses. It also showed that the recommendation of

POM Smith had expressly been arrived at having recognised, in terms, that the Claimant had not undertaken any offence focused work, and that the risk management in his case depended heavily on the imposition and management of external controls, with monitoring of his response being absolutely imperative.

ii) Had the Claimant received the ROTL Board Recommendations he would have had access to the various points there identified, on which he could have relied. This included the recognition of the value and appropriateness of "a robust process of testing". It included the fact that the ROTL Board addressed "the conditions set by the COM" – ie. COM Heald – and expressed the view that these "are robust and sufficient to manage the risk posed". This was linked to the specific support of ROTL by COM Heald on 25 March 2021.

61. I can test the position by reference to the points which had been of concern to ADG Woodburn. I can also test the position by reference to the points which were, in the event, of particular concern to DG Bailey as identified in her reasoned decision of 8 July 2021. The points to which I have drawn attention would, had the documents been available to the Claimant, have enabled an opportunity for him to make more informed representations about topics such as the "risk management plan … in the community" with its "external controls", and about the non-completion of relevant "offence focussed interventions", to counter ADG Woodburn's concerns and seek (prospectively) to allay DG Bailey's concerns. It is no answer to say that DG Bailey had the documents, so she could see what they said, and so informed representations from the Claimant could not assist. If that were an answer, procedural propriety would never need the disclosure of such documents. Informed representations are a way of giving emphasis, bringing to life, joining the dots. They are also a way in which the prisoner can show – in their own words – their own understanding, which may again bring a point to life; and the absence of which may count against them. POM Smith had put forward a reasoned basis on which ROTL was considered suitable notwithstanding the concerns. The conditions had been designed by COM Heald who had also expressed support. Those conditions had been characterised by the ROTL Board as robust and sufficient to manage the risk. It was not just the fact of support. It was the reasoning by which the support was expressed, and the topics with which it dealt. That was what was the Claimant was denied.

62. The Claimant would also have had the reasoned, documented basis to be able to make and support the following powerful point. When the Transfer Decision was made (3.12.19) (§6 above) it was on the express basis (see Transfer Decision at [9c]) of demonstrating the "ability to comply with ROTL conditions", in a context (see Transfer Decision at [8]) where it would be "for your offender manager or supervisor to identify relevant interventions for you as part of your sentence plan in order to address your risk of harm and risk of re-offending". The "offender manager or supervisor" were COM Heald and POM Smith (§13 above). Their considered position – which underpinned the ROTL Board Recommendations – was that there was no relevant intervention which was appropriate for the Claimant as a prior step to ROTL. I return to this and other points (§§79, 81 below).

63. None of this is to say what the decision of DG Bailey would have been had the Claimant had access to the written reasons and the documents, and had he taken the opportunity to make informed representations arising from their contents. It would be an exercise

in speculation, stepping into the shoes of the primary decision-maker, for me to seek to assess what the outcome would have been. It is sufficient to say that I can neither assess a negative outcome as inevitable nor as highly likely.

Anxious scrutiny and procedural propriety

64. I have arrived at these conclusions on the issue of procedural unfairness without any cross-reference to the principle of "anxious scrutiny" (see §§67-70 below). But in my judgment that principle, if anything, serves to reinforce the concerns which in my judgment in any event arise as to the procedural fairness of the decision of DG Bailey in light of the defaults which had preceded it. It is sufficient that I record that I do not think it is accident or coincidence that, at the same time that "anxious scrutiny" was breaking through in reasonableness-review in asylum cases (see R v SSHD, ex p Bugdaycay [1987] AC 514, 531E-G, 537H), heightened standards of procedural propriety were breaking through in that very same asylum context (see R v SSHD, ex p Thirukumar [1989] Imm AR 402, 414). Since my conclusion on procedural propriety is based on an entirely conventional, contextual approach, I need say no more.

Blameless unfairness

65. Before leaving the question of procedural unfairness, it is appropriate to make clear that the Court's finding does not entail any question of blame. It is very clear that POM Smith and SPO Carroll on 16 June 2021 were conscientiously assisting the Claimant including in relation to his rights to access documentation, and that the documents which they advised him to request would have included the written reasons. It is also clear that when Ms Harrison drew up the ROTL Notice of Refusal (14 June 2021) it was with a view to it being provided to the Claimant. When Ms Fisher responded to the Claimant on 14 June 2021 and 25 June 2021, she did so in a way which was intended to promote his being in an informed position including as to his rights. And then again, the week following Friday 25 June 2021, Ms Fisher conscientiously took steps to collate materials so that they could be made available to the Claimant. Ms Fisher did not know that these had not been received. But I have found that, in the event, the documents were not provided to the Claimant. Applying objective standards of procedural fairness, that rendered the Impugned Decision of DG Bailey procedurally unfair. It would not have been clearly identifiable by DG Bailey herself that the Claimant had, or must have been, deprived of the written reasons, still less that he had requested written materials which had not been provided to him.

Postscript

66. This case raises a question-mark as to whether and how prisoners, in respect of whom ROTL is being considered, are made aware of their procedural entitlements including (a) written reasons for refusal of ROTL (Policy §§4.19, 6.75) and (b) disclosure, on request by them, of "all information that has been taken into account in reaching the ROTL decision" (subject to three derogations) (Policy §6.78). In the legal analysis of the issues in the present case, I need say no more.

ANXIOUS SCRUTINY

67. The Agreed Issue is this: When reviewing DG Bailey's decision for the purposes of a rationality challenge, is it necessary and/or appropriate for the Court to exercise 'anxious scrutiny'?

68. Mr Bimmler submits that "anxious scrutiny" of the impugned decision is necessary and appropriate for the reason given by Saini J in R (Wells) v Parole Board [2019] EWHC 271 (Admin) at §35, 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.***

I agree.

69. Wells was a case in which the impugned decision was a decision of a panel of the parole board, not to direct the claimant's release. In R (M) v SSJ [2009] EWHC 768 (Admin), Silber J observed at §60 that that was "a case calling for intense scrutiny". M was a case in which the impugned decision was a decision of the SSJ not to transfer the claimant to open conditions, in the application of relevant criteria on transfer (see §§35-36) and on security categorisation (see §§49-50). In R (SP) v SSJ [2010] EWHC 1124 (Admin) at §21, Burnett J (as he then was) also described the principle of "anxious scrutiny" as applicable. SP was a case in which the impugned decision was a transfer direction from prison to a psychiatric hospital. Reference was also made to R (Browne) v Parole Board [2018] EWCA Civ 2024 at §52 and R (PP) v SSJ [2009] EWHC 2464 (Admin) at §§20, 65. Mr Pritchard points out, rightly, that none of these cases concerned ROTL. He submits that a decision on the application of the Rule 9(4) test (§2 above), whose consequences are to grant or decline ROTL, does not engage the principle of "anxious scrutiny". I cannot accept that submission. In my judgment, it would be odd and incoherent if "anxious scrutiny" applied to a decision – applying relevant criteria – whether to release on licence, whether to move a prisoner from prison to a psychiatric hospital, and whether to transfer a prisoner from closed to open conditions, but not whether to grant ROTL. Although "temporary" – whether day-release (RDR) or overnight release (ROR) – ROTL is a species of release on licence. It directly engages the liberty of the individual. It also constitutes a material stage in a prisoner's transition towards release on licence, on which they may in practice be reliant as a 'stepping stone': cf. R (Hirst) v SSHD [2001] EWCA Civ 378 at §18. This reality is reflected in the Transfer Decision at [9c] (§6 above). In that sense too, individual liberty is very much what is at stake.

70. I accept the further submission of Mr Pritchard, citing Browne at §52, that the "anxious scrutiny principle" is a contextual "minor modification" to the "relatively high threshold" of public law unreasonableness. Tracing "anxious scrutiny" back to its source, a good working illustration is Bugdaycay at 537H-538A, where judicial review succeeded because it was "not clear" that the defendant public authority "took into account or adequately resolved" relevant matters. That was reflective of an enhanced scrutiny, but in the context of entirely conventional public law principles and standards. I have already touched on the 'due process' analogue, which again concerns conventional standards: §64 above. The intensity of the scrutiny that leads to a conclusion on reasonableness, or unreasonableness, coheres within entirely conventional – and equally always entirely contextual – public law standards, in the exercise of the court's secondary and supervisory review jurisdiction.

REASONABLENESS

71. There are two Agreed Issues: (1) Was DG Bailey's decision unreasonable (irrational) because of the contents of the Transfer Decision (§6 above)? (2) Was DG Bailey's decision unreasonable (irrational) in relation to her treatment of the Claimant's denial of the index offences? More specifically, as to (2): Did DG Bailey, unreasonably (irrationally) consider the Claimant's denial of the index offences to be a bar to progression?

72. As Saini J had also explained in Wells at §§31-34:

> ***31. A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational? 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.***

This focus on logic, coherence and reasoning – to which I have also referred in R (CB) v SSHD [2022] EWHC 3329 (Admin) at §87 – approached with "anxious scrutiny" (Wells §35) provides the surest, principled approach to the issues with which I am concerned. It is our inheritance, 25 years on, from Sedley J's insights in R v Parliamentary Commissioner for Administration, ex p Balchin [1998] 1 PLR 1, 13E-F.

73. Mr Pritchard rightly accepts that that approach is one which can properly be invoked by the Claimant in the present case. Mr Bimmler rightly locates his reasonableness ground within this approach. Mr Bimmler also accepts that the reasonableness grounds advanced in the present case are not to the effect that the 'sole reasonable course' open to the Defendant was to approve ROTL. Rather, Mr Bimmler submits that the decision not to approve ROTL was vitiated in terms of the logic of the reasons, with the consequence that the decision should be remitted to be taken afresh.

Maintained innocence

74. I will start with Agreed Issue (2): the reasonableness grounds concerned with denial of index offences. Mr Bimmler points out that it is well-established that it is not permissible to rely on a convicted prisoner's maintained denial of guilt as a bar to their progression (see eg. R (Roberts) v SSHD [2004] EWHC 679 (Admin) at §§35-36; R (Gourlay) v Parole Board [2014] EWHC 4763 (Admin) at §§28, 31-33) which includes as a "dominating ground" (R v SSHD, ex p Zulfikar (No.2) unreported, 1 May 1996). Mr Bimmler accepts that DG Bailey correctly recorded the position in the Impugned Decision at [1] (§19 above): "I note that you maintain your innocence and that this is not a bar to you progressing". He submits that DG Bailey then misapplied the law at [6]: "The parole board have described the situation with you as 'an impasse' and they did not find your account or denial of your offending to be credible. I would suggest

that if you are to make significant progress towards release, you will need to reflect very carefully on your situation and consider further how you can demonstrate that the risk you pose to the public has reduced."

75. Mr Bimmler submits that the final sentence, with its emphatic language "if you are to make significant progress… you will need", was in substance identifying the acknowledgment of guilt as a precondition to progress towards release. He also relies on a factual contention, recorded in the Grounds for Judicial Review, that when Governor Hillman communicated DG Bailey's decision to the Claimant, he (Governor Hillman) told the Claimant that DG Bailey had indicated to him (Governor Hillman) that the final sentence was intended to refer to the Claimant's continued denial of his guilt. Mr Bimmler invites me to reject, as an ex post facto rationalisation, inconsistent with the contemporaneous reasons, DG Bailey's witness statement evidence which states that she had "not advised" Governor Hillman "that my reference to the need for [the Claimant] to reflect carefully was intended to refer to his denial of guilt".

76. I cannot accept this ground for judicial review. In my judgment there was no unreasonableness in DG Bailey's treatment of the Claimant's denial of the index offences; and DG Bailey did not treat the Claimant's denial of those offences as a bar to progression. It is appropriate, and sufficient, to focus on the contemporaneously expressed reasons (§19 above). There is no direct evidence from Governor Hillman; there is no direct evidence from the Claimant. The reasons constitute the decision, and it is the reasons that matter. They need to be read fairly and as a whole. The Decision started by recording, correctly, at [1] that maintained innocence is not a bar to the Claimant progressing. Throughout the rest of paragraph [1] and paragraphs [2] to [5] substantive reasons are given which are not expressed as, nor are in substance, a function of maintained innocence. The point at [3] which feeds into [4] and [5] clearly extends beyond the maintained innocence and its implications. The final sentence of [3] ("you have not completed any relevant offence focused interventions") is clearly linked as a consequence of maintained innocence. But it fits alongside the other reasons which, when read fairly and as a whole, do not reach a conclusion on that sole or predominant basis. The description at [6] of an "impasse", is one identified by the Parole Board. It needs to be read with paragraph [1]. It is plainly materially informed by the "denial of your offending" which was something the parole board has not found "credible". But that is not to say – nor is it suggested – that the Parole Board had treated maintained innocence as, in and of itself, a bar to the Claimant progressing. The "suggest[ion]" that the Claimant "will need to reflect very carefully" on the "situation" and "how" he can demonstrate reduced risk does resonate in terms of his maintained innocence. But it also resonates more broadly. In the Parole Board's decision – to which DG Bailey was referring – making the Transfer Recommendation on 21 October 2019 (§5 above), the Board had said this: "The panel accept that denial is not a bar to progression or release, although remain concerned that you do not identify that you had any difficulties in your life at the time you were offending and as such have not been able to evidence how your strengths and protective factors that might contribute to desistance from offending have developed." DG Bailey had said at paragraph [1] that it was noted, at the Claimant's last parole hearing, that his absolute denial "of committing any offences", "of having any sexual interest in female children", "and of needing personal development of any kind" was "a significant concern and certainly makes an assessment of the risk that you pose very problematic". All of this is broader than maintained innocence. Possible "work" was described in the "other reports" to

which DG Bailey referred at [3]. The recommendation of POM Smith referred to assessments of unsuitability of work as being based, not only on maintained innocence, but also on the fact that the Claimant "does not accept that he has any difficulties within his life that he needs to address". The first reason given by ADG Woodburn (albeit unseen by the Claimant), in the appealed decision of 8 June 2021 (§19 above), was that the "Parole Report stated that work should be undertaken in regards to a personality disorder pathway".

77. In my judgment, points relating to maintained innocence not being a bar to progression do serve – but can go no further than serving – to bring into sharp focus the reasons identified in the main body of DG Bailey's impugned decision, to see whether those reasons can withstand scrutiny on the approach identified in Wells. That leads me to the remaining and final issue.

Reasonableness in light of the Transfer Decision

78. This is the other reasonableness issue. It is the point that concerned Choudhury J. In granting permission, he said it was arguable that DG Bailey's decision "is unreasonable given the basis on which the Claimant was transferred to open conditions".

79. On this ground Mr Bimmler submits, in essence as I saw it, as follows. There was a logical incongruence, lacking a logical reasoned and reasonable justification, between the Defendant (DG Bailey)'s Impugned Decision of 8 July 2021 and the Defendant (Becca Humphrey)'s Transfer Decision of 3 December 2019 (§6 above), which explained the reasoned basis for transferring the Claimant to open conditions:

    i) The Transfer Decision of December 2019 had a close nexus. It had been arrived at, as a decision of the Defendant, in the circumstances of the Claimant's case including those matters which had been seen as potential impediments to a demonstrated sufficient low level of risk on release. The Transfer Decision had, moreover, been arrived at in the light of the assessment and observations (§15 above) of Michele Unwin (psychologist for the prison service) in October 2017. It had been arrived at in the light of the very Parole Board report which had made the Transfer Recommendation (§5 above), for monitoring and engagement and to assess progress, in circumstances which were being described by the Board as "an impasse" as regards "understanding your offending". It was in the context of all of that, that the Defendant's own recent – and closely linked – decision on 3 December 2019 had been to transfer the Claimant to open conditions.

    ii) A carefully reasoned basis had been given for that decision. It involved accepting open conditions as "the best way to assess" the Claimant's "progress", in light of "the lack of insight into your risk factors" (at [5]). It was a reasoned decision which also, clearly and expressly, identified a "review" (at [9]). That review was "set at 12 months" (at [9]) and one of the express criteria for the review period (at [9c]) was for the Claimant "to demonstrate" his "ability to comply with ROTL conditions". That could only work if there were ROTL. The informed, reasoned assessment very clearly contemplated that the Claimant would be afforded ROTL conditions which would enable him to demonstrate his ability to comply. That was a way through the "impasse". The Transfer Decision did not tie the Defendant's hands when consideration came to be given

to ROTL (see [9f]). But the decision of DG Bailey, on the appeal from the decision of ADG Woodburn, needed to grapple with this. It needed to identify some logical reason why it was that the Claimant was now being denied ROTL. It could not be sufficient simply to restate the position, which had existed prior to and at the time of the Transfer Decision. It could not be sufficient simply to say (Impugned Decision at [4]) that there had been little evidence of any significant reduction in risk. The question was why the material before DG Bailey supported the conclusion that the Claimant could not safely be given ROTL, given that the Transfer Decision had clearly envisaged that as the next stage within the 12 month review.

iii) These points are reinforced by further features of the case. One is the sharpened focus (§77 above) arising from the fact that maintained innocence could not, of itself, be a bar to progress. Another is that the Claimant had a 'full house' of support for ROTL: COM Heald's Report (25.3.21) (§12 above); POM Smith's Risk Assessment (updated on 1.6.21) (§8 above); the ROTL Board Recommendations written by SPO Carroll (21.5.21) (§9 above); and Kirsty Bain's Report (25.5.21) (§14 above). All of these reports supported the grant of ROTL.

iv) Another feature is the significance of COM Heald and POM Smith (§13 above) as the "offender manager or supervisor" described in the Transfer Decision at [8] (§6 above). The Defendant had identified the "offender manager or supervisor" as responsible for identifying whether there were "relevant interventions" for the Claimant as part of his "sentence plan" in order to "address his risk of harm and risk of reoffending". And the "offender manager or supervisor" had expressly concluded that no such interventions were suitable or appropriate as steps, so as to identify further reduction in risk, prior to the Claimant being permitted to access ROTL conditions.

v) In all the circumstances the Impugned Decision of DG Bailey involved a logical flaw. Like the Decision of ADG Woodburn which was under appeal, it did not explain why in light of the Transfer Decision, and the position taken in all of the reports, the features to which reference was being made stood in the way of the ROTL which all voices were, in unison, recommending as appropriate.

80. There is force in these points.

81. In approaching this, freestanding, reasonableness ground it is, in my judgment, appropriate to remember that I have already found that the Claimant did not have the rights which procedural fairness requires, so as to be able to advance more informed representations. The points which I have summarised in many ways exemplify what could have been put forward by him, on the merits, in informed representations with access to ADG Woodburn's written reasons and the Trilogy of Documents constituting the ROTL Risk Assessment. Naturally, the points would not have been made as a critique of an appeal decision not yet made; but rather as aspects of a challenge to ADG Woodburn's decision and as points going to the appeal decision which was yet to be made. On this topic, I have already explained why it would not be right to speculate on what DG Bailey's decision would have been, had the Claimant been in a more informed position in the making of his appeal representations, all of which is relevant to why there is a "material" procedural unfairness in this case. Had the Claimant been better

informed, and had he made points along the lines of what I have just summarised, the contextual framework for DG Bailey's decision would have been different. As a public authority giving a reasoned decision, she would be expected to deal with the key points raised in the representations, which representations could raise issues which became so obviously relevant that regard needed to be had to them, in turn affecting the analysis of the reasonableness and legal adequacy of reasons for an adverse decision. The consequence, moreover, of the Claimant's success on procedural fairness is that DG Bailey's decision will be quashed, and the matter remitted for consideration afresh. In these circumstances, there are some difficulties and dangers of distortion in the Court addressing – supposedly on an insulated and freestanding basis – the question of substantive reasonableness of the historic decision and its reasons.

82. Both parties encouraged me to deal with reasonableness ground, and to do so on a freestanding basis. I think the principled way in which to do so is to posit that I am wrong on the question of procedural fairness. That means I must treat the facts and circumstances of the present case as having arisen, just as they did, including the representations which the Claimant made. I must treat that as a position being consistent with applicable standards of procedural fairness, suspending my disbelief as to that consistency. That is what I will now do.

83. In my judgment, including in light of the representations which were being made, there was no logical gap – or other unreasonableness – in the reasons set out in the Impugned Decision of DG Bailey on 8 July 2021. DG Bailey needed squarely to address the Rule 9(4) test for ROTL (§2 above). That was the question governing ROTL, as it had been for ADG Woodburn. It was not the test being applied in the Transfer Decision which Becca Humphrey took for the Defendant on 3 December 2019. Next, the Transfer Decision could not and did not of itself constitute a reasoned basis for the Claimant being given ROTL. It was not an application of the relevant test for a decision on ROTL, nor was it arrived at after the relevant process for a decision on ROTL, nor was it taken by the relevant decision-maker for the purposes of ROTL. After describing the "review" and its function, the Transfer Decision stated expressly at [9f] that: "ROTL … will only be granted after a full risk assessment showing that it is safe for you to be trusted in the community". In other words, the Transfer Decision was expressly caveated, and without prejudice to, the need for there to be satisfaction of the rule 9(4) test, after a full risk assessment. DG Bailey's attention was drawn to the link between ROTL and the reasoned Transfer Decision in the following phrase in POM Smith's Recommendation (§8 above) that the Claimant have "access to ROTLs … as his progression to open conditions was directed by the secretary of state following a parole review in October 2019". If the word "as" was indicating that ROTL must now logically follow from the reasoned Transfer Decision, that would in my judgment have been an overstatement. DG Bailey had the relevant ROTL Risk Assessment (the Trilogy of Documents) and the other reports. Her decision identified features identifiable from those materials. She explained, by reference to a number of points – including the fact that she could see little evidence of a significant reduction in risk, and that she could not be confident that the Claimant could safely be released on temporary licence – correctly identifying her first duty as being to protect the public. I am applying anxious scrutiny. But I am leaving aside what content and standard of reasons would have been called for had different and more informed representations been put forward, or on a remitted reconsideration. Approached in that way, DG Bailey's conclusion did follow from the evidence and involved no unexplained evidential gap or leap in reasoning

which failed to justify it. Approached in that way, no relevant consideration – so obvious, from the evidence and representations, that it could not reasonably be left unaddressed – was disregarded. Applying anxious scrutiny, this is not a case crossing the high threshold of unreasonableness, where the decision is vitiated by the logic of the reasoning and requires reconsideration afresh on that basis.

84. That is not to say that the decision of DG Bailey on 8 July 2021 is necessarily correct on the merits. The merits are not for this Court. Still less is it to say that the reasons would be legally adequate, if fuller and more informed representations had been – or were now – put forward with the benefit of the documents which should have been available to the Claimant and were not. In light of my conclusion on the procedural fairness ground, I will quash the Impugned Decision of DG Bailey on 8 July 2021 and remit for reconsideration afresh by a different decision-maker, with the Claimant and his representatives afforded the opportunity to make fresh informed representations. It will be for the relevant decision-maker to decide what decision is the correct one, for what reasons, on the merits.

85. There are two endnotes to this analysis. First, Mr Pritchard submitted that the assessment of POM Smith and CRM Heald that no "relevant interventions" were suitable to "address" the Claimant's "risk of harm and risk of reoffending" could not, in principle, be relevant to the decision on ROTL. His submission was that all that was, in principle, relevant was their assessment as to the appropriateness of ROTL. Mr Pritchard emphasised that, in a scenario in which the ROTL test in Rule 9(4) (§2 above) cannot be met, it could not then assist that the "offender manager or supervisor" was able to come up with no further suitable intervention. I see the force of that submission in that scenario. But I cannot accept a wider submission that it is legally irrelevant that the "offender manager or supervisor" are not only recommending ROTL but also, being charged with the responsibility of identifying relevant interventions, expressing their satisfaction that no relevant intervention is necessary or appropriate to precede it.

86. Secondly, Mr Prichard showed me the decision of the Parole Board dated 21 October 2021, declining to direct the Claimant's release on licence, and stating in the reasons:

> ***You have still not completed any offending behaviour work and maintain the view that [sic] that you do not have any problems related to offending risk and do not require treatment to address risk. The Panel concluded that your lack of frank engagement with professionals in custody meant that your risks were not fully understood, and the proposed risk management plan relied upon hypotheses. Your own lack of insight into your risks and difficulties you may face in the community increased the Panel's concerns. The Panel concluded that you present a high risk of serious harm and your lack of insight into the risks you present in the community undermined plans for successful risk management. The Panel could not be satisfied that risk was not imminent.***

This and any other updated material will be available for the remitted, reconsidered decision. But I do not see how this October 2021 parole decision is relevant to the issues which I have had to decide, in the exercise of the Court's supervisory jurisdiction, as to whether there was any material public law error in the ROTL decision of DG Bailey on 8 July 2021, where the remedy sought is quashing for reconsideration afresh.

CONCLUSION AND CONSEQUENTIALS

87. In light of my conclusion on the procedural fairness ground, I will quash the Impugned Decision of DG Bailey on 8 July 2021 and remit for reconsideration afresh by a different decision-maker, with the Claimant and his representatives afforded the opportunity to make fresh informed representations. The unreasonableness ground fails. Having circulated this judgment as a confidential draft I can deal here with the order and consequential matters, including revisiting the question of the appropriate order as to costs in light of my earlier observations about the position, in principle, in light of the Defendant's various defaults. Creditably, the parties were able to agree the terms of a substantive Order appropriately reflecting the terms of this judgment – with which I agree – whose principal terms are: (i) the Claimant's claim for judicial review is allowed on Ground 1, for the reasons given in the judgment; (ii) the decision of DG Bailey dated 8 July 2021 on the Claimant's application for ROTL is quashed; (iii) the Claimant's application for ROTL is remitted for fresh consideration by a different decision-maker, with an opportunity for the Claimant and his representatives to make fresh informed representations; and (iv) the Defendant shall pay the Claimant's reasonable costs of the judicial review claim, to be assessed if not agreed, on the indemnity basis until 29 July 2022 and on the standard basis thereafter.