Neutral Citation Number: [2024] EWHC 429 (Admin)

Case No: AC-2023-LON-003278

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th February 2024

Before :

MR JUSTICE RITCHIE

- -

Between :

THE KING **Claimant**

on the application of

ROBERT BROWN

- and –

THE SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Philip Rule KC (instructed by **Kesar & Co Ltd**) for the **Claimant**
Iain Steele & Scarlett Milligan(instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 14th & 15th February 2024

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Approved Judgment

This judgment was handed down remotely at 14:00pm on 28th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The Claimant is in prison. He was convicted of the manslaughter of his estranged wife, Joanna Simpson (JS) and obstructing the Coroner and sentenced by Cooke J. on 24 May 2011 to serve 26 years in prison for those offences. He was acquitted of murder by a jury at the end of the trial. He pleaded guilty to manslaughter on the grounds of diminished responsibility.

2. The Defendant is the Secretary of State for Justice and the Lord Chancellor.

The Application and the Claim

3. The Claimant applies for permission to claim judicial review of a decision made by the Defendant under S.244ZB of the *Criminal Justice Act 2003* (ZB) to refer him to the Parole Board for consideration of whether he is dangerous to the public (Dangerous TTP). This is a rolled up hearing of both the application and, if permission is granted, of the claim.

4. There was a second judicial review claim for which permission was granted by Dan Kolinsky KC, sitting as a deputy High Court Judge, on 5.10.2023, which concerned a refusal to permit the Claimant to transfer from an English prison to a Scottish prison. That was settled in the week before the hearing.

Bundles

5. For the application and claim I was provided with: (1) a core bundle; (2) a supplementary bundle; (3) skeleton arguments; (4) an authorities bundle; (5) a bundle of miscellaneous documents including last minute applications; (6) further documents were handed up during the hearing and (7) further submissions after the hearing.

The Judge’s dangerousness decision in 2011

6. The Jury accepted the evidence of the Claimant’s consultant psychiatrist, Doctor Alcock, who opined that the Claimant was suffering from an Adjustment Disorder when he killed JS. When Cooke J. sentenced the Claimant for manslaughter, he did not find the Claimant to be Dangerous TTP. In his sentencing remarks he stated:

> “You are not, in my judgment, dangerous within the meaning of the term as used when considering life sentences, IPPs or extended sentences. I am therefore going to impose a determinate term of which you will serve half in custody and half on licence subject to the terms of that licence and compliance with it.”

The Dangerousness TTP criteria for the Judge

7. The Judge's decision related to an assessment of whether the Claimant was Dangerous TTP under the dangerousness criteria set out in S.225(1) of the *Criminal Justice Act 2003* (and other sections) which stated:

> "225 **Life sentence or imprisonment for public protection for serious offences**
> (1) This section applies where—
> (a) …
> **(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.**
> (2) If—
> (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,
> the court must impose a sentence of imprisonment for life …
> (3) In a case not falling within subsection (2), the court may impose a sentence of imprisonment for public protection … if the condition in subsection (3A) or the condition in subsection (3B) is met." (My emboldening).

8. So, Cooke J. considered Dangerousness TTP and whether a sentence of: (1) life imprisonment, or (2) imprisonment for public protection, or (3) an extended sentence, was appropriate applying the dangerousness criteria in S.255(1)(b) and other similar sections, for instance S.227. That test, as set out in bold above, involved consideration of three criteria:
(1) whether there is a significant risk to members of the public;
(2) of serious harm;
(3) occasioned by the commission by the Claimant of further specified offences.
I note the word "is" and the words "further… offences". The former concentrates on the present and the latter involves projecting forwards.

The assessment of Dangerousness TTP

9. S.229 of the *Criminal Justice Act 2003,* as at 2011, stated:

> "229 **The assessment of dangerousness**
> (1) This section applies where—
> (a) a person has been convicted of a specified offence, and
> (b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.

(2) the court in making the assessment referred to in subsection (1)(b)—

(a) **must take into account all such information as is available to it** about the nature and circumstances of the offence,

(aa) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,

(b) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (aa) forms part, and

(c) **may take into account any information about the offender which is before it**." (My emboldening).

Significant Risk

10. The significant risk criterion has been explained in various cases. In *R v Lang* [2005] EWCA Crim. 2864, [2006] 1 WLR 2509, Rose LJ ruled on the assessment of significant risk as follows:

"17. In our judgment, the following factors should be borne in mind when a sentencer is assessing significant risk.

(i) The risk identified must be significant. **This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Concise Oxford Dictionary) "noteworthy, of considerable amount… or importance**".

(ii) In assessing the risk of further offences being committed, the sentencer should take **into account the nature and circumstances of the current offence; the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed, details of which the prosecution must have available and whether the offending demonstrates any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships** and drug or alcohol abuse **and the offender's thinking, attitude towards offending and supervision and emotional state.** Information in relation to these matters will most readily, though not exclusively, come from antecedents and **pre-sentence probation and medical reports.** The Guide for sentence for public protection issued in June 2005 for the National Probation Service affords valuable guidance for probation officers. The guidance in relation to assessment of dangerousness in para 5 is compatible with the terms of this judgment. The sentencer will be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplates differing from the assessment in such a report should give both counsel the opportunity of addressing the point.

> (iii) If the **foreseen specified offence is serious,** there will clearly be some cases, though not by any means all, in which there may be a significant risk of serious harm. For example, robbery is a serious offence. But it can be committed in a wide variety of ways many of which do not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there is a significant risk of serious harm merely because the foreseen specified offence is serious. A pre-sentence report should usually be obtained before any sentence is passed which is based on significant risk of serious harm. In a small number of cases, where the circumstances of the current offence or the history of the offender suggest mental abnormality on his part, a medical report may be necessary before risk can properly be assessed.
> (iv) If the **foreseen specified offence** is not serious, there will be comparatively few cases in which a risk of serious harm will properly be regarded as significant. The huge variety of offences in Schedule 15 of the Act of 2003, includes many which, in themselves, are not suggestive of serious harm. Repetitive violent or sexual offending at a relatively low level without serious harm does not of itself give rise to a significant risk of serious harm in the future. There may, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, does not give rise to significant risk of serious harm." (My emboldening).

11. Three years later, in *R v Pedley* [2009] EWCA Crim. 840, Hughes LJ ruled on the meaning of significant risk as follows:

> "17 All the parties before us agreed that **in addressing the question whether the risk of serious harm is significant the Judge is entitled to balance the probability of harm against the nature of it if it occurs**. The harm under consideration must of course be serious harm before the question even arises. But we agree that within the concept of significant risk there is built in a degree of flexibility which enables a Judge to conclude that a somewhat lower probability of particularly grave harm may be significant and conversely that a somewhat greater probability of less grave harm may not be.
> 18 We do not, however, agree that it follows that there is any justification for attempting a redefinition of the plain English expression "significant risk . . . of serious harm". There is no occasion to rewrite the statute as Mr Fitzgerald invites us to do. In *R v Lang* [2006] 1 WLR 2509, para 17(i), this court noted that the dictionary definition of "significant" is "noteworthy, of considerable amount . . . or importance". That was not to substitute a different expression for the statute, but was and remains a helpful indication of what kind of risk is in issue.

> 19 In particular, it is wholly unhelpful to attempt to redefine "significant risk" in terms of numerical probability, whether as "more probable than not" or by any other percentage of likelihood. We doubt very much that the probability of future harm is capable of numerical evaluation. No attempt should be made by sentencers to attach arithmetical values to the qualitative assessment which the statute requires of them. Such would, moreover, be inconsistent with the degree of flexibility inherent in the word "significant" to which we have adverted in para 17 above. At one stage in his submissions Mr Fitzgerald contended that "significant risk" was being found in cases where there was no more than a 20% probability of serious harm. We are unaware of any sentencer expressing a sentence in any arithmetical terms, never mind those, and very much doubt that it has ever occurred." (My emboldening).

It is apparent from these authorities that when considering Dangerousness TTP the Judge was looking forwards and considering foreseeable specified offences and it is particularly relevant to this claim that he was required to consider the offender's thinking, attitude towards offending and supervision and his emotional state, taking into account the matters covered in the medical reports before him.

Serious harm

12. S.306 of the *Sentencing Act 2020,* which contains the same terms as the statute in force in 2011, states:

> "(2) In this Part— "serious harm" means death or serious personal injury, whether physical or psychological;"

Specified Offence

13. S.306 of the *Sentencing Act 2020,* which contains the same terms as the statute in force in 2011, states:

> "306 **Extended sentences: meaning of "specified offence"** etc
> (1) An offence is a "specified offence" for the purposes of this Code if it is—
> (a) a specified violent offence,
> (b) a specified sexual offence, or
> (c) a specified terrorism offence.
> (2) In this Part—
> … "specified violent offence" means an offence specified in Part 1 of Schedule 18;"

14. The specified offences in Schedule 18 include: Manslaughter; Kidnapping; False Imprisonment; Soliciting Murder; Threats to Kill; Wounding with intent to cause GBH;

Strangulation and Attempted Strangulation; Maliciously Administering Poison; Injuring Persons by Furious Driving; Assault Occasioning Actual Bodily Harm and many others.

Dangerous TTP: at what point in time?

15. I glean from the Statute law and the case law guidance that the Judge, when assessing Dangerousness TTP, was looking at foreseeable offences which the Claimant might commit, but was the Judge to consider Dangerousness TTP in prison and at the date of release from prison at the end of his determinate sentence or just the risk at the time of sentencing? This was considered in *R v Smith (Nicholas)* [2011] UKSC 37, decided two months after the Claimant was sentenced. Lord Phillips PSC in the Supreme Court ruled as follows:

> "14. Section 225(1)(b) is in the present tense. The sentencing Judge is permitted to impose a sentence of IPP if "there is a significant risk" that members of the public will suffer serious harm as a result of the commission by the Defendant of further offences. The construction for which Mr Barnes contends requires the sentencing Judge to factor in, when considering the question of risk, the fact that the Defendant is and will remain detained in prison for a significant period, regardless of the type of sentence imposed. Plainly the Defendant will pose no risk to the public so long as he remains in custody. Mr Barnes submits that the Judge must consider whether he will pose a significant risk when he has served his sentence.
> 15. If this is the correct construction of section 225(1)(b) it places an unrealistic burden on the sentencing Judge. **Imagine, as in this case, that the Defendant's conduct calls for a determinate sentence of 12 years. It is asking a lot of a Judge to expect him to form a view as to whether the Defendant will pose a significant risk to the public when he has served six years. We do not consider that section 225(1)(b) requires such an exercise.** Rather it is implicit that the question posed by section 225(1)(b) must be answered **on the premise that the Defendant is at large. It is at the moment that he imposes the sentence that the Judge must decide whether, on that premise, the Defendant poses a significant risk of causing serious harm to members of the public**.
> 16. For those reasons we reject the primary case advanced by Mr Barnes on behalf of the Defendant."

16. The Defendant submitted that the Judge's assessment of Dangerousness TTP would have been focussed on the Claimant at the conclusion of his time in prison and relied on *R (Sturnham) v Parole Board* [2013] UKSC 47, at paras. 33-34; *R v Bryant* [2017] EWCA Crim. 1662, at para. 8; S.142(1) of the CJA 2003 and S.57(2) of *the Sentencing Code.*

17. S.142(1) was not in the authorities bundle. Using the timeline adjusted online provision of the Act for 2011, I see no reference in S.142(1) which bears on the timing issue save for protection of the public. As for S.57(2) it likewise provides no support for the Defendant's submission. However, in *R (Sturnham)* Lord Mance JSC gave the lead judgment dealing with the Dangerousness TTP test under S.255(1)(b). At para. 3 he summarised the main issues in the case thus:

> "there are two grounds of appeal before the Supreme Court. The first focuses on the relationship between the criteria for the court to impose a sentence of IPP and for the Parole Board to direct release on licence. The Claimant submits that they must, though differently worded, be read as involving the same substantive test. The Parole Board and the Secretary of State submit that the difference in wording represents a difference in substance. The second ground of appeal is that, even if the criteria differ in substance, the Parole Board in fact applied a wrong test when deciding whether to order the Claimant's release."

18. On the issue of whether the Parole Board's decision was the same as or different from the sentencing Judge's decision on Dangerousness TTP Lord Mance ruled as follows:

> "40. None of these statements was however based on any detailed examination of the present issue, and I have come to the conclusion that they are wrong, so far as they suggest that the test which the Parole Board must apply when considering whether to direct release from IPP is precisely the same as that which the sentencing Judge had to apply in order to pass a sentence of IPP in the first place."

19. The ruling in relation to the timing of the Dangerousness TTP test for a Judge when sentencing was as follows:

> "37 Logically, it is also difficult to see why it was necessary at all in *R v Smith* [2011] 1 WLR 1795 to address the question whether the sentencing judge's assessment was of present risk or predictive. If the fact that the offender was in prison was relevant at all, it would exclude any present as much as any future risk of the offences to which he was evidently prone. The point which required decision was that, when deciding whether to order IPP, any concurrent prison sentence was to be ignored and the offender was to be assumed to be at liberty. More generally, unless the judgment required in the case of IPP is predictive, it must logically follow that, even though the fixed (tariff) period would in the Judge's view be sufficient to eliminate any further future risk before the tariff expired, the Judge would still be required (even after the time when the imposition of IPP became discretionary) to impose a

> sentence of IPP, although convinced that there was no point in doing so. The concept of a long determinate sentence sufficient to eliminate future risk would be largely superseded.
> 38 In these circumstances, I have grave reservations about the reasoning in para. 15 in *R v Smith* even in relation to sentences of IPP. But, since it was not challenged on this appeal and is not in my opinion ultimately decisive, I say no more on this."

The Judge's decision on Dangerousness TTP

20. So what could the Defendant have thought as he made his decision in 2023 about what the Judge was thinking in 2011, just 2 months before the Supreme Court in *R v Smith* ruled that he was to assess the Dangerousness TTP at the time of sentencing and 2 years before the Supreme Court in *Sturnham* stated that the Judge was to determine Dangerousness TTP looking forwards to the date of release? I have before me no evidence as to the legal guidance given to the Defendant about the proper approach in law for Cooke J. in May 2011 when he made his decision on Dangerousness TTP. Nor did Cooke J. explain which approach he took on the time of his assessment (the present danger assuming he is not in prison, or the predicted future danger at release). If he followed the approach set out in *Sturnham* it would make more sense of the Judge's sentencing powers because a predictive approach to assessing Dangerousness TTP is logically necessary for the decision on whether to impose a Life sentence, IPP or extended sentence because of Dangerousness TTP at release.

21. I consider that in this case the Defendant cannot be criticised as being illogical, irrational or unlawful for considering that the base line from which the Defendant was to start, when assessing whether to form a belief based on reasonable grounds that the Claimant would be Dangerous TTP in 2023, was that at sentencing Cooke J. determined that the Claimant was not going to be Dangerous TTP when reaching the end of his sentence in 2023. That assessment is necessarily imprecise and predictive and based only on what the Judge had before him at the time. Although the Judge heard the witnesses, including the Claimant who gave evidence and read the psychiatric reports, no pre-sentence report was before him. I also note that the psychiatrists did not provide any prognosis for the Claimant after conviction and were not asked or instructed to provide a prognosis for sentencing or to address the Dangerousness TTP test at all. So, his assessment of Dangerousness TTP in future was absent that information. If, on the other hand, the Defendant assumed that Cooke J. applied the Dangerous TTP test as at 2011, then any belief that the Defendant formed on reasonable grounds was in relation to a different time to the 2011 decision of Cooke J. because the Judge did not look forwards to release to assess Dangerousness TTP.

22. Returning to the Judge's sentencing remarks he explained his decision in this way:

> "The form of abnormality of mental functioning found by the jury is adjustment disorder, which is a mild disorder which rarely leads to

> outbursts of violence. In your case it appears to have disappeared almost immediately after killing your wife. In this case **I am satisfied that your responsibility for the death of your wife, though found by the jury to be diminished, remains substantial**. Although the jury have found that your ability to exercise self control was substantially impaired, and this must have constituted a significant contributory factor to you doing what you did, **in my judgment you retained real culpability for what you did.**"

23. Although the parties spent considerable time looking at the evidence before the Judge to explain or second guess the rationale for the decision on Dangerousness TTP, in my judgment that process is non contributory to a large extent in a proper analysis of the issues to be determined in this claim. The Judge's decision is not to be "reviewed" or re-interpreted years later by the Defendant, civil servants or the Claimant. It stands within its legal framework and on the sentencing remarks which the Judge made.

Retained Culpability

24. What is strikingly clear from the sentencing remarks is that Cooke J. found that the Claimant retained real culpability and substantial responsibility apart from, over and above the effects of the Adjustment Disorder (AD). I shall call this his "Retained Culpability" below. In addition, Cooke J. had clear evidence before him that the Claimant engaged with mental health professionals who analysed his disclosed thinking, who identified the relevant stressors, assessed the mental health condition (AD) which, on the evidence of Doctor Alcock, the jury accepted as diminishing his responsibility. So, Cooke J. identified his Retained Culpability. He did not find any lack of engagement with professionals.

The decision under review

25. On 8.10.2023 at 19.11 hours the Defendant's decision, which is challenged, was published in what is called a "readout". It stated:

> "The Lord Chancellor was thankful for the material which was provided, and confirmed that he **considered the submission** and **annexes carefully** over the weekend. He confirmed that, in making this decision, he read:
> 1. **The submission** dated 29 September, which sets out inter alia the power to detain provisions and HMPPS Power to Detain Framework, and the conclusions at para 17 regarding 'clear, strong and defensible arguments' for his using his power to refer
> 2. Cooke J.'s **sentencing remarks**, and in particular his finding of fact that RB's responsibility was 'substantial' [p.2G] and his observations that 'The stresses which operated upon you and which the jury must have found led to your adjustment disorder are those which many people face without resort to violence…' [p.7C/D]

3. The **OASys Assessment,** dated 2 Oct 2023, including (but not limited to):

a. the note at p.11 of 76 that 'In my interviews with Mr Brown he has failed to show remorse for the attack…' and that he 'has shown himself to have no insight into the seriousness of his action and a lack of appreciation for others to be safeguarded from him'

b. The note at p.12 that 'Despite encouragement from professionals, Mr Brown has never completed an offending behaviour programme in prison. There can be no possible way for him to evidence that his risk has decreased' and 'It is my assessment that Mr Brown continues to present a high risk of serious harm to future female partners when in the community'

c. The note a p.48 that 'There is nothing to indicate at this time that Mr Brown has lowered his risk to the public and is therefore assessed as high on release' (albeit not 'very high')

4. **The Note prepared by NSD** East entitled 'Consideration for application of powers to detain in the case of Robert Brown', including but not limited to the following:

a. The observation that 'his presentation has been described by various professionals as hostile, superior, defensive, dismissive and grandiose' and 'He continues to lack motivation to engage…' [p.2]

b. He declined to engage with a psychological risk assessment in July 2023. His conduct when offered the opportunity to engage is described as 'defensive and abrupt' [p.2]

c. 'He has not been willing to work with professionals to explore how the adjustment disorder manifested at the time of the offence, or identify possible triggers to a relapse in the future.' [p.3] although I also note that there is 'Currently no evidence that Mr Brown has an active intent to cause physical harm to identifiable known adults' [p.4]

d. Their assessment that the public interest test is met [p.8]

5. **The material at Annex E**, although it has not informed his assessment; that assessment is based on the evidence of the qualified professionals.

The Lord Chancellor continued that, having taken account of all the relevant material, he has concluded that you [Gordon] are right in your conclusions set out in paragraph 17 of the submission dated 29 September. Accordingly, the Lord Chancellor noted:

- the statutory power which permits him to refer to the Parole Board an offender serving a standard determinate sentence, thereby detaining that offender in custody after his scheduled automatic conditional release date;

- the terms of the HMPPS Power to Detain Policy, which sets out how he should use the power – and, in particular, the criteria ordinarily to be met before an offender is referred to the Parole Board; and
- the analysis in this submission of Robert Brown's case against the criteria in the Policy and, in particular, the criteria in the Policy which it does not meet.

Having done so, the Lord Chancellor has decided exceptionally that there are proper and sufficient grounds to refer Robert Brown to the Parole Board and he does so." (The last bit of emboldening is in the text. The rest is mine).

26. The Defendant focussed expressly on the following:

Retained Culpability risks

(1) the Claimant's lack of insight into his Retained Culpability (as opposed to his diminished responsibility caused by the AD) for the killing as determined by Cooke J.;

(2) the Claimant's refusal to gain insight into his Retained Culpability;

(3) the Claimant's refusal to engage with professional analysis, treatment, rehabilitation and assistance to reduce the risks he would pose to the public as a result of his Retained Culpability.

Mental Health risks

(4) the Judge's finding that the stressors which the Claimant faced in 2010 were ones which many members of the public face in their lives and the Claimant's lack of insight into why they led to him developing AD and his failure to seek treatment for AD before the killing;

(5) the Claimant's lack of insight into the need to identify future potentially similar (or dissimilar) stressors and the need to ameliorate the risk that he may then suffer AD and the risks which he would pose to members of the public as a result.

27. The Claimant challenges that decision and the two subsequent reviews carried out, the first of which was at his request, which did not lead to any change in the Defendant's decision.

28. The effect of the decision was that the Claimant was not released on his set release date and has been retained in prison until the Parole Board consider his case. This has no doubt been very hard indeed for him emotionally and may be considered a success by those campaigning for him not to be released. In any event it is temporary until the Parole Board make their determination.

The Defendant's power to refer

29. Before April 2022 the Defendant had no power to refer a prisoner serving a standard determinate sentence (SDS) who was therefore not found to have been Dangerous TTP by the sentencing Judge, to the Parole Board on the grounds of any concern that the prisoner might have become or revealed himself as Dangerous TTP in prison. So, release for a prisoner like the Claimant would have been determined by the statutes governing release. S.244 of the *Criminal Justice Act 2003* (CJA) imposed a duty on the Defendant to release the Claimant on licence for the rest of his term after serving one half thereof (13 years). Release on licence involves person specific conditions being imposed on the prisoner to reduce the risk of reoffending and to protect the public from his/her reoffending. If the conditions are breached the prisoner can be recalled to serve the rest of the term or part thereof.

30. In April 2022 the Defendant was given the power by Parliament, under S.244ZB of the CJA, (ZB) to refer prisoners to the Parole Board for consideration of whether they are Dangerous TTP. The section is worded as follows:

> "**244ZB Referral of high-risk offenders to Parole Board in place of automatic release**
>
> (1) This section applies to a prisoner who—
>
> (a) would (but for anything done under this section and ignoring any possibility of release under section 246 or 248) be, or become, entitled to be released on licence under section 243A(2), 244(1) or 244ZA(1), and
>
> (b) is (or will be) aged 18 or over on the first day on which the prisoner would be so entitled.
>
> (2) For the purposes of this section, **the Secretary of State is of the requisite opinion if the Secretary of State believes on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of any of the following offences—**
>
> **(a) murder;**
>
> **(b) specified offences, within the meaning of section 306 of the Sentencing Code.**
>
> (3) If the Secretary of State is of the requisite opinion, the Secretary of State **may refer** the prisoner's case to the Board.
>
> (4) Before referring the prisoner's case to the Board, the Secretary of State must notify the prisoner in writing of the Secretary of State's intention to do so (and the reference may be made only if the notice is in force).
>
> (5) A notice given under subsection (4) must take effect before the prisoner becomes entitled as mentioned in subsection (1)(a).
>
> (6) A notice given under subsection (4) must explain—
>
> (a) the effect of the notice (including its effect under section 243A(2A), 244(1ZA) or 244ZA(3)),

(b) why the Secretary of State is of the requisite opinion, and

(c) the prisoner's right to make representations (see subsection (12)).

(7) A notice given under subsection (4)—

(a) takes effect at whichever is the earlier of—

(i) the time when it is received by the prisoner, and

(ii) the time when it would ordinarily be received by the prisoner, and

(b) remains in force until—

(i) the Secretary of State refers the prisoner's case to the Board under this section, or

(ii) the notice is revoked.

(8) The Secretary of State—

(a) may revoke a notice given under subsection (4), and

(b) must do so if the Secretary of State is no longer of the requisite opinion.

(9) If a notice given under subsection (4) is in force and the prisoner would but for the notice have become entitled as mentioned in subsection (1)(a)—

(a) the prisoner may apply to the High Court on the ground that the prisoner's release has been delayed by the notice for longer than is reasonably necessary in order for the Secretary of State to complete the referral of the prisoner's case to the Board, and

(b) the High Court, if satisfied that that ground is made out, must by order revoke the notice.

(10) At any time before the Board disposes of a reference under this section, the Secretary of State—

(a) may rescind the reference, and

(b) must do so if the Secretary of State is no longer of the requisite opinion.

(11) If the reference is rescinded, the prisoner is no longer to be treated as one whose case has been referred to the Board under this section (but this does not have the effect of reviving the notice under subsection (4)).

(12) The prisoner may make representations to the Secretary of State about the referral, or proposed referral, of the prisoner's case at any time after being notified under subsection (4) and before the Board disposes of any ensuing reference under this section. But the Secretary of State is not required to delay the referral of the prisoner's case in order to give an opportunity for such representations to be made." (My emboldening).

31. The ZB power is only applicable to prisoners who were not declared Dangerous TTP by the sentencing Judge. That is why an SDS, not another type of sentence triggered

by a Dangerousness TTP finding, was passed. Even ignoring the published Policy, that fact gives rise, inter alia, to the questions: (1) to what extent, if at all, may the Secretary of State take a different Dangerous TTP decision to the Judge, on the same information as the Judge? (2) is new or additional information a prerequisite for exercising the ZB power? (3) must the Secretary of State believe there has been an escalation of risk or new behaviour affecting the risk? I shall address these below.

The 4 criteria

32. Pursuant to ZB, the following 4 criteria must be in place for the Defendant to have the "requisite opinion" and hence for the power to arise. When it does arise the Defendant has discretion because the word "may" is used for the exercise of the power.
The criteria are:
(1) the Defendant believed on reasonable grounds;
(2) that the Claimant would, if released, pose a significant risk to members of the public;
(3) of serious harm;
(4) occasioned by the commission of murder or the specified offences.

33. These four ZB criteria are not the same as those considered by Cooke J. in 2011 for the Dangerousness TTP test. Firstly, the Defendant was required only to have a "belief" on reasonable grounds. Whereas Cook J. was required to decide whether in his judgment the Claimant was Dangerous TTP on the balance of probabilities. Secondly, it is not clear whether Cooke J., at the time of sentencing, was assessing predictively 13 years forwards, or just as at 2011, whereas the Defendant is required to be predictive forwards to the date of release. The final 2 criteria for the Defendant to apply were the same as the Dangerousness TTP test applied by Cooke J. on sentencing but based on a belief on reasonable grounds.

Reasonable grounds

34. The correct test for this Court to apply when considering whether the Defendant held the requisite opinion which is required by ZB was considered by Heather Williams J. in *R (Simpson) v SSJ* [2023] 1 WLR 1505. Having analysed the judgment in *R (Evans) v Attorney General* [2015] AC 1787, she ruled as follows:

> "**The "on reasonable grounds" requirement in section 244ZB(2**)
> 111. I have already expressed the view that the need for the Secretary of State's belief to be "on reasonable grounds" requires more to be shown than that it is rationally held (para 71 above). This is reinforced by Lord Mance JSC's analysis in *Evans*, which was supported by a majority of the court (para 107 above). Making all due allowance for the different statutory contexts, I conclude that the inclusion of this requirement in section 244ZB(2) indicates, as Lord Mance JSC said, that the decision maker must surmount "a higher hurdle than mere rationality and the grounds which are relied upon in this regard must

be **identifiable and capable of scrutiny by the court."**" (My emboldening).

35. I agree and will proceed on the basis that each identifiable basis put forwards by the Defendant for each criterion of the Dangerous TTP test in ZB will be scrutinised for rationality and something more. But what does "something more" mean? Scrutinising rationality involves working out whether relevant matters have been considered for each criterion and irrelevant matters excluded. When scrutinising the identifiable relevant bases, the scrutiny will, in my judgment, need to involve some objective assessment of the weight given to each by the Defendant, if that can be discerned, and whether that was reasonable. If matters which should have been considered have been overlooked likewise an objective assessment of the weight of those being absent will be involved. I am also required to consider whether the decision was *Wednesbury* unreasonable.

Evidence in support

36. Guidance was provided by Heather Williams J. in *Simpson* on the sufficiency of evidence required for the Defendant's requisite opinion under ZB as follows:

> "110. In my judgment *Evans* does not indicate that the section 244ZB(2) reference to "on reasonable grounds" is to be read as confining the situations where the Secretary of State can be of the "requisite opinion" to those where there has been a material change of circumstances since the prisoner was sentenced."
>
> …
>
> "(v) The present context concerns an evaluative, forward-looking assessment as to the nature and degree of risk to the public posed by a particular prisoner. The fact that the Secretary of State at some subsequent juncture takes a different view of the risk that the prisoner would pose on release from the assessment of the court who passed sentence does not in itself indicate that the minister is seeking to overrule the court's decision on sentence thereby engaging the constitutional issue…."
>
> "113. … There is no hard and fast requirement for a material change of circumstances to be read into the statute, in circumstances where Parliament did not impose any such express requirement and *Evans* does not lead to such an implication. However, an absence of any new information or material developments (not necessarily a change of circumstances) since the sentencing judge's assessment would likely make it very difficult for the Secretary of State to show that "reasonable grounds" for their belief existed, if the exercise of the power was challenged. Conversely in a situation where there had been a material *change* of circumstances post-sentence indicating a

> significant increase in the risk of serious harm, a Secretary of State would likely be in a much stronger position in terms of there being "reasonable grounds" for holding the requisite opinion".

37. I accept and adopt that reasoning. ZB does not state a that a material change in circumstances is required for the exercise of the power. The power could not be exercised immediately after the Judge's decision because the Defendant's published Policy states it is to be exercised in the last 12 months prior to release. Nor does it need to be exercised early on in any sentence because it only bites at the end of a sentence. However, it is implicit that after the passage of time in prison which is part of the determinate sentence, after OASys reports and other assessments, new information may have arisen about each prisoner to inform the decision which will be made in the last 12 months.

The Published Policy

38. Three months after ZB came into force, on 14 July 2022, the Ministry of Justice issued the Guidance Policy (the Policy) on the "Power to detain Dangerous Prisoners serving a standard determinative sentence". It self-described as being mandatory. It was signed off by Gordon Davison the Group Director of the Public Protection Group, who gave evidence in this case.

39. At para. 1.3 it stated:

> "The use of this power is reserved for SDS prisoners who were not judged to be dangerous at the point of sentence (or who may have been considered dangerous but owing to the offence committed or another reason were not eligible for an extended determinate sentence at the time of sentencing) but who are subsequently assessed to pose a significant risk of serious harm to members of the public occasioned by the commission of specified offences on release."

(SDS means serving a standard determinate sentence)

40. At para. 2.3 it stated:

> "In recent years there have been several high-profile terror related incidents. The subsequent inquests have resulted in recommendations and conversations around what more can be done to support the safe management of individuals who may pose a similar level of threat to the public."

This paragraph may display an implicit acknowledgment that the choice of prisoners for consideration of the ZB power may depend on public concern, media interest or notoriety. I shall return to that below.

The Panel

41. The Ministry of Justice (MoJ) appointed an HMPPS (His Majesty's Prison and Probation Service) panel (the Panel) and delegated the power to make the requisite ZB decision on behalf of the Defendant. The Panel comprises: the HMPPS Lead Psychologist, the Executive Director for Security and the Chief Probation Officer, or an appropriate senior representative in their absence.

Selection

42. The Policy states that the standard process of identifying eligible prisoners uses the prison service's existing risk management tools. Those are described below as mainly being the OASys system but also many others. I shall refer to this basket of stated referral routes as the "automatic arm" for selection of prisoners from the SDS conveyor belt in prisons. I shall use the term "OASys" to cover all of the risk assessment tools for easy of terminology.

The new/additional information requirement for automatic selection

43. In relation to the evidence required for a prisoner to be considered, para. 4.5 stated:

> "Prisoners will only currently be considered for referral where the reasonable grounds are based on **new or additional information not available at the time of sentencing. Existing information, in particular information, which was before the sentencing Court, will not be deemed sufficient."**

44. This was expanded in paras. 6.10 and 6.13:

> "6.10 Central to the decision on whether a case is eligible for referral to the HMPPS Panel Secretariat under this policy is the need to ensure there is **new or additional information, over and above that available to the court at the time of sentencing**. This information must give reasonable grounds for believing that **the prisoner poses an imminent and very high (unmanageable) risk of serious harm to the public** (or a known individual) on release occasioned by the commission of specified offences, as set out in the legal threshold (see 4.1), alongside the additional policy criteria and tests outlined in the requirements and from 4.4 to 4.13. ...
> 6.13 The **new or additional information** referenced at 6.10 may demonstrate a continuing pattern of behaviour **which poses an imminent and very high risk of serious harm**, but in a manner which is **escalating**, **or may be evidence of new behaviour which is of significant concern**. This behaviour may have escalated or arisen as a direct result of being imprisoned, e.g., through criminal or extremist influences in custody e.g., the risk of causing serious harm through

committing further specified serious offences (the statutory test), must be something which can only be acted upon or fully materialise if the prisoner were released from prison. For example, a prisoner who is actively plotting to seriously harm or even kill an individual and has the means to do this on release (and not thought to be a risk that could be mitigated by licence conditions) but would not be able to carry this out while in prison.

…

6.20 This would draw on existing sources of evidence and assessments, including **risk assessments conducted in prison** (e.g., the Extremism Risk Guidance 22+, the OASys risk assessment, ViSOR record, or MAPPA screening). Other sources of risk evidence would include those assessments around **the prisoner's engagement and progress with offending behaviour programmes and interventions including theological and ideological interventions provided by specialist prison chaplains, violence reduction programmes** or programmes aimed at those convicted of sexual offending.

6.36 The HMPPS Panel does not need to consider all primary evidence relating to the prisoner; a **summary of such evidence** will be sufficient so long as it covers all relevant information and contains enough information to be able to make their decision. …" (My emboldening).

45. So, the prisoner's engagement with offending reduction programmes is expressly relevant. This new or additional information requirement was not required by ZB and was not part of the Dangerousness TTP criteria therein. It is clear that evidence which is regarded as within Policy includes consideration of the contents of or a summary of:

(1) the OASys risk assessments;

(2) other HMPPS assessments;

(3) MAPPA screening reports;

Furthermore, this threshold involves consideration of new evidence "over and above" that taken into account by the sentencing Judge.

Imminence and lack of manageability

46. In para. 4.8 the MoJ summarised the Dangerousness TTP criteria thus:

"4.8 Prisoners identified as potentially suitable for submission to the HMPPS Panel must also meet a test for dangerousness. Dangerousness test – the risk presented by the prisoner would:

a. cause serious harm to the public (through terrorism, death or serious injury/sexual assault) or present a national security threat if the risk were to materialise;

b. be **likely to materialise at or soon after the conditional release point (i.e., a degree of probability about the risk arising following release and that it may be imminent)**;

> c. **be credible** (the prisoner has the capability and means to commit a serious offence); and
> d. not be **safely manageable** using the normal means of applying even very stringent licence conditions, supervision and restrictions."
>
> "6.18 … the power should only be applied where other risk management approaches to management of risk in the community have been assessed as **insufficient to manage the risk** presented on release, as indicated by the new evidence or intelligence, and the power is considered the only remaining reasonable option." (My emboldening).

So, these paragraphs introduced new limiting factors for referral. Those were: imminence and lack of safe manageability in the community on licence.

Very High Risk = Imminence

47. At para 4.9 the MoJ introduced this limiting factor:

> "4.9 As part of this dangerousness test, prisoners must be assessed as being **very high risk of serious harm on OASys (Asset+)** meaning that there is an **imminent risk of serious harm** i.e., the potential event is more likely than not to happen imminently, and the impact would be serious."

48. Whilst this may appear to be an additional factor, when seen in the context of the existing prison service risk management tools (OASys and OMIC Early Allocation) and the requirement for imminence set out in the preceding paragraph, in fact it adds nothing because the difference between High Risk and Very High Risk is only imminence.

49. Under para. 4.10 prisoners must also be identified for management at MAPPA level 3, or the equivalent of MAPPA level 3 in circumstances where, due to restrictions around the index offence(s) not allowing for MAPPA level 3 management, a bespoke MAPPA information sharing meeting has taken, or will take, place. MAPPA means multi-agency public protection arrangements.

A public interest test

50. Under para. 4.12 the MoJ added a public interest test too:

> "4.12 Public interest test – if the dangerousness test is met, the public interest test must determine whether, on balance, it is in the public interest to detain the prisoner, potentially to the end of their sentence, rather than automatically release them at their conditional release date.

> This must be accompanied by a **deliverable plan** which sets out how any extra time served in prison will be used to reduce risk of harm. This should include deliverable objectives/activities."

51. Thus, it can be seen that there is a further filter to balance the risk and other factors arising from keeping the prisoner in prison against the same factors when releasing the prisoner on licence conditions. The public interest test is not engaged by the issues raised in this case.

Timing of the selection

52. By paras. 4.29 and 4.36, the decision to submit a case to His Majesty's Prison and Probation Service (HMPPS) Panel Secretariat should be made no earlier than 12 months prior to the prisoner's conditional release date. After that 12 month point has passed, the submission process should begin as soon as there is sufficient reason to believe the threshold may be met to justify doing so.

Procedure and dossier

53. Various senior bodies and persons are enjoined to submit cases to the Panel for consideration of referral under ZB by providing a dossier containing all relevant information including (para. 4.37):

> "the following mandatory reports:
> - Power to Detain Report, which sets out the justification for submission;
> - List of previous convictions;
> - OASys assessment (Asset+ for those under 18 at submission point);
> - Security report (gist of relevant intelligence); and
> - ERG assessment (for terrorist risk cases – where time allows).
>
> If available, a psychologist report will be provided. For terrorist risk cases, an ERG assessment must be provided where time allows taking into consideration the prisoner's conditional release date. …"

Specific decision making retained by the Defendant

54. Whilst ZB itself makes no reference to delegation of powers or retention of powers, in para. 4.42 of the Policy the Defendant will personally receive a referral from the Panel to make a decision where the Panel decide not to refer a case in which they have found Dangerousness TTP but have found that it can be managed effectively in the community or the public interest does not warrant referral. So, this is clearly a sensitive area which the Ministry of Justice considered should stay with the Defendant.

Victim input later, after referral

55. Under para. 4.49 on a case-by-case basis, victims engaged in the Victim Contact Scheme must be notified only once the prisoner has received their notice stating the CRD is overridden, in order to mitigate any worry or concern at not having been contacted about licence conditions for the CRD. The victim will then be given the chance to make and present a Victim Personal Statement (VPS) at any resulting Parole hearing and to request additional licence conditions for their protection if the prisoner were to be released by the Parole Board.

Guidance on factors which will not be sufficient to submit for a decision

56. In para. 5.3, guidance is given on evidence of behaviour which will not be considered to meet the threshold for selection for submission to the Panel to determine whether referral to the Parole Board will occur. These include: orchestrating criminal activity from within prison; prisoners about whom campaigns are waged by members of the public to keep the prisoner inside because the prisoner was not convicted of other offences due to lack of evidence; violent or poor behaviour in prison; solely due to mental health concerns; concerns over the availability of services in the community and finally, undue pressure due to notoriety or dissatisfaction with the severity of the original sentence (para. 5.3(f)).

Exceptional cases

57. Within the paragraph describing the process for selecting prisoners from the SDS conveyor belt for consideration by the Panel, at para. 4.14, the Policy stated this:

> "There may be cases that require exceptional consideration outside of the policy thresholds, and these will be considered on a case-by-case basis."

Thus, the Ministry of Justice foresaw and catered for exceptional cases of prisoners who would not be triggered for selection to be sent for the Panel to consider by the OASys automatic arm, but instead would be "hand picked" due to other reasons and considered outside the Policy thresholds. No further details were given in the Policy. The paragraph does not state who was envisaged to carry out the consideration of the ZB decision, the Panel or the Defendant. As will be explained below it is one of the Claimant's criticisms of the way his case was handled that the Defendant did not leave consideration to the Panel. I find little power in that criticism, firstly because the reports in the dossier made to the Defendant in this case came from MAPPA, the National Security Division (NSD), the OASys system and qualified experts and these bodies are not to be tarred with the assertion of inexperience. Secondly, because ZB grants the power to the Defendant and the Defendant may choose when to take the decision himself. The grounds for so choosing are not mentioned in or limited by the Policy. I shall return to this below.

The Claimant's Grounds of Claim

58. The Claimant's skeleton argument was woven into the Grounds and then also set out separately in another document. I have taken into account the full document and provide a summary of the main points below.

59. **Ground 1: No reasonable grounds.** the Defendant did not have reasonable grounds for believing the Claimant was Dangerous TTP so the ZB criteria were not met and the decision was unlawful or ultra vires. The decision of Cooke J. was not shown due respect; there was an absence of evidence of increased risk; there was no current intimate partner and no recurrent AD suffered by the Claimant; the Defendant misunderstood or failed to consider the psychiatric evidence before Cooke J.; there was no new or additional evidence which was material to the Dangerous TTP test.

60. **Ground 2: The decision was made contrary to the published policy on ZB.** The specific Policy paragraphs which are alleged to have been breached are:
- No Imminence: para. 4.8(b);
- Not Very High Risk: paras. 4.9 and 6.14;
- No new material information: 1.3, 4.5, 5.3(b), 6.10 and 6.13;
- No evidence of increase in risk: relying on *Simpson* at para. 132 in the judgment of Heather Williams J.;
- OASys/system did not trigger consideration: para. 6.12;
- Doctor Alcock's report was overlooked: para. 6.19;
- Early notice was not given: para. 6.15;
- Not last resort: para. 6.18;
- The Claimant is safely manageable in the community, so no referral should have been made, see para. 4.8(d).

The decision was made in the absence of: (1) imminence, and (2) new or additional evidence, (3) evidence of an increase in the risk he posed, and (4) evidence that the Claimant is not safely manageable in the community, so is contrary to Policy. The Claimant asserts that there was no good reason for the Defendant to depart from the Policy and the Claimant does not pose a sufficiently imminent Very High risk to be referred.

61. **Ground 3: the decision was Wednesbury unreasonable.** The Defendant failed to take into account relevant matters and took into account irrelevant matters. The relevant matters overlooked were as set out above and:
- The low risk of reoffending;
- Doctor Alcock's report;
- A misunderstanding of Adjustment Disorders;
- The absence of imminence or Very High Risk;
- The lack of an intimate partner;
- The safe manageability of the Claimant on licence with the proposed conditions.

The irrelevant matters were the public campaign.

62. **Ground 4: Bad Faith.** The decision was made for an improper purpose, namely at the behest of the campaigners, including JS's family and friends, politicians and the media to keep the Claimant in prison and this was evidenced by the Defendant's alleged personal involvement with those campaigns. Alternatively, the appearance of bias arising therefrom.

New Grounds

63. A last minute attempt was made to add two new grounds by the Claimant in his skeleton argument. No written application was made to amend the Grounds of Claim. No draft amended Grounds of Claim were provided. The Claimant did not apply at the start of the hearing for permission to amend. After submissions on an application for redactions which was agreed to be left in abeyance, when the Claimant started to seek to make out grounds 5 and 6 the Court raised the point. CPR Parts 23 and 54, and PD54A, at para. 11.1, require permission for pleadings to be amended once they have been served. Such an application must be made promptly and should be accompanied by a draft. The explanation for the need for the amendment and the reasons for any delay should be provided. Written evidence in support should be put forwards. The Defendant objected to the application made in the face of the Court. For the reasons given in open Court I refused the application for lack of procedural rigour and lack of such evidence in support, but stated that I would not restrict the Claimant from making the submissions he wished to make to see if the broader complaints would fit within the 4 original grounds.

The Defendant's Grounds of Resistance

64. The Defendant's arguments were woven into the Grounds and also set out separately in a separate skeleton. I summarise the responses to the Grounds of Claim below.

65. **Ground 1: reasonable grounds.** The Defendant had the requisite opinion namely he believed, on reasonable grounds, that the Claimant would be Dangerous TTP on release when making the referral to the Parole Board. The Defendant asserted that his ZB decision engendered no disrespect towards and does not undermine Cooke J.'s decision made 13 years before. The ZB power only arises in cases where Judges have decided at sentencing that the Dangerous TTP criteria are not fulfilled. Heather Williams J.'s formulation of the test to determine reasonable belief, set out in *R (Simpson) v SSJ* [2003] 1 WLR 1505, at paras. 111-113 applies and is satisfied on the basis of the evidence of Ms Moore, the NSD screening report and the submission, summarising the OASys reports on the Claimant from 2011-2023, set against the gaps in the psychiatric reports of Doctors Alcock and Joseph which were before the Judge and the absence of a pre-sentence report.

66. **Ground 2: The policy on ZB.** The Defendant accepts that the decision was exceptional because it was outside one of the general requirements (immediacy/Very High risk) but submits that there was good reason for making the decision despite the lack of immediacy, namely that Claimant had frustrated or undermined or blocked the OASys

and other professional risk assessments thus undermining the assessment of immediacy and safe manageability in the community.

- **Imminence:** para. 4.8(b). The Defendant accepts that the referral was a departure from policy on this ground but asserts that there were good reasons for doing so.
- **Very High Risk:** paras. 4.9 and 6.14; The Defendant accepts that the referral was a departure from policy on this ground but asserts that there were good reasons for doing so. This is the same as the immediacy point.
- **New material information**: paras. 1.3, 4.5, 5.3(b), 6.10 and 6.13. The Defendant asserts that there was new or additional material information on which to form the requisite opinion.
- **Evidence of increase in risk:** insofar as was required be *Simpson* para. 132 in the judgment of Heather Williams J., the Defendant asserts that there was evidence of an escalation in risk and/or new substantial concerns about risk and the Claimant frustrated the process for assessing risk and hence there is a good reason to depart from the policy because the Claimant caused the lack of evidence or ability properly to assess and reduce the risk.
- **OASys/system did not trigger consideration:** para. 6.12. This is denied.
- **Doctor Alcock's report was overlooked:** para. 6.19. This is denied, summaries of Doctor Alcock's report were expressly considered.
- **Early notice was not given:** para. 6.15. This is agreed but it is denied that early notice was required or that this was a breach of Policy.
- **Not last resort:** para. 6.18. The Defendant asserts referral to the Parole Board was the last resort and safe manageability was not present due inter alia to the Claimant's refusal to engage.
- **Manageability in the community:** para. 4.8(d). The Defendant asserts that safe manageability was not present or alternatively not possible to assess properly due to lack of engagement by the Claimant. The Defendant asserts that, on reasonable grounds the Defendant believes that the Claimant may not be manageable in the community because he has not engaged so that adequate, properly focussed licence conditions cannot be put in place for his issues and he may not engage outside and may frustrate and break any licence conditions.

67. **Ground 3: Wednesbury.** The Defendant submits that this Ground adds nothing to Ground 1 in the light of Heather Williams J.'s ruling in *Simpson* on the need to specify identifiable reasonable grounds and the bases thereof and to satisfy the defence to Ground 1.

68. **Ground 4: Bad Faith.** The Defendant expressly stated in the decision that he did not take into account undue pressure from media or campaigns or the documents and videos received from the campaigners or the media (set out in Annex E to the decision) when making the ZB decision. The Defendant denies there is any basis for inferring improper purpose or perceived bad faith from the factual matrix. His own statements were to the

effect that he would make the decision within the law. The Defendant denies, on the facts, that a fair minded and informed observer would consider that there was a real possibility that he had been biased.

The relief sought

69. The Claimant seeks: (1) an order quashing the referral; (2) a declaration of unlawfulness; (3) other relief and costs.

The chronology of the Claim

70. This claim dated 2.11.2023 was issued in very early November and dealt with quickly by the Administrative Court because the liberty of the subject is at stake. Permission was not considered on the paper. A rolled up hearing was ordered.

The facts

The Crime

71. In this paragraph is a summary of what the Claimant told the consultant psychiatrists before trial. It is not the same as the Judge's findings which I shall set out beneath it. The Claimant is aged 60, he was born in January 1964. He was brought up in Scotland as one of three brothers. His upbringing was stable and he went to university and obtained a degree. He was a keen cross-country runner and cyclist and represented Great Britain in the duathlon. From 1987 he joined British Airways and subsequently qualified as a pilot and later became a Captain, in 2004. He asserted he had a good occupational health record. Before marrying JS he had 4 long term intimate relationships with women and asserted that those involved no acrimony or violence. He met JS in 1998. She worked as a marketing manager, was divorced and had no children. They married in 1999 and signed a pre-nuptial agreement. She had a trust fund and a house. He paid off all or part of her mortgage by selling his flat. They were blessed with two children, a boy and a girl. The Claimant informed the psychiatrists for the purposes of their reports before trial that the marriage was good in the early years but, on his assertion, JS had an affair in 2006. They attended counselling but that did not work. In broad summary he informed the psychiatrists that there was a disputed incident in 2007 when JS had asserted that he had brandished a kitchen knife at her during an argument and as a result she had hidden in a room in the home, called friends for protection, fled to her parents abroad, returned with a personal protection officer, obtained an ouster injunction, installed CCTV at the matrimonial home, but not gone through with criminal proceedings. From 2007 to 2010 the divorce proceedings were extremely acrimonious, both in relation to finances and to custody of or contact with the two children. The Claimant reported to the psychiatrists that huge sums were spent by JS on legal fees involving, on his evidence, highly aggressive family law solicitors who sent a lot of legal letters to him. He also instructed family law solicitors. He took out two loans to pay for his legal fees amounting to £65,000. He found the process was grinding him down as they moved towards a final hearing in April 2010. That hearing was adjourned awaiting a decision by the Supreme Court relating to prenuptial agreements. On his self report to the psychiatrists he found holding down his highly

responsible job as a British Airways pilot alongside fighting the acrimonious divorce and dealing with the contact with his children and his interactions with JS and what he saw as her betrayal of him very stressful. He became unable to concentrate, particularly in meetings with his family law solicitor. On the positive side he met SB, an air hostess, in July 2007 and entered an intimate relationship with her. She became pregnant in early 2010 and the intimate side was strong. Tragically she miscarried two weeks before the financial dispute hearing in April 2010. This triggered the second bout of sleeplessness that the Claimant had suffered, the first starting in early 2010 for which he had been prescribed a two to three month course of sleeping pills. He started a second course of sleeping pills after the miscarriage and the adjournment of his matrimonial financial hearing. He also suffered tension and stress, shakiness, palpitations, poor concentration, anhedonia and fatigue on his self report. After a holiday in South Africa in late August 2010 which was enjoyable, he flew two long haul flights to the USA at work in early October which exhausted him and involved him being anxious and dreading the forthcoming adjourned hearing set for the 8th of November 2010. He had the children for a week of contact in the week leading up to the 30th of October 2010 and during that week his girlfriend and his parents stayed at his property. He was very anxious, stressed and using sleeping pills. On the 30th of October he was due to return the children to JS at 4:00 PM. He put a claw hammer in a plastic bag containing his daughter's homework and drove both children to the matrimonial home. After they entered and went to the TV room, he became involved in an argument with JS firstly over future schooling and secondly over a minor eye injury their son had suffered during the week of contact. The Claimant asserted to the psychiatrists that he was going to get the eye ointment from the car when he was called a "stupid idiot", he flipped and in a frenzy of emotion hit JS 14 times with the hammer, which he had taken out of the plastic bag. He stopped when he saw blood, carried the body back to the rear of his car and removed the CCTV from the matrimonial home. He put the children in the car. They were aware of their mother's body in the car. One commented that he/she thought they were going to hospital. He initially drove towards the hospital but changed his mind and dropped the children with his girlfriend at his house. He decided after doing so to put JS's dead body in a box he had previously placed in a large hole which he had dug in Great Windsor Park. He took various items from his garage, drove to Great Windsor Park and buried JS in a plastic box in the ground there. Thereafter, he had thoughts of suicide and wanted to make a public statement. He buried the hammer and the CCTV elsewhere, not with JS. He had thoughts of going back to work and flying and crashing a plane with passengers on it.

72. The relevant summary of the facts (to be contrasted with the Claimant's above accounts) was provided by Cooke J. after the jury delivered their verdict. This is what he found as facts on the balance of probability for sentencing:

> "There is no doubt that about 4 o'clock on Sunday 31st October you killed Jo by hitting her over the head at least 14 times in the hallway of Tunn Cottage, the house where you and she had previously lived

together. After your two children had spent the second week of half-term with you, your girlfriend and her two children, you drove them back to the house and handed them over to Jo on the Sunday afternoon. In the bag containing their homework, before leaving your own home, you placed a hammer, which is what you used to batter her to death with her children in a room two doors away. There was no fight, since there were no signs of disturbance in the hallway. She must have been taken by surprise, though the defensive injuries found on her arms and hands show that she must have sought to cover her head as you rained blows down upon it. She must have lost consciousness and died quickly. You then wrapped her body and put it in the back of your Volvo. The absence of bloodstains in the car shows this was done effectively. You knew she was dead. You went back into the house and removed the CCTV recorder, which would have contained film showing you putting the body in the car. You pulled out the telephone plug for the phone. You then took the children back to your girlfriend and left them with her. Your nine year-old daughter heard what happened and saw you put your wife's body in the back of the car. Your young son asked you on the way back whether you were taking Jo to hospital. You never called an ambulance nor took her to hospital and, in my judgment, you never had any intention of doing so. Instead, having dropped off the children, you took her body out to a remote part of Windsor Great Park in the car. You then carried or hauled her body 100 metres from the track and put it in a garden box, which you had buried in a hole that you had dug there previously, having left a spade nearby wrapped in a tarpaulin. The body was wrapped in a surfboard bag and plastic sheeting with a black bin liner over the head to stop the leakage of blood. You then left other items in the box you had intended to use to keep the blood off yourself, together with other items which you may have considered using to wrap the body up. You took a number of steps to ensure her body would never be found, though when it became plain to you that the evidence showing that you killed her was so strong you were later to direct the police to the burial site. You buried the hammer and CCTV recorder somewhere else, went home and changed before going out once again on your own evidence to dispose of the bloodstained clothes which you were wearing and torches or camping lights you had used. You took extensive steps to cover your tracks. You alone know how you came to kill your wife, but it is plain that you were angry with her and the way in which, through her lawyers, she had conducted the divorce proceedings which were due to culminate in a financial dispute hearing on 8th November. The resentment and hatred that you harboured in the context of an acrimonious dispute, where you considered she had made use of you and betrayed you, is apparent from materials in evidence before the

> court. You thought that she had concealed the extent of her assets from the divorce court and she had intended to force you to give way in the dispute by racking up costs and she intended you should get as little as possible out of the divorce whilst she continued to live well in Tunn Cottage. In particular you were aggrieved that she appeared, in your view, to want to deprive you in any real say in the education of your children for which she had always paid from her family's resources. On your own evidence you went to Tunn Cottage that day with the intention of remonstrating with her about the education of your children and, although in evidence you did not say that an argument had occurred about it in the hallway, that is what you told the police in a written statement which was handed over in the course of a series of interviews where you refused to say exactly what had happened. Questions of residence and access to the children had been resolved but the issue of their future education remained. There can only be one reason for taking a hammer to the scene, threatening with her with it, with a court hearing fixed for November 8th makes no sense at all, so I am driven to the conclusion that you went with the intention of hitting her with it either because of her perceived attitude towards you in relation to the divorce settlement and children's future or in the event that she should maintain her stance with regard to the children's education. Whichever it was, striking her 14 times with a hammer can only have been done with the intention of killing her. The box buried in the woods, whenever it was placed there, can only have been put there with one purpose in mind, that for which it was used, and shows that you had prepared for this. The matter is aggravated by three factors. First, the planning and premeditation involved, albeit flawed because of the presence of your children in a room two doors away. Secondly, the proximity of the children to the attack, the fact that they heard what occurred and were then carried in the car with the body of their mother in the back. Thirdly, the concealment of the body, although some four days later you were to show the police the location of the burial."

73. The Claimant appealed the sentence, reported at [2011] EWCA Crim. 2796, and was unsuccessful.

The psychiatric opinion evidence before the Judge

74. The Claimant's solicitors instructed Doctor Alcock to report on the Claimant's psychiatric condition so as to give evidence at the criminal trial. His report was dated 8th February 2011. He was a highly experienced consultant forensic psychiatrist. He set out the issues he was to address which were: whether the Claimant was fit to plead and whether the Claimant was suffering from an abnormality of mental functioning sufficient to justify a finding of diminished responsibility within S.2 of the *Homicide Act 1957* as substituted by S.52 of the *Coroners and Justice Act 2009*. Having set out

the past history and a summary of the events constituting the crime, Doctor Alcock recited the Claimant's time in custody during which his headaches resolved. On examination the Claimant reported being depressed, worried, suffering poor sleep but having no current suicidal thoughts. He was fully orientated in time and space with no psychotic symptoms, a full grasp of detail and able to communicate normally. Doctor Alcock gave his opinion that the Claimant was currently suffering no mental health disorder but had, in the past between April 2010 and up to and just past the killing, suffered from an Adjustment Disorder as categorised in section F43 of ICD 10. Stopping there, the International Classification of Disorders, version 10, is the European classification of mental disorders. It is a different book from the American manual which is called DSM, or the Diagnostic and Statistical Manual of mental disorders.

75. He recited parts of the F43 diagnostic criteria thus:

> "This category differs from others in that it induces disorders identifiable not only on grounds of symptomatology and course but also on the basis of one or other of two causative influences .... an exceptionally stressful life event producing an acute/stress reaction, or a significant life change leading to continued unpleasant circumstances that result in an adjustment disorder. Less severe psychosocial stress ("life events") may precipitate the onset or contribute to the presentation of a very wide range of disorders classified elsewhere in this work (re: ICD 10) but the etiological importance of such stress is not always clear and in each case will be found to depend on individual, often idiosyncratic vulnerability. ln other words, the stress is neither necessary nor sufficient to explain the occurrence and form of the disorder. In contrast, the disorders brought together in this category are thought to arise always as a direct consequence of the acute severe stress or continued trauma. The stressful event or the continuing unpleasantness of circumstances is the primary and overriding causal factor, and the disorder would not have occurred without its impact. Reactions to severe stress and adjustment disorders in all age groups, including children and adolescents, are included in this category. Although each individual symptom of which both the acute stress reaction and the adjustment disorder are composed may occur in other disorders, there are some special features in the way the symptom manifest that justify the inclusion of these states as a clinical entity. The third condition in this section - post-traumatic stress disorder has relatively specific and characteristic clinical features. These disorders can thus be regarded as maladaptive responses to severe or continued stress in that they interfere with successful coping mechanisms and thus lead to problems in social functioning. …
>
> **Adjustment Disorder**

> States of subjective distress and emotional disturbance, usually interfering with social functioning and performance, and arising in the period of adaptation to a significant life change or to the consequences of a stressful life event (including the presence or possibility of serious physical illness). The stressor may have affected the integrity of an individual's social network (through bereavement or separation experiences) for the wider system of social supports and values (migration or refugee status). The stressor may involve only the individual or also his or her group or community. Individual predisposition or vulnerability plays a greater role in the risk of occurrence and the shaping of the manifestations of adjustment disorders than it does in the other conditions in F.43. But it is nevertheless assumed that the condition would not have arisen without the stressor. The manifestations vary, and include depressed mood, anxiety, worry (or a mixture of these), a feeling of inability to cope, plan ahead, or continue in the present situation and some degree of disability in the performance of daily routine. The individual may feel liable to dramatic behaviour or outbursts of violence, but these rarely occur. However, conduct disorders (e.g. aggressive or dissocial behaviour) may be an associated feature, particularly in adolescence. None of the symptoms is of sufficient severity or prominence in its own right to justify a more specific diagnosis. The onset is usually within one month of the occurrence of the stressful event or life change, and the duration of symptoms does not usually exceed 6 months, except in the case of prolonged depressive reaction - F43.21 (a mild depressive state occurring in response to a prolonged exposure to a stressful situation but of duration not exceeding 2 years)."

Doctor Alcock provided the opinion that the Claimant suffered from an Adjustment Disorder (AD) which was exacerbated in the week before the killing and substantially impaired his ability to self control and form rational judgments at the time of the killing. He provided no prognosis and did not consider Dangerousness TTP nor was he asked to do so.

76. Doctor Joseph reported for the prosecution and gave evidence at the trial. His report dated April 2011 set out his understanding of the Claimant's previous life history and psychiatric history from the Claimant's self-report and his British Airways records. There was one entry in 1993 in the British Airways records but apart from that the Claimant had not had any emotional problems. Doctor Joseph noted that the Claimant felt devastated, betrayed and angry by what he perceived was his wife's infidelity and untruths about the 2007 knife incident and then about the divorce and his wife's lawyers. Doctor Joseph raised District Judge Davison's judgment dated 4th September 2009 which included a record of the Claimant's antipathy towards his wife and his opinion that JS was doing all she could to assist. Doctor Joseph noted the Claimant

considered the whole system was biassed against him as a father. Doctor Joseph accepted that from April 2010 the Claimant's stress was building up, he was struggling at work and making little mistakes. He was exhausted by mid-October. Doctor Joseph noted no mental health disorder was diagnosed in custody at anytime. On examination he found the Claimant polite, cooperative but controlling, assertive and angry with no anxiety or depression and recorded that the stress had disappeared after the killing. Doctor Joseph advised that the Claimant had capacity to plead and considered that the Claimant was single minded, determined, a logical thinker, decisive and resilient but, as a result of his marriage breakdown, he had become angry, frustrated, perceived that he was unfairly treated, had difficulty dealing with these emotions and developed headaches. Doctor Joseph did not consider that the Claimant was suffering from an Adjustment Disorder or any mental disorder, nor did he consider that the Claimant had a predisposition or vulnerability to mental disorder. He advised the opposite, that the Claimant was resilient to mental disorder. Doctor Joseph was not asked to provide a prognosis or to consider Dangerousness TTP.

Sentencing remarks

77. When sentencing the Judge said this about the stressors and the Retained Culpability:

> "The stresses which operated upon you and which the jury must have found led to your adjustment disorder are those which many people face without resort to violence, and the definition of this disorder suggests that violent outbursts are very rare even for those who suffer from it. Those stresses as set out in the evidence were as follows: the stress of the acrimonious matrimonial proceedings, the car crash in which Stephanie was involved in September 2009, the sight of a suicide in San Francisco in February 2010, the miscarriage suffered by Stephanie in April 2010, the adjournment of the final financial hearing from April to November, which resulted in a protraction of the dispute and uncertainty about the final resolution and the financial difficulties which you faced and uncertainty of the outcome in those matrimonial proceedings and, finally, as the psychiatrist instructed by the defence said, the pressure on you to deal with the issues that your solicitor wanted you to deal with prior to the November hearing. The jury have found that one or more or a combination of these stresses constituted a significant life change or a stressful life event within the meaning of the definition of an adjustment disorder, which is a minor form of stress disorder, and brought that stress disorder about. As I said, your responsibility, though diminished, remains substantial also. You intended to kill; you intended to conceal the body and to hide the evidence of the killing. I take into account the fact that you indicated that you would plead to manslaughter by reason of diminished responsibility when the psychiatric evidence was available."

Post conviction evidence

78. When, below, I am summarising the evidence put before the Defendant, I do so focusing on what the Defendant identified as his concerns.

The OASys reports

79. The Claimant was assessed every year using the OASys system. The risk labels used were as follows:

- Low risk of serious harm - current evidence does not indicate likelihood of serious harm.
- Medium risk of serious harm - there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse.
- High risk of serious harm - there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious.
- Very High risk of serious harm - there is an imminent risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious.

80. Ms Avarne was his probation provider at HMP Bullingdon who was supervised by J. Rowlands and completed the assessment in September 2011. Her stated sources included: the CPS; the previous convictions which included not just the manslaughter but also the conviction for obstructing the coroner's investigation; an interview and psychiatric evidence. Ms Avarne noted that during the probation interview the Claimant stated he believed his use of sleeping pills prior to the offence contributed to his actions. It was unclear if the Claimant was acknowledging the factors that led up to the offence or whether he viewed these factors as minimising his responsibility for his offending. In Section 3 Ms Avarne set out what she regarded as significant problems for the Claimant in relation to accommodation on release. In Section 5 she noted significant problems in relation to finances on release, including the legal fees debt incurred during the divorce. She noted those as contributing to the risk of harm. In Section 7 she raised the potentially manipulative behaviour of the Claimant during the relationship with the victim which would need to be explored further. In Section 10 she considered that psychological problems could be significant in relation to severe stress and the risk of harm to others. In Section 11, on the Claimant's thinking and behaviour, she raised significant issues about aggressive and controlling behaviour and temper control and the Claimant's inability to recognise problems. She recorded that:

> "during probation interview Mr. Brown seemed to have limited plans of how he was going to avoid further offending, stating that he felt the exact set of circumstances contributing to the offence would unlikely occur again and therefore he would not offend in the future. This is a very simplistic view of his offending and presents some

> concern - would benefit from improving his thinking skills to reduce his risk of reoffending."

In Section 12 the probation officer noted the Claimant indicated he would comply with any Sentence Plan but did not appear motivated to do so in order to address his offending, rather it was assessed that his desire was to maintain compliance. It was hoped his attitude might change. She proposed assessing his suitability for a programme on motivation. Under the section dealing with the risk of serious harm, the probation officer assessed that if the Claimant were released today the risk would be *"imminent and serious*" and greatest if the Claimant failed to receive intervention and faced ongoing financial difficulties. She pointed to relationships, disputes over finance, failing to address offending related behaviour, untreated ongoing mental health needs, a lack of problem solving skills and situations where the Claimant loses his temper. These were circumstances likely to increase the risk. The probation officer advised that he needed "targeted intervention" to address his lack of thinking skills and to explore factors contributing to his offending and to help constructing a release plan. The assessment of the risk posed by the Claimant in the community to a known adult was "High", to the public was "Low" and to children was "Medium". There was also a concern about the risk of suicide.

81. In the 2014 OASys assessment, which was also carried out by Ms Avarne at HMP Bullingdon and supervised by L. Pitman, the probation officer noted that the Claimant did not appear to be motivated to address the factors linked to his offending, refused to engage with his offender supervisor or mental health in-reach team and appeared to be preoccupied by "*grievance thinking*" rather than focusing on future goals and making the most of his prison sentence to prepare for release. He had completed a Sycamore Tree victim awareness group course, but feedback and learning from the course was unknown. During his probation interview the Claimant seemed to have limited plans of how he was going to avoid further offending, stating that "*he felt the exact set of circumstances contributing to the offence would be unlikely to occur and therefore he would not offend in future".* This was described as a "*simplistic view*" of his offending and presented concern. Under the Section 3, relating to motivation and capacity to change the positively, it was noted that Claimant was "*not at all"* motivated to address his offending. He did not have the capacity to change and reduce his offending. He was "*refusing to engage with his Sentence Plan or cooperate with his offender supervisor*". This was a change from his previous assessments where he had appeared more ready to engage. It was noted that he still required assessment for accredited programmes and mental health assessment and support. The priority for the Claimant was to reduce the risk of serious harm and reduce offending related factors.

82. The other OASys reports between 2015 and 2022 were summarised in the September 2023 submission to the Defendant.

83. The Claimant's most recent OASys report was dated 17 April 2023 and was prepared by the Claimant's then probation officer, and countersigned by Marina Moran, Senior Operations Lead within the NSD (National Security Division). The risk of serious harm posed by the Claimant was assessed as follows:

- children – High;
- public – High;
- known adult – Medium.

The officer concluded:

> "I assess that Mr Brown does not accept full responsibility. In telling me that the victim had had an affair and was 'premenopausal', he is perhaps attempting to tarnish the victim's character and see himself as the victim which goes some way to excusing his offending and shifting blame onto others"
>
> "In claiming that he is 'no risk' to future partners, Mr Brown has shown himself to have no insight into the seriousness of his actions and a lack of appreciation for the need for others to be safeguarded from him It is my assessment that Mr Brown continues to present a High risk of serious harm to future female partners when in the community."
>
> "From a risk management perspective it would be difficult without a high level of cooperation from Mr Brown in contributing meaningfully to any Risk Management Plan, to ascertain whether the stressors in his life may trigger high levels of stress in the context of the diagnosis of Adjustment Disorder. In other words, were Mr Brown to experience similar reactions from the Adjustment Disorder could he identify the signs and inform a supervising officer that his risk of serious harm towards others is likely increasing? Clearly, it is necessary for Mr Brown to devise a strategy where he can contribute to keeping others and himself safe in the future in the face of adversity. I am of the view that a psychological assessment is necessary to establish the role that the Adjustment Disorder plays in his future risk to himself and others."
>
> "Mr Brown has shown himself to be dismissive of professionals, disinterested in their advice, if he is not in agreement with it. He has not shown interest in developing an understanding of his risk factors and has boldly stated that he poses 'no risk' on release. This shows that Mr Brown does not recognise a need for him to change his behaviour now or on release and in my view has a distorted perception of the reality of his situation. His unwillingness to make positive changes is evidenced by lack of motivation to complete offence focused intervention and by only engaging with professionals on his own terms. His behaviour towards his POM in

> particular is of hostile orientation, dismissive and avoidant, engaging in topics of discussions which are of his choosing only."
> "Based on what behaviours the victim was subjected to and Brown's attitude towards professionals since his arrest, I am of the view that narcissistic traits are present and play a role in the risk he presents."
> "According to prison records & discussion with Mr Brown's POM, Mr Brown appears to have avoided & resisted undertaking any offence focused work or been willing to engage with his supervision plan. This indicates that he believes he has nothing to learn about himself & the risk he potentially poses to others & is unconcerned with engaging with a supervision plan to assist him with preparing a strategy to keep himself & others safe, which is concerning. Without cooperation to address underpinning issues & risks, he is unable to evidence any progress he has made nor can those monitoring his risks evidence change."

84. Specifically in relation to risk assessment his probation officer opined as follows in relation to the High risk to children:

> "**Known Children & Children in general** - … Mr Brown's son is at risk in light of domestic violence. Mr Brown's other children aged 10 and 9 at the time, were in the home when Mr Brown committed the offence against their mother. Any children within Mr Brown's future relationships are therefore at risk - assessed as high in the community. Although *** resides in France with his mother, the risk is imminent in the community as he frequently spends time in Edinburgh with his paternal Grandparents which offers Mr Brown access to his son which must be overseen safely.
> …
> "**What is the nature of the risk? 2) Children: If any children were to witness domestic violence this has potential for psychological and emotional harm**. It is not likely that this risk would be intentional by Mr Brown, but through the harm upon a future partner extending to the children. Risk of physical harm to children could not be ruled out due Mr Brown's disregard for the safety of his children who were also in the home when he committed the attack which killed the victim. This indicates a callous disregard for the children in committing their attack in close proximity and transporting their dead mother inside the car with them, failing to seek medical attention. As such, the propensity for inflicting future emotional and psychological harm upon a child cannot be ruled out.
> "
> **"R10.3 When is the risk likely to be greatest. 2) Children:** The risk is assessed as high on release and likely to be greatest when Mr

Brown is in the community and in a situation where he is spending a significant amount of time with children without the knowledge of professionals. The risk to his son *** is greatest on release as *** frequently stays overnight with Mr Brown's parents. This means that Mr Brown would have contact with his son at the premises and this is not appropriate without Children's Services assessment of risk being completed prior. The risk is also acute when Mr Brown is in a relationship and his new partner has children. In such circumstances, Mr Brown may fail to disclose developing intimate relationships to his COM, impacting on the ability to safeguard vulnerable children appropriately. Risk is heightened when he experiencing difficulties [sic] within a relationship and is exerting control through inappropriate response to conflict."

…

"R10.4 **What circumstances are likely to increase risk. 2) Children**: If Mr Brown were to become violent and/or aggressive. The mostly likely cause would be during a new relationship on release but, as evidenced by the circumstances around his adjustment disorder, may also be caused by acute stress. In such circumstances it cannot be ruled out that any children, if in Mr Brown's care or company, would also be harmed. This highlights the need for licence conditions which prohibit Mr Brown from having contact with children under 16 years old on release through a relevant licence condition."

…

"R10.5 **What factors are likely to reduce the risk.** … By engaging meaningfully with one to one work around victim empathy during supervision sessions with COM, Mr Brown is more likely to develop an understanding of the long term implications that his offending had had upon children.' (The emboldening was in the text).

85. In relation to the "medium risk" of serious harm posed to known adults, the Claimant's Community Offender Manager (COM) stated:

'R10.2 What is the nature of the risk 3) Known Adult: There is no indicator that Mr Brown has intent or desire to cause physical harm upon the listed known adults. On release, if Mr Brown expresses any plans or intentions to approach the family of the victim then the risk of harm would increase to high. The risk is of emotional and psychological harm through harassment behaviours as a result of grievance thinking. Mr Brown has made it known that he blames the media attention his case has received upon the deceased victim's family. He is no longer in a relationship with the mother of his son (SB) and therefore the risk to her is also medium

> but if this were to change and they were to reconcile then she would be at risk high of: physical harm through assaults, use of weapons with which to inflict injury or instil fear (power and control). Also the risk includes harassment and/or stalking behaviours in the event of sexual jealousy. There are risks of manipulative and predatory behaviours as part of generalised intimate partner violence risks and this could end in fatality.
>
> …
>
> R10.4 **What circumstances are likely to increase risk 3) Known adults:** The index offence indicates that Mr Brown is driven by a desire for revenge, power and control and with an inability to empathise. Mr Brown has objected to the media attention his case continues to receive and has grievance thinking around this. This underlying factor may trigger Mr Brown to redress justice or what he feels is fair. In light of the emotional abuse he exhibited towards the victim, there is a risk of harassment and emotional abuse extending to others he feels have wronged him. In light of Mr Brown's self disclosed negative views of the deceased victim and her family, there is the possibility for this to impact his son and daughter also. If Mr Brown's son's and daughter do not wish to have contact from Mr Brown, they are at risk of emotional harm. This would be imminent when Mr Brown is exhibiting attitudes which disregard the rights of others to their space and privacy and therefore attempts to seek them out.
>
> …
>
> R10.5 **What factors are likely to reduce the risk 3) Known adults:** Non contact conditions and allow Mr Brown to be aware of the firm boundaries in place to safeguard of known adults at risk. In light of the emotional harm that has been inflicted and continues to cause the victim's family distress, recall action will likely be necessary if it comes to light that Mr Brown has breached this condition.'

86. The Claimant's probation officer completed a SARA in conjunction with the 2023 OASys assessment and concluded that the Claimant posed a 'High' imminent risk of violence towards any partner and "*a High risk of physical and emotional harm to any future partner*" and a 'Medium' risk to others.

The information from the NSD

87. The Claimant's case was previously managed by the South Central Probation Region of the Probation Service. However, Mr Davison stated in his witness statement that the Claimant was referred to the Critical Public Protection Casework ('CPPC') team in the Probation Service's NSD on 10 June 2022 due to the high profile of his case. Any case in which there is likely to be a high level of media interest becomes complex for the

Probation Service to manage, because the fact that the licensed prisoner has a level of notoriety affects their reintegration into society. The Claimant's sentence is also managed by Multi Agency Public Protection Arrangements ('MAPPA') as a Level 3 case. The statutory MAPPA provisions require the Police, Probation and Prison Services acting jointly as a responsible authority for each of the 42 areas of England and Wales to work together to assess and manage the risks presented by known dangerous offenders, primarily those convicted of specified sexual and violent offences. Other agencies, such as health service and local authorities, are statutorily required to co-operate with the MAPPA responsible authority.

88. In November 2022, at a MAPPA Level 3 meeting to discuss the Claimant's case, it was decided that it was important for the Claimant to complete offence-focused intervention prior to his release, but that he had repeatedly refused to engage with interventions and his sentence plan. It was agreed that there should be further effort for a Programme Needs Assessment noting that it might require the Claimant's consent, as well as a transfer to another prison due to HMP Northumberland not having any psychology resource. The Claimant refused. The NSD later decided to instruct Ms Moore to report.

Ms Moore's report

89. On 10 July 2023, a forensic psychologist, Ms Moore, visited the Claimant in custody, seeking his consent to engage with a PRA. Ms Moore recorded that the Claimant "presented as defensive and abrupt and was not willing to engage in conversation with me." When asked if he would consent to a psychiatric assessment with regards to his previous Adjustment Disorder he said *'if they had done their homework they would have realised that it only lasts 6 months.*" The Claimant stated that he wanted to speak to his lawyer about the consent forms. Ms Moore returned a week later to collect the consent forms. The Claimant initially ignored her but then said "that his lawyer said no". Ms Moore's report is dated September 2023. She is a senior chartered forensic psychologist. She was instructed by NSD and MAPPA to report on the risk presented by the Claimant in the community. She was not specifically instructed to assess the Claimant on the Dangerousness TTP criteria. She noted that she had not been asked to provide a "parole directed" report in para 2.2.

90. Ms Moore decided to use the SARA V3 methods because the Claimant's main offence was intimate partner violence. She commented that there was no psychology file. This was because the Claimant had refused all along to engage during his sentence. She advised importantly that: *"Due to the lack of collateral information and the reluctance of Mr Brown to participate there are limitations to this assessment."* At para. 5.5 she summarised some of the text from DSM V on ADs. She summarised the build up to the offence. She summarised the sentencing remarks. She then progressed to do the SARA V3 assessment. She extracted information from the OASys system and the psychiatric reports from the trial. This is because she had nothing more to go on because the Claimant would not engage with her or previous professionals. She identified *"ruminative, angry grievance type thinking",* a conclusion reflected in the OASys

reports. She identified zero protective or control factors against the risks to the public other than the existence of the Claimant's parents in Scotland. This was important new or additional evidence in my judgment. Without control mechanisms future risk will not be controlled. Put the other way around, the risk which the Claimant poses to members of the public is increased by his lack of insight and control mechanisms. Ms Moore set out two risk scenarios, one would be in circumstances similar to the triggers and stresses of his first killing behaviour. She set out risk factors at para 9.1. She accepted the risk was not "imminent" because (on her then current information) the Claimant did not have an intimate partner, but raised the risk to SB and her son with whom the Claimant did have contact whilst in prison. In scenario two, a repeat but twist was foreseen wherein the Claimant would monitor or overtly stalk his children who did not wish to see him because he had killed their mother. Ms Moore laid out a non exhaustive list of foreseeable warning signs which a compliant offender on licence would discuss with their COM. She advised that the Claimant posed a High risk of serious harm but with low imminence. Ms Moore warned in relation to management of risk on licence that:

> "10.2 … Compliance by Mr Brown is likely to be influenced by his personality traits and sense of entitlement. He would benefit from developing a good working relationship with his new COM, however, this is dependent upon him engaging openly with them and communicating positively. Mr Brown may be a challenge to manage in the community due to his personality traits, as seen in the psychiatric report he tended to dominate the interview and talk about what he wanted to talk about rather than letting the psychiatrist lead. Mr Brown can be dismissive in the way he presents and in the twice I have met him he has displayed grandiosity and superiority when speaking to me, he can be defensive and he appears to be reluctant to engage with professionals. When he does he makes a note of what they say and often uses this to make complaints or to raise grievances about them which makes communication and building a working relationship with him difficult. If there is a PD service available in the community in Northampton it would be useful for them to be contacted by the COM in order to complete a formulation and provide advice."
>
> …
>
> "10.3 Mr Brown has many risk factors associated with Intimate Partner Violence and he has not completed any risk reduction work. Due to his reluctance to engage with professionals to complete this assessment it has not been possible to conduct an assessment of any current attitudes or beliefs that link to offending and to identify a clear treatment pathway."

91. Oddly, Ms Moore then advised that the Claimant had never been treated for AD which rather undermines Doctor Alcock's diagnosis that the AD resolved soon after the

killing. She also took hearsay advice from Doctor Attard, a consultant psychiatrist, but did so through a third party rather than speaking to the Doctor herself. This discloses that she considered herself incapable of diagnosing or prognosticating on AD or fully being able to advise the NSD on it. Doctor Attard was not given the Claimant's details or circumstances but the Claimant had refused to see any consultant psychiatrist so he had blocked a proper report from one. Doctor Attard advised that:

> "The symptoms could re-emerge if the person is in a similar situation, facing similar stressors (unless they have successfully completed treatment), the ability to manage stressors is likely impacted by personality vulnerabilities. Dr Attard stated that in order to manage it in terms of future risk the individual would need to identify stressors, identify how they know they are becoming dysregulated and managing stressors beforehand."

92. In my judgment this was a crucial general prognosis, albeit obtained as hearsay via a colleague.

The NSD screening report

93. The NSD report put before the Defendant was provided on 22.9.2023. This included an inappropriate summary of Ms Moore's comment that it was difficult in her opinion to identify how his presentation to the psychiatrists fitted with AD as identified in DSM V (five). I say this because Ms Moore was not entitled to go behind the jury's findings and because she is not a qualified doctor, not a consultant psychiatrist and does not profess to be able to diagnose AD, having needed to ask a consultant psychiatrist to summarise it for her in her report. In relation to the risk to JS' family and friends the NSD advised thus:

> "Currently there is no evidence that Mr Brown has an active intent to cause physical harm to identifiable known adults. The victim's mother ** and close friend ** have campaigned against the release of Mr Brown and report feeling in fear that he will seek retribution. While their fear is understandable, there is no current evidence that he intends to harm or seek contact with ** or ** following release, and the risk to them has been assessed as medium. If Mr Brown expresses any plans or intentions to approach the family of the victim, or there is intelligence that he intends to or has done so, then the risk of harm would rapidly increase. The most likely behaviour is of emotional and psychological harm through harassment behaviours underpinned by grievance thinking. The psychological risk assessment notes evidence of ruminative, angry, grievance type thinking at the time of the offence. Mr Brown has made it known that he blames the deceased victim's family for the media attention his case has received. This highlights his continued lack of remorse and accountability for his actions and the

> potential for him to seek retribution in the future." (I have anonymised names).

94. In relation to the risks to SB, his past girl-friend, the advice was as follows:

> "Mr Brown is no longer in an intimate relationship with SB, the mother of his son, and the female with whom he left his children when he disposed of the victim's body. The risk to SB is currently assessed as medium. This is a cautious assessment, as it has not been possible to establish reliable contact with SB who is reluctant to engage with professionals. While there is no direct evidence, it is possible that knowing Mr Brown's offending history, SB is in fear of Mr Brown and feels more able to protect herself and her son by avoiding being seen to 'side' with authorities against Mr Brown. She resides outside of the UK and therefore will be physically separated from Mr Brown on release. There is intelligence to suggest that SB previously requested that Mr Brown was prevented from contacting her from custody. Unfortunately, the provenance of this request cannot be found by the prison service and therefore can only be used as intelligence, and there is no reliable account for the reason for such a request, if indeed it was ever made. Since Mr Brown transferred to HMP Northumberland, he has regularly been in contact with SB and she has not reported any concerns or feeling in fear. Mr Brown's son, with SB (aged under 16), has frequent contact with Mr Brown's parents in Scotland, including staying with them in school holidays. If the couple were to reconcile, or if Mr Brown found himself in conflict with SB over contact with **, she would be at high risk of physical harm through assaults or psychological harm. Mr Brown has stated his intent to have direct contact with ** on release, and is in regular telephone contact with him from custody. The risk to SB includes harassment and/or stalking behaviours in the event of sexual jealousy or physical violence if Mr Brown felt that SB was preventing him from having contact with their son in the manner or frequency that he expects. There are risks of manipulative and predatory behaviours as part of generalised intimate partner violence and this could end in fatality." (I have anonymised names).

95. In relation to JS's family and friends who have campaigned against his release she advised that:

> "The most likely behaviour is of emotional and psychological harm through harassment behaviours underpinned by grievance thinking. The psychological risk assessment notes evidence of ruminative, angry, grievance type thinking at the time of the offence…"

96. In their screening report to the Defendant the NSD advised that:

> "… there have been subtle but persistent behaviours which highlight an active risk of harm in any future intimate relationships. Behaviours such as lack of remorse or empathy for the victim and her friends and family, refusal to engage with professionals to manage his mental wellbeing and understand his diagnosis of adjustment disorder and failure to engage in offence focussed work could all be considered new information to suggest an ongoing risk of serious harm. More subtle but persistent indicators such as his hostile presentation to professionals may also be considered new information pertinent to risk…'

97. The Claimant's release risk management plan was summarised by the NSD as follows:

> "**Release Risk Management Plan**
> Mt (sic) Brown's release on licence will be supervised by National Security Division. Mr Brown will receive a minimum of two contacts per week for the first 12 months of supervision; one of which will be a face-to-face appointment with a probation practitioner. This frequency of contact will remain in place until clear evidence of reduced risk can support a reduction in contact levels. He will reside in an Approved Premises for a minimum of six months. Home visits to also be carried out by Community Offender Manager to any subsequent move on addresses. Mr Brown will be subject to enhanced monitoring via a GPS tag, exclusion zones and non contact licence conditions. He will be required to disclose intimate relationships, and non intimate associations to his probation practitioner. He will not be permitted contact with children with permission of his supervision officer (sic). His probation practitioner will work as part of a multi-disciplinary team, including police and a forensic psychologist, and the case will be managed at MAPPA level three for at least the first six months of his licence period."

98. The NSD pointed out that the Claimant did not meet the Policy requirement of "imminence" so his threat level was "High" not "Very High". I bear in mind that a High means the risk of serious harm could occur at any time. However, the NSD advised that the Claimant's lack of engagement would make it difficult to identify when his risk might become imminent. They advised that without the Claimant sincerely and actively engaging with his COM (Community Offender Manager), probation services and mental health professionals over risk management strategies, the risk management could not be wholly reliable. The NSD asserted they had been advised that AD and relapses thereof *"can be triggered by further stressful events*". They were concerned that the Claimant lacked the insight into this possibility or his triggers therefore would be unlikely to identify warning signs. The NSD raised the Claimant's lack of remorse,

lack of empathy, refusal to engage with professionals managing his mental wellbeing, refusal properly to understand his diagnosis and failure to engage in offence focussed work, and advised that these were all new information not available to Cooke J. In addition, the NSD advised as follows:

> "We can be confident that Mr Brown has not evidenced any sincere commitment to change since sentence and risk management will be wholly reliant on external controls and is situational (e.g the absence of an intimate relationship). Risk could potentially be managed, at least initially, although there is concern regarding the ability to identify signs if Mr Brown's psychological wellbeing were to deteriorate. Mr Brown has high capability for covert monitoring which can be deployed to cause psychological harm or create opportunities for physical harm. We cannot be wholly confident that the risk management plan could mitigate such behaviours should Mr Brown choose to deploy them. The use of GPS tagging to monitor his movements, and mobile phone monitoring to monitor communications will be critical. Although the risk is not considered imminent it is assessed that risk could swiftly escalate and it would be difficult to identify warning signs given Mr Brown's above average capacity for masking his emotions."
>
> …
>
> "The OASys (Probation Service) definition of high risk of serious harm is that 'there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious'. On this basis, it could reasonably be argued that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences, and therefore he meets the criteria to be considered dangerous as per the Criminal Justice Act 2003."

The submission from Mr Davison

99. The Defendant had before him a ministerial submission dated 28.9.2023 on the Claimant's case and exercising his ZB power, written by Mr Davison and cleared by Mr Jennings. The Defendant was invited to consider whether, exceptionally, to exercise his power (outside the Policy). There was an error in para.3. It stated the Claimant relied on a psychologist's report at trial, in fact it was a consultant psychiatrist's report. The author summarised the ZB power and the Policy which narrowed the power in scope by the following identified factors: new information; the seriousness of the predicted future offences; the imminence and safe manageability of risks. The material before the Defendant was summarised. The author pointed out the lack of evidence for the "imminence" threshold and explained the NSD's concerns over whether safe management in the community could be achieved without a proper psychological profile, rehabilitation treatment and licence management plan and the Claimant's refusal to engage over 13 years with the necessary OBPs for his insight and

rehabilitation. He summarised Ms Moore's concern over re-manifestation of AD under stressors and the absence of an effective risk management plan on release due to the Claimant's refusal to engage. He summarised HMPPS' concern that the Claimant's refusal to engage had undermined their risk assessments of him and the fact that HMPPS did not have the power to force the Claimant to engage but that the Parole Board did. The author highlighted the need for a proper psychological assessment of the Claimant to address the risks. He advised that:

> "17. I conclude that there are clear, strong and defensible arguments for using your power to refer Brown to the Parole Board, meeting both the reasonable grounds requirement in the legislation and the requirement that there must be a good reason to deviate from established policy, in that:
>
> - there is a significant risk of his causing serious harm by committing one of the specified offences (paragraph 5d above) namely murder, manslaughter, threats to kill, GBH, ABH, putting people in fear of violence;
> - the OASys assessments, including the most recent one, contain new information not available when he was sentenced, as shown by his refusal to engage with qualified staff for the purposes of assessment and support (first bullet of paragraph 6 above); and
> - he meets the test of dangerousness in the HMPPS Policy Framework other than with respect to the OASys risk of harm assessment of "very high"; but
> - his refusal to engage meaningfully with HMPPS psychologists means there is no insight into his adjustment disorder and the serious risks that may currently pose to others' safety provide justification for viewing his case as exceptional where it does not satisfy every criterion in the Policy."

The Claimant criticises the last paragraph as suggesting that the Claimant has a current AD. But that interpretation takes the paragraph out of context. No one suggested the Claimant currently has a diagnosed AD. The objective meaning of those words is that Mr Davison was referring to the risk the Claimant will pose in future if triggers cause stress so that AD reoccurs.

Applying the law to the facts and the issues

Was there new or additional information since sentencing?

100. When Cooke J. sentenced the Claimant, he had a substantial gap in the information before him. He had no opinions from the two psychiatrists on the Claimant's mental health prognosis post-conviction or his ability to cope with stressors in prison and after release or his likely engagement with the professionals in prison who would assess him and seek to help to rehabilitate him to reduce his risk of reoffending. He had no opinion

from either expert on the Claimant's Dangerousness TTP at release and he had no pre-sentence report.

101. There is a substantial issue between the parties in this judicial review about whether the information recorded about the Claimant during his 13 years in custody, inter alia on the OASys system, in his psychology file (which was empty), in the report of Ms Moore, dated September 2023 and in the report from the NSD, is properly to be regarded as containing new or additional information within the Policy requirement. In my judgment the information put before the Defendant does come squarely within the definition of new or additional information. The contents of these related to the Claimant's behaviour since conviction, what he had said, how he had responded to his convictions and in particular to the suggested offender behaviour rehabilitation programmes (OBPs) and the need for psychological and psychiatric risk management assessments to construct OBPs properly. The information also evidenced his contact with known adults outside prison. The information related, either directly or indirectly to: his state of mind; his insight into his crimes; his insight into his Retained Culpability for his premeditated actions (including pre-meditated grave digging, taking a hammer to the scene, the act of killing of JS and his post event cover up); to his understanding of the stresses and triggers which led him to lose control; to the effects of his actions on others, including his children and the family of JS and crucially to the Claimant's post conviction ability to avoid losing control in future by identifying future triggers which are (1) similar to those which occurred in 2010 or (2) wholly different from those, which may produce similar symptoms leading to loss of control. This information also disclosed powerful insights into his post-conviction rigidity of thinking about his lack of acceptance of Retained Culpability and his nearly complete rejection of engagement with professionals to reduce the risk he poses in future. This type of information was expressly identified as having the potential to be new or additional in the Policy. On the one hand, Cooke J. had clear evidence of full engagement with psychiatrists before trial. On the other, the Defendant was provided with clear evidence of complete refusal to engage with psychiatrists and psychologists and OBPs for 13 years.

102. In my judgment, the dossier provided to the Defendant contained a substantial body of relevant new and additional evidence arising from the Claimant's 13 years in prison, which was material to the issues to be decided when considering whether the Defendant could form the requisite opinion. So, I reject the Claimant's submission that there was no new or additional relevant information before the Defendant. The issue in this judicial review is not whether there was any new or additional information but whether it was sufficient to pass the tests I have to determine to decide whether Grounds one to four are made out.

Ground 1: The Statutory Power

103. The criteria I shall now consider are whether the Defendant held the requisite opinion by considering in turn whether:

(1) the Defendant believed on reasonable grounds that:
(2) the Claimant would, if released, pose a significant risk to members of the public;
(3) of serious harm;
(4) occasioned by the commission of murder or the specified offences.

Belief

104. There was no submission by the Claimant that the Defendant did not subjectively hold the belief which he asserted he held when announcing the decision, save as to the asserted bias based on the media and campaign points which I shall address below. In any event, I am satisfied that the Defendant held the belief he asserts.

Did the Defendant believe, on reasonable grounds? – Significant risk

105. The test for significant risk set out at paragraphs 10-11 above is to determine whether the Defendant believed, on reasonable grounds, that the Claimant posed a risk which was "noteworthy, of considerable amount… or importance". The Defendant did not need in law to (1) be convinced or (2) to believe on the balance of probabilities. The assessment involved a flexible two way scale. One axis of the scale was the seriousness of the predicted offences. The other axis of the scale was the probability of the offences being committed after release.

106. Whilst the Claimant has been in custody many attempts to assess his risk have been made by HMPPS officials in relation three categories of members of the public if he were to be released into the community: adults known to him, children and adults not known to him. The Defendant's new information showed that those assessments had been blocked or significantly handicapped by the Claimant's refusal to engage with the HMPPS officials who attempted to assess his risks and to identify ways in which those risks might be reduced, managed or mitigated. For various asserted reasons he either refused to participate in any OBPs or avoided doing so. The OBPs were considered necessary to change the Claimant's thinking, attitudes and behaviours. Such programmes were entirely dependent on the offender being willing frankly and openly to engage with and participate in the processes. They were integral to the sentencing plans for this High risk offender. The Claimant did complete some courses, but they were not accredited OBPs and were not directly relevant to risk reduction or to the Claimant's core offending behaviour. The Claimant progressed in education and his general behaviour was conducive to his own receipt of enhanced privileges in prison. He completed courses linked to education, training and employment. He completed the Sycamore Tree Restorative Justice programme in 2012 and also a six week one day course 'Living with Loss" but neither were full force OBPs. The problem he posed was that from the outset of the Claimant's custodial sentence, he utterly failed to attempt to achieve his sentence planning targets. Those were: (1) to consent to and actively participate in a programmes needs assessment ('PNA') to inform his rehabilitation, his risk identification and his risk management; (2) to participate in Offender Behaviour Programmes (OBPs), including: (a) the Healthy Relationships Programme, which is designed to break the cycle of violent and abusive behaviours and attitudes; (b) the A

to Z programme; (c) the Kaizen programme; (d) the Motivation and Engagement programme; and (3) to engage in frank discussions about his offending, including a full account of his mental state, thoughts, the triggers or motivations for his crimes and the future risk of committing other serious crimes. The Defendant was informed that Claimant had repeatedly refused to participate in any of the above. In addition to the OBPs, the Claimant refused to engage in prison with any forensic psychologists or consultant psychiatrists. This refusal infected and degraded the HMPPS's, the NSD's and the Defendant's ability to assess the range of offences he might commit and the probability that he might do so.

107. When assessing risk, the seriousness of the predicted offences is more weighty the more serious the offence. Killing is of the highest weight and within that crime there is a further sub-scale of seriousness. The seriousness of an offender punching a man in a pub who falls and smashes his head on a table and dies is lower on the seriousness scale than that an offender who uses 14 hammer blows to kill his wife whilst his children are in the house and after digging a premeditated grave and bringing the killing weapon to the scene, then covering the whole event up. The latter permits foreseeability of premeditated very violent killing. The other foreseeable specified offences including causing GBH or ABH through stalking, monitoring, harassing or threatening and other actions would be lower down this scale.

108. When assessing the probabilities of the risk of such offences arising, the new or additional information which the Defendant had before him of the probabilities related to the two main issues identified by the Defendant in his decision. Firstly, to a large extent the probabilities related to the Claimant's misunderstanding of or more likely his outright rejection of his Retained Culpability, despite this being so clearly espoused by Cooke J. Determining what the Claimant's thought processes were and are which led him to maintain the conviction that *he* was not culpable and that once the short term AD was over, there was no future risk of recurrence, was beyond informed analysis because the Claimant refused to engage with professionals. Secondly, the precise level of probability of risk of the specified crimes which might be caused in part or in whole by a future recurrence of AD was beyond realistic assessment due to the Claimant's refusal to accept the AD will ever arise again and hence his refusal to engage with professionals to analyse potential triggers and symptoms and to reduce that probability through self-understanding, self-awareness, seeking treatment, seeking support and self-report.

109. On a more simplistic level, in my judgment the current unchallenged sub-categorisation of the Claimant as a High risk to one or more category of the public is sufficient for the risk to be significant in the circumstances of this case. In my judgment the Defendant had reasonable grounds, which he has identified and which have been capable of scrutiny by this Court, arising from the information put before him, for believing that a significant and considerable amount of risk was posed to the public by the Claimant of committing specified offences. Therefore, I am satisfied that the Defendant held his

belief on reasonable grounds that the Defendant posed a significant risk of committing offences.

Of committing murder or specified offences

110. The list of specified offences is very substantial and the offences which the NSD and MAPPA and the OASys reports were concerned about included specified offences. I consider that the Defendant's belief that this criteria was satisfied and was objectively reasonable.

The Policy

111. **Ground 2:** I shall now deal with each sub-ground in turn.

Imminence and Very High risk

112. The imposition of the imminence requirement into the automatic arm for selection of prisoners for consideration by the Panel restricts the use of the ZB power for the generality of prisoners to those who are assessed as an imminent risk. That is summarised in the Policy as one which will arise on release or soon after release (para. 4.8(b)). The words "soon after" may include week, a month or 6 months. No definition was given in the Policy. I do not attempt to define the limits of "imminence" here, nor do I consider it would be appropriate to do so. Flexibility is necessary. Whatever the timescale envisaged, in this case the Defendant accepted that, on a faithful OASys assessment, "imminence" was not established, so the Claimant was not assessed as Very High risk on release. This centred mainly on the Claimant's lack of an intimate partner on release. But that assessment does not prevent the Defendant exercising his powers altogether. The statutory power is wider than the Policy and the Policy itself permits and envisages exceptional circumstances, as para. 4.14 broadly states.

113. The real question here is whether the Defendant had good grounds to depart from the general Policy restriction concerning imminence in this case. The core running through the reasons put forwards is the Defendant's concern about the Claimant's refusal to engage with professionals for the last 13 years. This was based on his lack of insight into his Retained Culpability, his triggers for suffering AD and his rigid, denial thinking. Many professionals sought to analyse his thinking and the risks it posed, to rehabilitate his thinking, to increase his understanding and to reform his attitude. They sought to put in place effective and insightful internal controls which the Claimant could use to reduce his risk. They sought to work with the Claimant to create effective external controls through the licence conditions. The OASys system is designed and operated to assess mental health and thinking, to construct rehabilitation and treatment packages and to lower the risk of offending. However, the Claimant blocked the whole process.

114. In my judgment, as a matter of principle, if a prisoner refuses to engage, in whole or in part, in the OASys or other risk assessment processes and so undermines the very assessment of imminence of risk which operates the automatic arm for selection for ZB

and the referral created by the Policy, then it ill behoves such a prisoner to rely on the blocked or undermined OASys assessments when asserting that the Defendant's ZB decision does not match the requirements for imminence in the Policy. Having effectively disabled the automatic ZB selection arm by his refusal to engage, and undermined the assessment of imminence for referral, in my judgment the Claimant faces a higher hurdle when challenging the reasons for making a ZB referral outside the Policy requirement for imminence. Furthermore, by undermining the risk assessment in relation to imminence for 13 years; by failing to engage with probations officers, psychologists and psychiatrists; by forming fixed views on his own lack of Retained Culpability which denied the Judge's clear findings; by denying any future potential triggers for AD will occur, which is not a matter for a lay person to decide and by fixating on grievance based exculpatory thinking, in my judgment the Claimant himself catalysed the good reason for the Defendant to justify the exceptional referral. For these reasons, in my judgment, the Defendant has shown good reason to side step the Policy requirement of imminence (or "Very High" categorisation) and to refer the Claimant outside the Policy to the Parole Board. I should make clear that this will not arise in every case in which a prisoner is non complaint or refuses to engage with risk assessment. Each such decision is intensely fact sensitive.

115. Whilst post decision evidence is irrelevant to the substance of the review of the decision made, in this case it fits within the advised unreliability of the imminence risk assessment in 2023 which was caused by the Claimant's lack of engagement. I take into account what Lord Kerr explained in relation to decisions that can justify as lawful detention in *Lumba (WL) v SSHD* [2012] 1 A.C. 245 at [242]:

> "the justification must relate to the basis on which the detainer has purported to act, and not depend on some abstract grounds wholly different from the actual reasons for detaining. … Detention cannot be justified on some putative basis, unrelated to the actual reasons for it, on which the detention might retrospectively be said to be warranted. Simply because some ground for lawfully detaining may exist but has not been resorted to by the detaining authority, the detention cannot be said, on that account, to be lawful."

On 8th February 2024 Ms Rogers provided an updating witness statement which, on the Defendant's written application, I permitted to be put into evidence at the hearing. She is head of the South East NSD unit and a co-chair of MAPPA level 3 meetings. The Claimant was monitored closely after the Defendant's decision in October 2023 to refer him. Call monitoring disclosed that the Claimant sought to move abroad to be close to SB and their son and spoke about his elder son, whose mother was JS and his education. This new information is considered by the professionals to have a real effect on the imminence assessment. It also raised the risk to known adults from Medium to High (for SB), in particular if there was conflict with SB over the education of or contact

with this son. This led to the Defendant reaffirming his previous (challenged) decision by a readout dated 1.2.2024 (wrongly dated 2023 in the witness statement). Because of this, on 6.2.2024 Ms Moore changed her expert opinion on the imminence of the risk from Low to High. I have considered whether this decision makes the judicial review academic in relation to the Ground 2 assertions in relation to imminence and Very High risk. I asked both counsel to make written submissions on this after the hearing. They did so. Having carefully considered those I the Defendant asserts that the Claimant is in the Very High category now. The OASys assessment in January 2024 was: High/High/High for the public, so not Very High. The 21st February 2024 assessment was Very High for known adults. Neither party pressed for a finding that the review was academic. There are factual disputes arising from the late evidence of Ms Rogers and the Claimant applied, after the hearing, for the admission of new evidence (from SB) which I have read. I grant permission for that evidence to be admitted to answer the Defendant's late evidence from Ms Rogers. It does not change my judgment.

An escalated risk or new behaviour of significant concern

116. I start from the position that the Court will afford a considerable level of respect to the experts carrying out risk assessments. I take into account *R (Carman) v Secretary of State for the Home Department* [2004] EWHC 2400 (Admin) at paras. 50-52, 75-79 and *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ. 802 at paras. 69-71. The requirement under ZB is to assess the risk posed by the Claimant as part of the determination of Dangerousness TTP. ZB itself does not expressly require proof any increase in risk. The next question under this part of Ground 2, is whether there is a requirement for evidence proving an "increase in the risk" in the Policy as the Claimant submits. I do not find that way of phrasing the Policy criteria particularly helpful. The words used in the Policy were about evidence of risk *escalating, or ... evidence of new behaviour which is of significant concern"*. There was no numerical percentage set out by Cooke J. on the Claimant's risk of offending, and he was correct in law not to have tried to put a numerical figure on the risk. As set out above in the section on the law governing the assessment of Dangerousness TTP, flexibility is required and numerical assessment of significant risk is not appropriate. So, the Claimant's attempt in this claim to require something akin to numerical evidence of escalation of risk between 2011 and 2023 is also not appropriate in my judgment. These assessments are inherently flexible and multifaceted in relation to the predicted groups of members of the public at risk, the predicted offences likely to be committed, the predicted likelihood of each offence and the interactions between the three. Running through all three of those predictions in this case are the psychological drivers. These drivers included the Claimant's lack of insight; his Retained Culpability and his refusal to accept or gain insight into that after sentencing; his risk of suffering another AD based on identified future similar stress triggers or different stress triggers and his refusal to address any of those after sentencing. These important factors are to be contrasted with the fact that Cooke J. made no mention of and had before him no evidence about any assessment of the Claimant's: current insight; future insight; future likelihood of addressing the risk of further offending or accepting rehabilitation and treatment. So, the base line for

assessing escalation or new concerns in these fields was absent. In my judgment the Defendant was perfectly entitled to work on the basis of what Cooke J. did say in his sentencing remarks and to form the belief, on reasonable grounds, that the new or additional information which adversely affected the multiple risk components was an escalation and/or a new concern.

117. The Defendant's decision was made in October 2023. He formed the belief that the Claimant would be Dangerous TTP on release. The Defendant had a long and substantial body of properly collected professional evidence in the OASys reports, partly arising from the Claimant's own limited admissions. The Claimant's own words highlighted his rigid, grievance based thinking; his lack of insight; his rejection of his Retained Culpability and his abject denial of any risk of recurrence in future of AD. In addition, the Defendant had before him the Claimant's refusal to engage in any proper professional analysis of the rehabilitation he needed to understand and deal with his lack of insight into his Retained Culpability. Furthermore, the Defendant considered the professional evidence of the Claimant's refusal to take part in identifying potential triggers in future for AD; the treatment and rehabilitation which would lower the risks and how to reduce those risks internally and externally, on release. It is beyond dispute that none of that evidence was before Cooke J. because in 2011 the consultant psychiatrists were not asked to consider the prognosis after conviction or the Dangerousness TTP test after the verdict and on release from prison and because there was no pre-sentence report. Nor were the psychiatrists asked to comment on the Claimant's likelihood of engaging in prison with risk assessments, rehabilitation plans and professionals. So, in my judgment, the Defendant's belief that the Claimant would be Dangerous TTP can properly be described as being based on an escalation of risk and/or new behaviour of significant concern creating more risk arising from new or additional evidence obtained in prison which was not available to the Judge.

The OASys conclusions on imminence

118. For the reasons I have set out at paragraphs 112-115 above I do not consider that the fact that the Claimant did not qualify for selection by the automatic arm of OASys, and hence for referral, constitutes a valid ground for finding that the Defendant was acting contrary to Policy without good reason. I take this view because the Claimant pulled the wires out of the automatic selection arm himself by refusing to engage with the selection process component relating to the imminence of the risk he posed.

Doctor Alcock

119. I reject the Claimant's assertion that the Defendant did not have Doctor Alcock's report before him. I find the Defendant did have summaries of the report of Doctor Alcock by Ms Moore and in the reports he received from the NSD and Mr Davison. At the hearing this sub-ground within Ground 2 of the claim was not proceeded with by the Claimant and would have been dismissed by this Court in any event.

Early notice and the last resort

120. For the reasons given by Heather Williams J. in *Simpson* in paras. 83-90 of her judgment refusing permission to proceed on the grounds of delay, I do not consider that the time taken to gather the evidence and consider the decision to refer was unlawful or contrary to Policy in this case. Risk assessment evidence on the Claimant was being collected for consideration of selection for the ZB process in 2023 after being transferred to MAPPA and the NSD in 2022. If he had complied with the OASys assessments annually over his 13 years, engaged with professionals and completed the OBPs (Offending Behaviour Programmes), he might have received his decision much faster or avoided any hand picked referral. If he had engaged with Ms Moore and the consultant psychiatrist who she asked him to see, he might have received the decision earlier. But none of that took place because he blocked all engagement with such professionals, programmes and assessments. As for the last resort point, it is really part of the assertion that the Claimant's risk to the public can and will be safely managed in the community, so I will deal with that below.

Alleged safe manageability in the community

121. The Defendant did not have before him evidence that the Claimant was safely manageable in the community. On the contrary, the Defendant had before him a long list of proposed licence provisions imposed as a sort of scatter gun, with belt and braces attached, because the Claimant was: (1) a convicted killer who refused over 13 years to engage with the services provided to assist him to understand and to reduce his risk of offending, and (2) he did not acknowledge, understand or wish to understand his own triggers or his Retained Culpability; (3) the Claimant was intelligent, resourceful and rigid in his thinking. As he himself reported, in his mind he presents "no risk" to any member of the public. As set out in the Davison submission, the NSD screening report and the report of Ms Moore, without proper engagement by the Claimant, the licence conditions were less likely to be correctly constructed for this Claimant and less likely to be effective for this Claimant in protecting the public. After release, when or if he refuses to engage with his COM and/or challenges the licence conditions and/or seeks to evade them, there was at least a High risk of serious harm caused by specified offences and potentially an imminent risk.

122. In my judgment the evidence put before the Defendant provided reasonable grounds for his belief that the lack of safe manageability condition was satisfied for the Claimant.

The NSD's change of opinion in the screening report

123. I do not find anything sinister in the difference of opinion between Ms Moran and Ms Rogers over the drafting of the NSD briefing/screening report. Differences of opinion over difficult matters are to be expected. The basis of the difference was the weight to be applied to the Claimant's refusal to engage with: his sentence plan; the necessary OBPs, risk assessments, psychological and psychiatric assessments; his rigid thinking, lack of insight and grievance mentality and his denial of his Retained Culpability or any risk of re-triggering AD. The experts advised that the High risk he poses would not be imminent on release because as the NSD understood the facts he had split up from SB

long ago and so had no intimate relationship with her. However, Ms Rogers advised that the statutory criteria were met and the risk could escalate quickly and it would be difficult to identify triggers and warning signs when the Claimant is on licence if, as expected, he fails to engage. As explained by Ms Rogers in her recent witness statement the Claimant was not being wholly frank with the professionals in the OASys interviews about his relationships but I shall deal with that below.

Irrelevant basis – Campaign Matters

The referral decision

124. It would not have been a relevant basis on which to form the requisite opinion for referral to the Parole Board if the Defendant had taken into account any of the following: political advantage, notoriety or campaigns by the family and friends of JS or Members of Parliament, received either directly or in the Media. I shall call these “Campaign Matters”. I do not say that because of para. 5.3(f) of the Policy, which is worded expressly as applying only to the decision to select cases for consideration by the Panel not the decision to refer. I take that view because of the wording of ZB and for reasons of logic, justice and fairness. Prisoners are not to be detained in prison by mere public outcry or by Campaign Matters. In my judgment Campaign Matters were irrelevant to the referral decision.

125. The Claimant relies on a detailed chronology of meetings and announcements to seek to justify that assertion. The Claimant’s Grounds and skeleton dissected each record of each press release, briefing, meeting note and the other documents which led up to the decision, seeking to establish evidence of apparent bias against the Defendant and/or to make out the assertion that the Defendant took Campaign Matters into account as a basis for the ZB decision. For instance, in the September 2023 submission by Mr Davison the following was written:

> “**Media Handling**
> 20. This case is of significant interest to national and regional media and we expect this to continue. ** and ** have a significant media profile and their “Justice for Joanna” campaign, supported by The Sun, has specifically called for you to use the Power to Detain to keep Smith (sic) behind bars.
> 21. A decision to use this power would likely be greeted positively by national press outlets, most notably tabloid media. Press Office will provide more detailed media handling depending on the outcome of this submission.”

126. It was inappropriate, in my judgment, to put paragraphs into this briefing to the Defendant on the exercise of the ZB power to refer, which related to matters which were not relevant to the referral decision. Because the paragraphs were put in, it would have guided the Defendant properly to include an express warning that the contents of those paragraphs were not to be taken into account when making the decision.

127. However, when the Secretary of State announced his decision he expressly made it clear that he did not take any Campaign Matters into account. He also made clear more than twice to the campaigners and publicly that he would not take into account Campaign Matters when making his decision about referral to the Parole Board. In my judgment there is nothing relevant arising from how the Defendant came to make the decision to be the ZB decision maker instead of the Panel, when looking at the rationale for the decision to refer. It was separate and was kept separate from the referral decision. The Defendant said all along that he would keep the referral decision separate from Campaign Matters. Having carefully read all of the Claimant's analysis I have seen no good reason to doubt the veracity or apparent veracity of the Defendant's announcement. I am satisfied that when the Defendant came to consider the exercise of the ZB power, he made that decision without taking into account Campaign Matters. The Claimant's subjective suspicion is not enough and is not in evidence in any event. I consider that the process leading up to and decision to refer arising from the dossier would objectively be seen by a reasonable member of the public, fully informed of the events, as disclosing no real possibility that the Defendant was biased by Campaign Matters when making the decision to refer to the Parole Board.

The decision to be the person to make the ZB decision

128. The decision on referral is separate and distinct from the decision about who would make the referral decision.

129. The Policy is wholly silent on when and on what grounds a decision can be made by the Defendant to exercise the ZB power himself in place of the Panel. The Policy directs and assumes the submission will be made to the Panel and clearly gives guidance on the usual route. Thus the Panel is to receive the dossier on the case and to make the decision. Such a decision could be arguably within the scope of para. 4.14, exceptional cases, but it could equally not have been meant to have been covered by the Policy. It is not clear. In my judgment, in the absence of clear Policy guidance on when the Defendant can intervene, a judicial review of such a decision based on an assertion of a breach of Policy guidance is to be carried out on the normal criteria for the exercise of discretion by a public official, namely unlawfulness or irrationality. I set out the facts relating to this and my decision in the next few paragraphs.

Campaign Matters

130. In relation to selection of any case for a ZB decision, para. 5.3 of the Policy sets out "*... a list of circumstances which, if a particular case is reliant upon, will not be considered to meet the threshold for submission to the HMPPS Panel Secretariat*". Campaign Matters are one of these and are dealt with at para. 5.3 (f) thus:

> "**Undue pressure to submit cases due to their notoriety or dissatisfaction with the original sentence handed down.** Such cases may fall within the criteria for CPPC or NSD, if appropriate, and would

> therefore be managed under these arrangements. Where they do not meet the CPPC or NSD criteria but remain subject to pressure, the expectation remains that they must meet all the eligibility criteria and the legal threshold set out in this policy in order to be submitted to the HMPPS Panel Secretariat."

So, para. 5.3(f) states that if a case is reliant upon undue pressure from Campaign Matters it will not be considered to meet the threshold for submission to the Panel. The word "undue" assumes that not all Campaign Matters are undue pressures on the decision maker. That makes sense. Public fear and personal fear of the risk of releasing killers back into the public cannot be categorised as "undue" pressure automatically. Para. 5.3(f) then recognises that such cases are referred to be handled by the NSD inter alia because of the existence of Campaign Matters. The NSD then makes the decision to submit for consideration of a ZB decision as it did in the Claimant's case.

131. Para. 4.14 of the Policy imposes no such threshold for the selection for consideration of exceptional cases. These are assessed on a case by case basis. So, is selection under 4.14 subject to the undue pressure bar in para. 5.3(f) or separate from it? The first matter of note is that para. 5.3 governs submissions to the Panel but does not expressly cover submissions to the Defendant. I consider that the same Policy prohibition is reasonably to be inferred in the usual course of cases for submission to the Defendant. The second matter of note is that para. 5.3 does not expressly mention or touch upon exceptional cases nor does it say it overrides para. 4.14 at all. In my judgment para. 5.3 is dealing with the general run of cases and not expressly exceptional cases which may reasonably be foreseen to be likely to involve Campaign Matters and some public pressure, but not undue pressure.

132. I shall now turn to look at what happened. Mr Davison explained how, for the Claimant, selection by the NSD did not take place until after a last effort was made to obtain a realistic risk assessment and to provide rehabilitation before release. At para. 28 of his witness statement he set out what was done:

> "… he was referred to the Critical Public Protection Casework ('CPPC') Team in the Probation Service's NSD on 10 June 2022 due to the high profile of his case [GD1/59 – GD1/66]2. Despite its name, the NSD is not limited to cases which involve offences such as terrorism: it deals with high risk, complex and high-profile offenders of all types. Any case in which there is likely to be a high level of media interest becomes complex for the Probation Service to manage, because the fact that the licensed prisoner has a level of notoriety affects their reintegration into society."

On 29 November 2022, at a MAPPA Level 3 meeting to discuss the Claimant's case, it was observed that it was important for the Claimant to complete offence-focused

intervention prior to his release, but that he had repeatedly refused to engage with interventions and his sentence plan. It was agreed that there should be further exploration of whether or not a Programme Needs Assessment could be completed, noting that it may require the Claimant's consent, as well as a transfer to another prison due to HMP Northumberland not having any psychology resource. At the following MAPPA meeting on 1 February 2023, it was noted that the Claimant did not consider intervention programmes to be effective and refused to engage in a PNA. The MAPPA Level 3 panel agreed that further understanding about "the disorder" was required, specifically on how it may present in the future when stressors arise. At the 21 March 2023 MAPPA meeting, the panel were told by the Senior Forensic Psychologist that a Psychological Risk Assessment might be more helpful than a PNA.

133. There is evidence of Campaign Matters being taken into account when the Claimant was transferred to be handled by MAPPA and the NSD. That was in accordance with established procedure and Policy because of the type of offence, the complexity and the obvious Campaign Matters. This, quite properly, led to the last ditch effort to assess the Claimant and provide rehabilitation. None of this can properly be used to suggest the Defendant was in any way objectively being biassed when deciding that he would be the decision maker if the Claimant was selected by NSD for review. Whilst the Secretary of State in place in early 2023 kept a close eye on progress no "selection" had taken place for consideration before February 2023. In February the Secretary of State was given advice that the risk assessment process was still in progress.

The Guarantee

134. The MAPPA and NSD provided information to Mr Davison which was summarised and forwarded to the previous Secretary of State in his briefing notes in February 2023. These stressed that MAPPA and the NSD needed to obtain an up to date assessment of the Claimant's risk of harm by the end of September 2023 before they could "make an assessment" and make a selection decision and if they did select the Claimant for consideration then to put together a dossier for a for a referral decision. The previous Secretary of State was advised on 16.2.2023 that *"The most we can say is that, at an appropriate time before and close to his scheduled release, HMPPS will make an assessment of his risk to determine whether the power to detain should be used, having regard to the statutory provisions."* On 21.2.2023 the previous Secretary of State was advised that a risk assessment close to the point of release was necessary and it would be premature to intervene now but he could inform campaigners that he had instructed officials to provide advice before the end of September and the Policy prevented a reference decision: *"where the case involves undue pressure due to notoriety or prisoners or dissatisfaction with the original sentence handed down, where the other eligibility criteria for referral are not met."* In March 2023 at a meeting with JS's family the previous Secretary of State was noted to have said: *"*** wanted to know if the DPM was doing a full review of the case.* ***DPM guarantees review of the case, but cannot prejudice the outcome of that review and will not comment on the outcome.*** *Pending reviewing the evidence, the DPM confirmed he will be making the final*

decision, closer to the release date. DPM stated he cannot commit to referring the case to the Parole Board, but that he will review the case under Section 132." This guarantee to review was subject to two caveats: firstly, receipt of the up to date risk assessment and secondly, the exclusion of Campaign Matters from the referral decision. So, it was at most a conditional guarantee to do the review himself.

135. I am asked to take the view that the guaranteeing by the deputy prime minister (DPM) /Secretary of State for Justice that he would review the Claimant's case was due to the undue pressure brought to bear by Campaign Matters and to rule that it was contrary to the Policy. The Claimant ties that with Mr Davison's personal observation in the earlier meeting with campaigners that day in March when he was noted to have said that he was *"surprised by the jury's"* not guilty verdict on the murder charge. The Claimant seeks to establish a pattern of bias based on unconstitutional grounds.

136. On 5th May 2023 the new Secretary of State had recently taken his post. The Defendant was provided with a submission by Mr Davison suggesting he give serious consideration to using the ZB power. He wrote to the relatives of JS thus:

> "So I understand entirely why you write following the change in Lord Chancellor. I would like to assure you of my intention to take the same approach as my predecessor, who you met on 9 March – namely to consider very carefully whether to refer Mr Brown to the Parole Board, using my power in the Criminal Justice Act 2003. Given that the power has to be based on the offender's current risk, the decision must necessarily be made nearer the time of his scheduled release date, having regard to all relevant information."

The Claimant refused to engage with the risk assessment so Ms Moore's report was provided in September 2023 despite his refusal. Then the NSD decided to select the Claimant for review and prepared the second draft of the screening report by Ms Rogers. That, with the submission of Mr Davison and whole dossier, was provided to the Defendant in late September for his October review and decision. So, the selection decision was made by the NSD not the Defendant. It is not clear whether the Defendant would have reviewed the case if the Claimant had not been selected, if no positive screening report by the NSD had been sent to Mr Davison and then onwards to the Defendant.

The selection decision and the decision to be the decision maker

137. As I have stated above, there is a difference between; (1) the Defendant choosing to guarantee he would be the decision maker, and (2) the selection of the Claimant by the NSD to be put forward for consideration, and (3) the Defendant's the final decision to refer. I have already ruled in relation to (3) that Campaign Matters had no part in the decision to refer made by the Defendant. As for (2), the OASys system correctly did not pick out the Claimant because it was programmed to overlook those prisoners

marked High risk and below and only to select Very High risk prisoners (who are marked with imminence). Looking at the way in which the NSD handled their work with the Claimant, I am satisfied that Campaign Matters took no part in their decision to send the Claimant to the Defendant for consideration of the decision to refer. The NSD are required to handle and deal with the most serious and difficult cases and Campaign Matters arising from them but not permitted to take the latter into account on the decision to select. In my judgment, the facts of the evolution of the first draft and then second draft of the screening report involving Ms Moran being against selection and her senior, Ms Rogers being in favour, disclosed how professional, and untainted the whole process was when considering an exceptional case. As for decision (1) – who should take the referral decision, in my judgment, the guarantee given by the Defendant was based on Campaign Matters, at least in part. The previous and the current Secretaries of State chose to reserve the referral decisions to themselves instead of the Panel. They were asked to do so. The Secretaries of State did so after taking advice from the NSD and Mr Davison. Despite Campaign Matters being taken into account I have not seen evidence of undue pressure on the Defendant, either from the family of JS, or others. The evidence put before the Defendant by campaigners showed real and principled concerns from fearful parents and friends of JS, Members of Parliament and others. Many were very concerned about Intimate Partner Violence and about risks to the public. Those are concerns within the scope of the mischief the ZB power is meant to address. In my judgment, when the Defendant took Campaign Matters into account when deciding to shoulder the responsibility of making the ZB decision, that was not in breach of the Policy. It is silent on when the Defendant can intervene to take the referral decision away from the Panel. But further, even if the para. 5.3(f) of the Policy applied, I do not find evidence of any undue pressure.

138. Also, I have considered the practicalities. MAPPA or NSD, who manage notorious and serious cases, gather the information and then decide whether to select Policy compliant cases for submission to the Panel or the Defendant if he has chosen to be the decision maker. They may also decide to submit exceptional cases to the Panel or the Defendant. The exceptional cases are dealt with on a "case by case basis". In practice, few if any potentially exceptional cases could be hand-picked by the NSD for review without the preparation of a dossier. So, in most cases the preparation of a dossier will precede the selection for onwards determination by the Defendant or the Panel. At some time during that process the Defendant may choose to intervene by becoming the decision maker, if or when the selection by the NSD later arises. In this case the intervention occurred before the dossier was complete. I do not find anything in the timing of the intervention to be irrational. It was based on the growing concern in MAPPA and the NSD about the Claimant's failure to engage with risk assessment, his rigid thinking and lack of insight as set out more fully above and the "due" (as opposed to undue) pressure from Campaign Matters.

139. The Claimant also asserted that the first media driven, bad faith decision was the Defendant's refusal of the Claimant's request to transfer to a prison in Scotland, which

had been granted some years before. One of the reasons given for that refusal was acknowledged to have been incorrect. The other, the need for the Claimant to take part in the final risk assessment and necessary rehabilitation was not irrational in my judgment.

140. I have carefully read all of the campaign meeting notes, documents and reports, which I do not recite here. These are summarised in the Claimant's skeleton at para. 24. I note the Claimant's criticism of Mr Davison arising from *R (Bailey) v SSJ* [2023] EWHC 555; and EWHC 1438; *R (Zenshen) v SSJ* [2023] EWHC 2279; *R (Wynne) v SSJ* [2023] EWHC 1111. These are not relevant matters in this case in my judgment. I do not find anything amounting to evidence of apparent bias by the Defendant or that the Defendant took undue pressure from Campaign Matters into account when making the ZB decision. Certain documents could have been drafted better, some words said by campaigners likewise (the use of the word murder for instance by an MP), but the Defendant was scrupulous to state he would follow the law. The fact that he had sympathy and empathy for JS' family and friends is a quite separate matter.

Was there good reason to depart from the Policy?

141. Having a policy promotes the consistency and predictability of decision making. Allowing exceptions to a policy promotes the ability to respond flexibly to unusual or different situations. An inflexible policy could prioritise consistency at the expense of equal treatment. The duty to follow policy has been described as subordinate to the duty to exercise the statutory power lawfully and it would be wrong to allow policy to fetter discretion if there was a good reason not to follow policy: see *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, at paras. 29-31, per Lord Wilson:

> "**The Legal Effect of Policy**
> 29. In 2001, in *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2002] 1 WLR 356 , Lord Phillips of Worth Matravers MR, giving the judgment of the Court of Appeal, said in para 7:
>
> > "The lawful exercise of [statutory] powers can also be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such a policy gives rise."
>
> Since 2001, however, there has been some departure from the ascription of the legal effect of policy to the doctrine of legitimate expectation. Invocation of the doctrine is strained in circumstances in which those who invoke it were, like Mr Mandalia, unaware of the policy until after the determination adverse to them was made; and also strained in circumstances in which reliance is placed on guidance issued by one public body to another, for example by the Department of the Environment to local planning authorities (see *R (WL) (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ. 111,

> [2010] 1 WLR 2168, para 58). So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ. 1363 , as follows:
>
>> "68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."
>
> 30. Thus, in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2011] UKSC 12, [2012] 1 AC 245 (in which this court reversed the decision of the Court of Appeal reported as R (WL) (Congo) but without doubting the observation in para 58 for which I have cited the decision in para 29 above), Lord Dyson said simply:
>
>> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."
>
> There is no doubt that the implementation of the process instruction would have been a lawful exercise of the power conferred on the Secretary of State by section 4(1) of the Immigration Act 1971 to give or vary leave to remain in the UK.
>
> 31. But, in his judgment in the Lumba case, Lord Dyson had articulated two qualifications. He had said:
>
>> "21 … it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers."
>
> But there was ample flexibility in the process instruction to save it from amounting to a fetter on the discretion of the caseworkers. Lord Dyson had also said:
>
>> "26 … a decision-maker must follow his published policy … unless there are good reasons for not doing so."

The Policy imposed a self-limiting threshold of imminence upon the automatic picking arm powered by OASys and upon the decision to refer. High risk is the same as Very High risk save that it lacks imminence. The Policy should not be departed from without

good reason. This is not a case involving no reason so I must consider whether the reason given was a good reason.

142. Mr Davison considered the NSD report, the recent OASys reports and Ms Moore's report. He advised the Defendant that there was good reason in this way:

> "- his refusal to engage meaningfully with HMPPS psychologists mean there is no insight into his adjustment disorder and the serious risks that may currently pose to others' safety provide justification for viewing his case as exceptional where it does not satisfy every criterion in the Policy".

143. The logic behind this reason was explained by Ms Moore, in the OASys reports and the NSD report. In summary it was as follows. The Trial Judge identified and decided that the Claimant bore substantial Retained Culpability despite the AD he was suffering which diminished his responsibility. The Judge found that the Claimant dug a grave before the killing, took a weapon to the matrimonial home, committed the murder with his children in the house, put the body in the car with the children who were aware of her injured body in the car. The Judge found that the Claimant hid JS in the pre dug grave and separately hid the CCTV and hammer and then for 4 days obstructed the Coroner. The Judge clearly did not attribute all the culpability to the AD.

144. However, the Claimant appears to have misread or misinterpreted the Judge's sentencing remarks and considers that all of the culpability rests on the temporary AD which he suffered and which then resolved soon after the killing. The Claimant considers that he poses no risk, despite his Retained Culpability. He also considers that the specific triggers which stressed him and caused the AD will not arise again. These misconceptions, whether intentional or not, need addressing before insight can be gained and risk reduction may be achieved through therapy and rehabilitation. His refusal to engage undermines the ability of HMPPS, the probation service and other professionals to work with him to improve his insight, identify future triggers for AD through grievance and stress and improve his understanding of his Retained Culpability and his ability to control himself.

145. In particular, I refer back to and rely upon the decisions made and the reasoning set out above at paras. 112-115 relating to the Claimant intentionally undermining the risk assessment of immediacy. That obstructiveness and refusal to engage with HMPPS and NSD risk assessments for 13 years leads me to consider that the reasons put forwards by the Defendant are good reasons for departing from the Policy requirement of immediacy and for deciding to refer absent that criterion. I accept the submissions of Mr Steele at paras. 84 to 85 of the Detailed Grounds of Resistance and paras. 47-52 of the Defendant's skeleton argument. The Defendant's decision is consistent with the objectives underpinning the Policy, namely that proper protection of the public involves assessing each prisoner's risk and that if a prisoner seriously and substantially

undermines that assessment then the Policy is itself being undermined by the prisoner. I reject the Claimant's submission that, for the reasons set out in *R (Padfield) v Min of Agriculture F&F* [1968] AC 977, the Defendant's decision was tainted by illegality. I consider that the statutory intent behind ZB was to empower the Defendant to refer prisoners on a belief based on reasonable grounds which arises from a proper assessment of their risk. Undermining risk assessment undermines the statutory intent.

***Simpson* by analogy**

146. The Claimant relied on R (*Simpson) v SSJ* [2023] 1 WLR 1505, to assert that the Claimant should succeed in this claim. Having examined the facts of that case, I do not consider that submission to be sustainable. All of these ZB decisions are fact determined and hence fact sensitive. The facts of *Simpson* only had structural and superficial similarities to this case. That case involved a ZB decision on a prisoner. Evidence was given to the Heather Williams J. by Mr Davison. The Policy was relied upon by the Claimant and various requirements therein had not been satisfied before the decision was made. However, the similarities ended there. The prisoner committed a child abuse crime on her own child. She was being assessed on release for her danger to children. Issues over access to other children were involved. The professionals advising on licence conditions considered that the proposed conditions would control the risk adequately or safely. At para.118 Heather Williams J. set out the relevant bases identified by the Defendant for the decision. The prisoner had been given a 10 year sentence and had served 5. The Judge did not decide that she was Dangerous TTP at trial. Her OASys risk assessments and MAPPA risk meeting conclusions disclosed she posed a significant risk to children. There were the following notable similarities with the current case:

> "118. … (iii) The 26 May 2022 OASys assessment indicated that when the Claimant was recently interviewed she had shown no remorse and had remained in denial of her offending …;
> (iv) The same interviews also indicated that the Claimant had not developed any insight into her offending or as to what she needed to do to address her risk …; and
> (v) The 26 May 2022 OASys also indicated that over the recent years the Claimant had chosen to remain in contact with her co-Defendant …."

147. The material in those risk assessments was accepted by the Court as new or additional material. I agree with that approach. It would be Nelsonian to ignore MAPPA or OASys assessments when considering whether there is new and additional, post sentencing information, in particular because the drivers for committing serious crimes which put the public at risk may arise from the psychiatric or psychological state of the prisoner, his or her insight into the triggers and his/her ability to control the reaction that the triggers engendered during the crime and may engender again when placed in certain

established or foreseeable new triggering circumstances. However, on the facts Heather Williams J. held as follows:

> ”123. … In this instance there was a formidable body of material before the Secretary of State, at each stage of his decision making, which indicated that the claimant’s risks could be safely managed if she was released. Whilst he was not bound to agree with this, the Secretary of State’s decisions identified no reasonable basis for departing from those assessments and in so far as he focused upon the chances of the risk materialising, he appears to have relied upon a belief that the Claimant should not be released as the risk of her causing serious harm to a child could not be eliminated altogether. As I have explained, that was not the correct question for him to ask.”

In *Simpson* the Defendant did not provide a good reason for failing to follow his Policy, which required lack of manageability on licence, before a ZB decision could be justified. So, the claim succeeded and the decision was quashed.

148. There is no similar professional advice that safe management in the community can be achieved with Robert Brown. No such opinions were before the Defendant for him. On the contrary, he prevented the construction of a properly tailored set of effective licence conditions to match his thinking and risk profile, inter alia because he:

(1) refused to engage with the standard OASys systems aimed at penetration into and proper understanding of his psychiatric and psychological state and his thinking;
(2) stuck rigidly to his fixed opinion that he had no AD soon after he killed his wife and hence posed no risk in future;
(3) despite pleading guilty to manslaughter refused to take professional help to explore, analyse, take treatment for and cope with his Retained Culpability for the killing;
(4) did not recognise his inability to exercise effective control over his criminal actions;
(5) stuck rigidly to his grievance mentality;
(6) formed an unshakeable opinion that the triggers for his stress and AD in 2010 will not arise again on release, so he poses no risk;
(7) refused to discuss or consider whether a different set of stressors could lead to a similar outcome on release;
(8) refused to take part in any psychiatric and psychological assessment inside or outside OASys;
(9) refused to take part in various offender rehabilitation programmes recommended to him or made available to reduce the risk he loses due to his rigid thinking and lack of insight.

Thus, in my judgment, the *Simpson* case is distinguishable from this case on the facts.

Conclusions

149. I grant permission for Grounds 1, 2, 3 and 4 because I consider that each was arguable.

150. **Ground 1: Ultra Vires.** for the reasons set out above and in particular paragraphs 100 to 110, I dismiss the claim based on Ground 1. In my judgment the Defendant formed the requisite opinion by believing on reasonable grounds that the Claimant would satisfy the statutory Dangerousness TTP test and so the decision was not outside the scope of his power granted by ZB nor was it irrational, unlawful or unreasonable.

151. **Ground 2: Policy.** For the reasons set out above and in particular at paragraphs 111-145, I dismiss the claim based on Ground 2. In my judgment the Defendant has evidenced that he had good reason to make his decision despite the lack of fulfilment of the imminence Policy criteria (and hence of a Very High risk criterion) by the OASys system. In short, the Claimant substantially undermined or frustrated the imminence part of the risk assessment system and the system itself and displayed such worrying and entrenched lack of insight that his "imminence of risk" assessment was unreliable. In my judgment the Defendant had good grounds for believing, on new information, that at release the Claimant posed a High risk to the public of serious harm from specified offences and needed full and proper assessment by the Parole Board in particular in relation to imminence, because the Claimant had undermined the standard risk assessments for the last 13 years. I do not consider that undue pressure from Campaign Matters played any part in the Defendant's decision to refer.

152. **Ground 3.** As for *Wednesbury* unreasonableness, I do not think that this adds anything much to Grounds 1 and 2. I do not consider that the matters which the Claimant asserted the Defendant had overlooked were actually overlooked. The Defendant was properly briefed on the risk of reoffending as assessed, despite the Claimant's refusal to engage and hence his undermining of the risk assessment process. The Defendant was aware, in summary, of the contents of Doctor Alcock's report. In my judgment there is clear evidence of a fixed and worrying misunderstanding of his Adjustment Disorder by the Claimant ever since his sentencing. Whilst I accept that Ms Moore was not the right expert to diagnose an AD, she gained and passed on general advice from a consultant psychiatrist on the DSM V categorisation of AD. True it is that the general advice on AD did not focus on the Claimant himself, but it was apposite and in any event the Claimant had refused to engage, so he cannot be heard to criticise such a general approach. He prevented the specifics being gathered. The absence of imminence or Very High Risk was expressly considered by the Defendant and a logical decision taken despite the knowledge that this criterion set out in the Policy was not fulfilled. The Defendant was aware that the Claimant did not have an intimate partner but, due to the Claimant's lack of candour or engagement, his relationship with SB was shrouded in mystery at the time of the decision, at least until February 2024 when more information became available through telephone monitoring. As for the assertion of safe manageability by the Claimant when on licence, with the wide range of proposed conditions, I have dismissed that submission above for the reasons given at paras. 121-

122. As for the allegedly irrelevant matters taken into account, namely the Campaign Matters, I have concluded that there is no evidence that any of those were taken into account in the referral decision, which is quite separate from them being taken into account when deciding to be the reviewer after an NSD decision to submit the Claimant for consideration of the ZB power. Thus, for the reasons set out above I dismiss the claim based on Ground 3.

153. **Ground 4:** In my judgment and for the reasons set out at paras. 124-140 above I dismiss the claim based on ground 4. I find that neither the referral decision nor the selection decision was made taking Campaign Matters into account. I have found that the Defendant did choose to be the decision maker in place of the Panel for reasons that included Campaign Matters but that this was not contrary to Policy and in any event the decision was not based on undue pressure, and was not unlawful or irrational.

END