Peter Kane v Parole Board for England and Wales v Secretary of State for Justice

No Substantial Judicial Treatment

Court
King's Bench Division (Administrative Court)

Judgment Date
24 June 2025

Case No: AC-2024-LON-003249

High Court of Justice King's Bench Division Administrative Court

[2025] EWHC 1559 (Admin), 2025 WL 01745202

Before: Her Honour Judge Alice Robinson (sitting as a Deputy High Court Judge)

Date: 24/06/2025

Hearing dates: 27 March 2025

Representation

Julian Coningham (instructed by Coningham Solicitors) for the Claimant.

Approved Judgment

Her Honour Judge Alice Robinson:

Introduction

1. This is a claim for judicial review by Peter Kane (the Claimant) of a decision of the Parole Board for England and Wales (PB) dated 30 June 2024 (DL) not to release him from custody. That followed an oral hearing on 18 June. He is currently detained in HMP Full Sutton.

2. On 21 July 2024 the Claimant applied, as he was entitled to do, for the DL to be set aside. On 8 August 2024 the application to set aside was refused.

3. On 1 October 2024 the claim for judicial review was issued. On 24 October the PB filed an Acknowledgement of Service stating that it was neutral and did not propose to participate in the proceedings. The Secretary of State for Justice has not participated either.

4. On 16 December 2024 Upper Tribunal Judge Elizabeth Cooke sitting as a Deputy High Court Judge granted permission to apply for judicial review on the papers.

5. On 27 March 2024 I heard the substantive application for judicial review and reserved my decision. At the court's request, on 31 March Mr Julian Coningham, Solicitor Advocate, who appeared on behalf of the Claimant at the PB hearing and substantive judicial review hearing, sent to the court a written note on the applicable legal framework.

Factual background

6. The Claimant is 39 years of age. He has a long history of offending dating back to 1999. His convictions include wounding with intent (2003), assault occasioning actual bodily harm (2006), threatening to damage property (2008), affray (2010), fraud/6 money laundering offences (2012), for which he received a sentence of 3 years imprisonment, as well as multiple convictions for breaches of court orders. On 29 October 2015 he was sentenced to 14 years imprisonment for conspiracy to supply heroin between 17 September and 21 November 2013 (the index offence) following conviction after a trial.

7. The Claimant was sentenced on the basis that he played a leading role in the conspiracy, directing or organising buying or selling on a commercial scale, with substantial links to and influence on others in a chain and he had an expectation of substantial financial gain. The judge described the Claimant as "a clever, calculating man steeped in criminality". He also referred to the Claimant's frequent change of mobile phones in order to avoid detection and said that his explanations for the overwhelming evidence were "totally implausible."

8. There had been 3 seizures of heroin totalling 3.7 kilos which the judge said the Claimant had been at the heart of. The judge described these as "merely illustrations of what this conspiracy involved." There was evidence as to the purity of the heroin in only one of the three seizures, namely 20%. The judge therefore treated the case as one of category 1 harm where the starting point is based on 5 kilos.

9. At trial the Claimant had faced two counts, the charge of which he was convicted (count 1) and a further charge of which he was acquitted, conspiracy to supply heroin between 22 November and 17 December 2013 (count 2). The latter conspiracy came to light on 16 December 2013 when police seized just under 21 kilos of heroin of around 60% purity from the address of the Claimant's mother. Sometime after 5pm on 16 December the Claimant fled the UK for the Netherlands. He remained there until he was arrested and extradited to the UK for trial.

10. The statement later served pursuant to s.16 of the Proceeds of Crime Act 2002 (POCA) in support of the application for a confiscation order records the following. On 21 October 2014 the Claimant was arrested by Dutch police and the next day his address in Amsterdam was searched. Among other items, a loaded revolver and ammunition were found concealed in trunking in the cellar. DNA recovered from the firearm matched the Claimant's DNA profile and fingerprints on the box of ammunition matched those of the Claimant.

11. At a subsequent confiscation hearing, the court found that the value of the Claimant's benefit was £317,822.69. In his ruling on 13 April 2017, the judge found that the Claimant had been heavily involved in large scale drug supply after he left the UK in December 2013. The judge "unreservedly" rejected the Claimant's account that he had merely been working for others to pay off a debt. The judge found that the Claimant was operating a very profitable enterprise in cannabis dealing and

living the 'high life' in Holland taking into account his accommodation and expenditure in Holland, his use of a convertible E class Mercedes, a trip to Ibiza, voice recordings and the handgun found.

12. The judge made a deduction to reflect proportionality and on 13 April 2017 made a confiscation order for payment of £222,475. That did not reflect any assets owned by the Claimant which were limited to £3,240 cash seized by the police. Rather the judge found that the Claimant had substantial hidden assets and rejected his claim of impecuniosity about which he said "I found the defendant a wholly unreliable and unconvincing witness on this as on other topics." The Claimant was ordered to serve 2 years imprisonment in default of payment of the confiscation order.

13. On 13 June 2017 a Serious Crime Prevention Order (SCPO) was made against the Claimant for a period of 5 years from the date of his release from prison. Paragraphs 1.1 and 1.2 of the SCPO prohibit him from owning, possessing, using or controlling more than one mobile phone.

14. The Claimant's original release date was June 2022 but he served an additional period in custody owing to the default sentence imposed by the confiscation order. He was released on licence on 9 January 2023 and recalled on 24 February 2023.

15. In the meantime, on 28 November 2021 he was found in possession of a specified item in custody, a mobile phone, an offence to which he pleaded guilty, and in due course on 31 January 2023 he was sentenced to 6 months imprisonment, suspended for 12 months.

16. During his period on licence the Claimant was repeatedly in breach of his licence conditions including failing to notify full details of any vehicle before a car journey, entering an exclusion zone and consuming alcohol. These breaches resulted in meetings with the Claimant on 11, 18 and 23 January when he was repeatedly taken through his licence conditions in detail. Despite that a compliance improvement letter was issued dated 13 January for failing to notify full details of any vehicle before a car journey, a decision not to recall letter was issued on 24 January and two notice of concern letters were issued dated 15 February for entering an exclusion zone and 20 February for consuming alcohol in breach of hostel rules.

17. On 22 February 2023 information was received from HM Passport Office that an application had been made by the Claimant for a new passport. The Claimant's Community Offender Manager (COM), Mark Newton, took the view that the Claimant had not notified him of his intention to apply for a passport and was accordingly in breach of his licence conditions. The Claimant disputes that and also asserts that, in any event, the passport application had been made before he was released on licence with the full knowledge of the prison authorities so he was not in breach of his licence conditions.

18. The revocation of the Claimant's licence dated 24 February 2023 states that the Secretary of State was satisfied that he had breached the condition to be of good behaviour and not behave in a way which undermines the purpose of the licence period (condition 5i) and breached the condition to surrender his passport to his supervising officer and notify his supervising officer of any intention to apply for a new passport (condition 5xv).

19. On 24 February 2023 the Claimant was arrested pursuant to the revocation of his licence. Police searched his bag and found two mobile phones. The Claimant accepted that one of them was his which had been registered as required by the SCPO. He denied any knowledge of the second phone, stating it had been left in his vehicle by a family member and that police had found it there and put it in his bag.

20. The Claimant brought judicial review proceedings challenging the lawfulness of his recall. On 14 August 2023 that was rejected by His Honour Judge Sephton KC sitting as a Deputy High Court Judge. The court held that the Secretary of State was entitled to accept the evidence from Mr Newton that the Claimant had not notified him of his intention to obtain a passport. Further, the Secretary of State was "amply justified" in concluding that it was necessary to recall the Claimant to prison having regard to (1) his very high risk of serious harm to the public, (2) his previous failure to comply with restrictions on his conduct designed to protect the public and (3) he was a flight risk.

21. In due course the Claimant was prosecuted for breach of the SCPO by virtue of being in possession of two mobile phones. Initially he pleaded not guilty and was due to be tried in the Magistrates' Court. However, he changed his plea to guilty and on 7 May 2024 he was sentenced to 20 weeks custody, consecutive to 10 weeks which was the lesser term activated for breach of the suspended sentence order imposed on 31 January 2023. The Claimant's position is that he was not guilty of breach of the SCPO but thought he may have received a longer sentence if he maintained his not guilty plea.

Parole Board decision

22. In section 1 the PB panel summarised the Claimant's previous convictions and the circumstances of the index offence, drawing on remarks made by the sentencing judge. The panel summarised the Claimant's evidence at the oral hearing about his past offending. He said he pleaded not guilty to the heroin conspiracy because he was doing favours and was not going to accept being the main man. He denied having the sort of money identified in the confiscation proceedings. Regarding the gun seized in Amsterdam he said he was just bringing bags in and did not handle firearms.

23. In paragraph 1.16 the DL states:

> "The panel explored with Mr Kane his index offence and previous offences in detail. Mr Kane does not take anything like full responsibility for his convictions. He denies aspects of the index offence, particularly the level of involvement found by the trial judge, aspects of previous offences and all unproven allegations."

24. The panel went on to refer to the Claimant's account of his childhood, his substance misuse and his intimate relationships. The panel concluded in section 1:

> "1.21 In summary Mr Kane's risk factors include violence, financial motivation, organisational leadership, willingness to carry weapons, serious criminal associations, lavish lifestyle, lack of compliance, manipulation, antisocial behaviour, difficulties with intimate and other relationships, substance and alcohol misuse, traumatic childhood experiences and deviousness.
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> 1.22. Mr Kane asserts that he is highly motivated to lead a pro-social life and not to engage with negative peers. He believes he has matured, and his major aim is to have a family in the future. It is reported that he is "keen to buy a house and settle with BM" and his family are supportive. These are considered developing protective factors."

25. In section 2 of the DL, the panel referred to the Claimant's history of being in prison since the index offence, his automatic release on licence and his breaches of licence conditions. The panel then summarised the evidence relating to the Claimant's passport application including evidence given by the Claimant and his sister at the oral hearing. The gist of this was that she applied for the passport so he could prove his identity when he was released not because he had any intention of travelling. She had to resubmit the application for various reasons, the last time being at the end of December 2022/January 2023.

26. The panel went on to the refer to the allegation of breach of the SCPO, the Claimant's plea of guilty and his evidence that the second phone belonged to his brother and he was not aware of it being in the car. The DL continues:

> "2.13. The panel explored the two mobile phone issue in detail. Overall, the panel considered that Mr Kane does not take responsibility for having a second phone in his vehicle, despite his plea of guilty. Mobile phones are clearly linked to his risk of harm, his licence conditions specified he must not have more than one mobile phone. Mr Kane did not demonstrate insight into why a second mobile phone would cause concerns regarding how to manage his risk of harm in the community. Since he now denies possession of the second phone, the panel has no acceptable explanation for his breach of the terms of his licence and the SCPO."

27. The DL summarises what happened in prison after the Claimant was recalled, including security intelligence concerns, but concludes:

> "2.20. The panel considers that there is no clear evidence that Mr Kane has been involved in the drug culture in custody, and therefore takes no account of allegations that he has."

28. The DL continues:

> "2.21. Mr Kane has not accessed accredited offender behaviour work throughout his sentence. He has completed an in-cell victim awareness booklet. He is unable to access one-to-one work due to being housed in the segregation unit. Professionals do not believe he has outstanding core risk reduction work to complete in custody. It is reported that he would benefit from cognitive behavioural work to explore and address his thinking skills. This can be carried out through one-to-one work.
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> 2.22. The COM confirmed that she has built a positive working relationship with Mr Kane. The COM believes Mr Kane is open to engage in offending behaviour work in the community.

> 2.23. The POM and COM acknowledged that Mr Kane can be challenging particularly when pushing boundaries.
>
> 2.24. The COM believes she can have challenging discussions with Mr Kane, and he will be open and honest."

29. In section 3 the panel conducted an analysis of the manageability of risk. The OGRS3 score put him at a medium risk of re-offending. The OASys and COM assessed him as a very high risk of harm to the public which was reduced to high following a MAPPA meeting. The panel stated:

> "3.4. The panel considered the written report of Dr Beckley [a psychologist instructed on behalf of the Claimant]. She assesses Mr Kane to be a medium risk of future violence or engaging in organised crime. It is not clear from her report on what basis a forensic psychologist can assess the risk of a professional criminal returning to his former profitable unlawful activities.
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> 3.5. The professionals, including the psychologist, confirmed that they do not believe Mr Kane's risk of harm is imminent.
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> 3.6. Considering Mr Kane's index offence and his previous offences the panel accepted and agreed with the OASYs risk assessments save that the panel does not consider that his future risk of serious organised crime is medium. The panel, on the evidence it heard, considers it to be high.
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> 3.7. Mr Kane's risk is likely to escalate if he associates with criminals to enable him to gain finances through serious organised crime, confronts a male who he believes has wronged or disrespected him, is in a toxic intimate relationship, presents with disguised compliance and is not fully open and honest."

30. The panel went on to summarise the risk management plan in the event the Claimant was released and the Claimant's job and accommodation plans. In relation to the Claimant's flight risk, the panel record that the COM does not believe the risk is imminent but said "The panel is less sure of that" (paragraph 3.11). The panel stated the proposed licence conditions were necessary and proportionate (paragraph 3.12).

31. The panel concluded in section 3:

> "3.14. The COM believes warning signs of his risk escalating in the community would be identified. This includes if he is in possession of unauthorised mobile phones, is planning to leave the country, pushes boundaries, misuses substances, associates with negative peers. The COM believes he will be open and transparent.
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> 3.15. The COM, POM and psychologist recommend release. They believe that now that he has developed a positive relationship with his COM and has demonstrated a motivation to lead a pro-social life his risk of harm is manageable in the community.

> 3.16. The panel explored in detail as to whether the risk management plan would be effective. Considering Mr Kane's non-compliance, ability to present with disguised compliance, lack of insight into the importance of not having more than one mobile phone in his presence and lack of internal skills to manage his risk factors the panel did not consider the risk management plan is effective."

32. In section 4, "Conclusions", the panel considered the Claimant's recall and stated:

> "4.2 … On all the evidence available to the panel, the panel found that the recall was appropriate. Mr Kane continued not to fully comply with his risk management plan during his time in the AP despite having been provided with support from professionals outlining the importance of compliance and receiving a range of warning letters. If Mr Kane had not been recalled following the concerns regarding the passport application, he would have been recalled due to having more than one mobile phone. Mobile phones are directly linked to his risk of serious harm, and at the very least he did not demonstrate internal skills to monitor whether he was in possession of more than one mobile phone. The panel therefore agreed that his risk of harm became unmanageable in the community."

33. After reminding itself of submissions from Mr Coningham and the recommendations for release of the COM, POM and psychologist, the panel continued:

> "4.5. The panel noted that Mr Kane continues to be assessed as a Category A (CAT A) prisoner. This raises concerns regarding his risk of harm. Residents in custody who are initially in Cat A are later assessed as Category B/C or D following evidence of positive change.
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> 4.6. The panel explored in detail Mr Kane's index offence and his previous offences. Mr Kane did not demonstrate full responsibility for his offences. He denies many aspects of his convictions. He does not concede that he played a leading role in dealing with drugs, or that he made a considerable amount of money through supplying Class A, and later Class B, drugs.
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> 4.7. Mr Kane did not demonstrate an understanding of the importance of fully complying with his licence conditions, including managing mobile phones. The panel understood that Mr Kane asserts that he did not commit an offence regarding having two mobile phones and that he plans to appeal the mobile phone conviction, notwithstanding his plea of Guilty. Considering all evidence taken during the oral hearing the panel considers that Mr Kane does not demonstrate insight into how mobile phones are linked to his risk of harm or internal skills to ensure that he is does not have more than one mobile phone in any circumstance.
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> …
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> 4.9. The panel does not consider the risk management plan is effective because Mr Kane does not demonstrate an ability to fully comply, to be open and honest consistently with professionals, not to present with disguised compliance and internal skills to manage his risk factors including an ability to never be present on his own with more than one mobile phone. Therefore, warning signs of his risk escalating may not be identified by professionals.

4.10. Mr Kane also does not demonstrate anything like full acceptance of responsibility for his index offence and a range of his previous offences. The panel is bound to accept the assessment of the trial judge (who heard all the evidence) unless cogent evidence is adduced to demonstrate that the trial judge was in error, which has not been done. The account given by Mr Kane of his involvement puts him at a much lower level of criminal responsibility than the trial judge found. Nor does Mr Kane's account fit in with the very large confiscation order made by the court in respect of the index offence and his previous offending. The trial judge declared Mr Kane to be a wholly unreliable and unconvincing witness.

4.11. With regard to the events following Mr Kane's travel to the Netherlands after the arrest of his accomplice in his mother's house in possession of a large quantity of heroin, the panel is satisfied, on Mr Kane's own admission, that he was rapidly involved in cannabis dealing in that country. He lived in luxurious accommodation, he drove an expensive car (registered, as was his custom, in someone else's name), which he took to Ibiza for a prolonged and expensive stay. The panel has seen an extract from a letter Mr Kane wrote to a friend (and accomplice) boasting of how well he was living in the Netherlands, and of sitting in Ibiza for 3 months of the year as well. The panel is satisfied on the evidence that Mr Kane, while in the Netherlands, continued to live in the style of a successful drug-dealer at an organisational level, well above the street distribution that Mr Kane would suggest. The panel notes the evidence (which he was asked about, and did not dispute, though he sought, rather unconvincingly, to explain) of his DNA being found on a firearm and his fingerprints on a box of ammunition. The panel notes the ease and speed with which Mr Kane stepped into this level of criminal behaviour in a foreign country.

4.12. The panel considered the evidence about the passport application. Mr Kane said he had told his sister to abandon the attempt to get him a passport. She said she told him that she would carry on trying, and that Mr Kane knew her well enough to know that she meant what she said. Mr Kane agreed with that to the panel. The evidence therefore establishes that Mr Kane knew there was an ongoing passport application being made at the time of his release on licence. It is doubtful on the evidence, but not established on the balance of probabilities in the absence of live evidence from his COM at the time, that he kept his COM fully informed of what was going on. The panel does not, therefore, find a breach of the passport condition of his licence. However, the panel notes that the passport was to be sent to Mr Kane's mother's address, and therefore, if and when it was delivered, Mr Kane's COM would have no knowledge of the fact unless and until Mr Kane told him about it. Since Mr Kane would have been obliged by his licence conditions to surrender any passport he received to his COM until the end of his licence period (February 2029), the facts of the passport application, even taking the most favourable possible view of Mr Kane's activities, raise very significant doubts about his intention to comply with any licence conditions that might impede any future lucrative criminal activity.

4.13. The panel further notes that Mr Kane must have been involved in the index offences, relating to the transference of substantial quantities of high quality heroin, very soon indeed after his release from his previous sentence for money-laundering.

4.14. The panel therefore concluded that it is necessary for the protection of the public that Mr Kane remains confined and makes a **No Release Decision** ."

Legal framework

34. Part 12 , Chapter 6 of the Criminal Justice Act 2003 , as amended, contains provisions for release on licence and recall of prisoners. By virtue of s.244, fixed term prisoners who have served the requisite custodial period are automatically entitled to be released on licence.

35. Section 254(1) (as amended) provides for the recall of a prisoner released on licence:

> "(1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.
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> (2) A person recalled to prison under subsection (1)—
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> (a) may make representations in writing with respect to his recall, and
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> (b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations.
>
> (2A) The Secretary of State, after considering any representations under subsection (2)(a) or any other matters, may cancel a revocation under this section.
>
> (2B) The Secretary of State may cancel a revocation under subsection (2A) only if satisfied that the person recalled has complied with all the conditions specified in the licence."

36. Section 255C (as amended) provides so far as relevant:

> "(2) The Secretary of State may, at any time after P is returned to prison, release P again on licence under this Chapter.
>
> (3) The Secretary of State must not release P under subsection (2) unless the Secretary of State is satisfied that it is not necessary for the protection of the public that P should remain in prison.
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> (4) The Secretary of State must refer P's case to the Board—
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> (a) if P makes representations under section 254(2) before the end of the period of 28 days beginning with the date on which P returns to custody, on the making of those representations, or
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> (b) if, at the end of that period, P has not been released under subsection (2) and has not made such representations, at that time.
>
> (4A) The Board must not give a direction for P's release on a reference under subsection (4) unless the Board is satisfied that it is not necessary for the protection of the public that P should remain in prison."

37. The circumstances in which fairness requires the PB to hold an oral hearing before making its decision were summarised in R(Osborn) v Parole Board *[2014] AC 1115, para 2* per Lord Reed JSC. Procedural fairness is important because it is liable to result in better decision making, pays due respect to the person affected and accords with the rule of law, paras 65-71. Circumstances in which an oral hearing may be required include where important facts are in dispute or significant

explanations or mitigations are advanced which needed to be heard orally, see also *Pearce v Parole Board [2023] AC 807 at para 67* per Lord Hodge and Lord Hughes. An oral hearing was held in this case, evidence was heard and there was an opportunity for questions to be asked.

38. In *R(Wells) v Parole Board [2019] EWHC 2710 (Admin)* the Administrative Court (Saini J) allowed a rationality and reasons challenge to a PB decision not to release a prisoner. In doing so the court stated:

> "31. A modern approach to the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 (CA)* test is not to simply ask the crude and unhelpful question: was the decision irrational?
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> 32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.
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> 33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in *Wednesbury* (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?
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> 34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion."

39. Where a PB decision runs contrary to the recommendations of the professional witnesses the PB must take that evidence into account and give reasons for rejecting those recommendations, *O'Sullivan v Parole Board [2009] EWHC 2370 (Admin)* .

40. A decision may be challenged as unlawful on the grounds of a mistake of fact provided the following conditions are satisfied

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning." per Carnwath LJ in *E v Secretary of State for the Home Department [2004] QB 1044 at paragraph 66* .

41. Where a decision is challenged on the grounds of procedural unfairness, it is important to note that

> "the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects." Per Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531* at 560E.
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> A similar point was made by Lord Reed in Pearce , paragraph 66.

42. The requirements of fairness include giving the losing party an opportunity to address the grounds on which the tribunal proposes to reach its decision, see e.g. *R(Bousfield) v Parole Board [2021] EWHC 3160 (Admin), paragraphs 70-73* .

Submissions

43. The grounds of challenge assert that the DL was irrational because of significant factual errors and that it was procedurally unfair.

44. Before summarising the grounds which were pursued, I record that at the hearing the court enquired whether Mr Coningham was relying on an argument that there was actual or apparent bias on the part of the panel. That was in the light of some of the submissions in his Skeleton Argument, such as that the panel had adopted a deliberately unfair procedure. Having reflected on the matter, Mr Coningham said he was not alleging bias and stated that he was no longer relying upon the following passages in his Skeleton Argument: paragraphs 41(iii), 41(iv) first 3 lines and 41(vi) first 13 lines. Accordingly, with his agreement I put a line through those passages.

Unfairness

45. Mr Coningham's main submission was that that there was strong and consistent support for the Claimant's release from the POM, COM and psychologist. The panel failed to put to these professional witnesses, or the Claimant, their concerns which led to the no release decision. Further, although he did not put it this way, it was implicit in Mr Coningham's criticisms that the panel had failed to give reasons for rejecting the evidence of the professional witnesses.

46. He submitted that the COM's evidence was that she had an open and supportive working relationship with the Claimant and that his risk could be effectively managed in accordance with the exceptionally robust risk management plan which had been approved by the MAPPA board and a senior National Security Division Manager. Whilst the POM was sceptical about some aspects of the Claimant's behaviour, she gave a reasoned and thoughtful explanation as to why he should be released. Whilst Doctor Beckley was not present in person, her conclusions were positive and robust.

47. He submitted that although a panel is entitled to reject professional expert evidence, it must do so in a way that is fair to the prisoner. That means the panel's concerns should be put to witnesses at the hearing and any issues as to methodology raised. In this case the professional witnesses were not alerted to the panel's concerns as to disguised compliance. Mr Coningham submitted this was particularly important in respect of the COM's evidence as she considered that the Claimant was open and honest. There was one question only from the chair to the COM about disguised compliance and no indication that the reply had caused concern to the panel. No question was put to the Claimant as to any issue of disguised compliance. In the DL the panel criticised the usefulness and relevance of Dr Beckley's report but that had not been put to the Claimant's legal representative.

48. Allied to these criticisms, Mr Coningham submitted that the DL was irrational because the panel made a number of findings of fact in the Claimant's favour yet refused to direct his release. The panel found he had not breached the licence condition relating to his passport, they considered that the breaches of other licence conditions had not justified recall, they found he had not been involved in criminal activity either on licence or in custody and, in relation to the two mobile phones found in his bag on arrest, they did not find that the second phone belonged to the Claimant.

49. The other arguments relied upon that the DL is unfair may be summarised as follows:

(1) The panel's approach to the issue of breach of the licence condition relating to the passport application was unfair;
(2) It was unreasonable to rely upon licence breaches that did not lead to the Claimant's recall;
(3) The panel's approach to the two mobile phone issue was unfair;
(4) The panel's decision was unreasonable in the light of the lack of evidence that the Claimant was involved in criminal activity on licence or in custody;
(5) It was unfair of the panel to rely upon the Claimant's category A status;
(6) The nature of the panel's questioning of the Claimant was unfair;
(7) The panel acted unfairly in its approach to the evidence of DS Hughes, the officer present when the Claimant's bag had been searched when he was arrested on 24 February 2023 and the two mobile phones found.

Errors of fact

50. The factual errors relied upon may be summarised in this way:

(1) The panel wrongly stated that the Claimant failed to accept responsibility for his criminality – although this was described by Mr Coningham as a mistake of fact, it will be convenient to deal with it together with the allegation noted above in paragraph 49(6) that the nature of the panel's questioning of the Claimant was unfair;
(2) The panel wrongly relied upon evidence relating to count 2 of which the Claimant was acquitted;
(3) The panel mistakenly recorded that the Claimant's fingerprints were found on the gun seized from the cellar in Amsterdam;
(4) The panel mis-recorded the Claimant's evidence in three respects: as to his childhood, as to an allegation that he had received a drone package in prison and as to the amount of money paid by his family towards the confiscation order;
(5) The panel wrongly stated the Claimant had received a warning letter about his passport application when there was no evidence to that effect;
(6) The panel mistakenly thought that the Claimant had previously had risk management plans (which he had been in breach of).

Discussion

The panel's approach to the evidence of the professional witnesses

51. Mr Coningham did not draw the court's attention to any report from the POM or any particular passage of her evidence in the transcript. In her evidence she stated that, although she had not conducted a detailed analysis of all the Claimant's adjudications, her experience and caseload enabled her to observe broad variations. In the Claimant's case, he pushed boundaries and many adjudications got dismissed on technicalities so he will seek loopholes (transcript pp.106 & 111). Later she was asked whether she had a recommendation as to his release and said:

> "I would endorse Ms Roberts' professional opinion. I think the risk management plan is robust. I think that we do have a clearer idea now of what the early warning signs are, in terms of minor breaches, would indicate possibly wider breaches going on that we were unaware of. And I think Mr Kane is aware of that now, and then it would be seen as such. With that robust risk management plan, I think it would be possible to manage him on licence." (transcript p.250)

52. As to the COM, Kat Roberts (who had previously changed her name from Rabii), part 2 of her latest report dated 27 May 2024 states "Release is supported at this time in line with Risk Management Plan in place. It is my opinion that the external robust licence conditions in place can manage Mr Kane on a further period of licence supervision."

53. The risk assessment in Part 9 states that the risk of serious harm to the public is high and the risk assessments placed the Claimant at a medium risk of reoffending.

54. In Part 10, detailing the COM's contact with the Claimant, the report states that she has built up a positive working relationship with him. It sets out his account relating to the passport application and then his account of his future plans. In relation to the Claimant's flight risk, the report states the COM is not aware of any information to suggest this is imminent.

55. Part 12 of Ms Robert's report referred to a number of issues that had arisen with the Claimant's behaviour since he arrived at Full Sutton. These included an informal and formal PIN warning owing to misuse of the phone. He was put on report 3 times although none had resulted in an adjudication. She concluded "It appears Mr Kane's familiarity with prison disciplinary policies gives him confidence to push boundaries and challenge attempts to sanction behaviours."

56. Part 14 sets out the risk management plan. This included residing at Approved Premises (AP) for up to 12 months, GPS tagging and trail monitoring, weekly face to face contact with the COM in addition to telephone contact, further work and interventions, regular MAPPA meetings, licence conditions (relating to mobile phones, financial restrictions, vehicle notification, passport conditions and non-associations) and the Claimant will remain subject to the SCPO.

57. In oral evidence at the PB hearing Ms Roberts gave evidence in line with her report. She was asked about the passport application and said:

> "There are comments on Delius which would suggest that Peter notified his intention of applying for a passport. But in terms of the other issues that were going on, I've got relatively little knowledge, other than there were a few warning letters that were sent out in relation to behaviours we spoke about earlier on."
>
> The judge then asked "none of the other behaviours before the passport information came to light were going anywhere near resulting in his licence being revoked. Is that a fair comment?" To which Ms Roberts replied "That's correct. They didn't cross the threshold." (transcript p.214)

58. As to the phones found on him on arrest, she confirmed that the Claimant had consistently maintained that he was not in possession of the second phone (transcript p.215).

59. In relation to risk, Ms Roberts said the nature of the risk of harm was drug dealing as part of serious organised crime and what that can involve. She was asked "he was dealing in drugs on a major scale withing a very short time of his last release from custody for the money laundering offences. What's the evidence that he won't go straight back at it?" to which she simply replied "We've got no current evidence that is imminent" and it was a joint decision with MAPPA to reduce his risk of harm from very high to high (transcript pp.221-222).

60. There followed this exchange:

> "JUDGE THOMAS: Well, let's think about it for a minute, shall we? The drug dealing he was involved in, both here and in the Netherlands, was as drug dealing tends to be, heavily reliant on mobile phones.
>
> K ROBERTS: Yeah.

JUDGE THOMAS: And here we have him on his own admission to the Magistrate's Court, in possession of an unauthorised mobile phone. Does that tell you anything about the possible imminence of a return to drug dealing as soon as he gets the chance?

K ROBERTS: Possibly… if he was to come out, there's going to be warning indicators. He'll be heavily monitored. You know, if we were to find, you know, additional devices, or when we're checking his phones, or anything like that, we can always review the risk at that point…

JUDGE THOMAS: Okay. He's regarded as an ongoing flight risk with his international contacts.

K ROBERTS: Sir, yeah. And again, I'm not aware of any information to suggest that that flight risk is imminent. However, there is a risk there, given the abscond to Holland, and the international contacts.

JUDGE THOMAS: I mean, on one view of the matter, it's a point made in the papers, applying for a passport, which was going to be sent, not to where he was, but to his mother's address, might indicate a plan to go abroad as soon as he possibly could. Would you, are you able to respond to that suggestion that's there in the papers?

K ROBERTS: I think obviously, there's a suggestion there, but we've got no clear evidence that that's what the intention was going to be. But there is a suggestion within the papers.

THOMAS: I mean, what clear evidence could there be?

K ROBERTS: I suppose if there was any intel on top of that. If, you know, if his calls were getting listened into, and he was sort of planning on leaving the country when he was released. I mean, hopefully that would have been picked up on. So my understanding was that the passport, which we've discussed at length really is, was to be used for identity purposes.

JUDGE THOMAS: Yes. I mean, if you accept his version of events, and of his motivation. But court after court has found him to be an untruthful witness. Are you sure you're not taking him too much at his own word?

K ROBERTS: No, I think you've got to be balanced, haven't you? So there is a suggestion there, and I understand totally, you know, in terms of what you're saying, and what that suggestion is. But there's no clear evidence to suggest that he was going to abscond. We need to take into consideration that there is that risk, that flight risk. But we have a passport application, which he notified his intention of. He didn't get permission, but he doesn't need permission.

JUDGE THOMAS: No.

K ROBERTS: And he hasn't had that passport in his possession before it was sort of intercepted, as such. So yeah.

JUDGE THOMAS: Yes, I mean, you're saying that you accept that if he had received the passport, he would have been a good boy and handed it over …

K ROBERTS: I would hope, I would hope he would.

JUDGE THOMAS: Hope is a wonderful thing, Ms Roberts.

K ROBERTS: [Inaudible], isn't it? No, I would hope he would. I mean, ultimately it's the wording of that licence condition, isn't it? I mean, if it was to ask for permission, then that's different. The difficulty is when someone notifies their intention, and they're obviously applying for it, it's going to have to be in their possession first before it's handed over. And it's that level of trust, isn't it, in terms of whether they would do that or not?" (transcript pp.222-224)

61. Later Ms Roberts was asked whether she thought the Claimant was being frank and open with her or playing a deeper game to which she replied "we don't know do we?" but it was about looking whether the Claimant had met the tasks for release and the risk management plan. As to that she said she didn't consider there were any further external controls that could be placed on the Claimant (transcript pp.226-227).

62. The panel then asked her a number of times whether the Claimant had the internal controls necessary to stop him reverting to serious crime. She referred to the Claimant saying he had matured and that psychological work was available to him in the community as well as the support of his family including his partner with whom he had been in a relationship for 13 years. The judge pointed out that his partner had been stopped at the airport on the way to Amsterdam when the Claimant was living there with over £1000 in her handbag. Ms Roberts said she had not yet had a discussion with the partner about that (transcript pp.227-231).

63. After a discussion about the proposed licence conditions. Ms Roberts was then asked whether there was anything which springs out as calling for further attention and she replied no. At that point the judge asked: "Aren't you concerned about this heavy dispute about the telephone evidence?" to which she replied "I am concerned about that. I think at the end of the day, Peter's pleaded, he's pleaded guilty. He's been convicted. And we have to deal with the facts. I mean, he's got his reasons why he pleaded guilty, but I think he understands, we have to deal with it as he's guilty, because that's, he's plead guilty. He's been convicted of that. So I think it's just about yeah, getting Peter to sort of understand that, and be able to move forward. But yeah, I, it is concerning." (transcript p.240)

64. The judge then asked for her professional opinion as to release and Ms Roberts said:

> "I think we can manage him in the community. He can be rereleased. The risk management plan is robust enough. Should it fail, we can recall him. Again, there's very little point in him, he's in the segregation unit at the minute. My understanding is that …he's got until next October before it's going to be reviewed for him to come out of that segregation unit. He can't undertake any work in there, as far as I'm aware. I would fully support him in giving him another chance to come out, to prove himself, to comply with the licence conditions. They're heavily, he will be heavily monitored. So I think it's a case of we will see those warning signs before something happens." (transcript pp.240-241).

65. When asked what the warning signs might be for a potential return to serious criminality she said "It's difficult, isn't it?" She had referred to his previous behaviour on licence as a warning sign but added that, knowing he would be subject to room searches a person would not put a second mobile phone in their room, but that he would be heavily monitored. She said the fact he could not be monitored 24 hours a day was "definitely a concern" and it was whether the panel feel he has met the test for release but there were no other external measures which could be put in place. She agreed that the Claimant "has done absolutely no risk reduction work through any of his periods in custody" (transcript p.242).

66. During questioning by the chair the panel returned to the issue of warning signs and Ms Roberts was asked, having regard to the index offence and concern that the Claimant is quite skilful at disguised compliance, "How will you pick up any disguised compliance?" She responded: "I think it's, oh, it's hard, isn't it? I mean, I can't even explain it, to be honest with you. But it's a case of, I, with people I can probably say, 'Yeah, that person's got disguised compliance', or whatever. It's more about them going along, just like, playing the game, just sort of, yeah, not meaningful, not meaningful compliance. And I'm hoping, obviously he's going to have two, a supervision session with myself each week and a telephone contact. He's going to be in the approved premises with twice weekly APQ worker sessions, which will involve three-way meetings as well. We can very quickly pick up on that, because other behaviours are saying a different thing. And I think as well, any work that he does with our psychologist, who would be quite skilled in picking up that as well." She agreed with the chair's summary of her evidence on this point as being that "in effect, professionals would develop the skills to pick up his personality style and his ability to communicate effectively in terms of truthful and honesty" (transcript pp.246-247).

67. Turning to the report of the psychologist, Dr Kerry Beckley, she did not give live evidence because she had to attend another PB hearing. The Claimant did not ask for the hearing to be put off to a date when she could attend.

68. In section 9 of her report on progress in custody she stated that a programme needs analysis was completed in 2018 and the Claimant was assessed as suitable for Kaizen based on his previous convictions and custodial behaviour. He was offered a place in November 2018 and again in February 2019 but declined on both occasions (para 9.3).

69. Section 11 of her report deals with an HCR-20 risk assessment. She identified the primary concern in relation to public protection as the Claimant's involvement in organised crime, specifically the supply of class A drugs (para 11.5). She referred to his breach of licence conditions and said " problems with insight remain partially present and there are clear problems with supervision response" (para 11.8). She considered that there was little evidence to suggest he would use alcohol or illicit substances and that his risk in relation to organised criminal activity is linked to peer associates and financial motivation (para 11.11). She stated "Mr Kane's risk of recidivism is most effectively managed through developing a good working relationship with his community offender manager and the imposition of licence conditions, both of which are currently in place. A combination of motivated self-interest and external monitoring is likely to reduce the chance of Mr Kane reoffending in the future" (para 11.13).

70. In section 12, an assessment of protective factors, Dr Beckley addressed the Claimant's 'internal items', individual characteristics that have a protective effect. In paragraph 12.2 she stated that "There is a suggestion that Mr Kane has attempted to portray himself as less cognitively able as a means to minimise the risk that he poses in terms of organised criminal activity." She referred to his positive relationship with his mother, that decisions historically were primarily based on his own self interest and he can evidence self-control in relation to his use of violence.

71. As to motivation, Dr Beckley stated that "Mr Kane would assert that his motivation for the future is to invest in relationships with his partner and family, to secure appropriate and permanent accommodation and to find paid employment whilst progressing other aspirations such as the mentoring service" (para 12.3). Overall, the claimant has a moderate-high level of protective factors in place if he were re-released on licence (para 12.4).

72. Section 13 contains a psychological risk formulation. In relation to the Claimant's account of the index offence Dr Beckley stated: "Based upon the official accounts, Mr Kane's involvement in organised crime was far more significant which therefore suggests that he continues to minimise and conceal the extent of his criminal activity. If this is accepted, Mr Kane's capacity to be open and honest with supervising professionals is an area for future concern, although does not necessarily link directly to an increased propensity for future organised criminal activity" (para 13.2).

73. She considered that the proposed risk management plan would significantly impede the Claimant's future capability (para 13.4). In this section she concluded:

> "13.7 Mr Kane's risk of future violent recidivism is considered to be medium, and he poses a medium risk of causing serious harm. There is no evidence of imminence. Whilst it is not possible to use a structured clinical judgement approach to considering Mr Kane's future risk of involvement in organised crime, I would judge this risk to also be medium in the community when taking into consideration the imposition of a robust risk management plan and other protective factors in place."

74. Dr Beckley concluded that the Claimant is considered a medium risk of future violence or engaging in organised crime and there was little merit in him remaining in custody for the protection of the public (paras 14.1 & 14.2).

75. In my judgment it is clear that the panel was well aware that the POM, COM and Dr Beckley recommended the Claimant's release, see paragraphs 4.4 and 4.8 of the DL. Mr Coningham did not suggest to the contrary. Further, although he submitted there were some mistakes of fact in relation to the Claimant's evidence which I will deal with later, he did not suggest that the panel had failed to record the gist of the evidence from the professional witnesses.

76. The reasons for rejecting those recommendations are set out in the conclusions section of the DL. The panel decided that the Claimant's recall had been appropriate. They took into account the fact he remained a category A prisoner (para 4.5),

they found that he did not demonstrate full responsibility for his offences and the trial judge had found him to be a wholly unreliable and unconvincing witness (paras 4.6 & 4.10), they considered that he did not demonstrate an understanding of the importance of fully complying with his licence conditions (paras 4.7 & 4.12) and they did not consider the risk management plan was effective (para 4.9). The panel referred to the Claimant's criminal activities in the Netherlands and noted "the ease and speed with which Mr Kane stepped into this level of criminal behaviour in a foreign country" (para 4.11). Finally the panel referred to the fact that the Claimant was involved in the index offence very soon after his release from his previous sentence for money-laundering (para 4.13).

77. Subject to Mr Coningham's specific criticism of some of those findings to which I will turn, in my judgment, in general terms, the panel were entitled to reject the evidence of the professional witnesses for the reasons they gave.

78. There was no dispute that the risk of serious harm to the public arose from the Claimant returning to serious organised crime in the form of large scale drug supply. In contrast to Dr Beckley, the COM and OASys risk assessments put the risk of serious harm to the public as high, though they all put the risk of reoffending as medium. In the light of all the evidence, I consider the panel were entitled to conclude that the risk of re-offending was high (para 3.6).

79. The key issue was whether the Claimant could be safely released. The POM, the COM and Dr Beckley believed that the risk management plan was robust and the COM did not think any greater external controls could be imposed. As already noted the panel did not agree that the risk management plan was effective for the reasons they gave. The panel stated that the Claimant had not demonstrated an ability to fully comply with licence conditions. That was evidenced by his behaviour when previously on licence. The panel stated he had not demonstrated an ability to be open and honest with professionals. That was evident from the fact that in his discussions with them he continued to minimise the nature and extent of his previous offending despite the overwhelming evidence to the contrary.

80. The panel stated that he had not demonstrated an ability not to present with disguised compliance. In my judgment that was apparent from all of the evidence. Moreover, it is something to which Dr Beckley specifically drew attention in paragraph 13.2 of her report. There she referred to evidence the Claimant continues to "conceal" the extent of his criminal activity and concern at his capacity to be open and honest with supervising professionals.

81. The panel stated that the Claimant had not demonstrated the internal skills to manage risk factors. That was evidenced by what the panel said about the passport application and his possession of two mobile phones.

82. In the light of all of that I consider that, first, the panel was entitled to find that the warning signs of his risk escalating may not be identified by professionals and that the risk management plan is not effective and, second, the panel gave adequate reasons for their decision. The panel's overall reasoning and as to the effectiveness of the risk management plan addresses the evidence of the professional witnesses and explains why the panel took a different view. Put in the terms set out by Saini J in Wells , there is no unexplained evidential gap or leap in reasoning which fails to justify the conclusion and reasons for the panel's conclusion have been given.

83. Further, it is clear from the evidence given at the hearing, which I have set out above, that the panel asked the COM at some length about the issues of concern to them. Therefore the witnesses had the opportunity to deal with them. Although by this stage the Claimant had already given evidence, as set out below, he was also asked about these issues in some detail and he and Mr Coningham on his behalf were given an opportunity to give any further evidence or make any further submissions they wished.

84. Although the panel took the Claimant's evidence earlier than would be customary at a PB hearing, the panel made it clear that the Claimant and Mr Coningham would have the last word (transcript p.87) and in accordance with that indication, at the end of all the other evidence the panel gave the Claimant an opportunity to say anything further that he wished before hearing Mr Coningham's final submissions (transcript p.251). That was an opportunity of which the Claimant availed himself and Mr Coningham was also given the opportunity to ask the Claimant any further questions (transcript p.252).

85. In relation to Mr Coningham's submission that the panel did not state they were dissatisfied with the COM's evidence about disguised compliance, in my judgment they were not required to do so. Fairness requires that the witnesses have a fair opportunity to deal with the panel's concerns. The panel is not required to state in respect of all the answers given whether or not they accept that evidence.

86. Mr Coningham specifically criticised the panel's comment on Dr Beckley's report in paragraph 3.4 of the DL which states:

> "3.4. The panel considered the written report of Dr Beckley. She assesses Mr Kane to be a medium risk of future violence or engaging in organised crime. It is not clear from her report on what basis a forensic psychologist can assess the risk of a professional criminal returning to his former profitable unlawful activities."

He submitted that it was unfair of the panel not to have raised that concern about her methodology at the hearing.

87. However, the relevant passage of Dr Beckley's report (para 13.7) prefaces her assessment that the Claimant's risk of future involvement in organised crime was medium with these words: "it is not possible to use a structured clinical judgement approach to considering Mr Kane's future risk of involvement in organised crime" Therefore she herself had made it clear that this was not an opinion which was supported by the risk assessment tools used to predict a risk of future violence. Therefore the panel's observation that it was not clear on what basis she could assess that risk was entirely correct.

88. I do not consider that it was incumbent on the panel to make a point at the hearing which was reflected in the expert's own report nor that their failure to do so renders the decision unlawful. Further, the panel did not ignore Dr Beckley's evidence which they go on to refer to on the question of whether the risk of harm is imminent (para 3.5) and the recommendation for release (paras 3.15 and 4.4).

89. I turn therefore to Mr Coningham's specific criticisms of some of the matters relied upon in the DL.

Passport application

90. Mr Coningham submitted that the panel found the Claimant had not breached his licence condition relating to the passport application, yet they unfairly relied upon it in support of the no release decision. This was despite their failure to make any findings of fact. Further, he submitted that the panel failed to take into account the evidence from the Claimant or his sister on the point.

91. The panel dealt with the passport application in its conclusions in paragraph 4.12:

> "The panel considered the evidence about the passport application. Mr Kane said he had told his sister to abandon the attempt to get him a passport. She said she told him that she would carry on trying, and that Mr Kane knew her well enough to know that she meant what she said. Mr Kane agreed with that to the panel. The evidence therefore establishes that Mr Kane knew there was an ongoing passport application being made at the time of his release on licence. It is doubtful on the evidence, but not established on the balance of probabilities in the absence of live evidence from his COM at the time, that he kept his COM fully informed of what was going on. The panel does not, therefore, find a breach of the passport condition of his licence. However, the panel notes that the passport was to be sent to Mr Kane's mother's address, and therefore, if and when it was delivered, Mr Kane's COM would have no knowledge of the fact unless and until Mr Kane told him about it. Since Mr Kane would have been obliged by his licence conditions to surrender any passport he received to his COM until the end of his licence period (February 2029), the facts of the passport application, even taking the most favourable possible view of Mr Kane's activities, raise very significant doubts about his intention to comply with any licence conditions that might impede any future lucrative criminal activity."

92. In my judgment there is no inconsistency or unfairness in the panel decision. The evidence of the Claimant's sister was that she wanted to obtain a passport for him so he would have identification to prove who he was once released (transcript p.89). He told her to leave it but she made it clear to him she was going to continue with the application, leaving him in

no doubt that she was carrying on with the application (transcript p.97). That is what the panel found. There is no basis for saying that they failed to take into account her evidence.

93. Because the Panel had not heard from the Claimant's COM at the time, Mark Newton, they did not make a finding that the Claimant had failed to inform him of the application. Again, there was no unfairness.

94. The relevance of the passport application to the panel's decision was the fact that D was well aware the application was being made and that the passport would be sent to his mother's address, despite the fact his licence conditions meant he would have to hand it straight over to his COM. If he intended to hand it over, he would not have had it readily available to use for identification purposes which defeated the point of the application. That raised doubts as to whether he intended to hand it over. Moreover, I consider the panel were entitled to express "significant doubts" about his intention to comply with his licence conditions, having regard to their findings that the Claimant minimised his previous offending. That increased the risk of harm because the Claimant would have access to a passport which his COM would not know about enabling the Claimant to revert to his previous criminal activities abroad.

95. In my judgment the panel explained the relevance of the passport application to their decision and there was no unfairness in the PB's approach.

Breaches of licence conditions

96. Mr Coningham submitted that the panel unfairly placed weight on breaches of licence conditions which did not lead to the Claimant's recall, see paragraphs 2.3 and 4.2 of the DL. That was despite inviting the COM to agree that they were nowhere near the level to warrant recall and the breaches were not explored in evidence, see paragraph 58 above.

97. In section 3 on 'The Present' the Panel described the Claimant's period on licence as follows:

> "2.3 Following release, it is reported that on "numerous" occasions he breached his licence conditions. The previous COM reported that "every effort had been made to address this with him." He received a compliance improvement letter, a decision not to recall letter and a notice of concern letter. He was residing in Ascot House Approved Premises (AP) and the AP staff repeatedly provided information to him regarding his poor compliance and the need to address his behaviour."

98. Then in paragraph 4.2 the panel considered the merits of the Claimant's recall and decided on all the evidence that it had been appropriate:

> "Mr Kane continued not to fully comply with his risk management plan during his time in the AP despite having been provided with support from professionals outlining the importance of compliance and receiving a range of warning letters. If Mr Kane had not been recalled following the concerns regarding the passport application, he would have been recalled due to having more than one mobile phone. Mobile phones are directly linked to his risk of serious harm, and at the very least he did not demonstrate internal skills to monitor whether he was in possession of more than one mobile phone. The panel therefore agreed that his risk of harm became unmanageable in the community."

99. It is apparent from that passage that the panel considered recall had been appropriate owing to a range of factors, one of which was his failure to comply with licence conditions generally, despite having been provided with professional support. Mr Coningham did not submit there was anything factually inaccurate in the Panel's description in paragraph 2.3 or 4.2 of the Claimant's breaches of licence conditions. Nor did he submit that, as a matter of law, the panel were not entitled to take into account the previous breaches of licence conditions.

100. In my judgment, the Claimant's previous breaches of his licence conditions were plainly relevant and the panel were entitled to take them into account. The fact that the panel agreed that, on their own, the breaches would not have justified recall, which is consistent with what the panel say in paragraph 4.2, does not detract from that. Further, there is no evidence that the panel gave this factor such weight that the decision could properly be regarded as unreasonable as a matter of law. As set out in paragraphs 77 and following above, the panel relied on many factors when reaching the no release decision of which breach of previous licence conditions was only one.

Two mobile phones

101. Mr Coningham submitted that the panel did not find that the second mobile phone belonged to the Claimant yet they unreasonably relied upon the fact two mobile phones were found in his bag in support of the no release decision. Further, he submitted that it was unfair of the panel to rely upon the fact that the Claimant said he was going to appeal his conviction for breach of the SCPO as a ground for showing lack of insight. The grounds of appeal had nothing to do with his possession of the phones but related to whether the original application for a SCPO had been properly signed off.

102. The DL deals with this issue in the following way:

> "2.13. The panel explored the two mobile phone issue in detail. Overall, the panel considered that Mr Kane does not take responsibility for having a second phone in his vehicle, despite his plea of guilty. Mobile phones are clearly linked to his risk of harm, his licence conditions specified he must not have more than one mobile phone. Mr Kane did not demonstrate insight into why a second mobile phone would cause concerns regarding how to manage his risk of harm in the community. Since he now denies possession of the second phone, the panel has no acceptable explanation for his breach of the terms of his licence and the SCPO."
>
> "4.7. Mr Kane did not demonstrate an understanding of the importance of fully complying with his licence conditions, including managing mobile phones. The panel understood that Mr Kane asserts that he did not commit an offence regarding having two mobile phones and that he plans to appeal the mobile phone conviction, notwithstanding his plea of Guilty. Considering all evidence taken during the oral hearing the panel considers that Mr Kane does not demonstrate insight into how mobile phones are linked to his risk of harm or internal skills to ensure that he is does not have more than one mobile phone in any circumstance."

103. In my judgment Mr Coningham's submissions show a misunderstanding of the panel's reasoning. The panel did not find that the second phone belonged to the Claimant but, as Mr Coningham accepted, they were bound to find by virtue of his guilty plea that it had been in his possession. That was not affected by whether or not the SCPO was valid or any potential appeal against his conviction on the grounds that the SCPO was invalid. Yet the Claimant was approaching the issue of an appeal as if it would exonerate him from fault in this respect. The Claimant failed to appreciate that he had accepted being in possession of two mobile phones, whoever the second one belonged to.

104. As paragraph 2.13 of the DL states, mobile phones were clearly linked to the Claimant's risk of harm, namely by assisting him in reverting to organised drug activity. The panel had already noted that the Claimant had regularly changed his mobile phones during his offending, paragraph 1.6. The Claimant was questioned at some length by the chair as to why he did not take steps to ensure no member of his family left a phone in his car and, as the chair pointed out, he failed to answer the question, at least initially (transcript pp.173-175).

105. The point the panel were making in the DL was that the Claimant did not display any insight into why there would be concern that he had more than one mobile phone in his possession or the importance of complying with his licence conditions in this respect. I consider that the panel were entitled to form that view on the evidence before it and there is no unlawfulness in their approach on this issue.

Lack of current criminal activity

106. Mr Coningham submitted that the no release decision was inconsistent with the panel's findings, the panel found that "there is no clear evidence that Mr Kane has been involved in the drug culture in custody and therefore takes no account of allegations that he has" (para 2.20). Further, he submitted that there was no evidence that the Claimant had committed offences whilst on licence (save in relation to his possession of two mobile phones).

107. In my view, the panel was well aware of this and indeed in paragraph 4.3 reminded themselves of Mr Coningham's submissions to that effect. However, that does not prevent the panel from reaching the conclusion that it was necessary for the protection of the public that the Claimant not be released for the reasons they gave. I have already dealt with some of Mr Coningham's criticism of those reasons and I deal with the rest below.

The Claimant's category A status

108. Mr Coningham submitted that the panel had placed excessive reliance on the Claimant's category A status. Orally he submitted that although the risk of absconding was potentially relevant, in the decision the panel had merely relied on it by virtue of the fact that the Claimant's categorisation had not reduced. He submitted that someone on a determinate sentence may not go down a category because they have not done the necessary work. There was no evidence as to why the Claimant had not been recategorized and it was an irrelevant factor.

109. Paragraph 4.5 of the DL states:

> "The panel noted that Mr Kane continues to be assessed as a Category A (CAT A) prisoner. This raises concerns regarding his risk of harm. Residents in custody who are initially in Cat A are later assessed as Category B/C or D following evidence of positive change."

110. Although the category A team decision documents were not in the dossier, there was evidence before the panel about it which is alluded to in paragraph 2.14 of the DL. The POM, Lesley Stagg, said her understanding was that the Claimant's category A status related to his involvement in organised drug activity rather than his risk of absconding (transcript p.107).

111. The panel also asked the COM about the Claimant's category A status. She stated she did not know why he was still in that category, although she thought it was around his risk of absconding (transcript p.244).

112. The panel's comment in paragraph 4.5 that those who are in custody in category A are later assessed as in a lower category following evidence of positive change is consistent with Mr Coningham's submission that a prisoner may remain in category A because they have not done the relevant work. In this case the Claimant accepted that during his sentence for the index offence he had not engaged in any offending behaviour work (transcript p.179), something which was confirmed by the COM who agreed he had done "absolutely no risk reduction work through any of his periods in custody" (transcript p.242).

113. In my judgment the panel were entitled to rely on the evidence available to them as to the Claimant's category A status and the reasons for it as well as the evidence that he had not done any risk reduction work. There is no evidence that Mr Coningham asked for the relevant decision documents to be put in the dossier. Nor did he question anyone about the Claimant's category A status, despite the panel specifically asking the POM and COM about it.

114. Further, I note that Mr Coningham at no stage sought to argue that the panel had failed to take into account the evidence that risk reduction work would be available on release, something it is clear the panel were well aware of, see paragraphs 2.21 and 3.10 of the DL.

Panel's questioning of the Claimant and his evidence as to the level of his criminality

115. Mr Coningham criticised the panel for interrupting the Claimant during his evidence, particularly at the beginning. He submitted that it was unfair especially in the light of the evidence that the Claimant had just had an MRI scan and he was concerned about memory problems (arising out an assault against him in prison). He also submitted that it was untrue that the Claimant had been found to be an untruthful witness when, other than the index offence, he had always pleaded guilty.

116. Mr Coningham also criticised paragraph 1.16 of the DL where the panel said "Mr Kane does not accept anything like full responsibility for his convictions. He denies aspects of the index offence, particularly the level of involvement found by the trial judge, aspects of previous offences and all unproven allegations." Mr Coningham submitted that, contrary to the DL, the Claimant accepted involvement in the index offence over a 2 month period and gave details of the quantities of drugs and cash involved. He also admitted being involved in cannabis in Bournemouth and Holland. Mr Coningham submitted that these were very significant errors by the panel because they formed the basis for the panel's assessment as to the Claimant's credibility and his compliance whilst on licence.

117. At the beginning of his evidence the Claimant was asked "tell us your account of [the index offence] as briefly as you are able" (transcript p.113). The Claimant referred to being asked for favours, being caught up in easy money, being with Mr Gill and his friends who he did not know and Mr Gill being under surveillance. It was in this context that the judge interrupted and said "no, no, no, pause, I want to know what you did, what did you do?" The Claimant responded "I was just getting to that, so basically Gill would ask me to pick this up and drop that off", he said he was under instructions from Gill, doing a favour, knowing it was wrong and doing it for financial gain because he could not get a job. It was only after this that the Claimant gave any detailed evidence as to what he did when asked very specific questions such as "you picked up heroin from one person and took it to another, is that what you're saying?", "how many times?", "how much heroin?" etc.

118. In my judgment the nature of the Claimant's questioning was a direct result of the evasive way in which he gave his evidence and was not unfair. It is evident from the transcript that he was also perfectly able to say what he wanted and did so. I note that during her questioning of the Claimant the chair at one point said this:

> "you say that you don't feel you're intelligent but when you're answering a lot of these questions they've been quite not easy questions and yet you are very able to answer them, you look back in your dossier, you know exactly what page you need and where the information is, so in my view that shows your intelligence." (transcript p.173)

This indicates that the Claimant was able to make the points that he wanted at the hearing. At no stage did Mr Coningham object to the questioning of the Claimant nor did he raise any concerns about the Claimant's ability to give evidence. Further, Mr Coningham did not identify any evidence which he said the Claimant was prevented from giving.

119. Further, I am quite satisfied that the panel's assessment of the Claimant's approach to the index offence involves no mistake of fact. The transcript of the Claimant's evidence shows he flatly denied the level of involvement found by the trial judge, saying he was doing favours and acted under instruction at all times. He declined to say how many supplies of heroin he was involved with, merely saying "several times" and, when asked about quantity, he started off by saying "just bags and stuff" before eventually saying it was 1.7 kilos at one point and one was 900g before finally agreeing that he was carrying one kilo from one place to another (transcript pp.113-115).

120. As to unproven allegations, the Claimant said he was involved in cannabis in Bournemouth "but nothing, like, heavy" (transcript p.117) and also minimised his involvement in dealing cannabis in the Netherlands. He asserted he only got involved because he had to pay off a drug debt, he was "put to work" and was "packaging and delivering". When asked if he was making a good living he said "No, …most of the time paying the money, a debt off for the first… six or seven months." Eventually he agreed he was "making some money in the end" (transcript pp.132-133). He minimised the living costs in Amsterdam, saying that there were five others involved in the flat, that the debt list found there was not his, he wasn't paying for the hired Mercedes he was driving and everyone in Ibiza was staying in one room (transcript pp.133-139).

121. When asked what scale of dealing he was doing in Holland he said "Well I was doing whatever Bashkan [?] told me to do and then I was like packaging cannabis but as you know in Holland cannabis is legal." The judge pointed out that dealing cannabis was not legal there at which point the Claimant said "on a commercial scale it's not so it was illegal activity I suppose when people are growing cannabis and selling it". When asked if he was well linked into commercial dealers of cannabis he said "I didn't really know anybody in Holland, I met people through people. I mean if you're going to pick stuff up and drop them off and I weren't arguing with anyone…" (transcript pp.139-140).

122. In relation to the gun and ammunition found hidden in the basement of the Amsterdam flat he was living in the Claimant denied handling the gun despite his DNA being on it, saying he might have brought bags in and DNA is transferrable. He said he did not remember handling any ammunition although his fingerprints were found on the box (transcript pp.144-146).

123. Later the Claimant had this exchange with the judge (transcript pp.146-148):

> "JUDGE THOMAS: you were heavily involved in drug dealing after the seizure in Liverpool in December 2013, agree or disagree?
>
> P KANE: Do you mean in Holland?
>
> JUDGE THOMAS: Yes.
>
> P KANE: Yes, I was involved.
>
> JUDGE THOMAS: Heavily involved.
>
> P KANE: Yes, you know, growing cannabis and stuff, well I don't know how to grow cannabis but I was involved with people who were growing cannabis in Holland, yes.
>
> JUDGE THOMAS: You lived the high life in Holland, agree or disagree?
>
> P KANE: Sharing a flat and renting vehicles out is, it's not a high life, you know…
>
> JUDGE THOMAS: You were operating a very profitable enterprise in cannabis dealing, true or false?
>
> P KANE: Well I was involved in it but it wasn't my operation, I mean I don't even know how to grow cannabis.
>
> JUDGE THOMAS: The judge described you as an intelligent and astute drug trafficker with a strong personality and a man well qualified to carry on in Holland as he left off in the UK, albeit largely in a different class of drug, do you agree or disagree with the judge's assessment?
>
> P KANE: I can, well yes, I sort of agree, yes, you know, I don't, yes, I mean I was, I was, I did leave and was involved in cannabis so he is right, I can't dispute that.
>
> JUDGE THOMAS: … you boasted of having made hundreds of thousands of Euros, did you?
>
> P KANE: This was off a phone found in a flat…"
>
> Eventually when the question was repeated the Claimant said "no".

124. As to the confiscation proceedings, the Claimant said he was broke, the trial judge was completely wrong to find to the criminal standard that the Claimant had hidden assets and that, despite the judge describing him as "a wholly unreliable and unconvincing witness", the Claimant maintained he had been telling the truth.

125. Later the panel asked the Claimant about the six money laundering offences for which he was sentenced on 27 January 2012. The Claimant said it was £1200 that got taken off a vehicle, it was not a lot of money, and then referred to £700. When the Claimant was asked how that was consistent with the finding that his benefit from particular criminal conduct for those offences was £53,963.81 he said "I have no idea".

126. The clear inference from the Claimant's evidence is that he evaded answering questions which had to be repeated and he was minimising his involvement in any criminality. Any admissions were made very reluctantly and only after close and repeated questioning. In my judgment the panel was perfectly entitled to form the view that it did in paragraph 1.16 of the DL and to rely upon that when assessing the Claimant's credibility.

127. Finally on this point, during the panel's questioning of the COM, she said that she had discussed the passport application at length with the Claimant and her understanding is that it was to be used for identity purposes. The judge responded: "..if you accept his version of events and of his motivation. But court after court has found him to be an untruthful witness. Are you sure you're not taking him too much at his word?"

128. That is plainly an accurate statement as evidenced by the remarks of the trial judge in his sentencing remarks and confiscation ruling. The fact that the Claimant was acquitted of the second conspiracy count and has pleaded guilty to offences in the past does not detract from that assessment of his evidence in previous proceedings. Although Mr Coningham criticised the question as "far from neutral", if it had not been asked, he would no doubt have been submitting that it was unfair of the panel to have relied upon that matter in the DL without giving the Claimant an opportunity to deal with it. Further, as I have already said, at the judicial review hearing Mr Coningham expressly stated he was not submitting that the panel was biased.

129. I do not consider there was anything unfair about the panel's approach towards the Claimant's evidence.

130. Mr Coningham submitted that the panel also treated the Claimant unfairly when he tried to refer to his prepared statement in interview for the SCPO offence in contrast to their willingness to allow DS Hughes to give evidence as to the contents of another officer's statement.

131. When the panel allowed DS Hughes to give evidence of a statement by another police officer as to the attribution of the two phones seized from the Claimant when he was arrested on 24 February 2023, the judge expressly said in response to a tentative objection from Mr Coningham that they would receive the evidence but what they did with it afterwards Mr Coningham could help them with (transcript p.192). At the end of the panel's questioning of DS Hughes they suggested that Mr Coningham take instructions. While that was going on, the panel had this exchange amongst themselves:

> "JUDGE THOMAS: I would be astonished if Mr Coningham didn't say, 'I need to see this stuff and take instructions on it. Can we adjourn'?
>
> A COYTE: I was thinking exactly the same thing, as I -
>
> JUDGE THOMAS: Which is why I wanted to give him the chance to –
>
> A COYTE: Yes.
>
> JUDGE THOMAS: - think about it before he came back to us.
>
> A COYTE: Yes. It is quite possible that he will, following having heard that information…" (transcript pp.198-199)
>
> However, after he had taken instructions Mr Coningham asked whether he wanted to say anything. He did not ask to see the statement DS Hughes had referred to or ask for an adjournment. Instead he indicated he wanted to question the officer. Moreover, he did not ask any questions about the phone attribution statement.

132. When the Claimant set out at some length what he had previously said to the police about the phones the panel did not stop him from doing so (transcript pp.209-210). In due course the judge said that if he wanted the PB to see any statement it should be placed before them. However, he did not say the panel would ignore the Claimant's evidence and it is evident from the DL that they took into account his evidence about the phones.

133. Again, for these reasons I do not consider there was any unfairness.

The evidence of Ds Hughes

134. Mr Coningham submitted that it was improper of the panel to ask the officer at the end of her evidence if she had anything to add. He submitted that was an improperly wide invitation to say anything she wished about the Claimant. This evidenced a willingness to dispense with procedural fairness at the expense of the Claimant. He submitted that is also supported by the fact that she was allowed to introduce the phone attribution evidence.

135. As Mr Coningham himself accepted, the officer said there was nothing else she wanted to add so that no unfairness arose from the question in any event. I have already dealt with the panel's approach to the phone attribution evidence. It is insufficient to make generalised criticisms of unfairness unless the Claimant can point to any consequential unfairness or prejudice to him. I note that, despite expressing some reservations at the PB hearing that DS Hughes would be giving evidence after the Claimant, Mr Coningham did not argue in the judicial review hearing that the order of witnesses at the PB hearing was unfair and therefore unlawful.

136. For all these reasons I consider that there was no breach of the requirements of procedural fairness and there was no inconsistency in the panel's decision which is one they were entitled to reach.

137. I turn to the allegations of mistake of fact.

Count 2

138. Mr Coningham submitted that he had repeatedly written to the PB to express his concern that it did not conflate the Claimant's conviction on count 1 with the charge in count 2 of which he was acquitted. He submitted that it was apparent from the DL that the panel mistakenly believed that he had also been convicted of count 2. In paragraph 4.11 they describe the defendant indicted on count 2 as the Claimant's "accomplice" when he was not a party to count 1. In paragraph 4.13 the panel states the index offences (plural) relate to transfer of high quality heroin which related to count 2 whereas count 1 involved low quality heroin.

139. I am not satisfied that the panel made any material mistake of fact on this point. In paragraph 1.2 of the DL, the panel list the Claimant's "co-conspirators". These include all those named in count 1 and count 2. However, in the very next paragraph, paragraph 1.3, the DL states in terms that the Claimant was acquitted of the offence arising from the seizure of 20 kilos of heroin at his mother's address, a point also made at the hearing (transcript p.121-122). This was count 2. That the panel was clear as to which conspiracy the Claimant was convicted of is further evidenced by paragraph 1.12 which refers in detail to evidence relating to the index offence, including the Claimant's relationship with "KG" who was also charged on count 1.

140. The reference to "accomplice" in paragraph 4.11 does not in my judgment indicate that in the middle of the decision the panel had suddenly decided the Claimant had been convicted on count 2 as well. Rather, the panel appears to have used the language of "co-conspirator" and "accomplice" loosely to refer to persons also charged with the Claimant.

141. Further, the reference in paragraph 4.13 to "substantial quantities" of heroin is correct. Count 1 related to three seizures of heroin totalling 3.7 kilos which the judge described as "merely illustrations of what this conspiracy involved". The judge took as a starting point category 1 harm of the sentencing guidelines which is based on 5 kilos, on any view a substantial quantity of heroin. The fact that the panel thought it was "high-quality" again does not indicate that the panel had decided the Claimant had been convicted on count 2 as well. Further, insofar as the panel believed the heroin to which count 1 related was of 60% purity, I do not consider that played a material part in the panel's reasoning. Rather it was an expression of the seriousness of the index offence which was undoubtedly the case.

The gun

142. Mr Coningham submitted that the panel misrepresented the evidence about the gun and ammunition found in the basement of the flat in Amsterdam. There were no witness statements and no forensic evidence so the panel only had the Claimant's evidence on the point. Further, paragraph 1.15 of the DL wrongly suggests there were fingerprints on the gun which had never been alleged. The Claimant accepted his fingerprint may have been on the ammunition box because there were several boxes in the garage which he could have touched. Thus, he submitted that the characterisation by the panel in paragraph 4.11 that the Claimant's evidence in this issue was "rather unconvincing" was unfair.

143. In my judgment, paragraph 1.15 is a perfectly adequate summary of the Claimant's evidence about the gun and ammunition, including his explanation for the forensic evidence: "Regarding the gun found in the basement of flats in the Netherlands with his DNA on it and fingerprints, he believes that he was bringing bags in and somehow the bag with the gun had his fingerprints/DNA…" The panel did not say the Claimant's fingerprints were found on the gun.

144. It is clear from p.144 of the transcript that the panel were well aware that the information before it (set out in paragraph 3.15 of the s.16 statement made under POCA in the confiscation proceedings) was that DNA matching the Claimant's was found on the gun and fingerprints matching the Claimant's were found on the box of ammunition (transcript p.144). The position is put beyond doubt in paragraph 4.11 of the DL when the panel say this:

> "The panel notes the evidence (which he was asked about, and did not dispute, though he sought, rather unconvincingly, to explain) of his DNA being found on a firearm and his fingerprints on a box of ammunition."

145. Further, the Claimant did not dispute the forensic information before the panel. The fact it was contained in the s.16 statement does not mean the panel could not take it into account. As Mr Coningham accepted, the Claimant said his fingerprint might have been on the box of ammunition because he handled a box. The Claimant also said "I didn't directly handle a gun but I handled bags and there was multiple stuff in bags, so DNA is transferrable stuff" (transcript o.145). He therefore did not dispute the fact that his DNA might have been on the gun but sought to give an innocent explanation as to how it got there. The panel were entitled to conclude that these explanations were "rather unconvincing", especially in the light of the view it had formed about the Claimant's failure to accept responsibility for his offending.

Claimant's evidence: childhood, drone package and payment of confiscation order

146. Mr Coningham submitted that the panel failed accurately to record what the Claimant said about his childhood in paragraph 1.17 of the DL which was a significant error to his disadvantage. The Claimant did not say that a fellow inmate (R) could have received a drone package (DL paragraph 2.19), rather the reverse, he said it would have been impossible because of the location of R's cell. Paragraph 1.14 of the DL also wrongly records that the Claimant's family paid £1,500 towards the confiscation order whereas his evidence was that it was £15,000.

147. In my judgment there is nothing in these criticisms.

148. Paragraph 1.17 of the DL is in the section on the Claimant's past. It is a summary of what he told the psychologist Dr Beckley in paragraph 3.1 of her report which is headed "Family." Paragraph 3.1 concludes: "Mr Kane did not understand at the time that his childhood experiences were abusive and resulted in him engaging in disruptive and antisocial behaviour." Para 1.17 of the DL refers to the Claimant's evidence of his abusive childhood and finishes: "Mr Kane did not understand that he had had a traumatic childhood which impacted on his risk of harm." In my judgment this is an unexceptional summary of the relevant evidence.

149. The Claimant's evidence about his childhood was that because of not getting an education and the drink and drugs he made really bad choices (transcript p.173). He said he would engage with a psychologist in the community and would like to get to the bottom of it, whether it is childhood problems (transcript p.180).

150. In section 2 on "The Present" the panel expressly recorded the evidence that the Claimant would benefit from cognitive behavioural work which can be carried out one-to-one in the community, paragraphs 2.21 and 2.22. There is no evidence that the panel has failed to have regard to the Claimant' evidence.

151. In paragraph 2.19 of the DL, the panel addresses intelligence that the Claimant may have been involved in receiving items from a drone. The end of the paragraph states:

> "Mr Kane was seen speaking with a resident following a drone dropping a package. The Security Governor confirmed that there have been concerns since his return to custody regarding security

> intelligence, however, this has not resulted in an adjudication or clarification. Mr Kane told the panel that Mr R could have received the drone package because he was on the bottom floor."

152. It is correct that at the hearing the Claimant said "he couldn't even receive a drone because [R] was on the bottom floor" and that R had stated that the Claimant had been giving him cheese and noodles (transcript p.129). Thus the Claimant's evidence at the hearing was that R would not have a received a drone because he cell was on the bottom floor. That appears to be the opposite of what the DL states.

153. However, it is of note that in the next paragraph of the DL the panel say:

> "2.20. The panel considers that there is no clear evidence that Mr Kane has been involved in the drug culture in custody, and therefore takes no account of allegations that he has."

As this immediately follows the sentence at the end of paragraph 2.19 it may well be that this is a typographical error and the sentence should read "Mr Kane told the panel that Mr R could not have received the drone package because he was on the bottom floor." This could explain why the panel declined to rely on the intelligence information.

154. However, even if the panel genuinely believed that the evidence was that R could have received the drone package, as Mr Coningham concedes, it does not affect the panel's decision because the evidence was expressly disregarded as stated in paragraph 2.20. Mr Conningham submitted that it suggests a proper record was not being kept of the evidence. However, as the decision in E makes clear, for an error of fact to be unlawful, it must have played a material (though not necessarily decisive) part in the tribunal's reasoning. Self-evidently the error, if it was a genuine error, was not material. Whether any other errors are material has to be judged on the merits of the evidence and argument relating to that error.

155. I turn to the evidence as to the amount the Claimant's family paid towards the confiscation order. The Claimant said that his family had paid £15,000 towards the confiscation order (transcript p.142) whereas the DL states that it was £1,500 (paragraph 1.14). In my judgment this is likely to be a typographical error. There are others, e.g. paragraph 2.19 line two, "B11" should read "B1". Even if a genuine error, Mr Coningham did not explain how it was material to the decision.

Evidence re warning letters and previous risk management plans

156. Mr Coningham submitted that contrary to paragraph 2.7 of the DL, the Claimant never received a warning letter about his passport application. Further, he submitted that paragraph 1.11 inaccurately states that the Claimant has failed to comply with risk management plans in the past because he never had any.

157. Paragraph 2.7 of the DL in the section on 'The Present' states:

> "The current COM told the panel that she had relatively little knowledge regarding the passport application, however, he had received warning letters about this when in the community."

This incorrectly suggests the Claimant received warning letters about his passport application.

158. The COM is recorded in the transcript as stating:

> "I wasn't, so I wasn't involved in the case when this [ie the passport application] happened. And I have read records on Delius[?], because obviously there was so many complexities to this. I was

> trying to sort of work things out. There are comments on Delius which would suggest that Peter notified his intention of applying for a passport. But in terms of the other issues that were going on, I've got relatively little knowledge, other than there were a few warning letters that were sent out in relation to behaviours we spoke about earlier on." (p.214)

Thus the evidence was that the Claimant had received warning letters about other behaviours rather than the passport application.

159. The issue for the court is whether this error played a material part in the panel's reasoning. The panel dealt with the passport application issue in paragraph 4.12 of its conclusions. The panel found that the Claimant knew his sister was pursuing the passport application but, in the absence of evidence from the then COM, Mark Newton, it could not be satisfied on the balance of probabilities that the Claimant had failed to inform his COM about the passport application. Accordingly "The panel does not therefore, find a breach of the passport condition of his licence."

160. It follows that, whether or not the panel thought the Claimant received any warning letters relating to his passport application, at the end of the day there was no breach of his licence conditions in that respect. Thus, the fact that, in the panel's mind he had received warning letters, did not prevent the panel from finding that there was no breach of the relevant licence condition. The error of fact was therefore not material to the panel's decision.

161. The relevance of the application for a passport to the panel's decision not to release the Claimant is set out in the passage in paragraph 4.12 which I have already quoted (see paragraph 92 above). The panel considered that the fact of the passport application, even assuming it was not a breach of the licence conditions, raised very significant doubts about the Claimant's intention to comply with any licence conditions that might impede any future lucrative criminal activity.

162. In my judgment this conclusion has nothing to do with whether or not the Claimant may have received warning letters relating to the passport application.

163. Finally, as to the reference to risk management plans, paragraph 1.11 of the DL states:

> "It is noted that Mr Kane committed offences when on bail for previous offences and had not complied with his risk management plans."

This is the last paragraph in the section of the DL in which the panel summarise the Claimant's offending history. There the panel is making a general point about his previous non-compliance with conditions to which he was subject by reference to two points. First, the commission of offences while on bail for other matters. There are a number of such offences in his record and no complaint is made about that aspect of the DL.

164. Mr Coningham's criticism relates to the second point, namely that the panel wrongly stated that the Claimant was in breach of risk management plans when there was no evidence that he had been subject to any. In my view this point does not assist the Claimant. First, the Claimant has a conviction for failing to comply with licence conditions (number 5.2 on his PNC printout). Second, it is clear from the dates on the Claimant's PNC printout and the sentencing remarks of the judge who sentenced him for the index offence (p.6A-B), that when he committed the index offence the Claimant had been released on licence from the sentence of imprisonment for money laundering offences imposed on 27 January 2012. He was therefore in breach of the licence conditions and had been recalled.

165. In my judgment, whether the terms of the Claimant's release from prison sentences are described as licence conditions or a risk management plan is nothing to the point. The panel was correct to say that he has breached the terms on which he has been released from custody.

166. Mr Coningham also submitted that the panel did not raise their concerns about this aspect of the case with anyone at the hearing. In my judgment, what is required is that the PB gives the offender the opportunity to deal with the grounds on

which it proposes to reach a decision not to release. It is not required to raise with the witnesses every aspect of the evidence. Relevantly for present purposes, the panel took into account that the Claimant must have been involved in the conspiracy to supply heroin "very soon after his release from his previous sentence for money-laundering", paragraph 4.13 of the DL.

167. That was expressly raised at the oral hearing when the judge asked the COM this:

> "JUDGE THOMAS: … The risk of harm is essentially based on what? On the risk of his returning to drug dealing?
>
> K ROBERTS: Yeah, and the serious organised crime side of things, and what that can involve.
>
> JUDGE THOMAS: What evidence is there that that, the risk of that has reduced so that it's not imminent, and it's high, rather than very high? I mean, he was dealing in drugs on a major scale within a very short time of his last release from custody for the money laundering offences. What's the evidence that he won't go straight back at it?
>
> K ROBERTS: We've got no current evidence that is imminent, not that I'm aware of anyway. So on the back of that, I think that's, it's, yeah, that's how we came to that conclusion, that it was high as opposed to very high risk of harm."

168. That was a matter which the Claimant and Mr Coningham had every opportunity to address at the oral hearing.

169. In my judgment, paragraph 1.11 of the DL involves no unfairness to the Claimant.

170. For all these reasons, whether taken individually or cumulatively, I do not consider that any errors of fact were material to the panel's decision.

Decision

171. This application for judicial review is therefore refused.