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Case No: CO/368/2018, CO/370/2018 AND CO/554/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE JAY
and
MR JUSTICE GARNHAM

- -

Between :

THE QUEEN on the application of **(1) DSD and NBV** **(2) MAYOR OF LONDON** **(3) NEWS GROUP NEWSPAPERS LTD**	**Claimants or Interested Parties**
- and -	
(1) THE PAROLE BOARD OF ENGLAND AND WALES **(2) THE SECRETARY OF STATE FOR JUSTICE**	**Defendant or Interested Party**
- and -	
JOHN RADFORD **(formerly known as JOHN WORBOYS)**	**Interested Party**

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Phillippa Kaufmann QC and Nick Armstrong (instructed by **Birnberg Peirce Ltd**) for **DSD and NBV**
Dan Squires QC and Sarah Hannett (instructed by **Howard Carter, General Counsel**) for the **Mayor of London**

Gavin Millar QC and Aidan Wills (instructed by **Reynolds Porter Chamberlain LLP**) for **News Group Newspapers Ltd**
Ben Collins QC, Robert Moretto and Tom Cross (instructed by **Government Legal Department**) for the **Parole Board**
Clive Sheldon QC and Patrick Halliday (instructed by **Government Legal Department**) for the **Secretary of State for Justice**
Edward Fitzgerald QC and Matthew Stanbury (instructed by **Swain & Co Solicitors**) for **John Radford**

Hearing dates: 13th and 14th March 2018

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Approved Judgment

Sir Brian Leveson P, Mr Justice Jay and Mr Justice Garnham:

1. The Parole Board of England and Wales ("the Parole Board") was established by s. 59 of the Criminal Justice Act 1967 in order, for the first time, to recommend to the Secretary of State the release on licence of those serving determinate terms of imprisonment having served not less than one third of the sentence imposed or twelve months whichever expires the later. Over the years, its powers and its responsibilities have undergone many changes and, following the expiry of the term prescribed either by the legislation or the court as the minimum term to be served for punishment and deterrence, it is now (since 1997) responsible for directing the release of those sentenced to indeterminate and certain determinate terms of imprisonment if it is satisfied that it is no longer necessary for the protection of the public that they be detained.

2. There is no right of appeal against a decision of the Parole Board although any can be the subject of challenge by way of judicial review on public law grounds which, in this case, are designed to adjudicate upon the legality of decisions reached by an expert body entrusted by Parliament with the function of undertaking the relevant evaluative assessment, rather than upon the merits of that evaluation. There have been many such challenges brought by prisoners on the basis either that the procedure undertaken by the Parole Board has been unfair or that, for some other reason, a decision not to release is wrong.

3. As far as we are aware, this series of cases is unique for a number of reasons. First, never before has a decision to direct the release of a prisoner been challenged. Because the only parties to a hearing before the Parole Board are the Secretary of State and the prisoner, it also follows that never before has judicial review been mounted by anyone other than a party to the proceedings. Second, there has never previously been a challenge to Rule 25 of the Parole Board Rules 2016 (S.I. 2016 No 1041) ("Rule 25") prohibiting the making public of information about proceedings before the Parole Board or the names of persons concerned in the proceedings. The novelty of these challenges serves to emphasise its wholly exceptional features.

4. The background can be shortly summarised. On 13th March 2009, John Radford, then known as John Worboys but hereafter referred to by his chosen name, was convicted after trial in the Crown Court at Croydon of 19 serious sexual offences committed between October 2006 and February 2008 involving twelve victims. On 21st April 2009, Penry-Davey J sentenced him to an indeterminate sentence for public protection specifying a minimum term of imprisonment of 8 years' (being the equivalent of a determinate sentence of 16 years'), less time spent on remand. That period expired on 14th February 2016 after which Mr Radford was eligible to be released but only in the event that the Parole Board was satisfied that it was no longer necessary for the protection of the public for him to be held in prison.

5. On 26th December 2017, the Parole Board determined that incarceration was no longer necessary in Mr Radford's case and directed his release: the Parole Board's decision, including the detailed reasons for it, is referred to as "the release direction". Thus, Mr Radford is entitled to be released into the community, on licence subject only to the jurisdiction of this court by way of judicial review.

6. Publication of the news of the decision generated considerable publicity and, shortly thereafter, two women (DSD and NBV) who had succeeded in litigation against Mr Radford personally and, separately, against the Metropolitan Police intimated a claim for judicial review. The difficulty for those considering such proceedings was the fact that they did not know the basis for the decision or the evidence on which the Parole Board relied.

7. In the event, three sets of judicial review proceedings have been instituted. The first in point of time were brought by the Mayor of London ("the Mayor") against the Parole Board as Defendant, naming DSD and NBV, the Secretary of State for Justice ("the Secretary of State") and Mr Radford as Interested Parties. The Mayor contends that the release direction was unlawful on *Wednesbury* grounds, and that the Parole Board's failure to promulgate reasons accessible to those with an interest in that decision, including himself and the victims, was unlawfully brought about by Rule 25 which was, he contended, *ultra vires* the enabling statute. Although nothing turns on this, the Secretary of State should have been named as a Defendant to these proceedings because he was responsible for Rule 25; the Parole Board had no discretion to depart from it.

8. The second set of proceedings were brought by DSD and NBV against the Parole Board and the Secretary of State for Justice, with Mr Radford as an Interested Party. NBV is one of the 12 victims who gave evidence at Mr Radford's criminal trial; DSD was not although she had obtained a settlement in proceedings brought against him (without admission of liability). The nature of their challenge is essentially the same as the Mayor's although it differs to some extent in its exact formulation.

9. The third proceedings were brought by News Group Newspapers Ltd against the Parole Board and the Secretary of State, with the other individuals and entities whom we have already named being Interested Parties. This challenge is limited to the *vires* of Rule 25; its precise formulation diverges slightly from that advanced in the other cases.

10. On 26th January 2018, Supperstone J made an Order staying Mr Radford's release pending the hearing of the applications for permission to apply for judicial review, and anonymising the identities of DSD and NBV. On 7th February 2018, given that the liberty of Mr Radford was at stake, the challenges came before the Divisional Court (Sir Brian Leveson P and Garnham J), at which, initially, Mr Radford was unrepresented although, during the course of the hearing, he instructed a solicitor who was able to advise him. In the event, there was no opposition by the relevant Defendant or any Interested Party to the standing either of DSD and NBV or of the Mayor to bring their claims, although, in relation to the Mayor, the Court ordered that the issue of standing should be reserved for consideration at the substantive hearing. Furthermore, permission was granted in each case and, with the consent of all parties, the Court ordered that the release direction together with the dossier of evidence and documents before the Parole Board ("the dossier"), with appropriate redactions, should be provided to DSD, NBV and the Mayor upon the giving of undertakings as to confidentiality. In particular, the names of reporting officers and psychologists have been replaced by acronyms which we have used throughout this judgment.

11. In the circumstances, it is convenient to address these various challenges in one judgment, recognising that the *vires* issue in relation to Rule 25 arises not in the

abstract but in the specific context of the Parole Board's inability to communicate any information relevant to the release direction, still less a gist or synopsis of the reasons for it. However, it is important to underline that these are otherwise unconnected challenges because even if Rule 25 is *ultra vires*, it is not suggested that this would have impact on the legality or otherwise of the release direction.

12. Furthermore, it is inevitable that this judgment will place into the public domain far more information relating to the release direction than any *intra vires* rule would require. Contrary to the position advanced by the Secretary of State, for reasons which we shall elaborate, we do not consider that this fact serves to render the *ultra vires* challenge academic. In the circumstances, we will seek to preserve the confidentiality of matters which it is unnecessary to place in the public domain to enable our reasons, and the bases for those reasons, fully to be understood.

The Facts

The Material before the Parole Board

13. Mr Radford, a man of previous good character, was convicted of one count of rape, four counts of sexual assault, one count of attempted sexual assault, one count of assault by penetration and twelve counts of administering a substance with intent. These index offences related to twelve victims, aged between 19 and 33, and to crimes committed in the period of 18 months between October 2006 to February 2008.

14. There was no account from the trial of the circumstances of the offending contained within the dossier. Neither were the sentencing remarks of Penry-Davey J in the dossier (although it is conceded that they should have been). These remarks, delivered, as they were, after a trial, did not detail the precise circumstances of Mr Radford's offending, but the following passages are relevant:

> "As somebody with an enduring and powerful interest in sexual matters, you saw the opportunity through cab driving of exploiting that element of trust and, through the use of alcohol and drugs, of sexually abusing young women who had trusted you to take them home safely at night as it was your duty in the circumstances to do. You developed and perfected a web of deceit that was sufficient to ensnare young, intelligent and sensible women who had enjoyed a night out and whose only mistake, as it turned out, was to get into your cab late at night. It was perhaps the unlikely story about the lottery, backed up by the availability of substantial cash to prove it, and your persistence, that persuaded those young women to join you in a glass of champagne, often reluctantly, and it was that that sealed their fate because you were prepared to, and did, add sedative drugs to achieve your ends. A further consequence of the sophistication of your approach was that your victims would have difficulty in remembering what had happened.
>
> …

> Both reports [pre-sentence and psychiatric] identify you as a high continuing risk to women and as a significant risk of re-offending."

15. The pre-sentence report dated 17th April 2009 was in the dossier and added little to the sentencing remarks. However, the report set out limited further information in relation to the most serious of the 19 offences:

> "Several of the victims recall feeling extremely disoriented after consuming alcohol and for some their recollection of events ends there. For five others, they awoke in the taxi to [Mr Radford] sexually assaulting or attempting to sexually assault them. Another of the victims recalls, in the form of flashbacks, being raped by [Mr Radford].
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> …
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> … several of the victims were seriously sexually assaulted and all were administered a substance designed to render them incapable of staying conscious or, where semi-conscious, incapable of fighting off [Mr Radford's] advances.
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> …
>
> [Mr Radford's] offences were meticulously pre-planned …"

16. The psychiatric report from the trial was also not in the dossier but the inference must be that Mr Radford was not diagnosed as suffering from any mental illness or psychological disorder; had it been otherwise, Penry-Davey J would have referred to it. Mr Radford's offending was associated with the intake of excessive alcohol, although he denied to the Probation Officer that he ever drove over the limit.

17. Another feature of Mr Radford's case was that at the time he qualified to drive a licenced taxi cab in 1996, he was working as a stripper at hen nights, in gay bars and at swingers' parties, a role from which he retired in 1999. This line of work placed him, in the words of the Probation Officer, "in sexually charged environments".

18. Mr Radford's version of events, both before the jury and the Probation Officer, was one of denial. According to the pre-sentence report:

> "… [Mr Radford] denied committing any of the offences. He does, however, acknowledge a good deal of the circumstances surrounding the offences. For instance, he told me during interview that he actively sought to engage female passengers in conversation in his taxi cab. He did this by telling them, falsely, that he had won money through gambling that night and by showing them a bag filled with cash … When challenged he denied that his objective in engaging the women in conversation was to have sexual relations with them. He insisted that he enjoys female company and simply wanted

> companionship. [Mr Radford] said that he has been using this method of "breaking the ice" with women since 2002/2003.
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> …
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> In addition, [Mr Radford] acknowledges offering alcoholic drinks to his passengers, stating that he saw a fellow taxi driver offering drinks to passengers and thought it was a good idea …
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> …
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> When discussing the rape offence, [Mr Radford] was adamant that sexual contact with the victim was consensual, non-penetrative and initiated by the victim. The explanation he offered for the DNA evidence found on the victim's clothes was that while performing oral sex on the victim he ejaculated in his tracksuit bottoms. He insisted that his semen must have transferred from his hands to her clothes. He was adamant that the DNA evidence found on the vibrator that the police located in the car got there, not through a sexual assault, but through the victim touching it with her hand when he showed it to her in his taxi … [Mr Radford] denied any physical contact with the other assault victims."

The date range 2002/3 is significant in the context of the complaints made by DSD and we shall return to it.

19. On 28th May 2009, Mr Radford was transferred to HMP Wakefield where he has remained until very recently, and at all material times, a Category A prisoner. He applied for permission to appeal against his conviction: this was refused by the Court of Appeal (see [2010] EWCA Crim 1986). Thereafter, he pursued an application for his case to be considered as a miscarriage of justice by the Criminal Cases Review Commission ("the CCRC"). In June 2013 a psychologist noted the fact that Mr Radford maintained his innocence and, also, his lack of engagement in any offence focussed programmes. It was concluded that there was insufficient information about the build up to his offences to be able to conclude that there was a reduction in risk. In January 2015, another psychologist noted that Mr Radford's position remained the same and that he "is in the early stages of personal change". The conclusion was, as before, that there was no reduction in risk.

20. On 18th May 2015, approximately 9 months before the expiry of his tariff (i.e. the minimum term that he had to serve before being eligible to be released on parole), Mr Radford admitted his responsibility for the index offences and withdrew his application to the CCRC. In July 2015, he gave the following explanation for this change of heart to a psychologist:

> "[Mr Radford] said that he had "always felt guilty" regarding his offences and that these feelings had been intensified by recent media coverage of historical abuse cases. [Mr Radford] also thought his victims had been "fair" with regard to their accounts of his offending and recent compensation claims and

> as such felt as though he had to "given them their due" and "say thank you" by taking responsibility for his offending. He also said that he had maintained hope that his convictions would be overturned, and that this expectation now felt unrealistic; which was a further motivation to take responsibility for his sexual offending … [Mr Radford] appeared nervous throughout, on occasions becoming tearful and regularly telling me that he wanted to be honest and wanted to talk about "everything"."

21. It is clear that this explanation was taken as genuine and the psychologist recommended that Mr Radford commence work on the Sexual Offender Treatment Programme ("SOTP"). In November 2015, he completed the SOTP Foundation programme and, in October 2016, the Core programme.

22. Meanwhile, on 10th September 2015, the Parole Board's first post-tariff review did not recommend release or transfer to open conditions. It concluded that the level of risk posed by Mr Radford remained too high to be managed in other than closed conditions. The effect of s. 28(7) of the Crime (Sentences) Act 1997 ("the 1997 Act") is that Mr Radford could not require the Secretary of State to refer his case to the Parole Board until a further two years had expired.

23. In early 2017 preparations were set in train for Mr Radford's next Parole Board review. In due course a number of reports were provided.

24. In February 2017, an OASys risk assessment carried out by the National Offender Management Service ("NOMS") concluded that Mr Radford was a high risk of serious harm if released but at low risk of reoffending. Mr Radford told the author, OS2, that he "had to show victim empathy and let them know how sorry he was, and that he hoped that they would be OK, and that they could get on with their lives". In a report given on 28th February 2017 OS2 concluded that Mr Radford was not a suitable candidate for release or a move to open conditions.

25. On 12th April 2017, Mr Radford's offender manager ("PO2") completed a Parole Assessment Report Offender Manager report ("PAROM 1 report"). Mr Radford described how he committed his first offence after he planned to spend the weekend with his then ex-partner, M1. Later in the report Mr Radford stated that his relationship with M1 took place between 2001 and 2005, although after they separated he kept in contact and had hopes of reconciling. When discussing his offences, Mr Radford stated in respect of the rape that he had only placed his penis inside the victim's vagina for approximately four seconds and had removed it when asked to do so. In respect of the assault by penetration, he stated that he only used the vibrator under the victim's skirt and over her legs, and did not put it inside her vagina. At the same time, he claimed that he did not want to minimise the offence.

26. PO2 was concerned about aspects of Mr Radford's attitude, and lack of full insight, and concluded that "this is the start of [Mr Radford's] treatment pathway, which will need to be full and thorough given the seriousness and proliferation of his offending which spanned a period of 18 months and involved 12 identified victims". PO2 did not recommend either release or progression to open conditions, as the risk of serious

harm and similar reoffending remained high and core risk reduction work, which ought to be undertaken in closed conditions, was outstanding.

27. On 16th March 2017, a Registered and Chartered Forensic psychologist instructed by NOMS ("P9") produced a Structured Assessment of Risk and Need Report. P9 had previously assessed Mr Radford in August 2015 on instructions from his solicitors. P9 observed that Mr Radford now admits that he planned his offending meticulously. P9 noted Mr Radford's explanation that his offending was related to his relationship break-up with M1 in 2005/6. P9 stated that Mr Radford required further work to "target the full breadth of his treatment needs" which were specifically identified. Further:

> "I also recommend that at some point prior to Mr Radford's transfer to open conditions/release he is given the opportunity to learn about the potential risks associated with pornography use on the internet."

P9's conclusion was as follows:

> "Mr Radford has responded well to treatment and he has reduced his risk to some degree. He has some outstanding treatment needs to target, but there is no clear treatment pathway to recommend at present, other than work that Mr Radford can complete autonomously. Mr Radford is not currently suitable for transfer to open conditions, or for release, however in my opinion there is sufficient evidence of risk reduction to recommend a review of his security category. Once Mr Radford is downgraded from his Category A status, he will then be required to spend a period in high security conditions as a Category B prisoner, before he is considered for progression. At this point, if he maintains the progress he has made and the protective factors continue to be strongly present, in my view he will be ready for progression to a category C establishment."

28. On 30th May 2017 Mr Radford's solicitors wrote to the Parole Board seeking an oral hearing. Their representations sought his transfer to open conditions. They recognised that it would take a "brave Parole Board" to consider a Category A prisoner for open conditions, and acknowledged that perhaps a period of transition through the Category C estate would be better. On 8th June the Parole Board granted Mr Radford's request for an oral hearing.

29. Separately, on 8th August 2017, in a process that does not involve the Parole Board, the Secretary of State determined that Mr Radford should remain a Category A prisoner because there was insufficient evidence of risk reduction at that stage. On the following day, at the request of Mr Radford's solicitors, a Consultant Clinical and Forensic psychologist ("P12") reviewed his progress in an interview lasting some 3½ hours. A report was provided dated 10th August.

30. P12 described Mr Radford as being "very precise about dates". He said that he offered passengers drinks in December 2005 and June 2006 without offending, and that in

September 2006 he went to strip clubs and watched pornographic videos with an older man: one of these videos showed an actress being drugged by her boyfriend and raped. Mr Radford said that this triggered his interest in women in their mid-20s. Mr Radford maintained that the trigger for his offending was the events following his break-up with M1 in 2005. In particular, he explained that the "immediate trigger" for him beginning to offend was M1 contacting him in September/October 2006 after they had broken up and suggesting that "she come home with him". He found her heavily intoxicated when he picked her up and "he had to take her to her mother's house. Enraged, he decided to act, fetched the drugs and drink and went out looking for a victim that night".

31. Mr Radford told P12 that he waited for a week because he was anxious about being caught, and thereafter that there were 11 subsequent occasions when he offended. His planning was "very careful". Mr Radford said that for 11 of the 12 victims he only gave them half a tablet as he was concerned not to cause them too much harm. He would touch them on the leg or look up their skirt whilst fondling himself. The aim was to ejaculate but often the victim woke up, which panicked him. In relation to the rape victim, Mr Radford maintained that she boasted that she could take any drug, so he decided to give her a whole Temazepam tablet. Consequently, he was able to go further and penetrate her with his penis.

32. Deploying the Risk of Sexual Violence Protocol, P12 considered that Mr Radford was low risk. This assessment was based on his offending "spree" having taken place over an 18 month period and his "[c]urrent presentation is one of openness, and full accounts of the offences have been developed". P12 identified three specific risk factors of which Mr Radford had good understanding.

33. Overall, P12 concluded that Mr Radford provided a plausible account of the small incidents that triggered the gradual development of a plan to offend, and to do this he adopted a deceptive persona. By seeking out women with characteristics that he despised he was enabled to create a fantasy as a seducer which made him feel powerful and virile. All offence-related work had been completed. Whilst it was possible that Mr Radford might revert to habitual patterns of relating to women when in the community, this risk area "is now much easier to identify and manage, given the clarity about the motives and traits undermining his offending behaviour". P12 had no concern in recommending Mr Radford for open conditions asserting confidence that the risk to the public was low. A period in Category C conditions was worthy of consideration but not a necessary step.

34. The Parole Board requested a further forensic psychological assessment from P9. This was commissioned by the Secretary of State and was provided on 11th September 2017 in the form of an addendum psychological report. P9 stated that in all of the assessments of Mr Radford "he has demonstrated a very good understanding of victim empathy, and has expressed remorse and shame for his offending behaviour". P9 noted that Mr Radford's offending behaviour was linked to his break-up with M1 in 2005/6 and that in the "build up to his offending he was dwelling on his relationship breakdown with [M1] and during the period he offended he was feeling unhappy and unsatisfied about the lack of intimacy in his relationship with M8". P9 noted that Mr Radford "currently accepts responsibility for his behaviour", and "this is not considered an area that will affect future risk management". However, Mr Radford

had problems with intimate relationships and this was an area to monitor for future risk management.

35. Overall, P9 concluded that Mr Radford presented a low risk of sexual reoffending and that "[a] cautious option would be for [him] to progress to lower category closed conditions; however, on balance it is my view that [his] risk could safely be managed in open conditions and if he were released on licence".

36. On 26th September 2017 a psychological report was provided by another Registered Chartered psychologist ("P1"); this, again, was on the instructions of Mr Radford's solicitors. Mr Radford told P1 that his first offence had been committed in December 2005 (cf. other accounts) after M1 had left him in August 2005. Mr Radford stated that after he resumed his relationship with M1 he did not reoffend until June 2006. Mr Radford stated that the sexual assaults became more regular from October 2006 following an incident in which M1 had asked him to pick her up after a night out when she was heavily intoxicated, which angered him.

37. Mr Radford told P1 that he only used Nytol on one occasion when a victim stated she was going to be sick. He also claimed that his sexual offending primarily involved him touching the victim's leg whilst touching himself through his trousers. When the victim woke up in response, he would immediately return to the front of his cab and continue the journey. He told P1 that he touched the breasts of one victim and used a vibrator against the tops of the legs of another, denying penetration. Mr Radford stated that he had performed only one offence of rape which had occurred "when he felt angry towards his partner" before Christmas 2007. As for what happened:

> "Mr Radford maintained that this female had boasted she could take any drug, and he initially gave her a vitamin tablet, maintaining that it was Ecstasy. She then complained that it had no effect, and so he gave her a whole Temazepam tablet. He reported penetrating her with his penis for approximately four seconds. The victim became briefly conscious, telling him to get off her, before losing consciousness again. He reported masturbating before driving home, and that the victim made no further comment about the assault."

Mr Radford said that he committed "sexual touching" after the single act of rape but "did not consider that he would have attempted penetrative sex again".

38. P1's assessment was that Mr Radford has provided a detailed account of his offending behaviour, fully accepted its impact on his victims, and that he did not minimise it. The only element of his offending that he "refute[d] [sic] was using a vibrator to penetrate one of his victims". His "relational difficulties were a primary contributing factor to his offending behaviour". Overall:

> "I have carefully considered a range of progressive options for Mr Radford. I am not of the view that transfer to a Category C establishment is of any benefit in terms of risk reduction. He does not require a specialist unit such as a therapeutic community or a PIPE [Psychologically Informed Planned Environment]. I have also considered the possible merits of him

> progressing to open conditions. Mr Radford is highly unlikely to present a management problem in a Category D establishment. I would concur with P12 that there are problems associated with open conditions due to media interest in terms of Mr Radford's ability to work in the community and to have ROTLs. From a risk perspective, I find it difficult to justify why Mr Radford should remain in custody given his low risk of recidivism. The only complicating factor in Mr Radford's case is the high profile nature of the offences and the ongoing court case involving the Metropolitan Police. However, this is not specifically relevant to the risk of recidivism …"

39. On 20th September 2017 OS2, having seen most of the available material but not P1's report, provided an addendum report. It stated that Category A prisoners should progress through the categorisation system to be tested at each stage before moving onto the next. However, OS2 noted that P9 and P12 had both concluded that Mr Radford's risk could be managed in open conditions, and that P12 had supported release. OS2 did not support release, but given the views of P9 and P12, and the lack of further risk reduction work identified by them, OS2 supported transfer to open conditions.

40. On 11th October 2017, a new Offender Manager ("PO6") provided an addendum to the PAROM 1 previously provided in April 2017. This did not refer to P1's report. PO6 explained that Mr Radford's case has been discussed at Multi Agency Public Protection Arrangements ("MAPPA") meetings on 24th August and 2nd October 2017. The senior prison psychologist did not support the recommendation made in P9's addendum report. Concerns were expressed as to Mr Radford's narcissism, his impression management, and that he had only recently completed treatment; the assessment was that he required further work in custody. The view of MAPPA was that Mr Radford remained a high risk of harm and should not be granted release or moved to open conditions before progressing through security categories and continuing to work on his current treatment needs. PO6's conclusion was that there remained outstanding work around Mr Radford's self-worth, sources of validation and impression management that needed to be completed and tested within closed conditions. PO6 suggested that this could best be achieved in Category C conditions. The report stated that a move to open conditions or release could not be supported.

41. As is clear from the schedule to the witness statement of Mr Gordon Davison, Deputy Director in HM Prison and Probation Service, dated 5th March 2018, there were numerous references in the dossier to a large-scale police operation during which around 80 potential victims came forward, and a similar number of offences. Some of these references were specifically linked to the period October 2006 to February 2008; others were not. Although Mr Radford was consistently described as a "prolific" sex offender, it was clear that his admission of guilt (in 2015 and subsequently) has been confined solely to the series of offences for which he had been convicted.

The Hearing

42. The hearing took place on 8th November 2017 before a three-member panel which included an experienced chair, a specialist psychologist member and a qualified

lawyer: no further details are given in the witness statement of Mr Martin Jones, the Chief Executive of the Parole Board and, in particular, it is unknown whether the lawyer had judicial experience of any sort. The panel heard evidence from ALP1 (a senior prison psychologist who had not assessed Mr Radford in person), P9, P12, P1, OS2, PO2, PO4 (who had become Mr Radford's Offender Manager in September 2017) and Mr Radford himself. Handwritten and typed versions of the chair's contemporaneous notes, redacted where appropriate, have been helpfully provided.

43. In short:

i) on the day of the hearing P12 changed his/her recommendation and supported Mr Radford's release.

ii) ALP1 expressed surprise at P9's conclusion and recommended a slow move through the categorisation system and a placement in a PIPE in closed conditions.

iii) P1, P9 and P12 were agreed that treatment completed in prison had been effective, that Mr Radford did not require a therapeutic placement or a PIPE, that he posed a low risk of sexual offending in open conditions or if released, and that the risks "lacked imminence" in both settings.

iv) OS2, PO2 and PO4 gave evidence opposing release or a move to open conditions that was consistent with their reports.

v) Mr Radford's oral evidence started at about 2:40 pm and was completed by 3:30 pm. He had already provided to the panel a diary which threw some light onto his self-evaluation as to the reasons for this offending and his progress. This recognised that "by the time I am hopefully released I will probably be in my mid-60s" (Mr Radford was writing this diary when he was 60). Assuming that the chair's notes are complete, Mr Radford was asked few questions by the Secretary of State's representative, and gave answers which have been summarised in this way:

> "Negative attitude at the time.
>
> Semi-conscious – wouldn't know.
>
> Wasn't beating them up.
>
> Violent through the drugging and the sex.
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> M1 breakdown triggered it – not other breakdown of rels – Had? More in contact with M24 – strip clubs etc. when seeing M1
>
> M1 – lots of alcohol.
>
> Attracted to younger women – but no respect for them."

44. Questions were not asked of Mr Radford, either by the representative of the Secretary of State or by the members of the panel, directed to whether he was or might be

minimising the seriousness of the index offences, to the inconsistencies in the dates he gave as to the factor he was putting forward as the trigger for his offending, and to whether his offending (or any inappropriate sexual behaviour short of the commission of crime) was indeed confined to the twelve victims in relation to whom he was found guilty. It is a fair reading of the notes of the hearing that the credibility and reliability of Mr Radford's account was not probed to any extent, if at all.

The Decision Letter

45. In directing Mr Radford's release, by letter dated, rather surprisingly, 26th December 2017, the Parole Board noted the circumstances of his offending and identified some 17 overlapping risk factors which applied to him. However:

> "… the panel was able to identify protective factors that will serve to reduce your risk of further sexual violence and serious harm. You now take full responsibility for your offending behaviour and have undertaken treatment to address those risks, that work has been completed to positive treatment effect. You evidence good insight as to your risk factors and how you can use internalised risk management skills to ensure that you do not re-offend. You have learnt to be open and honest with professionals and you are assessed as being compliant and motivated to remain compliant when in the community.
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> …
>
> There is a consensus amongst the psychologists that you represent a low risk of sexual offending in open prison conditions and if released, and that the risks you pose lack imminence in both of those settings.
>
> …
>
> You stated that "I'm deeply sorry about what I have done. I feel I've become a better person since I changed my stance and admitted my guilt". You explained the context of your offending, the drivers and the links to your own life experiences and how that has all impacted to form your personality, attitudes and beliefs. Your account and explanation evidenced insight and was consistent with your disclosures and reflections in treatment and assessment settings … You said that "from 2011 I felt so guilty didn't know who to speak to – I found religion – decided if I'm going to follow the lord I've got to be honest and admit what I have done". You say that SOTP has taught you to identify risk factors and put in place strategies to self-manage those risks …
>
> …
>
> The RM2000 [static risk assessment] indicates a low risk of sexual harm/offending, this actuarial score may be affected by

> the fact that you have no relevant previous convictions, and the fact that you have had one sentencing exercise in respect of a number of counts of sexual offending, thus triggering an actuarial assessment of low risk. However, the panel notes and places weight upon, the dynamic risk assessments provided by psychologist witnesses that the dynamic risk of sexual offending is low …
>
> …
>
> You are assessed as being able and willing to comply with a licence and its conditions and the risk management plan in place is robust … Clinical opinions indicate that the risks you pose are manageable in the community and lack imminence. It is noted by the panel that, amongst those who opine that a slow progression through the custodial estate is required, your risks are assessed as being manageable and lacking imminence in the community and in open prison conditions.
>
> …
>
> The panel assesses that the test for release is met and that a period in less restrictive prison conditions is not required in your case. The risk management plan in place is robust and you will be managed on a multi-agency basis. You are assessed as being motivated and able to comply with your licence and all of its conditions. You evidence a reduction in risk. The proposed risk management plan is assessed as being strong enough to manage your risks at the point of release and over the currency of your licence. The panel notes the concerns expressed that, whilst the risk may be manageable at the current time, those risks will increase several years after release. The panel does not agree that an increase in risk is inevitable, in any event, any such increase in risk or decline in progress will be readily detected and the risk management plan will serve to manage any relevant issues that may arise.
>
> On the basis of the above, and other assessments, information and recommendations recorded in this decision-letter, the panel determines that it is no longer necessary for you to be detained in custody in order to protect the public."

46. The panel imposed a number of licence conditions including in particular that Mr Radford should permanently reside at specified approved premises; that he should be subject to a curfew; that he should notify his supervising officer of any developing relationships with women; that he should not delete the usage history of any internet enabled device or computer and allow such items to be inspected as required by the Police or his supervising officer; and that he should not own or possess more than one mobile phone or SIM card without the prior approval of his supervising officer, and provide him or her with relevant details.

47. The Claimants only learned of the release direction on 4th January 2018, when it was published in the media. The reasons for the Parole Board's decision, and the material on which it was based, were not placed in the public domain. The first time that the Claimants were able to consider the material or the detailed decision was following the order of this court on 7th February 2018.

48. On 5th March 2018, the National Probation Service requested additional licence conditions for the Parole Board's consideration. Following consultation with the victims it is proposed that Mr Radford be excluded from either the whole or part of Greater London, and from Sussex, and that his movements be monitored with a GPS tag. We understand that Mr Radford does not oppose these additional conditions and note that they remove the basis of the challenge by the Mayor of London (who expressed concern about his responsibilities for public safety in London).

Material not before the Parole Board

49. It is undeniable that there were references in the dossier to other matters which, had the Parole Board wished to enquire further, would have revealed other material which could be considered to be relevant to the credibility of Mr Radford's recent accounts of his criminality and thus the risk which he could continue to pose. Thus, we have already observed that, contrary to Schedule 1 Part A(5) of the Parole Board Rules, the judge's sentencing remarks were not in the dossier and neither was there any police report of the circumstances of the offending (which could itself have been contrasted to Mr Radford's account). Furthermore, although the dossier referred expressly to proceedings brought against the Metropolitan Police, and to at least 80 potential victims, there was no material in the dossier which related directly to anything which emerged during that hearing.

50. As for that litigation, in 2010 and 2012 respectively DSD and NBV brought proceedings against the Commissioner of Police for the Metropolis under ss. 7 and 8 of the Human Rights Act 1998 claiming breaches of their human rights under Articles 3 and 8 of the European Convention. These proceedings succeeded before Green J ([2014] EWHC 436 (QB)) and, at the time of the Parole Board hearing, the decision had been upheld by the Court of Appeal ([2015] EWCA Civ 646). It has since further been upheld by the Supreme Court: see [2018] UKSC 11.

51. This litigation and the findings of Green J are not binding on Mr Radford because he was not a party to it. Having said that, in short, without contest by the Metropolitan Police, Green J held that, between 2002 and 2008, Mr Radford committed in excess of 105 rapes and sexual assaults upon women in his taxi. In the judge's words, he was "clinical and conniving", and his methodology became "ever more refined" over time [6]. (We note that at [6] Green J gave the start date as 2002, whereas at [40] it was given as 2003. Given the evidence to which he refers, we take the latter date to correctly reflect what he found.)

52. Further, and unbeknownst to the Parole Board, quite apart from reaching conclusions about the extent of the criminality, Green J provided some critical detail of the circumstances of the police arrest and what was found (all of which could, in any event, have been made available to the Parole Board). He explained (at [20]):

> "When [Mr Radford's] home and car were searched by police, they discovered an extensive "rape kit" in the boot of his Fiat Punto. This kit contained everything he needed to stupefy and sexually assault a passenger. This included small bottles of champagne: "… ideal if you want to offer a glass or two of that drink with the benefit of the champagne not going flat as it would in a large bottle if the contents were not all drunk at once". They also found gloves a beret, maps, a torch, a quantity of plastic cups, a vibrator in a box, a box of condoms, and strips of Nytol tablets …"

53. Green J also referred to the opening which prosecuting counsel provided to the jury. This was in the context of the soporific effects of Nytol, and the risks of combining it with alcohol. Not merely was the opening potentially valuable in this regard (although we are not suggesting that the Parole Board were unaware of the basic properties of Nytol), it would have been of greater assistance in outlining the nature of the allegations in relation to the fourteen victims who formed the subject of the index offences (Mr Radford was found not guilty in two out of the fourteen cases).

54. It is significant (and was clearly very important for the Parole Board panel) that it concluded that Mr Radford took "full responsibility" for his offending behaviour and had "learnt to be open and honest with professionals". Putting to one side the extent of the criminality, it is beyond argument that the evidence that the High Court received about what was found when Mr Radford was arrested and the detail contained in the prosecution opening were both capable of having a bearing on the credibility and reliability of Mr Radford's account. At the very least, it provided material which could be put to him in order to test the credibility and reliability of his post 2015 account if only because of the expressed concerns that Mr Radford was manipulative, engaged in impression management and for more than 6 years had been steadfastly maintaining his innocence of any crime.

55. In addition, we turn to the evidence of DSD which is outlined in the judgment of Green J. Her witness statement included a detailed account of what she could recall of events which took place early in the morning of 7th May 2003. In line with his standard practice, the cab-driver (deploying a neutral designation at this stage) told DSD, who had been out celebrating a friend's birthday, that he had won a substantial sum of money, and he offered her a drink. Eventually she accepted. DSD recalled that the drink had a strong orange liquor flavour. The driver then stopped the cab, entered the rear to have a cigarette with her, put his arm round her and complimented her. Thereafter, DSD remembered nothing about the assault [20].

56. For present purposes, exactly what happened subsequently, distressing in detail, is not material. Suffice to say, DSD woke up in the Whittington Hospital soon to discover that her tampon had fallen out, and that her vagina was covered with lubricant, and was open and stretched [22]. She reported the incident to the Police that morning and a urine sample was taken. In due course traces of the active ingredient in Nytol were discovered by police toxicologists although the significance of this was not recognised [252]. The significance of this finding (if the allegation is relevant to Mr Radford's parole) is that it tended to contradict his version that he only used Nytol, as opposed to Temazepam, on one occasion. Although Green J observed that the toxicology findings in the cases of DSD and NBV were "inconclusive" [252], he

noted that the discovery of Nytol and Temazepam at Mr Radford's home address "corresponded to drugs found within the bodies of victims" [80].

57. After police investigations which were heavily criticised by Green J, whatever the position of Mr Radford, the Metropolitan Police accepted that DSD was one of his victims. Ms Phillippa Kaufmann QC for DSD and NBV informed us that DSD is believed to be one of his first victim, and NBV about his seventy-fifth. On 28th April 2009, the Crown Prosecution Service ("CPS") wrote to DSD thanking her for her assistance with the police investigation and pointing out that "there are dangers in putting too many charges on an indictment at the trial". We agree with Ms Kaufmann that the only fair reading of his letter is that the CPS considered that the evidential threshold had been surpassed in DSD's case.

58. This reading of the letter is wholly consistent with the Closing Report written by the Metropolitan Police dated 5th April 2011 (see [86] of Green J's judgment) which explains that at the time of the trial 83 linked offences were being investigated (the total number of allegations linked to Mr Radford upon the closure of the investigation was 105), but that the CPS sought for presentational reasons to include only those allegations "which were particularly serious or which added a great deal to the evidence against [him]". Reliance is placed on behalf of Mr Radford on a press statement from the CPS dated 5th January 2018 to the effect that the evidential threshold had not been met in relation to the 69 cases which did not form part of the trial (83 linked offences less the 14 indicted victims). How that fits with the earlier correspondence is not entirely clear but nothing may turn on this post-decision material and we say no more about it.

59. There are two other pieces of post-decision material which we should address. First, in a detailed witness statement prepared for these proceedings, dated 5th March 2018, P12 has explained that, taking a common sense approach, it was reasonable to assume that there were considerably more victims than the twelve in respect of whom Mr Radford was convicted; that such other offences he committed fell into the same pattern; that it is never appropriate to use a psychological interview for the purposes of a risk assessment to try and elicit a confession regarding wider allegations; that in the report to the Parole Board at no time did P12 mean that Mr Radford had given a full account or confession in relation to every sexual offence he may have committed; and that, in any event, "taking full responsibility" was not associated with lower re-offending rates. Regardless of whether evidence of this nature is admissible in judicial review proceedings, and it probably is not, we are unable to conclude that P12's thought-processes, assuming that they were held at the time, are reflected in any of the Parole Board's reasons. Accordingly, they take the matter no further in these proceedings, although it would be open for the Parole Board to consider them as relevant if so advised.

60. Of potentially greater interest is Mr Radford's witness statement dated 5th March 2018 in which he said the following:

> "5. I am aware that the police suggest that I may have committed many more offences than those for which I was convicted. I have also been the subject of civil claims by DSD, NBV and other women. I settled a total of 11 civil claims (3

> following guilty verdicts, 1 not guilty, 5 interviewed by police but not charged, 2 never interviewed).
>
> 6. I settled those claims on a "no fault" basis with Pannone Solicitors to the sum of roughly £241,000. I was never provided with a breakdown per Claimant. It was a global agreement for distribution by Pannone. I settled because I wanted to deal with the litigation and move on. I wanted to put an end to the case to focus on treatment and rehabilitation.
>
> 7. I am innocent of each of the other allegations made against me aside from those for which I was convicted."

61. Had Mr Radford been asked by the Parole Board, either before or at the hearing, any questions in relation to other offences for the purposes of probing his account, it is reasonable to infer that he would have answered in a manner consistent with this witness statement. However, bearing in mind the size of the payment, such answers should have generated a modicum of scepticism in the minds of a forensically astute panel.

62. Quite apart from not seeing the judgment of Green J or any information, evidence or material bearing on other allegations, in a case which it was known concerned a prisoner who was manipulative, managed impressions and had denied any offending for many years, the Parole Board dossier did not include the prosecution opening, any information, evidence or material bearing on the discovery of the "rape kit" at Mr Radford's home address, including amongst other things the box of condoms and the strips of Nytol or any police report. Although the Parole Board was entitled to make enquiries of the police and, in particular, it was entitled to obtain full details of the gravity of the offending in relation to the index offences, it did not do so.

The Legislative Framework

63. The starting point is the sentence passed on Mr Radford on 21st April 2009. Imprisonment for Public Protection was a sentence created by s. 225 of the Criminal Justice Act 2003 ("the 2003 Act") which was subsequently modified and then abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 although with prospective effect from December 2012. Thus, it remains the lawful sentence which Mr Radford is required to serve. The sentence was mandated if Penry-Davey J was of the opinion that "there is a significant risk to members of the public of serious harm occasioned by the commission by [Mr Radford] of further specified offences", unless he was satisfied that it was appropriate to impose a life sentence.

64. In making the cardinal assessment of dangerousness, s. 229 of the 2003 Act provides that the court is required to take into account a range of "information" relating to the offenders, the index offences and any information before it about any pattern of behaviour. It is not suggested that it was not entirely appropriate in Mr Radford's case.

65. The effect of the sentence is that it is an indeterminate life sentence for the purposes of s. 34(2)(d) of the 1997 Act. The minimum term to be served before eligibility for

parole could be considered was, in Mr Radford's case, 8 years' imprisonment (the equivalent of a determinate term of 16 years'). His release, however, was not determinate and was governed by the provisions of s. 82A of the Powers of Criminal Courts (Sentencing) Act 2000. Once the minimum term has expired, the "early release provisions" set out in s. 28(5)-(8) of the 1997 Act apply and responsibility for considering release passes to the Parole Board.

66. By s. 239(1)(b) of the 2003 Act, the Parole Board has the functions conferred on it in respect of life prisoners by Chapter 2 of Part 2 of the 1997 Act, s. 28(6) of which provides:

> "The Parole Board shall not give a direction under sub-section (5) above with respect to a life prisoner to whom this section applies unless –
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

Once a section 28 direction has been given, the Secretary of State must comply with it: see sub-section (5)(b).

67. By s. 31(3) of the 1997 Act, the Secretary of State must not include a condition in a life prisoner's licence on release except in accordance with recommendations of the Parole Board. That licence is subject to revocation by the Secretary of State pursuant to s. 32 of the 1997 Act whereupon the prisoner is recalled to prison although s. 32(4) then requires the Secretary of State to refer the matter to the Parole Board. By sub-section (5), if the Parole Board directs immediate release, the Secretary of State must give effect to it. Although it does not so state in terms, the necessary implication of s. 32(5)(a) is that in making a direction in relation to a recalled prisoner the Parole Board applies the s. 28(6)(b) test.

68. Section 239 of the 2003 Act provides in so far as is material as follows:

> "(3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider—
>
> (a) any documents given to it by the Secretary of State, and
>
> (b) any other oral or written information obtained by it;
>
> and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.

> (4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it.
>
> (5) Without prejudice to subsections (3) and (4), the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times.
>
> …
>
> (7) Schedule 19 shall have effect with respect to the Board."

69. Paragraph 1 of Schedule 19 provides:

> "(2) It is within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of –
>
> …
>
> (b) its functions under Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 in relation to life prisoners within the meaning of that Chapter."

70. The processes, functions and procedure of the Parole Board are set out in the Parole Board Rules 2016 made under s. 239(5) of the 2003 Act, which came into force on 22nd November 2016 (relevant earlier versions being set out below). By Rule 2, a "party" for the purposes of the Rules is the prisoner or the Secretary of State. Rule 7 provides for the service of information and reports by the Secretary of State on the Parole Board and the prisoner. In an initial release case, such as the present, the Secretary of State must serve the information specified in Part A of Schedule 1 and the reports specified in Part B.

71. Part A includes full details of the prisoner, the establishments in which he is currently being and has been held, the date of sentence, the offence and any previous convictions, and the sentencing remarks, if available, of the trial judge. (We note that in a recall case, Part A of Schedule 2 is in similar terms, save that the information must include the statement of reasons for the prisoner's most recent recall.)

72. Part B provides:

> "1. If available, the pre-trial and pre-sentence reports examined by the sentencing court on the circumstances of the offence.
>
> …
>
> 3. Current reports on the prisoner's risk factors, reduction in risk and performance and behaviour in prison, including views

on suitability for release on licence as well as compliance with any sentence plan.

4. A current risk management report prepared for the Board by an officer of the National Probation Service, including information on the following where relevant —

(a) details of the prisoner's address, family circumstances and family attitudes towards the prisoner;

(b) alternative options if the offender cannot return home;

(c) the opportunity for employment on release;

(d) the local community's attitude towards the prisoner (if known);

(e) the prisoner's attitude to the offence for which the offender received the sentence which is being considered by the Parole Board ("the index offence");

(f) the prisoner's response to previous periods of supervision;

(g) the prisoner's behaviour during any temporary leave during the current sentence;

(h) the prisoner's attitude to the prospect of release and the requirements and objectives of supervision;

(i) an assessment of the risk of reoffending;

(j) a programme of supervision;

(k) if available, a current victim personal statement setting out the impact the index offence has had on the victim and the victim's family;

(l) a view on suitability for release, and

(m) recommendations regarding any licence conditions."

73. Part 4 provides for the procedure before an oral panel. Rule 20 provides for a party to call witnesses, and allows for a member of the oral panel to call a witness. Rule 22(3) requires that a hearing be held in private, although there is power under sub-Rule (4) to admit any person subject to conditions.

74. Rule 23 deals with procedure at the hearing. Specifically:

"(1) At the beginning of the hearing the panel chair must—

(a) explain the order of proceeding which the oral panel plans to adopt, and

(b) invite each party present to state their view as to the suitability of the prisoner for release or for transfer to open conditions, as applicable.

(2) The oral panel—

(a) must avoid formality during the hearing;

(b) may ask any question to satisfy itself of the level of risk of the prisoner, and

(c) must conduct the hearing in a manner it considers most suitable to the clarification of the issues before it and to the just handling of the proceedings.

(3) The parties are entitled to—

(a) take such part in the proceedings as the oral panel thinks fit;

(b) hear each other's witnesses and representations;

(c) put questions to each other;

(d) call a witness who has been called in accordance with rule 20, and

(e) question any witness appearing before the oral panel.

...

(6) An oral panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law.

(7) No person is compelled to give any evidence or produce any document which they could not be compelled to give or produce on the trial of an action.

(8) The panel chair may require any person present to leave the hearing where evidence which has been directed to be withheld from the prisoner or their representative is to be considered.

(9) After all the evidence has been given, if the prisoner is present at the hearing, the prisoner must be given an opportunity to address the oral panel."

75. By Rule 24:

> "(1) The decision of the oral panel must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the end of the hearing.
>
> (2) The recorded decision must refer only to the matter which the Secretary of State referred to the Board."

76. By Rule 25:

> "(1) Information about proceedings under these Rules and the names of the persons concerned in the proceedings must not be made public.
>
> (2) A contravention of paragraph (1) is actionable as breach of statutory duty by any person who suffers loss or damage as a result."

The Submissions

The Release Direction

77. Given the time available the parties sensibly apportioned the oral argument between them where there was commonality of interest, thereby avoiding unnecessary duplication. We have paid as much attention to the written submissions as to their oral elaboration.

78. Ms Kaufmann rested her oral arguments on two broad platforms, and was content to leave the challenge to the *vires* of Rule 25 to be developed by others. Her first headline submission was that the material which was not before the Parole Board, as summarised above, could not rationally have been ignored in the light of its central bearing on the Board's essential risk assessment. Her second headline submission was that the release direction, even considered on its own terms without reference to any further material, was *Wednesbury* unreasonable in the straightforward sense of being irrational.

79. In developing her first headline submission, Ms Kaufmann sought to characterise what she called the "critical evidence" of wider offending as amounting to a relevant consideration for the purposes of her *Wednesbury* argument, or as leading the Parole Board to err in fact. This evidence was directly relevant to Mr Radford's risk factors and, in particular, his degree of dangerousness; it was also directly relevant to whether he had fully accepted responsibility for what he had done. Given that Mr Radford was claiming very precisely that the trigger for his offending arose in 2005 or 2006 (there is, however, some inconsistency as to the date, to which we have already alluded), it was obvious that evidence that he had offended before then necessarily impacted on his openness and honesty with professionals and the panel, as well as his level of insight.

80. Pressed by us to explain how and why it was incumbent on the panel to seek out further information which had not been included in the dossier by the Secretary of State (and, we might now add, did not feature in the latter's submissions to the panel or cross-examination of Mr Radford), Ms Kaufmann submitted that an expert panel

exercising an inquisitorial function should have undertaken further inquiry pursuant to s. 239(3)(b) of the 2003 Act. There were multiple references in the dossier to other potential victims, and the panel was also aware of the litigation involving the Metropolitan Police in that specific context.

81. The further information that the panel could and should have obtained included a report from the senior investigating officer responsible for Operation Danzey (the codename for the police investigation into Mr Radford's global offending) or a witness statement from DSD. Subject to overriding considerations of fairness, the panel could have admitted this evidence as hearsay – not necessarily for the purpose of proving that Mr Radford had committed other offences, but as a means of testing the account he was advancing and the evidential premises of the psychologists' reports.

82. In developing her second headline submission, Ms Kaufmann stated that there were a number of stark and atypical features of this case which called for the exercise of special caution. These included:

i) Mr Radford's change of stance and recognition of any offending was only 2½ years before the hearing.

ii) The fact that the Secretary of State was maintaining Mr Radford's category A status as recently as August 2017.

iii) The fact that it is extremely unusual for a prisoner to move directly from Category A to release on licence not least because of the absence of any testing in conditions other than of maximum security.

iv) There are numerous references in the dossier to Mr Radford's skills in the realm of manipulation and impression management to which appropriate attention needed to be paid.

v) The panel placed some weight upon Mr Radford's successful completion of the core SOTP, whereas it was discontinued in 2017 because it was found to yield a 2% increase in offending.

vi) The licence conditions proposed could easily be circumvented.

vii) In *R v Parole Board, ex parte Watson* [1996] 1 WLR 906, at 916H-917A, Sir Thomas Bingham MR, as he was then, held that:

> "in the final balance the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious harm".

83. Mr Dan Squires QC for the Mayor adopted Ms Kaufmann's oral arguments. In his Amended Statement of Facts and Grounds he formulated the first limb of the *Wednesbury* challenge (what we have called Ms Kaufmann's second headline submission) as follows:

> "… the Board failed to ask itself whether [Mr Radford's] apparent transformation in prison, since he admitted the

> offences for which he was convicted in May 2015, is genuine and whether he has indeed been "open and honest" about his offending and taken "full responsibility" for it; or whether his account to the Board and to those who have assessed him as to the scale, nature, extent, dates and triggers for his offending is based on a series of calculated lies. That was plainly a question that the Board should have asked itself."

84. Mr Ben Collins QC for the Parole Board emphasised that the decision of the panel on release "is a species of judicial decision" which speaks for itself and in the ordinary course does not require active defence: the position is analogous to judicial reviews of statutory tribunals which are not generally defended by the tribunals themselves. However, the Parole Board had recognised that in the particular circumstances of this case "it will be necessary, in order to address important issues of broad approach, and for the sake of clarity of the Parole Board's decision on such matters, to address some of the specific criticisms made of the Parole Board's findings and conduct of the hearing in this matter".

85. Mr Collins developed his oral arguments under four headings. First, he submitted that it is not the role of the Parole Board to determine the prisoner's guilt in relation to matters where no such finding has been made by a criminal court. Such a course would be anathema both to the statutory scheme and to authority. Moreover, even if the Claimants' cases were tempered to the extent that the postulated public law obligation of the Parole Board were to take account of evidence relating to other offending, rather than make any finding of guilt, the analysis would not alter. Once the evidence has been taken into account, it can only be relevant to the extent that it renders it more likely that the prisoner did commit other offences. Thus, there is an artificiality in seeking to draw any distinction in principle between various possible formulations of the Claimants' case. In addition, it would be almost impossible in practice to devise a fair procedure which would enable the prisoner to test the evidence to the extent necessary to nullify its probative value, if any.

86. Secondly, Mr Collins submitted that the Parole Board was not, in any event, bound in public law terms to consider evidence of wider offending. Mr Collins characterised this sub-issue as amounting to a pure *Wednesbury* review of the exercise of judgment by an expert panel rather than an alleged failure to have regard to a relevant consideration: evidence of wider offending is not an implied relevant consideration in the sense understood by the authorities.

87. Thirdly, Mr Collins addressed the various aspects of Ms Kaufmann's irrationality challenge and submitted that the Parole Board adopted a particularly cautious approach and, by necessary implication at least, addressed the possibility that Mr Radford was displaying an extensive exercise in impression management rather than being open and honest at all material times since May 2015.

88. Fourthly, Mr Collins submitted that the effect of s. 35 of the Domestic Violence, Crime and Victims Act 2004 is that only the victim of an index offence (i.e. NBV and not DSD) has a limited right to make representations regarding licence conditions and to receive information about these or supervision requirements to which the offender is subject in the event of release.

89. Mr Edward Fitzgerald QC for Mr Radford submitted that the Court should respect the special expertise of the Parole Board, that it was noteworthy that the Secretary of State had not initiated judicial review proceedings against the release direction, and that it was further to be noted that the Claimants' challenge was not directed primarily to the Parole Board's approach to the material placed before it by the Secretary of State.

90. Mr Fitzgerald submitted that evidence of wider offending was not a relevant consideration as a matter of legal obligation because it is not one impliedly identified by the governing statute, namely s. 28(6)(b) of the 1997 Act. He emphasised that this cannot be a case-specific analysis: a relevant consideration is one which is <u>always</u> germane, not one which may be characterised as obviously material on any given set of facts, and, therefore, irrational to ignore. In circumstances where the Secretary of State had not placed evidence of wider offending before the Parole Board in the dossier, it could not be said that it was entirely obvious that evidence bearing on unindicted offences should be sought out by the Parole Board. Mr Fitzgerald took us carefully through some of the copious material that was before the Parole Board, which included references to other potential victims, in support of his submission that it was not irrational for this panel in the exercise of its expert judgment not to seek out further evidence.

91. In response to the Claimants' pure *Wednesbury* argument, Mr Fitzgerald submitted that the only question to be addressed is whether it was irrational for the Parole Board to conclude that Mr Radford's confinement was no longer necessary for the protection of the public. The risk he posed was already very considerably reduced by his inability to work as a taxi driver. The Parole Board gave detailed and coherent reasons in support of its conclusion, buttressed by expert evidence, that Mr Radford's risk, such as it was, could be managed in the community.

92. Finally, Mr Fitzgerald submitted that the Court should refuse relief in the exercise of its discretion. Evidence of wider offending, had it been available to the Parole Board, would have carried little or no weight in the circumstances of this case.

93. Mr Clive Sheldon QC for the Secretary of State adopted a neutral stance in relation to the release direction. He submitted that decisions of the Parole Board were for it to defend if so advised; given that the criticism of the approach of the panel was in large part based on the absence of information which the Secretary of State's representatives could have put before the Board, this approach is not surprising. He added that the Secretary of State does not oppose the victims' challenge.

The Vires *of Rule 25*

94. On this topic, Mr Squires and Mr Gavin Millar QC for News Group Newspapers Ltd advanced the case in oral submissions. Ms Kaufmann did not develop her written argument. Mr Fitzgerald did not oppose the giving of greater publicity to the Parole Board's reasons. Mr Collins was silent. As we have already pointed out, the Parole Board is not responsible for the terms of Rule 25, and we should add that the current Parole Board chair, Professor Nick Hardwick, has publicly stated that there should be greater transparency. Mr Sheldon defended Rule 25 on a number of grounds.

95. Mr Squires submitted that Rule 25 is an exorbitant provision which in its blanket terms is *ultra vires* s. 239(5) of the 2003 Act because it offends the principle of legality and is not strictly necessary. The fundamental rights at stake are the open justice principle and the victims' right of access to the court. The general or ambiguous language of s. 239(5) did not expressly or by necessary implication authorise the trammelling of these rights, was not justified by a pressing social need, and went beyond the minimum interference necessary to achieve the appropriate objectives of Parole hearings.

96. Mr Squires advanced five propositions in relation to the victims' right of access to the court. These were, first, there is a right of unimpeded access; second, that right is interfered with if obstacles to its unimpeded exercise are put in place; third, victims require sufficient reasons for Parole Board decisions otherwise their right is "rendered nugatory"; fourth, the right to be given sufficient reasons does not require the disclosure of all the material in the dossier; and fifth, the right applies to judicial review proceedings. Although it has been open to the victims in this case to bring judicial review proceedings without having the reasons or any gist of them in advance, and those reasons have now been provided in the litigation, their right of access to the court was impeded to the extent that the absence of reasons rendered it harder to evaluate whether there might be a meritorious challenge to the release direction.

97. Finally, Mr Squires submitted that Directive 2012/29/EU and the Victims' Code of Practice require that victims be provided with the reasons for an offender's release.

98. The oral argument of Mr Gavin Millar focussed on the open justice principle. He submitted that the Parole Board is clearly a court for these purposes because it exercises the judicial power of the State. Although it is an aspect of the open justice principle that hearings are in public Mr Millar was content to assume that closed hearings could be justified to respect the rights of prisoners. He submitted that any need for a private hearing could not be deployed as a parallel or concomitant justification for a blanket prohibition on the promulgation of information, including the giving of reasons, redacted as necessary, after the event. Indeed, this is what happens in national security cases where there is a closed material procedure: the court hands down an open judgment which sets out as much information as possible, consistent with the interests of national security.

99. Mr Millar also submitted that the common law right to freedom of expression and the presumption of openness are fundamental rights which Rule 25 cuts across: see, in particular, *Kennedy v Information Commission* [2015] AC 455. He advanced broadly similar arguments under the rubric of Article 10 of the Convention.

100. Mr Sheldon's robust defence of Rule 25 was launched with the submissions that the Mayor did not have standing to challenge the Rule or the release direction; that the claims are out of time, because Rule 25 was in force as long ago as 22nd November 2016; and, that the issue is now academic because the victims and the Mayor have seen the dossier, the press have been given sufficient information, and the Secretary of State has indicated that the Rule is under review.

101. Mr Sheldon submitted that the prohibition in Rule 25 does not preclude information being given to a specific category of individuals (e.g. victims), that the name of the

offender and the fact of his release is in any event not "information" for the purposes of the rule, and that the victims can be given further information, including a summary of the Parole Board's reasons, under the Code of Practice for the Victims of Crime and the Victim Contact Scheme Guidance, PI 48/2014.

102. As for the merits of the *vires* challenge, Mr Sheldon submitted that no fundamental rights are engaged. The open justice principle is not absolute and the Parole Board is an historic exception. The right of access to the court is not impeded by Rule 25: this would only be the case if the Parole Board had a general duty to give reasons, and victims a correlative right to receive them, and none exists. The victims' standing, which Mr Sheldon concedes, does not confer or generate the relevant right. Finally, any right to receive information at common law is adjunctive to the open justice principle and is not free-standing.

103. Even if, contrary to the above, one or more fundamental right is in play, Mr Sheldon submitted that by enacting s. 239(5) in its admittedly broad terms Parliament has by necessary implication authorised both private hearings and the prohibition against provision of information, which was the default position before 2011.

The Issues

104. We must emphasise that the foregoing is no more than an outline of the parties' respective cases and submissions, and we have not ignored the detailed and careful manner in which often complex arguments were elaborated. In the light of these submissions, and in the interests of clarity and logical analysis, we propose to address the issues which arise in the following sequence:

i) The Mayor's standing to bring this challenge.

ii) The *Wednesbury* challenge: sub-divided into (a) pure *Wednesbury* or irrationality, and (b) failure to take into account relevant considerations. We take the *Wednesbury* questions in this order although Ms Kaufmann for understandable forensic reasons placed (b) before (a).

iii) The challenge to the *vires* of Rule 25: sub-divided into (a) the Secretary of State's various objections (viz. delay and challenge now academic), (b) whether any relevant fundamental rights are engaged, and (c) whether Rule 25 impliedly authorises the infringement of such rights.

Standing

105. Mr Squires points out that the Mayor has a series of powers and responsibilities which give him, he says, an obvious interest in tackling crime and in the operation of the criminal justice system as it applies to London, including in relation to support provided for victims and the confidence which they, and the wider public, have in the functioning of the justice system. The Mayor also has a number of specific and relevant statutory powers: including under the Police Reform and Social Responsibility Act 2011, as the occupant of the Mayor's Office for Policing and Crime ("MOPAC"), a statutory duty to "secure that the Metropolitan Police force is efficient and effective" (s. 6(3)), a duty to issue a "police and crime plan" (s. 6(1)), and a duty to "make arrangements for the exercise of … functions [of criminal justice

bodies] so as to provide an efficient and effective criminal justice system for the police area" (s. 10(3)). The current police and crime plan promulgated by MOPAC in March 2017 identifies five priority areas, including "a better criminal justice service for London" and to tackle "violence against women and girls". It aims to "prevent these crimes, tackle offending behaviour and support victims".

106. In his witness statement dated 21st February 2018 the Mayor has carefully explained to the Court his interest in this exceptional case: in particular, the fact that Mr Radford's crimes are obviously associated with London; the need to improve the confidence of victims of sexual violence to report crimes against them; and:

> "… given the very surprising decision at the heart of this case, the grave concern it has caused among Londoners and the potential implications for women and girls in particular, I felt compelled to do what I could to ensure that the Parole Board's decision received the full scrutiny of the Court and that in the future victims, if they wish, are provided with explanations for the Board's decisions."

107. Given the Mayor's legitimate concerns, Mr Squires submitted that he could scarcely be characterised as a "mere busybody": see, for example, *Walton v The Scottish Ministers* [2013] PTSR 51, at [90]-[92] and *R (O) v Secretary of State for International Development* [2014] EWHC 2371, at [12]. Unsurprisingly, he stressed the exceptional circumstances of this case, the widespread concern it has generated, and the breadth of the public interest in it.

108. We do not doubt the strength and sincerity of the Mayor's concerns on behalf of the victims in particular and Londoners in general. Mr Radford's crimes were committed in London, in a licensed taxi, in circumstances where his victims were entitled to trust a taxi driver implicitly. It was this trust that enabled Mr Radford to commit these offences in the first place; and it was his abuse of it, on whatever scale, that has given rise to such public interest in this case.

109. However, in our judgment none of these matters confers standing on the Mayor to bring this claim. The panoply of functions to which he has drawn to our attention is very general in scope, and does not relate in any respect, even indirectly, to the workings of the Parole Board or to its decisions in any particular case. The same would apply to sentencing decisions given in the criminal courts. The Mayor is, of course, entitled to comment on Parole Board decisions, and any concerns he might express would attract public attention, but, in our view, he is in no different position from any other politician or, indeed, any member of the public.

110. There are situations where the Court adopts a very liberal approach to the issue of standing, but this is not one of them. For example, in *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552 this Court accepted "without question" that Lord Rees-Mogg had standing to seek judicial review of the Foreign Secretary's decision to ratify the Maastricht treaty "because of his sincere concern for constitutional issues" [at 562A]. However, in that case if Lord Rees-Mogg did not have standing then no one did. In the present case, the Secretary of State as a party to the proceedings before the Parole Board was a natural claimant, and the standing of the victims has not been placed in issue. These are, or would be, obviously better-placed challengers.

111. The test for standing is discretionary and not hard-edged. We are not to be understood as saying that the Mayor is a "mere busybody" and that his *bona fide* concerns carry no weight. As Lord Reed JSC explained in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, at [170]:

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or abuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law … What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

We should add that this passage was cited by Lord Reed at [93] of his judgment in the *Walton* case, immediately after the paragraphs set out in Mr Squires' skeleton argument. In our judgment, to deny the Mayor standing would not disable the Court from performing its function to protect the rule of law. The Mayor cannot be regarded as a proxy for the interests of the victims because these have been fully safeguarded by Ms Kaufmann and those supporting her. Overall, the Mayor's interest falls on the wrong side of the line.

112. Nonetheless, having received detailed submissions by Mr Squires on both substantive issues, we cannot simply put them to one side; they must be taken fully into account. It follows that our ruling as to the Mayor's lack of standing is largely academic in terms of the present case but not in relation to future litigation on similar facts.

113. We should add that the standing of DSD and NBV to bring these proceedings has not been put in issue by any party: indeed, at the preliminary hearing, it was conceded. We recognise that, at that time, Mr Radford did not have (or had only just secured) legal representation and had Mr Fitzgerald sought to challenge the grant of permission on this basis, it may be that it would have been necessary to hear him. In the event, he did not and we consider that it is too late for the point to be taken, even by the Court (which did not reserve the standing of DSD and NBV as it did in respect of the Mayor).

114. Having said that, it is necessary to make the following brief observations. NBV's right to make representations in relation to the Parole Board's release direction under s. 35 of the Domestic Violence, Crime and Victims Act 2004 was limited to the proposed licence conditions, and did not cover whether Mr Radford should be released at all. Thus, her undoubted locus to apply for judicial review of the licence conditions would not, for this reason alone, give her a lever into the substance of the

release direction. Given the Secretary of State's early indication that he would not be seeking to challenge the Parole Board's decision, there is considerable force in the contention that had the standing of DSD and NBV been placed in issue that would have disabled this Court from performing its function (if it considered it appropriate) to protect the rule of law. Accordingly, it may well be that the present case is distinguishable from *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449, where it was held that Mr Bulger did not have standing to bring judicial review proceedings against the setting by the Lord Chief Justice of the tariffs in the cases of Thompson and Venables. This was because the Lord Chief Justice was performing judicial functions in relation to sentencing, and "the nature of [the] impact … [of that decision] was properly channelled through the only proper parties, the Crown and the defendant". In the end, however, we have not had to resolve these questions.

115. Given that the claim of News Group Newspapers Ltd is not against the release direction but the application of Rule 25 to it, we do not consider that any standing point arises. In any event, the issue has been superseded by the grant of permission.

The *Wednesbury* Challenge

Irrationality

116. The issue is whether the release decision was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person [here, the Parole Board] who had applied his mind to the question to be decided could have arrived at it": see Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374 at 410G. This issue must be addressed, as Ms Kaufmann accepts, upon an examination of the material that was before the Parole Board rather than ought to have been. Furthermore, the question is not whether the Parole Board "erred in fact": this rare sub-category of judicial review applies only to situations where the relevant fact is or has been established, and it has not been proved that Mr Radford has offended more widely. We repeat that the findings of Green J are not binding on him.

117. The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.

118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise judgment in this specialist domain. In *R (Alvey) v Parole Board* [2008] EWHC 311 (Admin), at [26] Stanley Burnton J, as he then was, neatly encapsulated the position as follows:

> "The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however, strong its view, for that of the Parole Board. It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant

> considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment."

119. Further, as Lord Phillips CJ observed in *R (Brooke) v Parole Board* [2008] 1 WLR 1950, at [53]:

> "Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the board is satisfied that there is *no risk* that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board's judicial function."

120. *Brooke* was heard in the Court of Appeal alongside other appeals; those went before the House of Lords and were affirmed on different grounds: *see Regina (James) v Secretary of State for Justice (Parole Board intervening)* ([2010] 1 AC 553). Lord Phillips' general statement of principle was not undermined. At the conclusion of his speech in the House of Lords, Lord Judge CJ stated, at [134]:

> "In expressing myself in this way, I am not to be taken to being encouraging applications by prisoners for judicial review on the basis that the prisoner may somehow direct the process by which the Parole Board should decide to approach its section 28(6) responsibilities either generally, or in any individual case. These are question pre-eminently for the Parole Board itself. Although possessed of an ultimate supervisory jurisdiction to ensure that the Parole Board complies with its duties, the Administrative Court cannot be invited to second-guess the decisions of the Parole Board, or the way it chooses to exercise its responsibilities. Your Lordships were told that the Board is frequently threatened with article 5(4) challenges unless it requires the Secretary of State to provide additional material. Yet it can only be in an extreme case that the Administrative Court would be justified in interfering with the decisions of what, for present purposes, is the "court" vested with the decision whether to direct release, and therefore exclusively responsible for the procedures by which it will arrive at its decision."

Although these general statements were made in the context of the procedure to be adopted in individual cases in discharge of the Parole Board's core function under s. 28(6) of the 1997 Act, they should equally apply to this Court's approach to the substance of release decisions.

121. Finally, we should touch on one sentence in the judgment of Sir Thomas Bingham MR, as he then was, in *R v Parole Board, ex parte Watson* [1996] 1 WLR 906, at 916H-917A:

> "In exercising this practical judgment [sc. whether or not to direct release] the board is bound to approach its task under the two sections in the same way, balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious harm to the public against the need to protect the public against a man who is not unlikely to cause such injury. In other than a clear case this is bound to be a difficult and very anxious judgment. <u>But in the final balance the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury.</u> This is the test which section 34(4)(b) prescribes, and I think it is equally appropriate under section 39(4) [emphasis supplied]"

122. It is to be noted that s. 34(4)(b) of the Criminal Justice Act 1991 is in the same terms as s. 28(6)(b) of the 1997 Act. We do not, however, read this passage from Sir Thomas Bingham's judgment as indicating that the need to protect the public is some extra factor which weighs particularly heavily in the Parole Board's decision-making. He was making the point that although a balance fell to be struck (see his previous two sentences), the essential statutory question for the board, and the one to which its decision must be directed, is whether the prisoner's continued confinement is no longer necessary for the protection of the public. This may well justify a cautious approach on the part of the Parole Board – and, on our understanding of his submissions, Mr Collins accepted as much – but it cannot warrant placing a special onus on the prisoner to demonstrate that he is no longer dangerous.

123. We turn to address Ms Kaufmann's submissions on the irrationality question. We recognise that there is considerable force in some of the submissions she advanced. First, it is very rare for a prisoner to move directly from a Category A establishment to release without any intervening period at a lower categorisation, still less open conditions. At paragraph 77 of his first witness statement, Mr Martin Jones informed the Court that in the financial year 2016/7 there were 63 prisoners released from Category A prisons. At paragraphs 2-7 of his second witness statement, this figure was broken down and it appears that "on the basis of the figures available, excluding recalls, 6 Category A prisoners were released directly from Category A prisons in the 2016/7 financial year". These data lend support to the proposition that release from Category A is exceptional, that strong reasons to justify it must be identified, and that the more cautious, orthodox approach urged by those within HMP Wakefield should be given considerable weight. There are obvious advantages in subjecting a prisoner to regimes of lessening stringency in order properly to test the robustness of the risk assessment.

124. Secondly, there are a number of striking features of Mr Radford's case which give rise to concern. His change of position was a dramatic *volte face* which came after at least six years of his adamantly maintaining his innocence and attempting to secure his release through the court system and the CCRC. There are numerous references in the dossier to the actuality or possibility of impression management, a suggested

character trait which chimes rather too uncomfortably with the manner in which Mr Radford must have secured the trust of his passengers from the front seat of his taxi. The possibility that he was not being open and honest with the professionals and the Panel itself fell to be considered.

125. With respect, it does not seem to us that this possibility was thoroughly probed by the independent psychologists, two of whom had been instructed by Mr Radford and the third had previously been instructed by him, or by the panel of the Parole Board itself. There were some inconsistencies as to the timing of the alleged "trigger" which directly emerge from a close examination of the dossier which do not appear to have been examined. Ms Kaufmann's forensic instinct located these inconsistencies for our benefit, but we are left wondering why they were not exposed, and explored as appropriate, by the Panel, in particular by its legally qualified member. Furthermore, whether or not the rape offence lasted for just four seconds, we have some difficulty with Mr Radford's account that the sexual assaults amounted to no more than his touching his stupefied victim's leg and masturbating. Mr Radford has not accepted the circumstances of the offence of assault by penetration, denying that his vibrator ever penetrated the vagina of his victim.

126. We have examined the chair's notes of the hearing on 8th November 2017 with a view to ascertaining whether any questions were asked of Mr Radford by the panel itself directed to his credibility or reliability as a historian in relation to the index offences. We have found nothing. When pressed by Garnham J on this point, Mr Collins was unable to draw anything to our attention.

127. Overall, the possibility exists that Mr Radford has provided what may be described as a carefully calibrated account, steering adroitly between admitting too much and too little, rather than one that is entirely open and forthcoming.

128. On the other hand, not all of Ms Kaufmann's arguments were equally compelling. The panel was not bound to accept the Secretary of State's categorisation of Mr Radford made on different evidence and applying a different test. In any event, the Parole Board is independent of the Secretary of State. Further, in our view, the Parole Board was entitled to attach weight to Mr Radford's successful completion of the SOTP rather than to hold this against him on account of recent statistical evidence relating to the cohort of sex offenders as a whole. Having effectively required him to enter the SOTP as a means of demonstrating his insight and lowering of risk factors, the proposition that this should now be held against him has shades of Catch 22. It is true, as Ms Kaufmann submitted, that two of the psychologists, P9 and P12, altered their view in Mr Radford's favour, but this was a matter for the panel to consider, and it is clear that it did. Finally, it is also true that Mr Radford could circumvent one or more of the licence conditions by acquiring another SIM card or computer, but the same point could be made in relation to all sex offenders.

129. We were invited by all Counsel to apply an anxious scrutiny to this case. Although this is not the sort of situation where the anxious scrutiny principle is directly applicable in the sense in which Lord Bridge was using the term (cf. *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514), we have given Ms Kaufmann's powerful submissions very careful, extended consideration.

130. Ultimately, we are not persuaded that this panel reached an irrational decision. It is not sufficient for the Claimants' purposes to have persuaded us, as they have done, that this decision is surprising and concerning. The panel had the benefit of expert advice from three psychologists with experience in complex cases of this sort. The panel gave clear and detailed reasons explaining why it had reached the conclusion that Mr Radford's risk factors had diminished to a point where he could be safely managed outside a prison environment within the framework of a series of reasonably robust licence conditions. The panel was fully aware that it was taking an unusual and unorthodox step, and in so doing was rejecting the assessments of those who had had dealings with Mr Radford over time. Although the prison witnesses were not altogether independent, there is nothing to indicate that they were approaching Mr Radford's case other than fairly.

131. The possibility that Mr Radford is devious, calculating and an expert manipulator could not have been lost on this panel. Apart from the various references in the dossier, it is entirely reasonable to assume that an expert panel would have sufficient experience of human nature to understand his psychological profile. Further, to be fair to Mr Radford, these are not traits which are immutable or incapable of amelioration.

132. The issue which has caused us the greatest difficulty is whether, in the light of the evidence that was in the dossier, it was irrational for the panel not to have probed Mr Radford on the account he had provided, rather than appear to have accepted it at face value. We emphasise that for the purposes of this exercise we are excluding from account, as Ms Kaufmann invited us to do, any additional evidence that might have been obtained following inquiry. Our examination of Mr Radford's version has led us into a degree of scepticism such that it would be safe to conclude that had any of us been on the panel a number of questions would have been asked. That, however, is not the test. The issue for this Court is whether it was irrational for the panel to proceed as it did, recognising always that it was for the panel to decide what questions to ask in all the circumstances of the case. Of course, without the additional evidence which we address below, any probing of Mr Radford could not have been with reference to material indicating that he might be wrong. Not without some hesitation, we cannot conclude that it was irrational to fail to probe Mr Radford along the lines we have adumbrated.

133. A risk assessment in a complex case such as this is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself. This panel's reasons were detailed and comprehensive. We are not operating in an appellate jurisdiction and the decision is not ours to make. We are compelled to conclude that the decision of the panel must be respected. It follows that the irrationality challenge, in the terms in which it was advanced by Ms Kaufmann (adopting also those made by Mr Squires), cannot be upheld.

Failure to have regard to Relevant Considerations

134. Despite references in the dossier to "80+ potential victims", it is clear that the panel did not take this factor into account. Specifically, the panel did not obtain any evidence bearing on the issue of possible wider offending, no questions were asked of Mr Radford about it, and the reasoning in the release direction is premised solely on the commission of the index offences on the terms admitted by Mr Radford. On Ms Kaufmann's primary formulation, the question arises whether the panel, in

approaching Mr Radford's case in this manner, failed to take into account a relevant consideration, namely "critical evidence of wider offending". She submitted that this was "obviously material" because the period and extent of Mr Radford's offending was relevant to the nature and degree of his risk – if the statutory question is whether his confinement is no longer necessary for the protection of the public, the starting point must be ascertained – as well as to his insight. If, contrary to his account, his offending started in 2003 and not 2006, the trigger for it could not have been a relationship breakdown in 2005 or 2006.

135. Both Mr Collins and Mr Fitzgerald contested the proposition that "critical evidence of wider offending" was a relevant consideration in the sense in which that concept was used by Lord Greene MR in November 1947, and as explained in subsequent authority. Lord Greene's classic statement of the principle of what is most commonly called "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 229) was as follows:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

136. *In re Findlay* [1985] AC 318 the issue was whether an implied statutory requirement was imposed on the Home Secretary to consult the Parole Board before formulating changes in parole policy. The House of Lords held that there was not. Lord Scarman cited with approval observations of Cooke J, as he then was, in the New Zealand case of *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, at 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

137. Lord Scarman held that these words did not support the submission of Mr Sedley QC for the appellants that no reasonable Home Secretary could have reasonably omitted to have consulted the board. He added [at 334A/B]:

> "But, and it is this upon which Mr Sedley has to found his argument [i.e. his *Wednesbury* argument], the judge in a later passage, at p.183, line 33, did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by ministers … would not be in accordance with the intention of the Act. These two passages are, in my view, a correct statement of principle." [emphasis supplied]

These highlighted words, as well as the context, indicate that both Cooke J and Lord Scarman were addressing pure *Wednesbury* unreasonableness, not a failure to take into account relevant considerations. That issue had been covered by Cooke J in the first citation from the *CREEDNZ* case. If a consideration falls to be taken into account only in certain circumstances, it cannot logically be one which the statute impliedly identifies account must be taken as a matter of legal obligation. If, on the other hand, a matter is so obviously material to a decision on a particular project, it would be *Wednesbury* unreasonable for the decision-maker to ignore it.

138. In *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, Lord Hobhouse formulated the question as follows [45]:

> "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

139. In *B (a minor) v DPP* [2000] 2 AC 428, at 464, Lord Nicholls put the matter in slightly less austere terms:

> "… "necessary implication" connotes an implication which is compellingly clear."

140. Finally, in *R (on the application of Khatun) v Newham LBC* [2005] QB 37, Laws LJ analysed Lord Scarman's speech in *Findlay* as follows [35]:

> "In my judgment the *CREEDNZ Inc* case (via the decision in *In re Findlay*) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review. By extension it gives authority for a different proposition, namely that it is for the decision-maker and not for the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such."

141. The distinction between relevant considerations, properly so called, and matters which may be so obviously material in any particular case that they cannot be ignored, is not merely one of legal classification; it has important consequences. If a consideration arises as a matter of necessary implication because it is compelled by the wording of the statute itself, the decision-maker must take it into account, and any failure to do so is, without more, justiciable in judicial review proceedings. If, on the other hand, the logic of the statute does not compel that conclusion or, in the language of Laws LJ, there is no implied lexicon of the matters to be treated as relevant, then it is for the decision-maker and not for the court to make the primary judgment as to what should be considered in the circumstances of any given case. The court exercises a secondary judgment, framed in broad Wednesbury terms, if a matter is so obviously material that it would be irrational to ignore it.

142. It is clear that s. 28(6) of the 1997 Act does not expressly set out any considerations or matters which a panel of the Parole Board is required to take into account in all cases, in determining whether or not the prisoner's confinement is no longer necessary for the protection of the public. Nor, in our judgment, can it be said that s. 28(6) compels the conclusion that evidence of wider offending is relevant to the statutory question. We agree with Mr Fitzgerald that this conclusion would only flow if evidence of wider offending were *always* relevant to the statutory question: it cannot depend on the circumstances of individual cases. The Parole Board will be aware that a prisoner's index offences, and his criminal record, will not necessarily represent the sum total of his previous offending, particularly in prolific cases.

143. Further, evidence of wider offending will often simply not be available, assuming that it ever came to police attention. Prisoners cannot sensibly be asked open-ended questions by the board about whether their record gives the complete picture. Even where evidence is available, further investigation or inquiry cannot be mandated in every case; there may well be situations where such evidence could not be relevant to the level of the prisoner's risk. Given that the statutory test is directed to whether confinement is no longer necessary for the protection of the public, the principal focus in the majority of cases will be on current and future risk. A prisoner's risk factors will require identification, but the degree of risk at the time of sentencing will not necessarily require precise ascertainment.

144. In any event, Ms Kaufmann's submission, in its highest form, tends to elide two questions. The first is whether the panel should have undertaken further inquiry. The second is whether the panel, having done so, should have taken evidence of wider offending into account. Ms Kaufmann's focus was on the second question but it does not arise unless the first question is answered affirmatively. Thus, the relevant consideration invoked by Ms Kaufmann is a matter which, by definition, cannot arise in all cases; it only arises if a logically prior step has been undertaken. As a matter of analysis, that step – the undertaking of further inquiry - cannot arise as a matter of legal obligation; and, in any case, there are statements of the highest authority to the effect that the scope of inquiry in any particular case must be a matter for the board: see *Walker* (*ibid*), per Lord Hope [21] and Lord Judge (in the passage previously cited).

145. At the outset of her oral argument, Jay J asked Ms Kaufmann whether there was an alternative formulation to her case on relevant considerations, namely that in the particular circumstances of this case it was irrational not to have considered evidence

of wider offending. Ms Kaufmann's riposte was that there was agreement between her and Mr Fitzgerald that the issue was whether evidence of wider offending was obviously material. She appeared to be adhering to a formulation that tied this limb of her case to an omission to take into account a relevant consideration. That, however, was not at all Mr Fitzgerald's formulation, which was why Jay J asked the question. That said, provided that the issue is framed in Mr Fitzgerald's terms – of irrationality rather than of omitting to consider relevant considerations - there can be no unfairness in our addressing it. In doing so we will avoid the elision between the two questions we have identified at paragraph 144 above.

146. Mr Collins' first submission, directed admittedly to Ms Kaufmann's slightly different formulation but for present purposes it does not matter, was that it was simply impermissible for the Parole Board to consider whether Mr Radford had committed further crimes. We were taken by counsel to a number of authorities bearing on this topic, as well as the related topic of the nature of the evidence, information and material that the Parole Board is entitled to take into account.

147. In *R v Kidd and others* [1998] 1 WLR 604 the Court of Appeal, Criminal Division, restated the principle that a defendant is not to be sentenced for an offence unless it has been proved against him by admission or verdict, or he has admitted it and asked for the court to take it into consideration when passing sentence for an offence of which he has been convicted.

148. In *R v Farrar* [2007] 2 Cr. App. R. (S.) 35, the Court of Appeal, Criminal Division applied this principle to the exercise of determining the issue of dangerousness for the purposes of s. 229 of the CJA 2003. Accordingly, it was wrong for the judge to determine, to the criminal standard, that the defendant was guilty of a separate sexual offence. However, Mitting J (giving the judgment of the Court) added, at [19]:

> "The principle must not be taken too far. As the Court in [*Kidd*] recognised, full account can be taken of "acts done in the course of committing that offence or offences even when such acts might have been separately charged". In the specific case of sexual offences against children, evidence about the offences charged may demonstrate a pattern of behaviour before their commission which includes other criminal conduct … Nor, in our view, would a judge who had presided over a trial of a defendant charged with a sexual offence at which evidence of similar conduct was given, and must have been accepted by a jury, whether in relation to the same or another complainant, be prevented from taking such behaviour into account under section 229(2)(b)."

149. Similarly, in *R v Considine* [2008] 1 WLR 414 a five-judge constitution of the Court of Appeal, Criminal Division (Lord Judge CJ presiding, and giving the judgment of the Court), drew a distinction between "the introduction of a hybrid arrangement into the criminal justice system, in effect the possibility of conviction, or effective conviction, of a serious criminal offence after trial by judge alone in the course of a sentencing decision" [34], which is prohibited, and:

> "[36] … the court making the section 229 decision [being] precluded from considering evidence of previous misconduct which would amount to a criminal offence. Arguments advanced on the basis that [*Farrar*] did so decide are ill-founded. The contrary is true, and in *Farrar*, the end result was that material directly related to the earlier incident did in fact contribute to the conclusion that Farrar himself should properly be assessed as dangerous. For this purpose no conviction was necessary. Provided the judge could resolve the issue fairly, it was sufficient for the information to be contained in a psychiatric report …
>
> [37] We have deliberately declined to lay down any hard and fast rules about how the court should approach the resolution of disputed facts when making the section 229 assessment. In reality, there will be very few cases in which a fair analysis of all the information in the papers prepared by the prosecution, events at the trial, if there has been one, the judicial assessment of the defendant's character and personality (always a critical feature in the assessment), the material in mitigation drawn to the attention of the court by the defendant's advocate, the contents of the pre-sentence report, and any psychiatric or psychological assessment prepared on behalf of the defendant, or at the behest of the court itself, should not provide the judge with sufficient information on which to form the necessary judgment in relation to dangerousness."

150. Although these decisions were directed to the sentencing exercise rather than to the function of the Parole Board, they do lend support to Mr Collins' submission that the latter should not be determining issues of guilt in relation to non-index offences. In any event, it is not the role of the board to determine a criminal charge: see *R (West) v Parole Board* [2003] 1 WLR 705. On the other hand, these decisions do not support the proposition that evidence of other offending cannot be considered as part and parcel of a global assessment of risk. If that exercise may be undertaken for the purposes of s. 229 of the CJA 2003 on the basis of all the information that is before the sentencing judge, there is no reason why it cannot be performed for the broadly similar purposes of s. 28(6) of the 1997 Act.

151. Section 229(3)(a) uses the term "information", as opposed to "evidence", as does s. 239(3)(b) in the context of the Parole Board. It is clear from Lord Judge's judgment in *Considine* that the sentencing judge is given considerable latitude as to the range of the information to be considered, subject always to considerations of fairness. In our judgment, the same principle applies to the Parole Board.

152. Our attention was drawn to a number of authorities which show that hearsay evidence is admissible in proceedings before the Parole Board and that matters which are disputed by the prisoner do not necessarily require cross-examination of witnesses, subject to the demands of fairness in the individual case. We refer in particular to *R (Sim) v Parole Board* [2004] QB 1288 [52-59], *R (Brooks) v Parole Board* [2004] EWCA Civ 80 and *R (McGetrick) v Parole Board* (in the Divisional Court, [2012] 1 WLR 2488 and in the Court of Appeal [2013] 1 WLR 2064). Although these were

recall rather than first release cases, the statutory test and the applicable principles are the same: see *Watson* (*ibid*) at 916H, 917H-918B and 919F. It follows that we cannot accept Mr Fitzgerald's submission that recall cases are logically distinct because the focus must be on what has occurred after initial release. That will be the starting-point for the inquiry, but the Board's function in a recall case is to determine the same critical question as to the necessity for continued confinement. Nor, in a first release case is there anything in s. 28(6) of the 1997 Act or 239(3) of the 2003 Act which limits the inquiry, either expressly or by necessary implication, to post-conviction matters.

153. Mr Fitzgerald dwelled on *McGetrick*, a case which has generated some difficulty. The dossier submitted to the Parole Board by the Secretary of State contained material which had been prepared for, but not used, in the claimant's criminal trial. This material comprised allegations of a number of further sexual offences in respect of which the claimant had not been convicted, no indictment in relation to them having ever been pursued. Stanley Burnton LJ, giving the judgment of the Divisional Court with which King J agreed, held that the Parole Board did not have power to exclude this material from the dossier, and that its inclusion was not in breach of the Secretary of State's policy. Further:

> "30. … Where, however, the matter in question (whether it amounts to a criminal offence or not) has not been the subject of a prosecution or adjudication, the facts will not have been established in court, and the Secretary of State is entitled to require the board to consider any relevant evidence, including witness statements.
>
> …
>
> 33. Kennedy LJ's summary [in *Brooks*] remains relevant under current legislation. It is essential to bear in mind that it is not the function of the board to find a prisoner guilty or innocent of any offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence. For that purpose, the board must take into account hearsay and other evidence of misconduct or criminal offences on the part of the prisoner, whether that misconduct or offence took place before or after or at the same time as the offending for which he was sentenced. Similarly, the board must take into account evidence of any good conduct of the prisoner, whenever it took place. The weight, if any, to be given to that evidence is a matter for the board."

154. The Court of Appeal in *McGetrick* reversed the decision of the Divisional Court on the issue of whether the Parole Board had power to exclude untried material from the dossier in the interest of fairness. The other observations of Stanley Burnton LJ, however, and in particular those set out at [33] of his judgment, remain intact. In our judgment, these are clearly in line with other authority and reflect the breadth of the statutory provisions which govern the functions of the Parole Board. In short, there is no implied limitation on the nature or temporal character of the information the Parole

Board may take into account in assessing risk: the only constraint is that the board must act fairly.

155. Drawing these strands together, whereas we agree with Mr Collins that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission, shared by Mr Fitzgerald albeit advanced in slightly different terms, that it is precluded from considering evidence of wider offending when determining the issue of risk. The distinction between these formulations is important, not least because it was occasionally obscured during the course of Ms Kaufmann's argument. It was, however, very clearly drawn at the beginning of her submissions in reply. As for Mr Collins's submission that the distinction between taking account of evidence of wider offending and refraining from making determinations about it is artificial, we cannot agree: it is important. At the risk of repetition, in the circumstances of the present case, this evidence or material could have been used as a means of probing and testing the honesty and veracity of Mr Radford's account.

156. The next question which arises is whether it was irrational for the Board not to have undertaken further inquiry.

157. Both Mr Collins and Mr Fitzgerald stressed the height of the bar that needs to be surmounted before a conclusion of irrationality could properly be drawn. Apart from all the judicial statements about this, from which we do not resile, counsel emphasised that the dossier in Mr Radford's case contained a plethora of material about him which appeared to cover all relevant ground, as well as detailed, careful expert evidence. Moreover, the dossier covered all the matters set out in Schedule 1 to the Parole Board Rules 2016, including "the prisoner's attitude to the offence for which the offender received the sentence which is being considered by the Parole Board". There is no express requirement to seek information about the prisoner's attitude beyond this, although such inquiry is not precluded.

158. These were powerful submissions which we have considered very carefully indeed. We recognise that this is a difficult, troubling case with many exceptional features.

159. Ultimately, however, we are driven to conclude that, in the particular circumstances of this case, the Parole Board ought to have carried out, or have instigated the carrying out of, further inquiry. Our reasons, advanced cumulatively, are as follows:

    i) There were numerous references in the dossier to "80+ potential victims". It was clear that Mr Radford's case was that he only offended against twelve victims, and that this was confined to the period October 2006 to February 2008. It follows that, putting to one side the two cases where he was acquitted, if Mr Radford's case is right the CPS had, quite remarkably, selected for inclusion in the indictment just those cases where offences had in fact been committed.

    ii) Mr Radford's account, subject to the inconsistencies we have mentioned, was punctilious in its precision as to timing and the sequence of events which led to his first offence. We do not go so far as to hold that Mr Radford's account is inherently implausible, but there was, at the very least, reason to doubt his explanations as a matter of common sense.

iii) Other aspects of Mr Radford's account, including possible minimisation of what he did in the twelve cases where he was convicted, have already been addressed by us at paragraphs 124-5 above. We believe that these concerns do not merit repetition.

iv) There were several references in the dossier to proceedings brought by victims against the Metropolitan Police. In November 2017 the judgments of both Green J and the Court of Appeal were available. It did not require an exercise in speculation to infer that this litigation might have involved some of the "80+ potential victims" and even if the Parole Board was not going to look at the number of victims, far more information about the circumstances of his offending would have been apparent.

v) Mr Radford's change of position came after at least 6 years of adherence to an account which he now accepts was completely untrue. This cannot have been an example of a prisoner persuading himself that he had not offended. This factor, coupled with Mr Radford's apparent deftness in impression management, should have engendered a considerable degree of dubiety.

vi) The Parole Board was aware, or at least ought to have been aware, that it had been provided with no material from the police or the CPS with which to probe the honesty of Mr Radford's account in relation to the index offences. The prosecution's opening note provided for the purposes of the criminal trial and the judgment of Green J could easily have been provided if sought.

vii) A key issue in this case, and one directly relevant to Mr Radford's continuing risk, was whether he was being open and honest.

160. Had some basic lines of inquiry been undertaken, it would very rapidly have become apparent that DSD was claiming that she was sexually assaulted, if not raped, by Mr Radford as long ago as 2003, and that a "rape kit" containing strips of Nytol (cf. the assertion by Mr Radford that he used Nytol only once, as well as the forensic evidence relating to DSD) and a box of condoms, amongst other items, had been found in the boot of his car. In our view, this could or should have generated further lines of inquiry, including obtaining, with her consent, a copy of DSD's witness statement used in the civil proceedings, of counsel's opening to the jury in the criminal trial and the April 2011 report relating to the conclusion of Operation Danzey. Yet further lines of inquiry would probably have led to the revelation that Mr Radford had settled the civil claims of a number of individuals who were not his indicted victims. We appreciate that the settlement was without admission of liability but that would not have precluded questions.

161. In our judgment, this material would have provided a sound platform for testing and probing Mr Radford's account, either at a pre-hearing interview by a member of the panel or at the hearing itself. The psychologists would also have been asked to reconsider their assessments in the light of it.

162. At this point, it is unnecessary to examine Ms Kaufmann's submission that this evidence should have been taken into account because it was so obviously material. The prior question which we have examined is whether this evidence should have been obtained and, in our judgment, it plainly should have been.

163. Mr Fitzgerald valiantly submitted that it was clear to the Panel that Mr Radford was a serial offender, and that whether he had or may have committed a significant number of further offences was not relevant, or should carry very little weight. We cannot accept this. Once the prior question we have identified has been asked and answered, and additional material obtained, we would hold that it was so obviously material that it would have to be considered. In any case, in strict public law terms the issue for us is whether we could be confident that this additional material could make no difference to the outcome, in other words that the Parole Board would inevitably have taken the view that it is irrelevant. It would be impossible for us so to conclude.

164. It follows that the release direction must be quashed and Mr Radford's case remitted to the Parole Board for rehearing before a different panel in the light of this Court's findings. We would encourage the Parole Board to ensure that the panel included someone with judicial experience.

The* Vires *Challenge

Preliminary Objections

165. It is convenient first to address Mr Sheldon's various submissions to the effect that the substance of the *vires* challenge should not be considered by this Court in the exercise of its discretion. He argues that all of the Claimants are out of time to challenge Rule 25. This point was not taken in the Secretary of State's skeleton argument filed for the purposes of the permission hearing, and permission was granted by this Court on an unconditional basis (cf. the position as regards the standing of the Mayor).

166. In the leading case on this topic, *R v Criminal Injuries Compensation Board, ex parte A* [1999] 2 AC 330, it could be inferred that time had been extended by the judge granting permission [340D/E], but the same inference cannot be drawn in the present case. However, in the light of Lord Slynn's summary of the position [341A-G], that makes no difference to the outcome. This Court has granted permission to the Claimants to challenge the *vires* of Rule 25, and the issue cannot now be re-opened. The timeliness or otherwise of this challenge is part of that issue. In theory, as we have previously observed in relation to standing, it could have been re-opened had an application been made to set aside permission, but none has been brought. In any event, such an application would have failed.

167. Putting that argument to one side, the claims by DSD/NBV and the Mayor are clearly not out of time. We agree with the Claimants that there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract. Cases falling into the first category include *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 (where the point was not taken on behalf of the Secretary of State, but would have been had it possessed merit), *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 443 and *R (T) v Chief Constable of Manchester* [2015] AC 49; an example of a case falling into the second category is *R (Cukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin). It is arguable that Mr Sheldon is on stronger ground in relation to the claim of News Group Newspapers Ltd but, if necessary, we would grant an extension of time. Aside from the futility of closing the door of the court on Mr Millar

once others have passed through it, and without prejudice to our conclusion that it is too late to take a time point at this stage, there are good reasons to extend time, not least because it was only the circumstances of this particular case that focussed press attention on the breadth of Rule 25.

168. We were not impressed by Mr Sheldon's subordinate arguments on discretion. Allowing these Claimants to proceed, even if we could properly prevent them, will not generate a spate of similar claims directed to other Parole Board decisions given, but not publicly promulgated, over the years. Although it is correct to point out that these Claimants have received everything (and more) to which an *intra vires* rule might have entitled them, the legitimacy of Rule 25 falls to be judged at the point in time before these proceedings were brought. We were informed that the Secretary of State is reconsidering Rule 25 and will not publish the result of his review until after judgment has been handed down, but this cannot be a reason for our not doing so.

Are any Fundamental Rights in Play?

169. Dealing first with the principle of open justice, it is not in dispute that this principle is one of constitutional importance and that the rights which flow from it are fundamental in nature. We agree with Mr Millar that the open justice principle is multifaceted and its application is not "all or nothing". As Lord Toulson JSC explained in *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2015] AC 455, at [115]:

> "The fundamental reasons for the open justice principle are of general application to any such body [viz. a body exercising the power of the state], although its practical operation may vary according to the nature of the work of a particular judicial body."

170. The open justice principle includes the obligation to hold hearings in open court to which the public has access (see *Attorney General v Leveller Magazine Ltd* [1979] AC 440, at 450, per Lord Diplock); the right of the press and others to report on legal proceedings (see *Khuja v Times Newspapers* [2017] 3 WLR 351 at [16], per Lord Sumption); the placing into the public domain of judicial decisions (see *R (Mohammed) v Foreign Secretary* [2011] QB 218, at [37] - [41], per Lord Judge CJ and [189], per Lord Neuberger MR), even in cases where there has been a closed material procedure; and, the obligation to ensure that evidence or information communicated to a court is presumptively available to the public (see *R (Guardian News & Media) v City of Westminster Magistrates Court* [2013] QB 618).

171. The open justice principle does not apply to tribunals which are not courts, and Mr Sheldon submits that the Parole Board is not a court for these purposes. He does accept that it is a court for other purposes, including the application of Article 5(4) of the Convention. That submission receives some support from the fact that the board has inquisitorial functions, deploys a degree of informality and does not apply strict rules of evidence; and that between 1968 and 1997 its function was to advise the Secretary of State rather than make binding determinations. However, matters have moved on and the critical question is whether the body at issue exercises the judicial power of the state: see *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370, at 417G, and *City of Westminster Magistrates Court* (*ibid*), at [46]

approved in *Kennedy* (*ibid*), at [115]. In the case of the Parole Board, that question must be answered affirmatively: see *R (Giles) v Parole Board* [2004] AC 1, at [10], and *R (Brooke) v Parole Board* [2007] EWHC 2036 (Admin), at [2], [14] and [17] (Divisional Court) and [2008] 1 WLR 1950, at [53] (Court of Appeal). The judicial function of the Parole Board is to determine whether a prisoner should remain confined after the expiry of his minimum term. Adjudications upon matters of individual liberty are paradigm examples of the exercise of a judicial function.

172. Mr Sheldon's more powerful submission was that the Parole Board should be envisaged as occupying an exceptional category because historically its hearings have been in private. He heavily relied on *Pickering* and Lord Bridge's analysis in that case of *Scott v Scott* [1913] AC 417, at 437-438 where Lord Haldane LC carved out a number of exceptions to the open justice principle, including proceedings involving wards of court, the mentally ill and matters of national security ("As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield."). According to Lord Bridge (at [417D-F]):

> "Thus the exceptions in paragraph (a) are all proceedings requiring for their just disposal the safeguard of privacy which proceedings in wardship always attracted. So also are the proceedings under Part VIII of the Act of 1959, now Part VII of the Act of 1983, which are concerned with the same subject matter as was formally under the jurisdiction of the judges in lunacy acting on behalf of the Crown as *parens patriae*. Paragraphs (c) and (d) speak for themselves [national security cases]. The proceedings before a mental health review tribunal, itself the creature of the Act of 1959, exercising a novel jurisdiction over the discharge of patients liable to be detained under the Act, are, for obvious reasons, included in the exceptions as proceedings which require for their just and effective conduct the same cloak of privacy as the common law had always drawn around proceedings in the other categories mentioned."

173. Mr Sheldon's submission, as we understood it, was that the right to information which the Claimants invoke must be seen in the context of a justifiable Rule requiring Parole Board proceedings to be held in private. Accordingly Rule 22, which the Claimants carefully do not seek to assail, has direct consequences for Rule 25 which they do attack.

174. The Claimants were highly dismissive of Mr Sheldon's argument, contending that he was aiming at the wrong target or was setting up a straw man. Although we recognise some of its force we have concluded that his argument cannot be accepted. Notwithstanding Lord Bridge's broad statements of principle in *Pickering*, which are strictly speaking *obiter*, it is noteworthy that Rule 24(4) of the Mental Health Tribunal Rules 1960 did permit the tribunal in its discretion to direct that information about the proceedings before it could be made public. Furthermore, the law has not remained static, and recent jurisprudence makes clear that the open justice principle retains its vigour even in situations where the imperatives of national security have led to proceedings being held, at least in part, in private: see *Mohamed* (*ibid*), at [41], [44], [46], [134], [189], [262] and [285].

175. Particularly valuable in our view is the extended analysis of the open justice principle by Lord Toulson JSC in *Kennedy*, at [113]–[140]. He stressed the role of the court in exercising a broad judgment as to where the public interest lies "in infinitely variable circumstances". In our judgment, a correct application of this approach leads to the conclusion that the open justice principle may well require some information about proceedings which are quite properly taking place in private being put into the public domain, depending on all the circumstances.

176. There are no obvious reasons why the open justice principle should not apply to the Parole Board in the context of providing information on matters of public concern to the very group of individuals who harbour such concern, namely the public itself. Indeed, it seems to us that there are clear and obvious reasons why the Parole Board should do so. This information can readily be provided in a fashion which in no way undermines the Article 8 rights of the prisoner and the confidentiality which attaches to it.

177. Our conclusion is that the open justice principle, or more particularly the right of the public to receive information which flows from the operation of that principle, applies to the proceedings of the Parole Board.

178. A number of subsidiary arguments were advanced as to whether DSD and/or NBV have a right to information *qua* victims pursuant to Directive 2012/29/EU, the Code of Practice for Victims of Crime and the Victim Contact Scheme Guidance PI 48/2014, and whether providing information to victims is in any case not a breach of Rule 25 because that would not amount to the making of such information public within the meaning of that Rule. We consider that these submissions lead nowhere. They cannot impact on the position of News Group Newspapers Ltd. Neither DSD nor NBV was given any information about the release decision before these judicial review proceedings were brought.

179. Mr Sheldon's submission that limited disclosure to victims would not be to the public generally was not prefigured in his Detailed Grounds, could not properly be addressed by the Claimants, and appears to us, at first blush, to be without merit: given that there is no suggestion that the victims would be bound by any obligation as to confidentiality, there would be nothing to prevent them placing what they were told in the public domain. Finally, if the open justice principle applies, it is not required to give way because the victims might acquire relevant information by some other means.

180. In relation to the fundamental right of access to the court, the right in question concerns the ability for a victim to challenge the release direction (or, given the entitlement to be consulted in relation to licence conditions, those conditions) by bringing judicial review proceedings. It has rightly not been suggested that the door to the Administrative Court has been completely barred to them in this case but this was because it was conceded that material should be supplied to all parties on a confidential basis. The argument proceeds on the footing that the blanket restriction on the provision of information impedes or interferes with this right, or otherwise hinders its exercise: see *Raymond v Honey* [1983] 1 AC 1 and *Leech* (*ibid*), at 210A-D in particular.

181. Mr Squires' submission, strongly supported by Ms Kaufmann in writing, is that the right of the victims to bring judicial review proceedings was impeded because, in the absence of any information about the release decision and the reasons for it, they were firing into the dark. No informed assessment could be made of the merits, and no sensible advice given. In the absence of any information, all that could be said by any reasonably objective lawyer was that the decision gave rise to concern and appeared to be aberrant.

182. Mr Sheldon's answer to this submission was that it rather assumed what needed to be established, namely that there was a right to such information in the first place. He argued that in the absence of a general common law right to reasons the postulated interference did not arise.

183. In our judgment, Mr Sheldon is correct in submitting that there is no general right at common law for persons directly affected by administrative decisions to be given reasons for them, but he is incorrect is submitting that DSD and NBV's case proceeds on that premise. It does not; they invoke a different right. They rely on the principles enunciated by the House of Lords in *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, and *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, as applied by Green J in *R (Privacy International) v Revenue and Customs Commissioners* [2015] 1 WLR 397, at [142]–[162].

184. The Parole Board is a judicial body which under Rule 24(1) is required to provide reasons for its decisions and to promulgate these to the parties. DSD and NBV are not seeking to access reasons through the portal of this Rule. Their point of departure is that they have standing to bring these judicial review proceedings. Their complaint in these proceedings is not (and does not have to be) that the Parole Board owes a general duty at common law to give reasons for its release direction. It is that the release decision is irrational and that, as a separate matter, a rule exists which wrongly prevents the Parole Board from giving them any information about the proceedings, including a summary of the reasons for it.

185. In order to vindicate their argument in relation to this separate matter, the victims say that the existence of Rule 25 infringes their fundamental rights because it renders it more difficult to bring the challenge in the first place. True it is that the fundamental right being invoked flows out of the common law, but it is not equivalent to or a synonym for any right correlative to a (non-existent) duty in the Parole Board to give reasons for its decisions. As Lord Steyn stated in *Anufrijeva*, at [26]:

> "The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system."

We should add that "the individual concerned" includes a person with proper standing to seek judicial review: see *Corner House*, as discussed by Green J in *Privacy International* at [146]–[155].

186. The right to information, which flows from the right of access to the court, is not absolute and will have to yield to stronger competing public interests. However, for present purposes the Claimants do not have to be particularly ambitious; all that they need say is that their right of access to the court entitles them to *some* information about the release decision. Rule 25 disentitles them to any.

187. We would hold that an inseparable part or corollary of the victims' right of access to the court entitles them to be given some information about the substance of the release decision. In that regard, we have not overlooked the decision of the Court of Appeal in *Hasan v Secretary of State for Trade and Industry* [2009] 3 All ER 539. In that case the information sought was highly sensitive and the standing of the claimant was very much in doubt.

188. In the circumstances, it is unnecessary for us to address the parties' other arguments at common law, under Article 10 of the Convention, and in relation to the rights of victims conferred by the Directive or government policy documents.

Does s. 239(5) Authorise the Infringement?

189. The principle of legality is now well-established in our law. The authorities usually cited for it are *R v Home Secretary, ex parte Simms* [2000] 2 AC 115 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. As Lord Hoffmann explained in *Simms*, at 131E-G:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

190. Even if some degree of infringement is impliedly authorised, it is incumbent on the executive to justify this by a pressing social need and as being the minimum necessary

to achieve the objectives sought. These are matters for the court and not for the decision-maker.

191. Rule 239(5) contains general and ambiguous words which do not expressly authorise any trammelling of fundamental rights. The issues for us are whether authorisation is implied; and, to the extent that it is or may be, whether the infringement is justified.

192. Rule 25 implements a "blanket ban" on the provision of information. The courts have consistently held that a rule of this nature, which does not permit of exceptions, is both unlikely to be impliedly authorised by the enabling statute and difficult to justify. These are unpropitious starting-points for Mr Sheldon. He advanced two submissions in support of the Rule, both directed to the issue of implied authorisation. The first was that an examination of the legislative history reveals that Parliament must have authorised Rule 25. The second, effectively an argument by analogy, was that given that proceedings of the Parole Board have always been in private – a state of affairs which Parliament must have authorised despite the generality of s. 239(5) – it follows that the enabling statute also authorises Rule 25. In our judgment both of these submissions are wrong.

193. As for the first submission, Mr Squires took us carefully through the predecessors to s. 239(5) of the 2003 Act in the Criminal Justice Act 1967 and Criminal Justice Act 1991, and to Rule 25 in various versions of the Parole Board Rules promulgated in 1992, 1997, 2004 and 2011. In short, the position is that the wording of what is now s. 239(5) has not changed over the years, and that at all material times until 2011 the wording of what is now Rule 25 was either in terms that information about the proceedings should not be made public "except insofar as the chairman of the panel otherwise directs" or the Rules were silent (see the Parole Board Rules 2004). The first iteration of the formulation which did not admit of any discretion came about in 2011.

194. It follows that three sets of Parole Board Rules did not contain any equivalent to Rule 25, and that the position changed in 2011 for reasons which seem to us to be wholly unclear. Mr Sheldon submitted that the "default position" in relation to Rules made under the 1991 Act was that information would not be provided, but for present purposes there is a very important difference between a Rule which is adamantine and one which permits of exceptions. Overall, we completely fail to see how an examination of the legislative history avails Mr Sheldon in any respect.

195. Furthermore, we agree with Mr Squires that the legislative history is not relevant to the question in issue, namely, whether s. 239(5) of the 2003 Act impliedly authorises Rule 25. That question must be addressed on a narrow basis, focussing on the statutory language, and applying the rigorous approach outlined by Lord Hobhouse in the *Morgan Grenfell* case, at [45]. We answer this question, applying that approach, below.

196. As for Mr Sheldon's second submission, the separate privacy provision, Rule 22(3), raises different issues. We consider that s. 239(5) by necessary implication permits the Parole Board to regulate its own procedure and to require proceedings to be held in private where necessary, in the interests of confidentiality. An issue arises, but not for our determination, as to whether proceedings should always be held in private in the light of those interests. The pressing need and proportionality arguments are stronger

in this context than they are in the context of Rule 25, but it is unnecessary for us to express a concluded view about them.

197. Returning to the question which directly arises for our consideration, we would hold, as Lord Bingham held in *Daly* in the context of s. 47(1) of the Prison Act 1952 (at 540C), that s. 239(5) by necessary implication authorises the withholding of certain information relating to the proceedings of the Parole Board. Information which is confidential would fall into that category. However, the Rule is of such breadth that it embraces information which is not confidential, or at the very least information which can be presented in such a manner that the private rights of individuals are left respected.

198. Accordingly, the question is whether the Rule goes too far, because it imposes a prohibition which is not the minimum necessary to protect such rights. Unlike *Simms* (*ibid* 130D-G), this is not a case where it is possible, in applying the principle of legality, to construe Rule 25 in a manner which preserves fundamental rights. In line with the approach in *Leech*, and *Daly*, we have concluded that a provision which is unnecessary and/or disproportionate cannot be regarded as authorised by the enabling statute as a matter of necessary implication.

199. In our judgment, the Rule clearly does go too far. There is no objective necessity for a rule which stifles the provision of all information relating to the proceedings of the Parole Board, regardless of the justified public interest in any particular set of proceedings and of the fact that not all information needs to be safeguarded. These obvious propositions are vouched by a brief examination of the earlier versions of the Parole Board Rules containing discretionary language, the position which currently obtains in Scotland, the position in relation to Mental Health Review tribunals, and the view of the Chairman of the Parole Board that greater transparency is desirable, and by implication, achievable.

200. For all these reasons, we would hold that Rule 25(1) of the Parole Board Rules 2016 is *ultra vires* s. 239(5) of the 2003 Act.

Conclusion

201. In the circumstances which we have outlined, we uphold the challenge by DSD and NBV to the rationality of the decision of the Parole Board directing the release of Mr Radford on the basis that it should have undertaken further inquiry into the circumstances of his offending and, in particular, the extent to which the limited way in which he has described his offending may undermine his overall credibility and reliability. That is so even in relation to the offences of which he was convicted, let alone any other offending.

202. In the light of our decision, the release direction will be quashed and Mr Radford's case remitted to the Parole Board for fresh determination before a differently constituted panel. It is for the Parole Board to decide the procedure appropriate to the re-determination of Mr Radford's case, taking into account the terms of this judgment, including the observations we have made at paragraphs 159-161 above regarding the need to undertake further inquiry. We would add that consideration should also be given by the Parole Board in a case of this complexity and prominence to whether a serving or retired judge should chair the panel. We must emphasise that we have not

held, nor must we be understood as suggesting, that Mr Radford's present risk is such that his continued imprisonment is necessary for the protection of the public, or that the Parole Board should so find. Subject only to the review jurisdiction of this Court, the assessment of all the available evidence, and all matters relevant to Mr Radford's risk, is for the Parole Board alone to make.

203. We also uphold the Claimants' challenge to the *vires* of Rule 25(1) of the Parole Board Rules 2016. In the circumstances, the Claimants are, at the very least, entitled to declaratory relief: it will be for the Secretary of State (as it may be that he is minded to do) to decide how Rule 25 should be reformulated. We invite written submissions from Counsel as to the form of relief in the light of our judgment.

204. We conclude this judgment by thanking all those involved for the care and detailed consideration (under considerable pressure of time) which they have given to this case under difficult time constraints. Given that the consequence of the decision of the Parole Board was that Mr Radford was entitled to be released, it was of very real importance to ensure that the challenge was determined as quickly as possible.