Neutral Citation Number: [2022] EWHC 3181 (Admin)

Case No: CO/3803/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

R (ON THE APPLICATION OF JODY SIMPSON)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Jude Bunting KC (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Victoria Ailes (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 1 December 2022

- -

Approved Judgment

Mrs Justice Heather Williams:

Introduction

1. The Claimant, a serving prisoner, challenges the decision of the Secretary of State for Justice made under section 244ZB(3) of the Criminal Justice Act 2003 ("CJA 2003") to issue a notice of his intention to refer, and thereafter to refer, her case to the Parole Board, rather than release her on licence on her conditional release date ("CRD") of 12 August 2022. Section 244ZB was added to the CJA 2003 by section 132(4) of the Police, Crime, Sentencing and Courts Act 2022 with effect from 28 April 2022. It confers a power on the Secretary of State to refer certain determinate sentence prisoners who would otherwise be eligible for automatic release on their CRD. The effect of a referral is that the prisoner is not released until the Parole Board is satisfied that it is no longer necessary for the protection of the public for the prisoner to be confined or the prisoner reaches the end of their sentence. I am told that this is the first occasion on which the Court has considered this new statutory power, which I will refer to as the Power to Detain.

2. On 16 February 2018 the Claimant and her partner, Anthony Smith, were both convicted of offences of causing or allowing their baby, Tony, to sustain injury and of wilful neglect. Tony had suffered a catalogue of very serious non-accidental and life-changing injuries by the time he was 41 days of age. The Claimant was sentenced to a determinate sentence of ten years' imprisonment. Allowing for time served on remand and in accordance with the provisions applying to fixed-term sentences of that nature, she was due to be released on licence on 12 August 2022, the half-way point of the sentence. On 11 August 2022 the Secretary of State personally made the decision to refer her case to the Parole Board in exercise of the section 244ZB power. This decision was subsequently re-affirmed on 30 September 2022 and on 1 November 2022. (In so far as it is necessary to differentiate between them, I will refer to these, respectively, as the "August Decision", the "September Decision" and the "November Decision"; and collectively as the "Power to Detain Decisions".)

3. Pursuant to section 244ZB(3), the Power to Detain is exercisable when the Secretary of State is of "the requisite opinion". Section 244ZB(2) provides that the Secretary of State is of the requisite opinion if they believe "on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm" occasioned by the commission of an offence of murder or a "specified offence" within the meaning of section 306 of the Sentencing Code. The Claimant was convicted of "specified offences".

4. On 14 July 2022 the Ministry of Justice issued the "*Power to Detain Dangerous Prisoners Serving a Standard Determinate Sentence Policy Framework*" (the "Power to Detain Policy").

5. This claim was issued on 17 October 2022. By Order dated 27 October 2022 Steyn J granted expedition and abridged the time for the Defendant to file and serve an Acknowledgement of Service. An Acknowledgement of Service and Summary Grounds of Defence ("SGD") were filed on 3 November 2022. By now the November Decision had been made. The Defendant indicated in the SGD that he had no objection to the Claimant amending her claim to take account of this decision. The Claimant duly submitted an Amended Statement of Facts and Grounds ("ASFG") on 3 November

2022 and a Response to the SGD. By Order dated 9 November 2022, Bourne J granted the Claimant permission to rely upon the ASFG and the Response and listed the case for a "rolled-up hearing" to take place as soon as possible after 3 December 2022. This direction was subsequently varied, by consent, to enable it to be held on 1 December 2022. The Claimant's Parole Board hearing is currently listed for 3 January 2023. As the lawfulness of the referral to the Parole Board is challenged in these proceedings, the parties wanted judgment to be handed down as soon as possible.

6. The hearing took place remotely. At the outset I indicated that I would hear all of the submissions and then determine whether permission to apply for judicial review should be granted and, if so, whether to uphold the ground/s in a reserved judgment.

7. The Claimant relies upon three grounds of challenge. Taking into account refinements provided during the hearing, they are as follows:

   i) The August Decision was taken following unreasonable delay which has had the effect of unlawfully prolonging the Claimant's detention ("Ground One");

   ii) The Defendant was not of the "requisite opinion" as his belief was not "on reasonable grounds", as section 244ZB(2) requires, in relation to any of the Power to Detain Decisions and/or each of these decisions was irrational. In particular, there was no material change of circumstances that justified departing from the assessment of the Sentencing Judge who had concluded that the Claimant did not pose a significant risk of serious harm to members of the public through the commission of specified offences ("Ground Two"); and/or

   iii) Each of the Power to Detain Decisions was unlawful because the Defendant departed from the Power to Detain Policy without having good reason for doing so ("Ground Three").

8. The Claimant seeks declaratory relief if Ground One is upheld and the quashing of the Power to Detain Decisions if Ground Two and/or Ground Three succeed. At the hearing, Mr Bunting KC confirmed that Ground Two asserts both that the statutory "reasonable grounds" test was not met and that the decisions were unreasonable in the "*Wednesbury*" sense. Although not the only plank of his Ground Two challenge, Mr Bunting contends that the Power to Detain can only be exercised where there has been a material change of circumstances since the prisoner was sentenced.

9. As regards Ground Three, Ms Ailes accepts that the Defendant departed from the Power to Detain Policy in two respects, namely that the "dangerousness" test set out at para 4.8 of the policy was not met and that the Claimant had not been assessed as posing an "imminent" risk of serious harm, as contemplated by para 4.9. She takes issue with a third way in which the Claimant says that the policy was not followed, namely that there was no new or additional information, in the sense contemplated by the policy, over and above that which was available to the Court at the time of sentencing. The Defendant relies upon the 26 May 2022 OASys assessment of the Claimant in this regard, whereas Mr Bunting submits that this did not add, or did not materially add, to the information that was before the Sentencing Judge. As regards his acknowledged departure from the policy, the Defendant contends this was justified by the cumulative impact of: (i) the Court's approach to imminence of risk in *R (Secretary of State for Justice) v Parole Board* [2022] EWHC 1282 (Admin), [2022] 1 WLR 4270 ("*Johnson*")

and potential revisions to the Power to Detain Policy in consequence; and (ii) the exceptional circumstances of the case in terms of the severity of the likely harm to children if the risk materialises and the Claimant's continued denial of her guilt.

10. The Defendant relies upon a witness statement from Gordon Davison, the Public Protection Director of His Majesty's Prison and Probation Service ("HMPPS") dated 24 November 2022. The statement exhibits contemporaneous documentation showing the decision making process in this case.

11. The structure of this judgment is as follows:

    i) The facts and circumstances: paras 12 – 53;

    ii) The legal framework: paras 54 – 72;

    iii) The Power to Detain Policy: paras 73 – 80;

    iv) Ground One: discussion and conclusions: paras 81 – 96;

    v) Ground Two: discussion and conclusions: paras 97 - 126;

    vi) Ground Three: discussion and conclusions: paras 127 – 146;

    vii) Overall conclusion: paras 147 – 150.

The facts and circumstances

The Claimant's conviction and sentence

12. The Claimant was born on 23 July 1993. On 8 October 2014 she gave birth to a child, Tony. The child's father was the Claimant's partner, Anthony Smith. At about 11.20am on 18 November 2014, the Claimant took Tony to the GP's surgery. He was subsequently taken to hospital. He was suffering from very serious injuries, including eight non-accidental fractures which were the result of vigorous force being used towards him on or before his then 41 days of age and from which he would have been in considerable pain. These injuries and the infection resulting from them were so extensive that doctors considered there was a high chance that Tony would die from multi-organ failure secondary to his injuries and septicaemia. Fortunately Tony survived, but he sustained life changing injuries, including the amputation of both his legs, profound impairment to both his hands, the loss of working thumbs, a lost left hip joint which could not be reconstructed and full hearing loss in one ear and partial hearing loss in the other ear.

13. The Claimant and Anthony Smith were charged with two offences in relation to these events: causing or allowing Tony to sustain serious injury contrary to section 5(1) and 5(8) of the Domestic Violence Crime and Victims Act 2004 ("DVCVA 2004") and wilful neglect, in that they had failed to seek immediate medical attention for his injuries, contrary to section 1 of the Children and Young Persons Act 1933 ("CYPA 1933"). Both defendants denied the charges and their trial took place before HHJ Statman and a jury at the Crown Court at Maidstone. By the jury's verdict, returned on 16 February 2018, they were both convicted of the two offences.

14. HHJ Statman passed sentence on 19 February 2018. He sentenced the Claimant to a determinate sentence of ten years imprisonment on the principal charge, with a term of five years imprisonment to be served concurrently on the wilful neglect offence. In accordance with the law as it then was, the Judge informed the Claimant that she would serve half of her sentence less any time she had already spent in custody and she would then remain on licence until the sentence concluded. Allowing for time already served, her sentence expiry date was (and is) 14 August 2027. The half-way point was 14 August 2022, a Sunday, and thus the Claimant's CRD was scheduled as 12 August 2022.

15. I have taken my summary of the facts at para 12 above from the Judge's Sentencing Remarks. Whilst there is some ambiguity in the documentation, I am told by Ms Ailes that the Sentencing Judge did not have a Pre-Sentence Report on the Claimant. He did have a report from a consultant psychologist, which concluded that the Claimant's cognitive function was at the bottom of the low average range. The Judge was satisfied that she was able to provide proper care for Tony and that she was not suffering from any relevant mental disorder. The following is also apparent from HHJ Statman's Sentencing Remarks:

    i) The Claimant was of good character at the time of the offences concerning Tony (Transcript at 2H);

    ii) During cross examination the Claimant had spoken of her love for her co-defendant and she had remained in a relationship with him, including after they were charged and bailed. He considered that she put her relationship with Mr Smith before her care for Tony (3E-F);

    iii) There was no suggestion that the Claimant had shown violence towards a child in the past (4H);

    iv) An aggravating feature was the Claimant's failure to seek medical help. The Judge observed that any mother would have appreciated immediately if their child had sustained a fractured ankle (the most serious of the injuries) and that it should have caused the Claimant to immediately take the child for emergency treatment (2E and 5A). A further identified aggravating factor was the prolonged suffering that Tony underwent prior to being taken to the GP in circumstances where he was particularly vulnerable, given his young age (5B-C);

    v) The Claimant had shown no remorse (5D);

    vi) After considering with "the greatest care" whether the Claimant posed "a significant risk of serious harm, in this case in relation to babies or young children?", he had concluded that the statutory gateways for the imposition of an extended sentence were not met (5E-F);

    vii) As he could not be sure which of the two co-defendants had caused the injuries, he could not sentence either of them as a perpetrator and he sentenced both of them on the basis that they allowed the perpetrator to act as they did (5H-6A);

    viii) He considered both defendants to be equally culpable (6B); and

ix) He passed the maximum sentence that was permitted by Parliament, indicating that he could not "envisage a worse case than the one which I have had to deal with, with this jury, over the course of the last two weeks" (6B-C).

The 26 May 2022 OASys assessment

16. An OASys assessment dated 26 May 2022 was prepared by Caroline Harrison of the Kent, Surrey and Sussex Probation Service. The Claimant was interviewed for the purposes of this review. The document included the following passages:

> "**2.8** Why did it happen – evidence of motivation and triggers
>
> Both Mr Smith and Ms Simpson deny the offence and deny causing injury to Tony (Jnr). However, in interview, Ms Simpson admitted that she was misusing heroin and crack cocaine during her pregnancy, and that they were both using heavily after Tony (Jnr) was born. She described a violent and problematic relationship with Mr Smith, and she seemed to prioristised [sic] this intimate relationship over the welfare of her child. Ms Simpson claimed, in interview, that she witnessed Mr Smith 'being rough' with Tony (Jnr)…When I asked Ms Simpson what she did to stop this behaviour she appeared shocked that I would ask this question, and told me 'you can't tell a 40 year old man what to do'. Ms Simpson appeared very immature and did not seem to understand the gravity or seriousness of her conviction, and the impact of their actions on Tony (Jnr).
>
> …..
>
> In interview, Ms Simpson spoke a lot about Mr Smith, and their relationship. She described Mr Smith as a 'violent travelling man' and seemed to accept this, speaking about him fondly. She clearly did not question his actions, and prioritised his needs before the needs of their baby.
>
> **2.11** Does the offender accept responsibility for the current offences
>
> Ms Simpson denies causing injury to Tony (Jnr). She said that she has 'no idea' how the baby received the injuries stated, but can only think Mr Smith was 'too rough' with him. It was rather difficult to interview Ms Simpson at times, as she did not speak openly or honestly. She had a noticeable smirk on her face throughout the interview, and did not display any emotion. In my assessment, she has limited understanding of the impact of her offending behaviour.

2.12 Pattern of offending (consider details of previous convictions)

…There is no identifiable pattern of violence or a risk to children.

2.14 Identify offence analysis issues contributing to risks of offending and harm. Please include any positive factors

Ms Simpson remains in denial with regard to the index offences. She does not have a history of violence, but admitted to being violent toward Mr Smith and described their relationship as 'violent and chaotic'. In my assessment, Ms Simpson fails to grasp the serious nature of her offending behaviour and this subsequent conviction. She said, more than once during the interview, that she doesn't want to 'dwell on the past' and that she wishes to 'move on with her life'. Whilst it is important that she moves on positively, she would benefit from undertaking some victim empathy work, as well as explore her motivation for committing this offence.

An update from the OS in November 2019 states that she demonstrates a level of shame and guilt with regards to her offending and particularly the subsequent loss of her son but struggles to piece together how the circumstances evolved.

11.10 Identify thinking / behavioural issues contributing to risks of offending and harm. Please include any positive factors.

During interview it was quite difficult to engage in any meaningful discussion with Ms Simpson. She appeared reluctant to discuss her personal circumstances, motivation or reasons for offending. She struggled to make eye contact, and clearly found it difficult to answer questions. Her interpersonal skills were poor, and when discussing the index offence (especially given the sensitive and traumatic content of these discussions) she smirked throughout, and did not seem to take the conversation seriously.

In my assessment this needs to be explored further whilst she is in custody. It could be, for example, that Ms Simpson struggles to understand what is being asked of her, or struggles to communicate how she feels. At the current time, I have assessed that thinking and behavioural issues are linked to her offending behaviour and risk of serious harm…

> **12.9** Identify issues about attitudes contributing to risks of offending and harm. Please include any positive factors.
>
> …Ms Simpson presents with a concerning attitude towards the index offence and the ongoing impact of her offending behaviour. It may be that Miss Simpson struggles to display emotion, and has a very poor attitude but it is a concern that Ms Simpson does not understand the motivation or impact of her offending behaviours ,and what she will need to do to address to reduce her risk.
>
> This will have to be addressed in the sentence plan and in the community."

17. As the OASys form records, the assessment of risk is undertaken on the basis that the prisoner could be released back into the community imminently. The available categories of risk (which are also set out on the form) are as follows:

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

18. The risk of the Claimant causing serious harm to adults was assessed as "Low". The risk of her causing serious harm to children was assessed as "Medium". In this regard the assessment said at R10.3:

> "The risk to children is assessed as medium. Ms Simpson denies ever causing any harm to Tony (Jnr) and has no insight into the motivations or impact of her offending behaviour. She has demonstrated a lack of victim empathy, and aside from detoxing from drugs, has not addressed ongoing risk factors. If Ms Simpson were to fall pregnant in the community or have regular unsupervised contact with a child then the risk would increase and contact would be made with childrens [sic] services."

19. Circumstances identified as likely to increase the risk were if the Claimant lapsed back into drug use, resumed a relationship with Mr Smith, formed another relationship,

became pregnant, had unsupervised contact with any child or became increasingly socially isolated without support. Factors identified as likely to reduce the risk were Approved Premises ("AP") staff and facilities, the Mental Health In-Reach Team / Community Mental Health Team, victim empathy work, substance misuse relapse prevention work, offending behaviour work (in custody and on release), relationship work, mentoring, the Freedom Programme on release and successful engagement with licence conditions on release. The assessment noted at R11.12 that the Claimant was "currently in denial, and does not appear motivated to address her risk factors".

20. The statistical tools assessed the likelihood of the Claimant reoffending within the next two year as "Low". However, the reviewer commented that taking into account dynamic factors and the Claimant's lack of insight and remorse, she considered that Ms Simpson posed a medium to high risk of reoffending. The OASys also set out the intended licence conditions under which the Claimant was to be released. I refer to the detail of these conditions at para 27 below.

MAPPA management

21. The CJA 2003 provided for the establishment of Multi-Agency Public Protection Arrangements ("MAPPA") in each of the 42 criminal justice areas in England and Wales. Under these arrangements, the Police, Probation and Prison Services work together with other agencies to manage the risks to the public posed by violent and sexual offenders living in the community. All MAPPA offenders are assessed to establish the level of the risk of harm they pose to the public. The categorisation system is the same as that employed in OASys assessments (para 17 above). The level at which a prisoner is managed by MAPPA will depend on a number of factors. The Claimant is managed at Level 3 because of the high profile nature of the offences.

The HMPPS Panel

22. As explained in Mr Davison's statement, under the Power to Detain Policy a prisoner's case is usually considered (at least in the first instance) by the HMPPS Panel, to whom the Secretary of State delegates part of the decision making. This is a panel of senior HMPPS staff based in the Public Protection Casework Section ("PPCS"). It comprises the HMPPS Lead Psychologist, the Executive Director for Security and the Chief Probation Officer (or another senior representative in their absence). It is supported by a secretariat which is part of the PPCS, within the Public Protection Group ("PPG") of HMPPS. Mr Davison is Head of the PPG.

Referral of the Claimant's case to the NSD

23. The Claimant's case was formerly managed by the Kent Surrey and Sussex Region of the Probation Service. On 15 July 2022 it was referred to the Critical Public Protection Casework ("CPPC") Team in the Probation Service's National Security Division ("NSD") because of the high profile of the case. On the same day it was registered as a CPPC case; and on 22 July 2022 management of the case was transferred to the NSD London, Kent, Surrey Sussex Region.

24. On 29 July 2022 Mr Davison attended a meeting with the Probation Director of the NSD and the Regional Probation Director for Kent, Surrey and Sussex at which the case was discussed. At that stage it had not been formally considered under the Power

to Detain policy. In his statement, Mr Davison says that this was because "the general view within the Kent Surrey and Sussex Region had been the threshold for a referral was not met". He suggested that a Power to Detain assessment be made and this was agreed.

The 8 August 2022 assessment

25. The Power to Detain assessment was undertaken by Gillian O'Brien, the Head of the NSD London and Kent Surrey Sussex Unit on 8 August 2022. Her report indicated that she had reviewed the minutes of a MAPPA meeting on 6 July 2022 and the 26 May 2022 OASys Assessment. Her recommendation was that the case did not meet the required legal threshold to be referred to the Parole Board under the Power to Detain legislation. Her discussion of the risk presented by the Claimant included the following passages:

> "…Her behaviour in prison has been compliant. There is no evidence of a pattern of behaviour.
>
> The antecedents and circumstances of the index offence indicate that the risk to children would apply in very specific circumstances – i.e. if Ms Simpson had unsupervised access to and care of young children, or if she became pregnant. This is identified in the oasys assessment and I would endorse this. There is no evidence of a risk of immediate harm to stranger children who she might encounter in everyday life.
>
> The licence conditions on release for Ms Simpson include residence in Approved Premises, curfews and licence conditions preventing contact with children and requiring the disclosure of any developing relationships. She has licence requirements to address substance use and prevent contact with her co-defendant. It is noted that she will be living a significant distance from her co-defendant. The licence runs for five years and these requirements will significantly mitigate the risk. It should be noted that the Children's Services would be likely to take immediate action should Ms Simpson have contact with/care of young children, or become pregnant, for many years to come.
>
> …..
>
> The information that this application is based on was available in its entirety to the sentencing court. Media reporting at the time makes it clear that the court was fully aware of the life-changing injuries caused to the victim. There is no information which has subsequently come to light, and Ms Simpson's behaviour in prison has not raised further concerns about her risk.
>
> …..
>
> Whilst Ms Simpson's index offending had catastrophic results for her young baby, I am not persuaded that she would meet the

> test for dangerousness. Her offending was committed in very specific circumstances which she will not be in a position to repeat.
>
> …..
>
> Ms Simpson has complied with prison rules. Whilst she had not acknowledged her responsibility for the offending, this of itself does not increase her risk of further harm, and no further custodial interventions have been identified. Her risk is more likely to be reduced through close supervision in the community, particularly in developing her ability to relate to other people, and sustaining abstinence from drugs. In these circumstances I am not persuaded that detaining her potentially to the end of her sentence, at which point she could be released without licence supervision, would be in the public interest."

The August Decision: events 8 – 11 August 2022

26. On 8 August 2022, a submission was sent to the Defendant's Private Secretary on behalf of Sara Robinson, the Director of the NSD, giving him advanced notice of the imminent release date for the Claimant and for Mr Smith. The submission had been cleared by Amy Rees, the Director General of the Probation Service. It said that the Claimant had been assessed as not meeting the threshold for the Power to Detain provisions. The three page document said that Ms Simpson had been assessed as posing a High risk of serious harm to children on release. (Whilst she had been assessed as High risk, this did not reflect the most recent OASys, which assessed the risk as Medium, as I have already indicated.) Paragraph 7 of the submission said:

> "It would need to be shown that they present a risk of committing imminently upon release murder or other specified serious offences. It is our assessment that there is no such imminence in either case. Whilst the assessment of risk of harm is that of high, the antecedents and circumstances of the index offences indicate that the risk to children would apply in very specific circumstances, that being if either Ms Simpson or Mr Smith had unsupervised access to and care of young children, and for Ms Simpson if she became pregnant. There is no evidence of a risk of immediate harm to stranger children who they might encounter in everyday life."

27. The submission appended a list of the licence conditions that Ms Simpson was to be subject to on her release. In addition to the standard requirements (such as keeping in touch with her supervising officer and residing at an approved address), the conditions included: not to enter the Kent area without prior approval; not to seek to communicate with the victim or his family; to notify her supervising officer of any developing intimate relationships; not to have unsupervised contact with children under 16 without prior approval (save for where it was inadvertent and not reasonably avoidable); to comply with requirements imposed by her supervising officer to ensure she addresses drug related / offending behaviour problems; not to contact Anthony Smith; to confine herself to the AP during a night-time curfew, initially to run from 7pm to 7am and to

report to staff at the AP daily between 11am and 3pm, unless otherwise authorised; and not to reside in the same household, even for one night, with any children under the age of 18 without prior approval.

28. The Defendant's Private Secretary responded on the morning of 9 August 2022 indicating that the Minister's Special Advisers had requested a revised submission which included what powers the Secretary of State had in this situation and what "the plan is to ensure he's never told about such a high profile case so late again".

29. With the assistance of colleagues, Mr Davison prepared a revised version of the submission, which he emailed to the Defendant's Private Secretary. There were no new accompanying documents. The revised document summarised the Power to Detain and its effect. It referred to the "restrictions" on cases which may be referred to the Parole Board that were set out in the Power to Detain Policy, in particular the test of "dangerousness" at para 4.8 of the policy (para 74 below). The submission said of these restrictions:

> "Whilst the statutory provisions are drawn quite broadly, it was agreed that the policy should define the type of offender in scope more narrowly, and this was signalled to the House when the clauses were being debated".

30. As to whether the case met the criteria identified in the Power to Detain Policy and the options open to the Secretary of State if it did not, Mr Davison wrote:

> "10. Based on their current assessed risk, undertaken by the Probation Service, and having regard to the restrictions in the published policy, it would be very difficult indeed to make an arguable case to refer…Ms Simpson…to the Parole Board for a release decision. However, it would be open to you to refer their case to the Parole Board outside the terms of the published policy, though you would need a reason to do so. In light of the recent High Court decision in the case of Leslie Johnson, which clarified that, when applying the statutory release test, the risk posed by an offender is not limited by a temporal element, it would be possible to argue that the Secretary of State should apply the same principle to these cases. Further arguments for referral might be found to argue that, given the exceptional cruelty of their offending and their current high risk of serious harm, the Parole Board should rule on whether their risk is capable of being effectively managed in the community using the powers available to the Probation Service and its partner agencies…
>
> 11. We would need to be careful to avoid scoping in potentially thousands of cases by effectively removing the concept of imminence in every case. Going forwards, Public Protection Group and GLD will review the policy to ensure that it addresses the import of the *Johnson* judgment."

31. Mr Davison describes a meeting with the Secretary of State that took place shortly after this revised submission was sent to him (para 37 of his statement). The other attendees included Ms Rees, the Director General of the Probation Service. He says:

> "…the Secretary of State indicated a view that the Claimant should be referred to the Parole Board. The Director General of Probation said that she could say confidently that the Probation Service could manage the risk posed by the Claimant in the community, as she was not a risk to children she was not looking after. However, the Secretary of State did not agree with the assessment that the risks were manageable and that it was not as clear cut as she suggested. Accordingly, the agreed actions from the meeting were for me to draft a referral to the Parole Board and to inform them of the decision to refer the case."

32. A summary of the meeting was circulated in an email from the Defendant's Private Secretary sent at 4.54 pm on 9 August 2022. The first action assigned to Mr Davison was to draft a referral to the Parole Board "based on the Johnson judgment". The email said that the Secretary of State thought they should refer the Claimant's case to the Parole Board for two reasons "first of all for risk and second for public confidence".

33. Mr Davison indicates that he emailed colleagues at 1.40pm on 9 August 2022 to inform them that they were going to make a referral to the Parole Board, who should be notified to expect it on 11 August 2022. He also observes in his statement that no final decision had been taken at this stage. Mr Davison says that the PPCS then instigated requests for various documents, including the most up to date OASys assessment and the Judge's Sentencing Remarks. The Probation Service were asked to complete sections 1 – 12 of the Power to Detain Referral Form. This was supplied by the Probation Service at 5.20pm along with the 26 May 2022 OASys assessment. Mr Davison says that he was not aware of this OASys assessment at that stage. Earlier OASys assessments completed on 18 November 2019 (fast review) and on 30 March 2022 (full review) had assessed the Claimant as posing a High risk of serious harm to children. Assessments at the MAPPA meetings held on 9 March, 4 May and 6 July 2022 had also assessed the Claimant as a High risk to children, although this assessment was reduced to a Medium risk subsequently (para 44 below).

34. On the 10 August 2022, the Head of the Post-Release and National Security Casework Team received a further version of the Power to Detain Referral Form with additional content added by the Probation Service. She then completed the remainder of the Form by adding the reasons that Mr Davison had provided to her. He says that he formulated these reasons to reflect the views expressed by the Secretary of State at the meeting on 9 August 2022. A submission was sent to the Defendant for consideration at 6.45pm on 10 August 2022. It invited the Secretary of State to note that a referral would be made to the Parole Board using the statutory power, but outside the terms of the policy. The submission annexed a list of the relevant specified offences, the Power to Detain Policy and the draft Power to Detain Referral Form.

35. Shortly after this a telephone call took place involving, amongst others, the Secretary of State, the Director General of the Probation Service and Mr Davison. The outcome was that Mr Davison was asked to update the draft Power to Detain Referral Form to reflect the views expressed by the Secretary of State during the call. An email from the

Defendant's Private Secretary sent later that evening contained a readout of this discussion (para 53 of Mr Davison's statement). It said that the Claimant's case met the Power to Detain Policy requirement for new or additional information as "the OASys is new evidence that Ms Simpson remains high risk of serious harm, a point not available at the time of sentencing". This was not an accurate characterisation of the most recent 26 May OASys assessment, which had not been seen by either the Defendant or Mr Davison at this stage (as he confirms at para 53 of his statement). The text of the email said that the Claimant met the dangerousness test set out in para 4.8 of the policy, as:

> "We cannot manage her risk to be an unregulated babysitter/carer or having children. This should emphasise that Ms Simpson is of high risk and we have difficulty assessing her trigger points. This argument should also spell out that Ms Simpson also meets 4.9 in that she is assessed as being very high risk of serious harm on OASys."

36. As I have already indicated, this was inaccurate. Ms Simpson was currently assessed as a Medium risk in the OASys and she had never been assessed as a Very High risk. The readout also said that the public interest test at para 4.12 of the Power to Detain Policy was met, as due to the level of risk, her release "would test public confidence".

37. Mr Davison updated the draft Power to Detain Referral Form on the following morning, 11 August 2022. Shortly afterwards, a further meeting took place with the Defendant. The readout of the meeting noted changes that the Secretary of State had asked to be made to the draft. These included: acknowledging that the Claimant posed a High risk of harm, not a Very High risk; that the referral should be "under the *Johnson* test"; and that the text should indicate that it would not be possible to prevent her pregnancy or unregulated babysitting.

38. Mr Davison then completed the Power to Detain Referral Form to reflect the points raised. At para 58 of his statement he says:

> "In making his decision, I am clear that the Secretary of State knew that he was departing from policy in two respects: that he was making a referral notwithstanding that the Claimant was not assessed as posing a '*very high risk*' of harm on OASys and that he was departing from the approach taken to imminence under the policy. He also knew that officials' view was that there was no 'new' information to support a referral. This was not the intended meaning of that policy at the time of drafting and was not the meaning used for other offenders referred to the Parole Board prior to that date; however…he concluded that the fact that the Claimant *remained* a high risk and had not reduced her risk while in custody did nevertheless constitute new information in accordance with § 4.5 of the policy." (Emphasis in original.)

The Power to Detain Referral Form

39. The Referral Form was submitted to the Parole Board on 11 August 2022. The first page of the form incorrectly stated that the Claimant has been assessed as posing a Very

High risk of serious harm to the public. This has not been corrected. At Section 8 of the document, her current risk of serious harm to children was stated as High, which was inaccurate so far as the most recent OASys assessment was concerned. The justification for making the referral was set out in Section 14 and included the following:

> "The Secretary of State submits that Ms Simpson's case meets all the criteria in the published policy with two exceptions (the level of her assessed risk of serious harm, and imminence).
>
> Firstly, in accordance with paragraph 4.5 of the published policy, there is new or additional information not available at the point of sentencing. After she was sentenced, a formal risk assessment for her was undertaken, using the Offender Assessment System or OASys. That was the first time that a comprehensive analysis of her risks and needs had been produced. The resulting assessment was that she represents a high risk of serious harm. That remains the assessment, notwithstanding the five years she has spent in custody and even though she has completed the following courses: the Freedom Programme (for survivors of domestic violence), Coping with Loss, Understanding Forgiveness and Sycamore Tree (Victim awareness). The policy anticipates that the risk will be very high risk of serious harm, but the Secretary of State exercises his discretion to proceed with this referral on the basis of high risk of serious harm, owing to the nature of the harm which may result and the extremely significant impact of reoffending."

40. The document also said that the Secretary of State was satisfied that the Claimant met all the limbs of the dangerousness test set out at para 4.8 of the Power to Detain Policy. At the hearing, Ms Ailes accepted that this statement is not correct, so far as limb (b) is concerned, given that the requirement of imminence was not met (para 74 below). The document then referred to *Johnson* indicating that:

> "…the Secretary of State considers that the *Johnson* judgment has implications for the policy and has asked officials to review it, to ensure that the Secretary of State considers more than just the imminence of the assessed risks when determining whether to use his statutory power. The *Johnson* judgment may have wider impact on the policy given its application to risk of an offender and how bodies ought to consider it.
>
> Whilst it may be that Ms Simpson's risk may not manifest itself instantly after she leaves prison, given *Johnson* the SSJ considers he ought properly to consider this limb circumspectfully and therefore applies this limb per *Johnston* [sic] to find her risk will manifest itself following release to the extent she ought properly to be considered by the Board.
>
> On limb (c), the details of her conviction and OASys assessment provide credible and strong evidence of the risk of serious harm which she presents.

> On limb (d), the Secretary of State is not satisfied that the licence arrangements are sufficient, in accordance with limb (iv) of the dangerousness test. Whilst she is prohibited by licence conditions from having unsupervised access to children, she will not be supervised for 24 hours a day, 7 days a week, she might undertake informal babysitting undetected or become pregnant, so it is not beyond the realms of possibility that she will gain access to children in an environment in which safeguarding checks are not undertaken or required.
>
> …..
>
> Finally, in accordance with paragraph 4.12 of the policy, due to the level of risk should she be released, it would test public confidence. Given the terrible injuries which she inflicted on Tony, an extremely vulnerable young victim, the public must have confidence that she is safe to be released, not automatically released. She should remain detained and should use this additional time served in prison to reduce her risk of harm, by completing any formal programmes for which she is assessed as suitable or by undertaking other risk reduction work."

41. Section 17 of the Referral Form indicated that the referral had been "personally authorised" by the Defendant.

Notice given to the Claimant, representations made and further risk assessment

42. On the same date, 11 August 2022, the Defendant sent the Claimant a notice pursuant to section 244ZB(4) CJA 2003 (para 62 below), stating that the automatic release provisions no longer applied to her and that instead of being released on 12 August 2022, her case was to be referred to the Parole Board who would determine if it was no longer necessary for the protection of the public for her to remain confined.

43. The Claimant's solicitors sent an urgent letter to the Defendant on 25 August 2022, explaining that it should be treated as a pre-action protocol letter before claim and as representations about the referral of her case to the Parole Board pursuant to section 244ZB(6)(c) and (12) (para 62 below). By this time a further OASys assessment dated 17 August 2022 had been prepared. The assessment of the Claimant's risk was the same as in the 26 May 2022 report.

44. On 31 August 2022 a MAPPA meeting downgraded the Claimant's risk of serious harm from High to Medium. The meeting minutes include the following:

> "The risk is not immediate and would occur following a change of circumstances following release from prison. The change in circumstances could be resuming her substance misuse, entering into a new relationship or into a new friendship with an individual with young children. Ms Simpson denies ever causing any harm to Tony…and has no insight into the motivations or impact of her offending behaviour. She has demonstrated a lack of victim empathy, and aside from detoxing from drugs, has not

> addressed ongoing risk factors. If Ms Simpson were to fall pregnant in the community, or have regular unsupervised contact with a child, or children, then the risk would increase and contact would be made with children's services immediately."

The Parole Board

45. On 12 September 2022, Sir John Saunders considered the Claimant's parole review on the papers and directed that it should be determined at an expedited oral hearing to be listed after 19 December 2022. He observed that:

> "The reference does not seem to be compliant with the Secretary of State's own policy and the evidence which is said to support the reference is overstated. These may well lead to the conclusion that the principal reason for the reference is that it would 'test public confidence' if she was released bearing in mind the awful injuries the child suffered and the amount of adverse publicity there has already been to Ms Simpson's release…"

The September Decision

46. Following the change of Government, Mr Davison prepared a submission for the new Secretary of State attaching the Claimant's representations of 25 August 2022, the Power to Detain Policy, the 8 August 2022 assessment by Gillian O'Brien and the material that was before the previous Secretary of State. The submission, dated 26 September 2022, made no recommendation as to the decision to be reached, instead indicating that it was for the Secretary of State to consider whether he was of the same view as his predecessor having taken account of the representations.

47. In his statement Mr Davison acknowledges that the submission was incorrect in stating at para 7 that the Claimant's assessed risk "at the time of referral was, and continues to be, 'high'". He explains that at this time he was not aware of the 17 August 2022 OASys assessment or the assessment made at the 31 August 2022 MAPPA meeting.

48. By email sent on 28 September 2022, Mr Davison was informed that the new Secretary of State was of the same view as his predecessor, notwithstanding the representations. This outcome was conveyed to the Claimant's solicitors in a relatively brief letter dated 30 September 2022, which indicated that the Secretary of State remained of the view that there were reasonable grounds for believing that she posed a significant risk of harm to members of the public by the commission of specified offences should she be released.

The November Decision

49. Mr Davison explains that it was decided that the Claimant's case should be returned to the Secretary of State for a further review, in light of the previous failure to refer to the current OASys and MAPPA assessments of her risk (para 72 of his statement). To this end he prepared a further ministerial submission dated 31 October 2022. By this time, the Rt Hon. Dominic Raab was Secretary of State for Justice again. The attachments to the submission included Gillian O'Brien's assessment of 8 August 2022, the Power to

Detain Policy, the letter before claim, the OASys assessments dated 26 May and 17 August 2022, MAPPA Executive Summaries and the earlier submissions dated 10 August 2022 and 28 September 2022 with their annexes.

50. The 31 October 2022 submission noted that the matter was urgent given the application for judicial review and the expedited timescale directed by the Court. The Defendant was asked to decide whether he remained of the "requisite opinion" that the Claimant's case should be referred to the Parole Board. The submission summarised the background and the recent developments. It pointed out that it was now appreciated that the Claimant's risk of serious harm to children had been assessed as Medium at the time of the August Decision; that this remained her assessed level of risk; and his predecessor had not been made aware of this or of the subsequent OASys when he took the September Decision.

51. On the subject of "new information", Mr Davison observed that: "In the other cases where the power to detain provisions were used, 'new information' meant something different from an OASys report completed after sentencing", but that it was "clear an OASys report *can* contain new information", so that it would be legitimate to continue to view the OASys report of 26 May 2022 as containing new information. Paragraphs 2.11, 2.14, 11.10 and 12.9 of the OASys report (para 16 above) were identified as "highly relevant" in indicating that the Claimant had no present insight into her offending behaviour, was partly in denial and had failed to address her ongoing risk other than by detoxing from drugs.

52. The submission also indicated that the Probation Service's position remained that the risk management plan "is sufficiently robust to manage her risk in the community, but cannot guarantee that she would pose 'no risk' to children on release". The view was expressed that "the application of *Johnson* remains a valid reason to consider risk on a longer-term basis under the policy".

53. The Secretary of State discussed the submission at a meeting on 1 November 2022, where he confirmed that he remained of the "requisite opinion" and had decided not to rescind his decision of 11 August 2022. A readout of the meeting was circulated by email from his Private Secretary on 3 November 2022. The Secretary of State was recorded as observing: "There is a discrepancy between medium and high risk, this is two different bodies who have taken a slightly different view. You can't unlearn the presentation of risk, it is more the characterisation than the label. Having looked at the substance I am satisfied that this is a high risk case". He also said that: "If our satisfaction for managing risk comes from being able to keep her away from children, we cannot do that". The Defendant made reference to various sections of the 26 May 2022 OASys assessment, including some of those identified in Mr Davison's submission. He commented that: "If there is a very high risk which is impossible to manage, it is compounded by the fact that she is in total denial and very deceitful". He said that he saw someone who was "mentally unwell" and that she "laughs when talking about the index offence". (The latter appears to be a reference to what was said at sections 2.11 and 11.10 of the 26 May 2022 OASys (para 16 above)).

The legal framework

The sentencing powers available to the Crown Court in February 2018

54. At the time when the Claimant was sentenced, section 142(1) of the CJA 2003 provided that any Court dealing with an offender must have regard to the identified purposes of sentencing, including: punishment of the offender; reform and rehabilitation of the offender; and "the protection of the public".

55. If a determinate (fixed term) sentence was imposed, the offender would usually be entitled to release on licence at the half-way stage of their sentence, pursuant to section 244 CJA 2003. The licence continued until sentence expiry and where a standard determinate sentence ("SDS") prisoner was recalled to custody prior to their sentence expiry, the Defendant or the Parole Board could re-release them where it was "not necessary for the protection of the public" that they should remain in prison: section 255C(2) and (4) CJA 2003.

56. When the Claimant was sentenced, the power to impose an extended sentence was contained in section 226A CJA 2003. (The extended sentence provisions that apply to offenders aged 21 and above are now to be found in sections 279 – 281 of the Sentencing Code.) An extended sentence comprised the aggregate of the "appropriate custodial term" and an "extension period" during which the offender was subject to a licence: section 226A(5) CJA 2003. The "appropriate custodial term" was the term of imprisonment that would be imposed apart from this provision: section 226A(6). The "extension period" was of such length as the Court considered necessary for the purposes of protecting members of the public from serious harm occasioned by the commission of further specified offences: section 226A(7) (subject to stipulated maximum periods). An extended sentence prisoner was released after the requisite custodial period of their sentence (usually two thirds of the determinate term) once the Parole Board directed their release: section 246A(3) – (6) CJA 2003. The Board would do so when satisfied that "it is no longer necessary for the protection of the public" that the prisoner should be confined: section 246(6)(b) CJA 2003. Save where a prisoner had previously been released on licence and recalled, the Secretary of State was under a duty to release them on licence once they had served the appropriate custodial term: section 246(7).

57. At the time when the Claimant was sentenced, the criteria for imposing an extended sentence under section 226A CJA 2003 were that:

    i) The offender was aged 18 or over and convicted of a specified offence. Section 224 CJA 2003 contained a similar list of specified offences to the list that is now contained in the Sentencing Code (para 66 below);

    ii) The Court was not obliged to impose a sentence of life imprisonment;

    iii) At the time the offence was committed the offender had been convicted of an offence listed in Schedule 15B or, if the court were to impose an extended sentence, the term that it would specify as the appropriate custodial term would be at least four years; and

iv) The Court "considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences" (section 226A(1)(b)).

58. The assessment of whether an offender posed a significant risk to members of the public of serious harm occasioned by the commission of further specified offences (the "statutory dangerousness test") was addressed in section 229 CJA 2003. Sub-section (2) provided that in making the assessment the Court was to take into account all such information as was available about the nature and circumstances of the offence and could take into account any information about the pattern of behaviour of which the offence formed part and any information about the offender which was before it.

59. Pursuant to section 226A(9) CJA 2003, the overall length of an extended sentence could not exceed the maximum term that could be imposed for the offence at the time when it was committed. In light of this provision, the Sentencing Judge could not in fact have imposed an extended sentence on the Claimant as the custodial term that he assessed as appropriate was the statutory maximum of ten years (para 15(ix) above). Nonetheless, it is clear from his Sentencing Remarks that he gave specific consideration to the statutory dangerousness test, concluding that it was not made out (para 15(vi) above).

The Power to Detain

60. As I have noted at para 55 above, pursuant to section 244 CJA 2003 the Defendant was under a duty to release a SDS prisoner as soon as they had served half of their sentence (save in circumstances that do not arise in this case). However, this position was modified by section 132 Police, Crime, Sentencing and Courts Act 2022 which introduced new subsection 244(1ZA) and sections 244ZA and 244ZB into the CJA 2003, with effect from 23 April 2022.

61. Pursuant to section 244(1) the Secretary of State is required to release a fixed term sentence prisoner once they have served the "requisite custodial period". It is accepted that absent the Secretary of State using the Power to Detain, the duty would be to release the Claimant at the half-way point. However, section 244ZA(1ZA) provides that the duty to release in sub-section (1) does not apply if the prisoner's case has been referred to the Parole Board under section 244ZB or a notice given to the prisoner under section 244ZB(4) is in force.

62. It is necessary to set out section 244ZB in full:

> "**244ZB Referral of high-risk offenders to Parole Board in place of automatic release**
>
> (1) This section applies to a prisoner who-
>
> (a) would (but for anything done under this section and ignoring any possibility of release under section 246 or 248) be, or become, entitled to release on licence under section 243A(2), 244(1) or 244ZA(1), and
>
> (b) is (or will be) aged 18 or over on the first day on which the prisoner would be so entitled.

(2) For the purposes of this section, the Secretary of State is of the requisite opinion if the Secretary of State believes on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of any of the following offences-

(a) murder;

(b) specified offences, within the meaning of section 306 of the Sentencing Code.

(3) If the Secretary of State is of the requisite opinion, the Secretary of State may refer the prisoner's case to the Board.

(4) Before referring the prisoner's case to the Board, the Secretary of State must notify the prisoner in writing of the Secretary of State's intention to do so (and the reference may be made only if the notice is in force).

(5) A notice given under subsection (4) must take effect before the prisoner becomes entitled as mentioned in subsection (1)(a).

(6) A notice given under subsection (4) must explain-

(a) the effect of the notice (including the effect under section 243(2A), 244(1ZA) or 244ZA(3)),

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

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

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

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

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

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

(b) remains in force until-

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

(ii) the notice is revoked.

(8) The Secretary of State-

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

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

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

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

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

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

(a) may rescind the reference, and

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

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

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

The statutory scheme

63. Accordingly, the arrangements imposed by section 244ZB operate as follows:

i) Before a prisoner is referred to the Parole Board, the Secretary of State must notify the prisoner in writing of their intention to make the referral (subsection (4));

ii) The notice must "take effect" before the prisoner becomes entitled to automatic release on licence; and must explain the effect of the notice, why the Secretary of State is of the "requisite opinion" and the prisoner's right to make representations (subsections (5) and (6));

iii) The effect of serving the notice is that the prisoner is not released on licence (section 244ZA(3));

iv) The notice remains in force until such time as either the Secretary of State refers the prisoner's case to the Parole Board or the notice is revoked (subsection (7));

v) If after issuing the notice, the Secretary of State takes longer than is necessary to refer the case to the Parole Board and the prisoner would but for the notice be entitled to release, they may apply to the High Court, which has power to order revocation of the notice if satisfied that their release has been delayed for longer

than is reasonably necessary for the Secretary of State to complete the referral (subsection (8));

vi) A prisoner may make representations to the Secretary of State about the referral of their case to the Parole Board at any time before the Board has disposed of the reference (subsection (12));

vii) The Secretary of State has power to revoke the notice or rescind the reference to the Parole Board (with the effect that the prisoner will be entitled to immediate release) at any time before the Board has disposed of the reference and must do so if he is no longer of the "requisite opinion" (subsections (8), (10) and (11)).

64. Following the referral, the prisoner will be released when the Parole Board is satisfied that it is not necessary for the protection of the public that the prisoner should be confined or, in any event, on the expiry date of their sentence.

The "requisite opinion"

65. The power to refer the prisoner's case to the Parole Board arises where the Secretary of State is of the "requisite opinion", as defined by section 244ZB(2). This requires that the Secretary of State subjectively believes that if released, the prisoner would "pose a significant risk to members of the public of serious harm" occasioned by the commission of an offence of murder or any of the offences specified in section 306 of the Sentencing Code. The Secretary of State's belief must be founded "on reasonable grounds", a requirement that I discuss at paras 71 and 111 – 113 below.

66. The list of "specified offences" in section 306 of the Sentencing Code is extensive. By way of example only, it includes offences of manslaughter, kidnapping, false imprisonment, child destruction, infanticide and various offences under the Offences against the Person Act 1861, the Firearms Act 1968, the Theft Act 1968 and anti-terrorism legislation. The offences that the Claimant was convicted of under section 1 CYPA 1933 and section 5 DVCVA 2004 appear on this list.

67. The statutory dangerousness test that was previously contained in section 226A CJA 2003 (para 57 above) is now in section 280(1)(c) of the Sentencing Code for offenders aged 21 and above. The test still requires that "the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences". Counsel agreed that in so far as the language in section 244ZB(2) uses the same words and phrases as the well-established statutory dangerousness test, Parliament must be taken to have intended them to bear the same meaning.

68. In *R v Lang* [2006] 1 WLR 2509 the meaning of a "significant risk" to members of the public of serious harm was addressed by Rose LJ (giving the judgment of the Court), in the course of considering 13 appeals arising from provisions then in force in sections 224 – 229 CJA 2003 regarding sentences for public protection from dangerous offenders. *Lang* remains the leading authority on this point. Lord Justice Rose said:

> "The risk identified must be significant. This is a higher threshold than the mere possibility of occurrence and in our view

> can be taken to mean (as in the Concise Oxford Dictionary) 'noteworthy, of considerable amount…or importance'."

69. In terms of the other elements of the statutory dangerousness test, successive legislative provisions have defined "serious harm" as meaning "death or serious personal injury, whether physical or psychological" (for example, section 224(3) CJA 2003). It is well established that "members of the public" may include a particular category of people, for example, children: for example, per Rose LJ in *Lang* at para 19.

70. Accordingly, I proceed on the basis that the references to "significant risk", "serious harm" and "members of the public" in section 244ZB(2) CJA 2003 should be understood in the same way as applies to the statutory dangerousness test.

71. The statutory dangerousness test is met where the Court "considers" / "is of the opinion" that the prescribed criteria is met, whereas section 244ZB(2) requires that the Secretary of State's belief to that effect is held "on reasonable grounds". Counsel did not agree about what this requires. Ms Ailes submits that these words underscore the degree of deference to be afforded to the decision maker; the Secretary of State does not have to be satisfied of the criteria on a balance of probabilities and in some situations more than one reasonably held view would be possible. Whilst she is correct that the Secretary of State does not have to be satisfied to a civil standard of proof, I do not accept that the "on reasonable grounds" wording does no more than Ms Ailes suggests. The wording is clearly there to add something to the rationality limitation that would apply in any event. This is not surprising given the context; whereby the Secretary of State is making a decision that will alter the basis upon which the prisoner in question is serving their sentence of imprisonment. In my judgment this phrase introduces an objective requirement for there to be an identifiable supporting basis for each of the requisite elements of the Secretary of State's belief. However, Mr Bunting goes further. He submits that "on reasonable grounds" indicates that the Secretary of State can only arrive at the "requisite opinion" where there has been a material change of circumstances since the Sentencing Judge imposed a determinate sentence. I return to the meaning of "on reasonable grounds" and address this submission when I consider Ground Two.

72. Before leaving the statutory provisions, it is also relevant to note that, pursuant to section 244ZB(3), where the Secretary of State is of the "requisite opinion", they have a discretionary power, rather than a duty, to refer the case to the Parole Board.

The Power to Detain Policy

73. The statutory Power to Detain is summarised at paras 1.1 – 1.3 of the Power to Detain Policy, where it is explained that use of this power is reserved for SDS prisoners who were not judged to be dangerous at the point of sentence (or who may have been considered dangerous but who were not eligible for an extended determinate sentence at that time), but who are subsequently assessed as posing a significant risk of serious harm to members of the public occasioned by the commission of specified offences on release. The text of para 1.2 includes the following:

> "Prisoners must meet both the legal and policy thresholds to be eligible for consideration under this policy, which includes a dangerousness test and a public interest test."

74. Paragraphs 4.4 – 4.14 appear under the heading "Policy eligibility". As Mr Davison recognised in his statement (para 29 above), the eligibility criteria that are set out there are more restrictive than the statutory test. Furthermore, the test for dangerousness identified at para 4.8 involves a higher threshold than the statutory dangerousness test. As material, this part of the policy says:

> "4.4 Application of this policy to a prisoner is a discretion which rests with the Secretary of State, exercised by the HMPPS Panel on their authority. Further to the statutory requirements, it has been determined that referral to the Parole Board should only occur in particular cases (shaped, in part, by the risk assessment processes which prisoners are subject to whilst in the prison estate). As part of the process of identifying eligible prisoners, HMPPS's existing risk management tools will be used.
>
> 4.5 Prisoners will only currently be considered for referral where the reasonable grounds are based on new or additional information not available at the time of sentencing. Existing information, in particular information, which was before the sentencing Court, will not be deemed sufficient.
>
> …..
>
> 4.8 Prisoners identified as potentially suitable for submission to the HMPPS Panel must also meet a test for dangerousness. Dangerousness test – the risk presented by the prisoner would:
>
> a. cause serious harm to the public (through terrorism, death or serious injury/sexual assault) or present a national security threat if the risk were to materialise;
>
> b. be likely to materialise at or soon after the conditional release point (i.e., a degree of probability about the risk arising following release and that it may be imminent);
>
> c. be credible (the prisoner has the capability and means to commit a serious offence); and
>
> d. not be safely manageable using the normal means of applying even very stringent licence conditions, supervision and restrictions.
>
> 4.9 As part of this dangerousness test, prisoners must be assessed as being very high risk of serious harm on OASys (Asset+) meaning that there is an imminent risk of serious harm i.e., the potential event is more likely than not to happen imminently, and the impact would be serious.
>
> 4.10 Prisoners must also be identified for management at MAPPA level 3 or the equivalent…

> …..
>
> 4.12 Public interest test – if the dangerousness test is met, the public interest test must determine whether, on balance, it is in the public interest to detain the prisoner, potentially to the end of their sentence, rather than automatically release them at their conditional release date. This must be accompanied by a deliverable plan which sets out how any extra time served in prison will be used to reduce risk of harm. This should include deliverable objectivise/activities.
>
> …..
>
> 4.14 HMPPS use different risk assessment tools for different prisoners. Although ultimately, the Secretary of State can only refer those who meet the statutory threshold and will only refer those who meet the policy threshold, the below identification processes outline how different types of eligible prisoners can be identified. There may be cases that require exceptional consideration outside of the policy thresholds, and these will be considered on a case-by-case basis."

75. The last sentence of para 4.14 contains a recognition that there may be cases that require "exceptional consideration outside of the policy thresholds". The Secretary of State relies upon this passage.

76. The policy then outlines how eligible prisoners are to be identified. The initial process in relation to violent and sexual risk cases is set out at paras 4.22 – 4.29. The case is to be triaged for management by the NSD by the Heads of Public Protection in the Probation regions. Heads of Service must consider whether a prisoner's case meets all the criteria for review by the HMPPS Panel and as part of this review consider whether the prisoner meets the Dangerousness test and the Public Interest test contained in the policy. If the Head of Service considers the prisoner meets the legal threshold and the policy criteria for submission, they will submit the case to the HMPPS Panel Secretariat via the functional mailbox. The decision to submit a case to the HMPPS Panel Secretariat "should be made no earlier than 12 months prior to the prisoner's conditional release date. After that 12-month point has passed, the submission process should begin as soon as there is sufficient reason to believe the threshold may be met…" (para 4.29). The dossier sent to the HMPPS Panel Secretariat should contain the documents listed at para 4.37, including the Power to Detain Report, setting out the justification for submission of the case.

77. Paragraphs 4.41 – 4.48 address the HMPPS Panel's consideration of the case. The policy says that the Panel will consider the dossier and decide whether the prisoner meets the legal and policy thresholds. If the Panel considers that the prisoner will present a risk of serious harm to the public imminently on release and there is supporting evidence of this but decides not to refer the case to the Parole Board on the basis of criteria c. and d. in para 6.34, then the Secretary of State (or his delegate) will personally take the decision whether to refer the offender to the Parole Board (para 4.42). Criteria c. and d. are that: "the risk cannot be managed effectively in the community using existing available means (even under very stringent licence

conditions)" and a referral to the Parole Board is in the public interest. The policy does not explicitly contemplate referring a case to the Secretary of State for a decision in circumstances where the HMPPS is not satisfied that there would be an imminent risk of serious harm. The policy envisages that in situations outside of para 4.42, it will be the HMPPS Panel who will make the decision whether to refer a case to the Parole Board and who will consider any subsequent representations made by the prisoner (paras 4.44 – 4.48).

78. Paragraph 5.3 lists various circumstances that will not be considered as meeting the threshold for submission to the HMPPS Panel Secretariat. It includes at (f): "Undue pressure to submit a case due to their notoriety or dissatisfaction with the original sentence handed down", where "the expectation remains that they must meet all the eligibility criteria and the legal threshold set out in this policy in order to be submitted to the HMPPS Panel Secretariat".

79. Section 6 of the policy is headed "Guidance". It includes the following text under the sub-heading "Suitability":

> "6.10 Central to the decision on whether a case is eligible for referral to the HMPPS Panel Secretariat under this policy is the need to ensure there is new or additional information over and above that available to the court at the time of sentencing. This information must give reasonable grounds for believing that the prisoner poses an imminent and very high (unmanageable) risk of serious harm to the public (or a known individual) on release occasioned by the commission of specified offences, as set out in the legal threshold (see 4.1), alongside the additional policy criteria and tests outlined in the requirements and from 4.4 to 4.13.
>
> …..
>
> 6.13 The new or additional information referenced at 6.10 may demonstrate a continuing pattern or behaviour which poses an imminent and very high risk of serious harm, but in a manner which is escalating, or may be evidence of new behaviour which is of significant concern. This behaviour may have escalated or arisen as a direct result of being imprisoned, e.g., through criminal or extremist influences in custody…
>
> …..
>
> 6.15 The submission of a case to the HMPPS Panel Secretariat should be made as near to the 12-month starting point (i.e., 12 months prior to CRD) as possible. After that 12-month point has passed, the submission process should begin as soon as there is sufficient reason to believe the legal threshold and policy requirements may be met to justify doing so. It is right that all parties involved, including the prisoner, have as much notice as possible if release is not going to be automatic. Early notice will increase transparency and procedural fairness.

> …..
>
> 6.17 There is an assumption that the sort of new or additional evidence or intelligence triggering consideration under this policy will have also triggered a review of a prisoner's security category…"

80. Paragraphs 6.25 – 6.30 address submissions to the HMPPS Panel Secretariat. Paragraph 6.29 contemplates that there may be cases identified for submission to the Panel "where the prisoner's conditional release date is imminent". It is said that in those circumstances, the dossier for the Panel must be collated as a priority and that: "Those managing the case and considering referral to the HMPPS Panel Secretariat should give full consideration as to what other mechanisms are available to manage the newly identified risks on release and decide if, on balance, submission under this policy is the most reasonable course of action considering the timeframes".

Ground One: discussion and conclusions

81. Mr Bunting submits that the Secretary of State's August Decision involved unreasonable delay, which had the effect of unlawfully prolonging the Claimant's detention. He emphasises that the decision was made and conveyed by the notice on 11 August 2022, the last day before her CRD. He says that given its high profile, this case should have been on the radar of the HMPPS Panel and the Secretary of State well before that date and that no reasonable explanation has been provided for the delay. As I have already indicated at para 8 above, Mr Bunting does not suggest that this should lead to the August Decision being quashed, but he seeks a declaration recognising the delay.

82. Ms Ailes does not accept Mr Bunting's underlying proposition that the Secretary of State was under a duty to act with reasonable expedition in making a decision pursuant to section 244ZB(3) and/or in notifying the prisoner of this decision under section 244ZB(4). She submits that no such duty can be implied from the statutory scheme or on any other basis and that in any event a failure to act with reasonable expedition would not of itself provide a public law ground for invalidating the decision. Additionally or alternatively, she disputes that there was any unreasonable delay in this case.

83. In his oral submissions Mr Bunting accepted that Ms Ailes "may be right" in saying that delay would not invalidate a decision made under section 244ZB(3). In these circumstances I doubt that I would have considered it appropriate to grant the declaration sought, even if I did find that there had been a failure to comply with an obligation to act with reasonable expedition. However, for the reasons that I will go on to explain, I do not accept that it is arguable that such a duty exists or, if it does, that there was unreasonable delay in this instance.

Alleged duty to act with reasonable expedition

84. It is common ground that Article 5.4 of the European Convention on Human Rights ("ECHR"), which confers a right to a speedy adjudication of the legality of detention, does not apply to a determinate sentence prisoner during the currency of their sentence:

R (Youngsam) v Parole Board [2019] EWCA Civ 229, [2020] QB 387 ("*Youngsam*") at paras 25 and 34 – 35.

85. Mr Bunting derives the duty he relies on from the proposition that there is a general common law duty on public bodies to make decisions within a reasonable period of time, particularly where liberty is involved. He also relies upon particular aspects of the statutory scheme and the Power to Detain Policy.

86. I consider that Mr Bunting's proposition is couched too widely. Firstly, whether a decision maker is under a duty to make a particular decision or undertake a particular action within a reasonable period of time will depend upon the statutory provisions involved and the context. Secondly, if such an obligation does exist, the consequences of failing to adhere to it will also depend upon the provisions and upon the context. By way of example only, this is illustrated by the cases included at para 46.1.3 "Delay as ultra vires/breach of statutory duty" in Sir Michael Fordham's *Judicial Review Handbook* (7th edition). I also note that, unlike the present situation, consideration of whether such a duty exists, often, although not invariably, arises in a context where the decision or action in question has yet to be taken and the claimant is seeking mandatory relief to compel this.

87. The appeal in *Youngsam* was primarily concerned with whether Article 5.4 ECHR applied (para 84 above). The claim arose from the Parole Board's delay in considering a prisoner's release following his recall from licence. Mr Bunting relies upon para 36 where Nicola Davies LJ quoted paras 54 – 55 of the judgment of Turner J below. This included an observation that he was "satisfied that the consequent delay was not of such duration, when measured against the background circumstances of this case, to give rise to a breach of the common law duty to act within a reasonable time". Given the issues on the appeal, the judgments of the Court of Appeal did not discuss the basis for or the scope of the common law duty; the best that can be said, from the Claimant's point of view, is that the existence of such a duty, in that context, was not called into question. In any event, the context is distinct. The Parole Board is a judicial body charged by statute with carrying out certain functions, including making decisions on cases such as Mr Youngsam's once they are referred to it. In the circumstances I do not consider that this passage establishes or provides significant support for the proposition that the Secretary of State was under a common law duty to act within a reasonable time in making a decision and issuing a notice under section 244ZB(3) and (4) CJA 2003.

88. Mr Bunting also relies upon *R v Secretary of State for the Home Department ex parte Phansopkar* [1976] 1 QB 606. However, the decision in that case was based on the effect of particular provisions in the Immigration Act 1971 and I do not consider it assists with the present context. Mr Bunting drew my attention to para 50.1.3 of the *Judicial Review Handbook* "Delay as abdication of function". However, the cases referred to in that paragraph arise in different contexts and are concerned with indefinite delay in decision making and/or decisions to defer making particular decisions, which is quite different to the current circumstances.

89. Accordingly, in my judgment, the existence of any duty to act with reasonable expedition has to be derived from the particular statutory provisions and the context. However, aside from the general proposition that liberty is involved, I consider that the provisions negate rather than support Mr Bunting's contention, in particular:

i) Section 244ZB is not simply silent on the question of timing. It does state when the notice must be served on the prisoner, namely before the case is referred to the Parole Board (subsection (4)) and before the prisoner becomes entitled to be released (subsection (5)). As the section specifically addresses the timing of the notice, it would be surprising if Parliament intended additional, unaddressed requirements as to when the notice should be served to apply and that they should, in effect, be read into the provision. I do not see any indication to that effect;

ii) Section 244ZB(9) does provide a mechanism whereby the prisoner can seek an order from the High Court revoking the notice where there is unreasonable delay between the service of the notice and the referral of their case to the Parole Board and they would otherwise be entitled to be released. However, Parliament has not also conferred an explicit right on the prisoner to challenge the validity of a notice on the grounds that it has been delayed (which could also have an adverse impact on their release date). As Parliament has chosen to address delay in the subsection (9) context, again, it would be surprising if it also intended that an enforceable duty should arise in relation to pre-notice delay; and

iii) He points out that a prisoner cannot challenge their notice *after* their case has been referred to the Parole Board and he says this indicates that the statutory scheme envisages notice being provided sufficiently in advance of a prisoner's CRD for them to have time to challenge this pre-referral. However, I do not accept this premise. Firstly, there is nothing to prevent the referral of the prisoner's case to the Board being made shortly after the service of the notice, so that an earlier notice would not necessarily afford this period of time. Secondly, the fact of referral does not close the door on a prisoner disputing the use of the power; the prisoner can make representations to the Secretary of State inviting them to rescind the reference right up until the time when the Board disposes of the case.

90. Additionally, it appears that Parliament contemplated that the decision to refer the case could be made up to and including at a time close to the prisoner's CRD. This is why there is a need to provide for a notice procedure under which service of the notice on the prisoner has the effect of preventing them from being released on their CRD, pending consideration of their case by the Parole Board. If referral to the Parole Board could only occur well before the prisoner's release date, it is hard to see what would be added by the existence of the provision of notice stage (as opposed to the referral itself preventing release on the CRD, with a requirement to notify the prisoner of this). Equally, it cannot be said that delaying the prisoner's release date beyond their CRD pending consideration by the Parole Board is outside of the intended statutory scheme, as this is the statutory purpose of serving the notice.

91. Mr Bunting also seeks to derive support from the Power to Detain Policy. However, it appears to me that the timescales referred to therein are provided as guidance as to when, ideally, the internal processes should commence, rather than by way of setting out a timetable that is enforceable by the prisoner under consideration. In addition, it is apparent that the policy envisages applications being made at a later stage.

92. Mr Bunting relies in particular upon para 4.29 of the policy, but as Mr Davison points out at paras 23 – 24 of his statement, that paragraph is concerned with submission of a

case to the HMPPS Panel Secretariat, a stage that could occur some significant time before all the relevant material is assembled and a decision then made and notified to the prisoner. Furthermore, para 4.55 expressly contemplates that the Parole Board hearing may take place after the prisoner's CRD; para 6.15 contemplates that the submission process may begin after the 12 month pre-CRD point that is referred to in para 4.29 (para 76 above); and para 6.29 envisages that there will be cases that are referred to the HMPPS Panel where the prisoner's release date is imminent (para 80 above).

93. I therefore conclude that no arguable basis has been shown for the proposition that the Secretary of State was under an implied duty to make the section 244ZB(3) decision and serve the section 244ZB(4) notice with reasonable expedition, in addition to satisfying the express statutory requirements.

Alleged delay on the facts

94. Further or alternatively, I do not consider it arguable that there was unreasonable delay in this case. The Power to Detain Policy was only finalised in June 2022 and it came into effect on 14 July 2022. The Claimant's CRD was less than a month later on 12 August 2022. The Claimant was referred to the CPPC Team in the NSD of the Probation Service on 15 July 2022 and registered with the NSD on the same day; and management of her case was transferred to the NSD London, Kent, Surrey and Sussex region on 22 July 2022 (para 23 above). On 29 July 2022 a decision was made for the case to be considered against the Power to Detain provisions and this assessment was completed on 8 August 2022 (paras 24 - 25 above). The Secretary of State considered the matter on the same day and then over successive days, as I have described earlier, making the final decision on 11 August 2022.

95. This chronology does not indicate unreasonable delay. In so far as the date of the August Decision was the result of the Secretary of State taking a different view to that which had been reached earlier as to whether the Claimant's case should be referred to the Parole Board, I do not consider that this gives rise to a free-standing delay point: either the Defendant's substantive decision was unlawful (as asserted by Ground 2 and/or Ground 3) or, if it was otherwise lawful, then I see no free-standing complaint arising from the fact that it was only finalised on 11 August 2022.

Conclusion

96. Accordingly, I do not grant permission to apply for judicial review in relation to Ground One and this aspect of the Claimant's challenge will be dismissed.

Ground Two: discussion and conclusions

97. As I foreshadowed earlier (para 8 above) Mr Bunting submits that the statutory scheme makes clear that the Secretary of State can only form the "requisite opinion" where there has been a material change of circumstances since the offender was sentenced. It is, of course, accepted that there is no express wording to this effect in the statute, but Mr Bunting contends that this is to be derived from the inclusion of the requirement in section 244ZB(2) for the Secretary of State's belief to be on "reasonable grounds", given the context and given that Parliament must be taken to have been aware of the Supreme Court's decision in *R (Evans) v HM Attorney-General* [2015] UKSC 21,

[2015] AC 1787 ("*Evans*") when this provision was enacted. He also seeks to derive support for this proposition from the Ministry of Justice's White Paper "*A Smarter Approach to Sentencing*" (CP 292), from statements made by the Minister in Parliament when introducing the Power to Detain provisions (then clause 108 of the Police, Crime, Sentencing and Courts Bill) and from the Power to Detain Policy.

98. The second plank of Mr Bunting's argument is that there was no material change of circumstances in this case from the situation when the Claimant was sentenced in February 2018 or, in any event, there was no material change of circumstances that the Defendant was aware of during the time when he made the key decision, namely 9 – 11 August 2022.

99. Further or alternatively, Mr Bunting submits that even if there is no statutory requirement for a material change of circumstances, in any event the Secretary of State's belief that the Claimant would, if released, pose a significant risk of serious harm to children was not based "on reasonable grounds" and/or was unreasonable in the *Wednesbury* sense.

100. Ms Ailes disputes that there is any statutory requirement for there to have been a material change of circumstances since the Sentencing Judge passed sentence. Further or alternatively, she submits that there was a material change of circumstances in this instance, in terms of the information contained in the 26 May 2022 OASys assessment. More broadly, she contends that there was ample basis for the Secretary of State's opinion as to the risk posed by the Claimant and his reasons for referring her case to the Parole Board.

Permission to apply for judicial review

101. For reasons that will be apparent from my discussion below, I accept that Ground Two is arguable. I therefore grant permission in relation to it. I will first address the question of whether there is a statutory requirement for a material change of circumstances and then turn to the decision made by the Secretary of State in this instance.

Alleged requirement for a material change of circumstances

Alleged analogy with *Evans*

102. Mr Bunting emphasises the context in which the Secretary of State will consider exercising the Power to Detain provisions. The decision of the Sentencing Judge to impose a determinate sentence, rather than an extended sentence, will have been made by a member of the judiciary at a public hearing on the basis of all relevant material then available and following oral submissions. Furthermore, the Judge will have had the opportunity, particular if there has been a not guilty plea and a trial, to assess the offender's level of culpability, their remorse and all other factors relevant to the risk they pose to the public. The sentence that was passed will have taken the risk to the public into account (para 54 above).

103. Mr Bunting submits that given this context it would be surprising if section 244ZB gave a member of the executive, the Secretary of State, the power to reconsider the question of risk and to extend the period that a determinate sentence prisoner spends in custody simply because they take a different view to the Sentencing Judge; and do so in

circumstances where they have not had the benefit of oral argument or of hearing from the prisoner. Mr Bunting says that the safeguard against such a scenario must be a requirement that the Secretary of State can only form the "requisite opinion" where there has been a material change of circumstances since the sentence was imposed. He says that this follows from the "on reasonable grounds" requirement, interpreted in light of *Evans*.

104. It is therefore necessary for me to consider *Evans* in some detail. In that case the Supreme Court was concerned with the lawfulness of a decision made under section 53 of the Freedom of Information Act 2000 ("FOIA 2000"), which confers a power on an "accountable person", in that instance the Attorney General, to override a decision notice served under the Act. Section 53(2) provides that such a notice: "ceases to have effect if, not later than the twentieth working day following the effective date, the accountable person…gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that" in respect of the request/s concerned, there was no failure to comply with the section 1 FOIA 2000 duty to provide disclosure of the requested information. Where there is an appeal against a refusal to give disclosure, the "effective date" is the day when the appeal is determined or withdrawn. In *Evans* the Upper Tribunal had allowed part of the claimant journalist's appeal against the refusal of various government departments to disclose communications passing between them and the (then) Prince of Wales. The departments did not appeal that decision but the Attorney General issued a section 53 certificate stating that he had on reasonable grounds formed the opinion that there had been no failure to comply with FOIA 2000. The claimant challenged the certificate, arguing that section 53 did not permit the Attorney General to issue it on the basis of the same facts and issues as had been before the Upper Tribunal, simply because he took a different view of whether the Act required the information to be provided.

105. The Court of Appeal set aside the section 53 certificate. The Supreme Court dismissed the Attorney General's appeal from this decision by a 5 – 2 majority. Lord Neuberger of Abbotsbury PSC (with whom Lord Kerr of Tonaghmore and Lord Reed JJSC agreed) considered that section 53 FOIA 2000 did not permit a member of the executive to overrule a decision of the judiciary simply because, on consideration of the same facts and arguments, they disagreed with it. He observed that the statutory wording would have to be "crystal clear" for a provision to have this effect and that this could not be said of section 53 (paras 58, 59, 68 and 69). He concluded that section 53 had a very narrow range of application and that it would not be reasonable for an "accountable person" to make a decision that was contrary to an earlier decision on precisely the same point simply because they took a different view, even if that view was otherwise reasonably held (paras 86 and 88). Lord Neuberger went on to discuss the limited circumstances in which a section 53 certificate could be issued after a Tribunal or Court had approved a decision notice, agreeing with the analysis of Lord Dyson MR in the Court of Appeal that examples of this would be where there had been "a material change of circumstances since the tribunal's decision or that the decision of the tribunal was demonstrably flawed in fact or in law" (paras 71 – 78).

106. Lord Mance (with whom Baroness Hale of Richmond DPSC agreed) took a broader view of the section 53 power. In common with the view expressed by Lord Wilson and Lord Hughes JJSC (in the minority), he accepted that the provision entitled the "accountable person" to disagree with the Tribunal about the relative *weight* to be

attributed to the competing public interests identified by the Tribunal and thus to come to a different conclusion (para 130). However, he determined that the Attorney General's certificate was unlawful in this instance because he had departed from the Upper Tribunal's *factual findings* without providing any adequate explanation for doing so, meaning that his decision had not been justified "on reasonable grounds" as section 53 required (paras 130 and 145.

107. As regards the meaning of "on reasonable grounds" in section 53(2), Lord Mance said:

> "129. On any view, the Attorney General must under the express language of section 53(2) be able to assert that he has reasonable grounds for considering that disclosure was not due under the provisions of the FOIA. That is, I consider, a higher hurdle than mere rationality would be…On judicial review, the reasonable grounds on which the Attorney General relies must be capable of scrutiny."

Lord Neuberger indicated at para 91 that he agreed that "on any view, 'reasonable grounds' in section 52(3) must require 'a higher hurdle than mere rationality'".

108. Mr Bunting place reliance on part of Lord Neuberger's description of the constitutional dimension that arose in *Evans* as follows:

> "51. When one considers the implication of section 53(2) in the context of a situation where a court, or indeed any judicial tribunal, has determined that information should be released, it is at once apparent that [the claimant's argument] has considerable force. A statutory provision which entitles a member of the executive (whether a Government Minister or Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.
>
> 52. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive…Section 53 as interpreted by the Attorney General's argument in this case, flouts the first principle…It involves saying that a final decision of a court can be set aside by a member of the executive…because he does not agree with it…"

109. For the reasons that I go on to explain in the next paragraph, I do not consider that *Evans* indicates that the section 244ZB power to detain can only be exercised where there has been a material change of circumstances since the prisoner was sentenced. In reaching this conclusion I have also borne in mind the supporting submissions made by Mr Bunting that I address at paras 114 – 117 below. Nonetheless, Lord Mance's analysis of the section 53(2) FOIA 2000 requirement for the accountable person's

opinion to be held "on reasonable grounds" supports the view that I have in any event formed as to the effect of these words in section 244ZB (para 71 above; and paras 111 - 113 below).

110. In my judgment *Evans* does not indicate that the section 244ZB(2) reference to "on reasonable grounds" is to be read as confining the situations where the Secretary of State can be of the "requisite opinion" to those where there has been a material change of circumstances since the prisoner was sentenced. I reach this conclusion for the following reasons:

i) Both Lord Neuberger and Lord Mance stressed that the meaning of "on reasonable grounds" in section 53(2) FIOA 2002 was dependent upon its context (paras 66, 88, 91 and 128). By way of two examples, the section 53(2) decision will be made just a matter of days after the earlier judicial decision on the appeal given the applicable time limit (para 104 above); and there is an express requirement to identify and communicate the "reasonable grounds" to the applicant (section 53(6));

ii) The issue in *Evans* arose in circumstances where the Attorney General had disagreed with the Upper Tribunal's findings and decision and (just a few days later) had arrived at a different view on what was admittedly the same material. This not only explains the central reason why a majority of the Supreme Court considered that the certificate should be set aside, it provided the factual context in which the scope of the power was considered and the Justices' observations were made;

iii) In any event, Lord Neuberger was in a minority of three (with Lord Kerr and Lord Reid) when it came to the Supreme Court's analysis of when a Minister could lawfully issue a section 53 certificate after a Tribunal's or Court's decision to the opposite effect (paras 105 - 106 above). A majority of the Justices did not adopt the "material change of circumstances" limitation and considered that the wording of section 53(2) was wide enough to permit the Minister to form a different view of the same material in terms of the weight that they attached to the competing public interests that were engaged (para 106 above);

iv) Furthermore, Lord Neuberger did not decide that the section 53 power could *only* be used when there had been a material change of circumstances, rather this was of one of two situations he identified, making clear in para 78 that he did not consider this to be an exhaustive list; and

v) The present context concerns an evaluative, forward looking assessment as to the nature and degree of risk to the public posed by a particular prisoner. The fact that the Secretary of State at some subsequent juncture takes a different view of the risk that the prisoner would pose on release from the assessment of the Court who passed sentence does not in itself indicate that the Minister is seeking to overrule the Court's decision on sentence thereby engaging the constitutional issue that concerned Lord Neuberger (para 108 above).

The "on reasonable grounds" requirement in section 244ZB(2)

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

112. In turn, I consider that interpreted in this way, this requirement meets the concerns that Mr Bunting raises. He says that absent a "material change of circumstances" criterion, a Secretary of State could decide to exercise the Power to Detain a few days after a Judge had passed a determinate sentence simply because they thought that the sentence was too lenient, thereby offending basic constitutional principles as to the separation of powers. However, in that situation I do not consider that the Minister would be able to identify "reasonable grounds" for holding the "requisite opinion"; simply disagreeing with a Judge's assessment made at a public hearing after considering the relevant material and doing so on what would, almost inevitably in this scenario, be the same information, would not afford such grounds.

113. Accordingly, in my judgment, the position is more nuanced that Mr Bunting suggests. There is no hard and fast requirement for a material change of circumstances to be read into the statute, in circumstances where Parliament did not impose any such express requirement and *Evans* does not lead to such an implication. However, an absence of any new information or material developments (not necessarily a *change* of circumstances) since the Sentencing Judge's assessment would likely make it very difficult for the Secretary of State to show that "reasonable grounds" for their belief existed, if the exercise of the power was challenged. Conversely in a situation where there had been a material change of circumstances post-sentence indicating a significant increase in the risk of serious harm, a Secretary of State would likely be in a much stronger position in terms of there being "reasonable grounds" for holding the "requisite opinion".

The White Paper

114. Mr Bunting also relies upon the White Paper (para 97 above). As confirmed by Lord Hodge at para 30 in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343, sources such as Government White Papers may be considered as part of the background to a statute and can assist the Court in identifying the mischief which it addresses and the purpose of the legislation; but external aids of this nature do not displace the meaning conveyed by the words of a statute which, after consideration of the context, are clear and unambiguous in their meaning and do not produce absurdity.

115. In the White Paper the proposed introduction of the Power to Detain is headed: "Preventing automatic early release for offenders who become of significant public protection concern". Mr Bunting emphasises the use of the word "become" which, he says, supports the proposition that a material change of circumstances post-sentence is required before the power can be exercised. He does not rely upon the text of the

document beyond the use of this word. I do not consider that it bears the significance that Mr Bunting seeks to place on it; inevitably the prisoner will have become a concern if and when the Power to Detain is exercised, but it does not follow that this must have resulted from a material change of circumstances. Furthermore, as Lord Hodge explained, the potential value of a White Paper lies in assisting the Court to identify the purpose of the legislation; its contents cannot alter the meaning of unambiguous statutory wording. I do not consider that there is any ambiguity in the present context. There is no indication, either explicit or implicit, in the wording of section 244ZB(2) that the Secretary of State's opinion must be based on a material change of circumstances.

Ministerial statements in Parliament

116. In these circumstances I do not consider that the conditions identified by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, at 640, are met in relation to the Parliamentary statements that Mr Bunting seeks to rely on. In particular the legislative provision is not ambiguous or obscure and a conventional interpretation of it does not lead to absurdity. In the circumstances, I say no more about these statements.

The Power to Detain Policy

117. I do not consider that the Power to Detain Policy assists Mr Bunting with his "material change of circumstances" submission. The policy identifies a more restrictive approach to the statutory power, as Mr Davison acknowledges (para 29 above). I will consider the effect of this when I come to Ground 3, but I do not accept that its contents are capable of altering the unambiguous statutory wording.

Whether the Secretary of State's belief was "on reasonable grounds"

118. For the avoidance of doubt, I do not consider that this can be characterised as an instance where the Secretary of State simply disagreed with the Sentencing Judge's evaluation of the risks posed by the Claimant, after considering the same material (a situation which, as I have indicated at paras 112 - 113 above, would be unlikely to meet the "on reasonable grounds" requirement). In particular:

    i) His assessment was being made more than four years later and he was engaged in assessing the risks that the Claimant posed at this stage if released;

    ii) Several OASys assessments of the risk posed by the Claimant of serious harm to children had been conducted in the interim, as had assessments of her risk at MAPPA meetings. These assessment had been conducted on the basis of updated information, including as to courses the Claimant had undertaken whilst she was in prison, the attitudes she recently displayed and the proposed licence conditions. By contrast, it appears that the Sentencing Judge did not have a Pre-Sentence Report on the Claimant (para 15 above);

    iii) The 26 May 2022 OASys assessment indicated that when the Claimant was recently interviewed she had shown no remorse and had remained in denial of her offending (para 16 above);

iv) The same interviews also indicated that the Claimant had not developed any insight into her offending or as to what she needed to do to address her risk (para 16 above); and

v) The 26 May 2022 OASys also indicated that over the recent years the Claimant had chosen to remain in contact with her co-defendant (para 16 above).

119. Mr Bunting makes the point that much of this was not known by the Secretary of State when he made the August Decision and that it was only brought to his attention subsequently. That proposition is borne out by the chronology of events that I have set out at paras 26 – 37 above; in particular the Defendant had not seen and had not been informed of the detail of the 26 May 2022 OASys, including what the Claimant had said in interview, when he made his initial decision on 9 August 2022 to refer her case to the Parole Board or when he confirmed this decision on 10 and 11 August 2022. Accordingly, I have reflected upon whether this *in itself* means that there was an absence of "reasonable grounds" for the belief that he expressed.

120. However, Mr Bunting draws no distinction between the lawfulness of the Power to Detain Decisions for the purposes of Ground Two (as opposed to Ground One). He contends that after making a flawed decision in August 2022, there was a natural reluctance on the part of the Defendant to change course and thus, he says, the absence of information about the 26 May 2022 OASys assessment in August 2022 infected the Defendant's subsequent decisions as well. I do not accept this proposition. In my judgment this is not a reason *in itself* to invalidate the November Decision which, as I have explained, was taken after the Secretary of State had been furnished with the up to date OASys and the MAPPA assessments and his attention had been drawn to their contents in the accompanying submission (paras 49 - 50 above). I do not see that there is any basis for the Court to go behind the Defendant's assertion that there was a re-assessment of the circumstances at this stage, which took into account this material. Accordingly, the fact that much of the information now relied upon was not before the Secretary of State when he personally took the decision in August 2022, does not, in my judgment, call into question the legality of the November Decision. In these circumstances, I do not see any utility in separately determining the impact of this specific factor upon the August Decision or the September Decision.

121. Moreover, for the reasons that I will go on to detail, I have in any event come to the conclusion that each of the Power to Detain Decisions was unlawful as the Secretary of State did not believe "on reasonable grounds" that the Claimant would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of specified offences.

122. As I have indicated, a "significant risk" involves there being more than "a mere possibility of occurrence" and entails a risk that is "noteworthy, of considerable amount…or importance" (para 68 above). Accordingly, in order for the Secretary of State's opinion to meet the statutory test it had to be based on there being "reasonable grounds" for him believing that there was a significant risk, so interpreted, of the Claimant causing serious harm to children based on an objectively identifiable basis for considering that this level of risk existed. For the reasons that I go on to explain, I conclude that this was not the case.

123. In light of her previous offences, there can be no doubt, that if the Claimant were to re-offend in a similar way it would be likely to lead to very serious harm to a child or children. The Secretary of State was understandably concerned about this. However, the scale of the harm that could be caused is not the only part of the inquiry. Nor is the impact of the Claimant's release on public confidence. The Defendant also had to consider the prospects of the risk materialising. The statutory test requires that the Secretary of State believes "on reasonable grounds" that there is a "significant", as opposed to a possible risk of her re-offending or a risk that cannot be ruled out altogether. In this instance there was a formidable body of material before the Secretary of State, at each stage of his decision making, which indicated that the Claimant's risks could be safely managed if she was released. Whilst he was not bound to agree with this, the Secretary of State's decisions identified no reasonable basis for departing from those assessments and in so far as he focused upon the chances of the risk materialising, he appears to have relied upon a belief that the Claimant should not be released as the risk of her causing serious harm to a child could not be eliminated altogether. As I have explained, that was not the correct question for him to ask.

124. In this regard, I note the following in particular:

i) Inherent in the assessments in both the May 2022 OASys and the August 2022 OASys that the Claimant posed a Medium risk of serious harm to children if released, was the opinion that she was unlikely to do so unless there was a change in her circumstances (para 17 above). The assessment that she posed a Medium level of risk was also the view taken by MAPPA from 31 August 2022 (para 44 above);

ii) The Power to Detain assessment in respect of the Claimant was conducted at a very senior level by Gillian O'Brien, the Head of the NSD London and Kent Surrey Sussex Unit. She considered the contents of the 26 May 2022 OASys. She concluded with supporting reasoning that the risk the Claimant presented to children would arise in very specific circumstances that she would not be in a position to repeat; that her continued denial of responsibility did not increase her risk of causing further harm; that her licence conditions would "significantly mitigate" the risk that she posed over the next five years and that thereafter Children's Services would be likely to take immediate action if Ms Simpson had contact with young children or became pregnant; and that her risk was more likely to be reduced by close supervision in the community than by remaining in custody (para 25 above);

iii) This view was endorsed at a very senior level by Sara Robinson, the Director of the NSD and by Amy Rees, the Director General of the Probation Service, as indicated by the 8 August 2022 notification to the Secretary of State (para 26 above);

iv) At the 9 August 2022 meeting with the Secretary of State, the Director General of the Probation Service indicated that she could say "confidently that the Probation Service could managed the risk posed by the Claimant in the community" (para 31 above);

v) The subsequent 31 October 2022 submission (which contained the fuller information and attached documents) indicated that it remained the Probation

Service's position that the risk management plan was "sufficiently robust to manage her risk in the community", but they could not guarantee that the Claimant would pose "no risk" to children on release (para 52 above). As I have already indicated, the ability to eliminate all risk is not the requisite test;

vi) The contemporaneous material indicates that the Secretary of State applied too low a threshold in terms of what is capable of amounting to a "significant risk". The justification set out on the Power to Detain Referral Form reflected the views that had been expressed by the Secretary of State (para 34). When asserting that the proposed licence conditions were insufficient the Form said that "it is *not beyond the realms of possibility* that she will gain access to children in an environment in which safeguarding checks are not undertaken" (emphasis added). The fact that an eventuality is not beyond the realms of possibility and thus cannot be ruled out altogether involves a substantially lower prospect of a risk eventuating than the existence of a "significant" risk. That a lower threshold was applied by the Secretary of State is also the impression given by other contemporaneous documents. The readout of the 9 August 2022 meeting says that the Secretary of State thought that the manageability of the risk was "not as clear cut" as Ms Rees had indicated (para 31 above). The readout of the 1 November 2022 meeting indicates that the Defendant's Advisor proposed saying that the Secretary of State did not agree with the Probation Service's assessment that they could manage the risk, as "licence conditions can never negate 100 per cent of the risk". The Secretary of State's subsequent comments suggest he adopted that view (rather than appreciating that it was the incorrect approach);

vii) Equally, there is nothing in the contemporaneous documents that counteracts the impression that too low a threshold was applied when the prospects of the risk materialising were considered. The Secretary of State is not recorded as discussing or applying the correct approach at any stage and the various ministerial submissions do not appear to have advised him as to the approach to take when considering whether a "significant risk" existed;

viii) The specific circumstances which the Defendant highlighted as concerning, namely that the Claimant might become pregnant or carry out unregulated babysitting had been identified and addressed in reasoned terms in both the OASys assessments and in Ms O'Brien's assessment. These assessments had also factored in the Claimant's continuing denial of her guilt. Accordingly, the matters raised by the Secretary of State were not aspects that had been overlooked by the professionals who had, on the face of it, thoroughly assessed the Claimant's risk and its manageability. It is not clear from the contemporaneous document why the Defendant disagreed with the assessments that had been made of these particular aspects; and

ix) The contemporaneous documents also indicate that the Secretary of State's own assessment was based on, or at least influenced by, misapprehensions as to the Claimant's assessed level of risk. As I have explained in detail when setting out the chronology of events, during his decision making on 9, 10 and 11 August 2022 the Secretary of State was under the incorrect impression that her current OASys assessment was of a High risk to children (in other words that "the potential event could happen at any time": para 17 above). The readout of the

10 August 2022 meeting indicates that the Defendant's stated belief that her risk was not manageable was directly related to his misunderstanding that she was currently assessed as "high risk" or "as being of very high risk of serious harm" (para 35 above). The misunderstanding that the Claimant remained assessed as High risk was replicated in the reasoning contained in the Power to Detail Referral Form (para 39 above). Although he was appraised of the correct position as to the assessments of her risk in the 31 October 2022 submission, at the 1 November 2022 meeting the Secretary of State was nonetheless recorded as expressing the view: "If there is a very high risk which is impossible to manage…" (para 53 above). It also appears that at this stage he was under the erroneous impression that there was a "discrepancy" and that "two different bodies" had taken a different view of the Claimant's level of risk, when in fact both the MAPPA and the OASys assessments were that her risk level to children was "Medium" (paras 18, 43 and 44 above) – a view that accorded with the assessments conveyed to him by senior professionals at the earlier meetings. The readout also suggests that he viewed the distinction between "Medium" and "High" risk as a "label", without appreciating that the different criteria for these categories could have a direct impact on whether the risk was a "significant" one.

Conclusion

125. Accordingly, I uphold Ground Two. Although I have rejected the submission that the Power to Detain can only be exercised where there has been a material change of circumstances since the prisoner was sentenced, I have concluded that in this particular case that there was an absence of "reasonable grounds" for the Secretary of State's belief that the Claimant posed a risk that met the section 244ZB(2) criteria. Whilst I will give Counsel the opportunity to make written submissions as to the precise form of relief that I should grant, it appears to follow from this conclusion that the Power to Detain Decisions should be quashed.

126. In light of the conclusion I have expressed in respect of the "reasonable grounds" requirement, I have not proceeded to consider whether Ground Two could also succeed on the irrationality challenge.

Ground Three: discussion and conclusions

127. As I summarised earlier, the Secretary of State accepts that in the Claimant's case the eligibility criteria in the Power to Detain Policy was not met in two respects, namely: (i) the test of dangerousness set out at para 4.8(b) was not satisfied in that it was not believed that the risk of serious harm to the public would "be likely to materialise at or soon after" the CRD (para 74 above); and (ii) she had not been assessed as being Very High risk of serious harm on OASys, as per para 4.9. It is necessary for me to consider whether the policy was departed from in a third respect, namely that there were no "reasonable grounds…based on new or additional information not available at the time of sentencing" as contemplated by para 4.5. This is in dispute. Ms Ailes relies upon the contents of the 26 May 2022 OASys assessment of the Claimant; whereas Mr Bunting submits that this did not add or did not materially add to the information that was before the Sentencing Judge.

128. In any event the Defendant contends that the departures from the Power to Detain Policy were justified by the cumulative impact of: (i) the Court's approach to imminence of risk in *Johnson* and potential consequential revisions to the policy; and (ii) the exceptional circumstances of the case in terms of the severity of the likely harm to children if the risk materialises and the Claimant's continued denial of her guilt. As regards the first of these factors, Mr Bunting submits that *Johnson* concerned a different statutory test and a different issue and that it did not give rise to a basis to depart from the detailed and carefully calibrated policy in this instance. As regards the circumstances of her case, Mr Bunting submits that the Claimant's denial of guilt was not considered to impact on her risk in the 8 August 2022 Power to Detain assessment and the level of harm involved in her offending was insufficient to make her case exceptional, given the number and range of very serious crimes that are "specified offences" for these purposes and thus can engage the Power to Detain.

Permission to apply for judicial review

129. For reasons that will be apparent from my discussion below, I accept that Ground Three is arguable. I therefore grant permission in relation to it. I will firstly address the question of whether there was a third departure from the Power to Detain Policy and then the question of whether departure from the policy was lawful in this instance.

Whether there was a third departure from the policy

130. I emphasise that at this stage I am concerned with whether there was "new or additional information" in the sense contemplated by the Power to Detain Policy; this is a distinct question from the issues that I considered in relation to Ground Two.

131. There was some post-sentence material regarding the Claimant, as I have identified at para 118 above. In considering this issue, I accept Ms Ailes' point that paras 4.5 and 6.10 of the Power to Detain Policy are not intended to mean that the reasonable grounds for the belief can *only* be derived from new or additional information; the material has to be considered as a whole.

132. However, in my judgment the policy contemplates that the "new or additional information" (taken with the previously available material) indicates that the prisoner's risk has *increased* since they were sentenced, as opposed to it showing no more than the risk that the offender posed when a determinate sentence was imposed has not reduced. This is apparent from para 6.13 which refers to the new or additional information demonstrating either a continuing pattern of behaviour which is "escalating" or evidencing "a new behaviour which is of significant concern" (para 79 above). This impression is reinforced by the assumption identified in para 6.17 that the new or additional information will "have also triggered a review of a prisoner's security category" (para 79 above). There are no indicators within the policy that point in the contrary direction.

133. At its highest, the post-sentence material relating to the Claimant indicated that she had not progressed in the sense that she had not accepted her guilt or developed insight into her offending; it did not suggest that in, consequence, her risk was *higher* than it had been when she was sentenced. The concern expressed was, at its highest, that her risk had not reduced. The Power to Detain Referral Form said (incorrectly) that High risk of serious harm "*remains* the assessment" (para 39 above; emphasis added).

Furthermore, the 26 May 2022 and the 17 August 2022 OASys assessments and the 31 August 2022 MAPPA assessment all indicated that her assessed risk level had in fact reduced, at least to some degree. Given this situation, I do not consider that there was "new or additional information" in the sense contemplated by the policy.

134. The view that there was no new or additional information in the sense contemplated by the policy is reinforced by Mr Davison's frank acknowledgement at para 58 of his statement that the view of the Secretary of State's officials was that there no new or additional information in the sense intended by the policy when it was drafted or in terms of how the policy had been applied thus far (para 38 above).

135. As I have concluded that there was no new or additional information in the sense contemplated by the Power to Detain Policy at the time when each of the Power to Detain Decisions was taken, in common with my approach to Ground Two I have not gone on to address the alternative contention that in any event there was no new or additional information before the Secretary of State when he made the August Decision because he was not aware of the contents of the 26 May 2022 OASys assessment at that stage (para 120 above).

Whether there was good reason to depart from the policy

136. Counsel were agreed that the applicable principle was identified by Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at para 26, namely that a decision maker must follow their published policy "unless there are good reasons for not doing so". I appreciate that the Defendant relies upon the combined effect of the factors that are advanced in support of the policy departure in this case. However, for the purposes of setting out my reasoning, I will consider each of them in turn. For the avoidance of doubt, I would reach the same conclusions if the departures from the policy were confined to the two admitted instances of this.

Reliance on *Johnson*

137. In light of the competing submissions it is necessary to describe the circumstances and the decision in *Johnson* in some detail.

138. Mr Johnson was sentenced to an extended sentence following his conviction for various child sex offences. As an extended sentence prisoner he was referred to the Parole Board once he had served the requisite custodial period. Pursuant to section 246A(6) CJA 2003, the Board had the power to direct his release on licence only if it was satisfied that it was "no longer necessary for the protection of the public" that he be confined. A panel of the Parole Board directed Mr Johnson's release, finding that although there was a risk of him reoffending, his previous practice had included a prior period of grooming a child, so that he was very unlikely to commit further offences in the short time before the expiry of his appropriate custodial term (when the Secretary of State would be required to release him). The Secretary of State's application for a reconsideration of this decision was refused by a judicial member of the Board on the basis that the panel had been correct to limit its consideration of risk to the period between the proposed date of release and the end of the appropriate custodial term (some nine and a half months later), as it was not empowered to consider public protection beyond the latter date.

139. The Divisional Court (William Davis LJ and Garnham J) allowed the Secretary of State's application for judicial review and quashed the Board's decisions. The Court held that the decisions were irrational whatever view was taken of the Parole Board's powers to consider risk, as the reasoning ignored the fact that grooming was itself an offence capable of causing harm (paras 23 – 27).

140. However, the Court also went on to decide whether the Board had been correct to consider that it was precluded from taking into account the risk to the public arising after the expiry of the prisoner's appropriate custodial term (para 28), concluding that the Board's interpretation was erroneous as the statutory test it had to apply had no temporal element rendering risk after the expiry of the appropriate custodial term as irrelevant (para 29). The Court observed that if "a prisoner will pose a danger after the expiry of that term, that is bound to be relevant to the issue of the safety of the prisoner's release prior to that point" (para 31).

141. Accordingly, *Johnson* was not concerned with the section 244ZB(2) CJA 2003 criteria or with the tests under the Power to Detain Policy. Furthermore:

i) The Court in *Johnson* was considering a differently worded and broader statutory test, namely whether the Board was satisfied that "it is no longer necessary for the protection of the public" that the prisoner should be confined (section 246A(6) CJA 2003). This is "substantially different" to the statutory dangerousness test: per Lord Mance at para 41 in *R (Sturnham) v Secretary of State for Justice (No.2)* [2013] UKSC 47, [2013] 2 AC 254;

ii) The Court's judgment in *Johnson* explicitly acknowledged this distinction, observing that the test for the Parole Board "is not the same as the test applied when imposing an extended determinate sentence (or any other sentence to which the dangerousness provisions apply)" and noting that the threshold for the dangerousness test "is higher than the threshold test for release" under section 246A(6) (para 19);

iii) The question that arose in *Johnson* does not arise in respect of a determinate sentence prisoner who is being considered under the Power to Detain Policy, the issue thereunder is whether they should be detained beyond their CRD, not whether their anticipated conduct after the date when they must be released can be taken into account;

iv) There is in any event no suggestion in the section 244ZB test or in the eligibility criteria in the Power to Detain Policy that a temporal cut off point should apply, such as the Parole Board had wrongly applied in *Johnson*, precluding consideration of the prisoner's anticipated conduct after a particular point in time. Accordingly, the decision in *Johnson* did not call into question the criteria set out in the policy as there was no such temporal cut-off point in the policy;

v) There was no suggestion in *Johnson* that the Court's decision went any wider than the specific issue before it, namely the temporal period over which the prisoner's conduct could be considered for the purposes of the Board applying the section 246A(6) test. Furthermore, as *Johnson* was solely concerned with the specific question that I have already identified, there is no apparent reason why, for example, the Court's decision should lead to a re-evaluation of the very

well established way that risk is assessed pursuant to the categories of Very High, High, Medium and Low that are used by the Probation Service, amongst others, when assessing the risks that a prisoner poses; and

vi) More particularly, the Court in *Johnson* was not concerned with whether a risk that was not "imminent" at the time of release was nonetheless capable of being a "significant" risk.

142. In addition to the fact that *Johnson* addressed a different issue, I note the following matters:

i) The Divisional Court's judgment in *Johnson* was handed down on 27 May 2022, some seven weeks before the Power to Detain Policy was issued. As the Secretary of State for Justice was the Claimant in that case, he, or at least senior officials within the Ministry of Justice, were aware of the decision and could have revised the draft policy if this was thought appropriate. However, the suggestion that *Johnson* might bear on the Power to Detain Policy criteria appears to have been raised for the first time by Mr Davison on 9 August 2022 after he was asked to re-draft the submission to the Secretary of State regarding the Claimant's proposed release (para 30 above);

ii) As I have described at paras 73 – 79 above, the Power to Detain Policy contains a detailed scheme for the evaluation of the risk posed by a prisoner and the circumstances in which the power is to be used. Evaluation of risk is explicitly linked to the level of risk identified by the very well established risk assessment tools. At para 4.4 the policy says that the risk assessment process undertaken whilst an offender is in prison will shape, in part, the question of referral to the Parole Board (para 74 above); and explicit reference is made to the need for an OASys assessment of a Very High risk at para 4.9. More generally, the need for there to be an imminent risk of serious harm is integral to the eligibility tests set out in paras 4.8 and 4.9 of the policy and in the subsequent passages indicating how these tests will be applied (paras 74 and 76 - 79 above). Whilst the statutory test in section 244BZ(2) does not require the risk of serious harm to be an imminent one, this is a central feature that was deliberately included in this detailed policy. As Mr Davison explains, the policy was drawn up with a view to limiting the circumstances in which the statutory power would be exercised (para 29 above); and

iii) Accordingly, if it was thought that somehow as a result of *Johnson* the approach to imminence of risk ought to be re-considered, on the face of it, this would entail a fundamental re-write of the policy and a re-calibration of the circumstances in which the section 244ZB power would apply. Moreover, this would be in the nature of a general revision to the eligibility criteria; it is very difficult to see how *Johnson* could be said to give rise to a discrete exception to the current terms of the policy, applicable in only a limited number of instances such as the Claimant's case. (For the avoidance of doubt, I was not shown any post-*Johnson* proposed revisions to the terms of the policy; and the comments made by Mr Davison in the 9 August 2022 revised submission support the impression that there was no intention to generally remove the requirement of imminence (para 30 above).)

143. For the reasons identified in the previous two paragraphs I do not consider that *Johnson* provided a basis for deciding that there was good reason not to apply the Power to Detain Policy to the Claimant's circumstances. The misperception of what *Johnson* had decided was reflected in the contemporaneous statements, such as: "it would be possible to argue that the Secretary of State should apply the same principles" as in *Johnson* in the 9 August 2022 revised submission (para 30 above); and although para 4.8(b) was not met the Secretary of State "applies this limb per *Johnston*" in the Power to Detain Referral Form (para 40 above). As I have already explained, there was no temporal barrier in the Power to Detain Policy analogous to that applied by the Parole Board in *Johnson* preventing consideration of conduct after a certain date. The misunderstanding of the *Johnson* judgment appears to have played a central role in the decision to consider this case outside of the terms of the policy: on 9 August 2022 it was decided that the referral to the Parole Board was to be "based on the Johnson judgment" (para 32 above); and on 11 August 2022 the Secretary of State indicated that the referral should be "under the *Johnson* test" (para 37 above).

Reliance on exceptionality

144. The injuries that Tony suffered were extremely serious, as I have already described, and accordingly, the Secretary of State was entitled to approach this matter on the basis that the further harm that could be caused if the risk materialised would be of a very serious nature. However, the specified offences in section 306 of the Sentencing Code include: manslaughter; wounding with intent to cause grievous bodily harm; maliciously administering poison so as to endanger life; causing explosions likely to endanger life; infanticide; possession of a firearm with intent to endanger life; hijacking; destroying, damaging or endangering the safety of an aircraft; causing death by dangerous driving; causing death by careless driving when under the influence of drink or drugs; use of chemical weapons; use of nuclear weapons; preparation of terrorist attacks and encouragement of terrorism. Accordingly, I do not consider that the severity of the harm that could result if the Claimant were to re-offend is reason in itself to treat her case as an exceptional one falling outside of the key criteria contained in the Power to Detain Policy. Similarly, the fact that she continued to deny responsibility for the offences is, unfortunately, unremarkable in itself and had been assessed in this instance as not increasing her level of risk (para 25 above). Accordingly, I do not consider that these factors gave rise to a good reason for failing to apply the policy.

Conclusion

145. Accordingly, the Claimant's case did not satisfy the eligibility criteria set out in the Power to Detain Policy in three respects, all of which were integral to the scope and operation of the Power to Detain under this policy. For the reasons I have identified, I do not consider that the factors relied upon by the Secretary of State afforded or indeed came close to showing that there was a good reason to depart from the policy in this instance. Plainly the notoriety of the Claimant's case was not a reason for doing so, as para 5.3 of the policy acknowledged in terms (para 78 above).

146. As I have indicated in relation to Ground Two, it therefore follows that the Power to Detain decisions should be quashed, but I will consider Counsels' written submissions as to the terms of the order to be made. For the avoidance of doubt, my decision on Ground Three is independent of the outcome of Ground Two.

Overall conclusion

147. The Secretary of State's decisions to refer the Claimant's case to the Parole Board pursuant to the provisions of section 244ZB(2) and (3) CJA 2003 were unlawful for two reasons. Firstly, I have concluded that the Secretary of State did not believe "on reasonable grounds" that, if released, the Claimant would pose "a significant risk" to members of the public of serious harm occasioned by the commission of a relevant offence, as the statutory test requires. Although I have rejected Mr Bunting's submission that the Secretary of State can only be "of the requisite opinion" where there has been a material change of circumstances since the prisoner was sentenced, I have nonetheless found that the statutory criteria were not met in this instance for the reasons I have identified at paras 121 – 124 above.

148. Secondly, the Secretary of State's own policy narrowed the circumstances in which the Power to Detain would be used. The Claimant's case did not meet the eligibility criteria set out in this policy in three significant respects (paras 127 and 130 - 134 above). Whilst the Defendant can depart from his own policy where there is good reason to do so, I have found that the features he identified in this instance did not amount to a good reason. They were based on a misunderstanding of the Court's decision in the *Johnson* case and a reliance on factors that did not give rise to sufficient exceptionality.

149. Accordingly, I have granted permission to apply for judicial review in respect of the Claimant's Ground Two and Ground Three and upheld these contentions. It follows that the Secretary of State's decisions to refer the Claimant's case to the Parole Board should be quashed.

150. I have refused permission to apply for judicial review in relation to the Claimant's Ground One. I have not accepted that it is arguable that the Secretary of State was under a duty to act with reasonable expedition in making the decision under section 244ZB(3) or in serving the notice pursuant to section 244ZB(4); or, if such a duty existed, that there was unreasonable delay in this case.