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Case No: CO/2724/2022
and CO/3259/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2023

Before:
LADY JUSTICE MACUR
and
MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING **on application of** **(1) ADRIAN JOHN BAILEY** **(2) PERRY MATTHEW MORRIS**	**Claimants**
– and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
– and –	
PAROLE BOARD FOR ENGLAND AND WALES	**Interested Party**

- -

Philip Rule and Michael Bimmler (instructed by **Instalaw Solicitors**) for the **Claimants**
James Strachan KC, Scarlett Milligan and Myles Grandison (instructed by the **Government Legal Department**) for the **Defendant**
Nicholas Chapman (instructed by the **Parole Board**) for the **Interested Party**

Hearing dates: 1 and 2 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 9.30am on 16 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE MACUR AND MR JUSTICE CHAMBERLAIN

Lady Justice Macur and Mr Justice Chamberlain:

Introduction and summary

1 The Parole Board ("the Board"), although funded by the Ministry of Justice ("MOJ"), is an arms-length body with important judicial functions. These include deciding whether prisoners with indeterminate sentences who have completed their minimum terms, or who have been released and recalled to prison, should be released into the community. The law requires this function to be discharged by a body which has the essential attributes of a court – i.e. one which is, and is seen to be, impartial and independent of the executive. It is well established that the Board satisfies these criteria in principle. It is equally well established that, when exercising powers in relation to the Board, the Secretary of State must not to do anything that undermines or would be perceived as undermining the independence of the Board or that encroaches upon or interferes with the exercise by the Board of its judicial responsibilities.

2 In this claim, the claimants were prisoners serving indeterminate sentences whose cases were before the Board and who were awaiting oral hearings when, on 28 June 2022, the Secretary of State exercised his statutory powers to make the Parole Board (Amendment) Rules (SI 2022/717: "the Amendment Rules"). These amend the rules governing proceedings before the Board. Rule 2(22) of the Amendment Rules came into force on 21 July 2022. It prohibited staff employed or engaged by HM Prison and Probation Service ("HMPPS staff") from including in their reports a view or recommendation on the question whether a prisoner is suitable for release or transfer to open conditions ("the ultimate issue"). It also provided that, where considered appropriate, the Secretary of State would present a "single view" on the prisoner's suitability for release. To explain the implications of the prohibition for HMPPS staff preparing reports for the Board and giving evidence at oral hearings, the Secretary of State issued guidance ("the July Guidance"), which was used as the basis for staff training.

3 The claimants challenged the decision to make rule 2(22) on the grounds that it: amounted to an unlawful interference with the independent judicial determination of the legality of detention, contrary to common law and/or Article 5(4) of the European Convention on Human Rights ("ECHR") (**ground 1**); was *ultra vires* the enabling power, construed in accordance with Article 5(1) and (4) (**ground 2**); frustrated the claimants' legitimate expectation that the rules would remain as they were when their cases were first referred (**ground 3**); was made without prior consultation and therefore unlawful (**ground 5**); and was irrational (**ground 6**). They also challenged the July Guidance as unlawful (**ground 4**).

4 In the first claimant's case, an application for interim relief was successful before HHJ Bird (sitting as a High Court Judge). He granted an interim declaration that the July Guidance was of no effect in that case. The Secretary of State gave an undertaking to similar effect in the second claimant's case. In the light of the points made in the claim and the judgment of HHJ Bird, the Secretary of State "revoked" the July Guidance, without expressly disavowing its contents, and produced a new version ("the October Guidance"). Chamberlain J granted the claimants permission to amend their claim to include within ground 4 a challenge to the October Guidance, which they said was subject to many of the same criticisms as the July Guidance.

5 Our conclusions, in summary, are as follows:

(a) Rule 2(22) applies only to those reports forming part of the dossier which the Secretary of State is required to serve when referring a case to the Parole Board. It does not prevent the Board from using its case management powers to direct a witness to provide a further report containing a view about the prisoner's suitability for release or transfer to open conditions ("the ultimate issue"); nor does it affect the witness's legal obligation to comply with such a direction. Equally, it does not prevent the Board from asking the witness for a view on the ultimate issue during the oral hearing; nor does it affect the witness's legal obligation to answer such a question.

(b) On its true, narrow construction, the result achieved by rule 2(22) was within the power conferred by s. 239(5) of the Criminal Justice Act 2003 "(the 2003 Act"), read compatibly with Articles 5(1) and (4) ECHR.

(c) However, the decision to make rule 2(22) was nonetheless unlawful for two reasons:

(i) One of the Secretary of State's principal purposes in making it was to suppress or enable the suppression of relevant opinion evidence which differed from his own view in cases where he expressed one. That purpose was improper. The decision to make the rule was an attempt by a party to judicial proceedings to influence to his own advantage the substance of the evidence given by witnesses employed or engaged by him and an impermissible interference with a judicial process. The fact that the attempt failed because the drafters did not achieve his purpose does not save the decision from being unlawful.

(ii) There is no evidence that the Secretary of State ever considered whether a prohibition on the expression of views on the ultimate issue was justified if its application was limited to the reports sent with the referral. The reasons currently advanced for it do not provide a rational justification for rule 2(22) on its correct, narrow construction.

(d) Even on the footing that rule 2(22) had been lawfully made, the decision to promulgate the July Guidance was unlawful. It instructed HMPPS witnesses that they must not include any view on the ultimate issue in their written reports, without distinguishing between the reports to which the prohibition applied and those to which it did not. It also instructed those witnesses to refuse to answer questions about their views on the ultimate issue. There was no legal basis for these instructions, which would induce report writers to breach their legal obligations. The July Guidance was therefore unlawful.

(e) Although the July Guidance was "revoked" and replaced by the October Guidance, HMPPS staff were never told that the former misstated the law or that they should disregard the training they had recently received based on it. On the contrary, they were given the impression that it was simply being reissued in a more concise form. No further training was offered. In any event, even taken alone, the October Guidance would be understood by HMPPS staff as instructing or encouraging them not to offer views on the ultimate issue even when (i) they have such views and (ii)

they have been directed to provide them in reports or asked for them in oral hearings. In these respects, the October Guidance continued to misstate the law and to induce staff to breach their legal obligations. The decision to promulgate it was therefore also unlawful.

(f) The July Guidance and October Guidance were bound to, and did, cause report writers to breach their legal obligations in large numbers of cases. It is not possible to say with certainty what effects this guidance has had in the cases determined while it was in force. But its promulgation may well have resulted in prisoners being released who would not otherwise have been released and in prisoners not being released who would otherwise have been released.

(g) The Secretary of State did not consult outside the MOJ before making rule 2(22). If he had done so, he might have avoided the unedifying confusion which appears to have prevailed within the MOJ and HMPPS about the effect and consequences of rule 2(22). However, there was no statutory obligation to consult and no promise or sufficiently consistent practice of doing so. The failure to consult was therefore not unlawful.

The status and functions of the Parole Board

6 The Board is established under s. 239 of and Sch. 19 to the 2003 Act. Section 239 provides insofar as material as follows:

> "(3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider—
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> (a) any documents given to it by the Secretary of State, and
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> (b) any other oral or written information obtained by it;
>
> and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.
>
> (4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it.
>
> (5) Without prejudice to subsections (3) and (4), the Secretary of State may make rules with respect to the proceedings of the Board...
>
> (6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the Secretary of State must have regard to—
>
> (a) the need to protect the public from serious harm from offenders, and

(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

7 The Board is a body corporate and has the status of an executive non-departmental public body. Its sponsoring department is the MOJ, but it performs administrative functions free from direct governmental control. Originally, its functions were advisory only. Under the influence of the Strasbourg Court, however, statutory amendments have given the Board the function of making decisions about whether to release prisoners. These decisions bind the Secretary of State, who is a party to proceedings before the Board.

8 When taking these decisions, the Board has to consider whether it is "satisfied that it is no longer necessary for the protection of the public" that the prisoner should remain in prison: see s. 28(6) of the Crime (Sentences) Act 1997 (in relation to life sentence prisoners referred to the Board) and s. 32(5A) of the same Act (in relation to prisoners who have been released and recalled). It is common ground that the phrase "suitability for release", as used in the Rules, is a shorthand for these materially identical statutory tests.

9 If the Board gives an affirmative answer to the statutory question, the Secretary of State is legally obliged to release the prisoner. If not, and the prisoner is currently accommodated in the closed estate, the Board can recommend the prisoner's transfer to open conditions. On that issue, the final decision remains that of the Secretary of State, though policy and the case law interpreting it impose constraints on the circumstances in which he can differ from the Board's view: see e.g. *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin), [18]-[30].

10 From the perspective of the Board the "ultimate issue" is whether to direct release and, if not, whether to recommend a transfer to open conditions. There are, however, other issues which fall for determination first, as essential staging posts *en route* to the determination of the ultimate issue. These may be termed "staging post issues". They will differ from case to case. Some will be pure factual issues, e.g. is it established that the prisoner engaged in violent conduct in prison on a particular occasion? Others will turn on the Board's assessment of expert evidence, e.g. does the prisoner have a personality disorder? Others are evaluative questions which rely on prior factual findings but also turn on the exercise of professional judgment, e.g. what is the level of risk that the prisoner will reoffend? In *R (DSD) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285, at [133], the Divisional Court (Sir Brian Leveson P, Garnham and Jay JJ) described the exercise of risk assessment as "multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself".

11 In *R v Parole Board ex p. Watson* [1996] QB 906, a recall case decided under the previous legislative regime, the Court of Appeal made clear that the Board was not limited to reviewing the legal validity of the Secretary of State's reasons for recall. At 916E, Sir Thomas Bingham MR said: "It is the judgment of the board as a quasi-judicial review body, not the judgment of the Secretary of State as an arm of the executive, which matters." It is common ground that this statement applies equally to the Board's current functions of deciding whether indeterminate sentenced prisoners should be released under the statutory provisions now in force. The description of the Board as "quasi-judicial", however, requires some modification in the light of subsequent authority.

12 Much of this subsequent authority emanates from the Strasbourg Court, but it is not necessary to consider the decisions of that Court, because they have been summarised in and incorporated into domestic authority. A review of that domestic authority demonstrates that the applicable principles first articulated in Strasbourg march in step with the doctrine of the separation of powers, which in this context is reflected in the common law principle that decisions about the liberty of the subject should be taken by a body which is independent of the executive and impartial as between the parties, save where Parliament expressly provides to the contrary.

13 In *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, Lord Bingham summarised the case law:

> "The board is not in any ordinary sense a court. But it is accepted as being a court for purposes of article 5(4) because, and so long as, it has the essential attributes of a court in performing the function of directing release and other functions not in issue in this appeal. Thus it is independent of the Secretary of State, and the Prison Service and the prisoner: *Weeks v United Kingdom* (1987) 10 EHRR 293, para 62. It is impartial (*Weeks*, para 62), in the sense that it decides cases on the material before it without any prejudice or predilection against or for any party. In cases such as the appellant's oral hearings are now routinely held. The board is obliged to act in a manner that is procedurally fair (*Weeks*, para 61), as it is when resolving challenges to revocation of parole licences: *R (West) v Parole Board* [2005] 1 WLR 350, para 1. In contrast with the position which obtained in the past (*Weeks*, para 64), the board now has the power to direct the release of a tariff-expired mandatory life sentence prisoner and not merely to advise or make a recommendation to the Secretary of State."

14 Thus, the Board qualifies as a "court" for the purposes of Article 5(4) because "and so long as" it has the essential attributes of a court. But the Board is not a court "in any ordinary sense", because of its historic and continued relationship with the MOJ. As the subsequent case law shows, the consequence is that the Secretary of State must tread a very careful line in his interactions with the Board. In particular, he must be constantly vigilant to ensure that he does nothing to undermine the Board's actual and perceived independence from the executive (of which he is a member) and impartiality between the parties (of which he is one).

15 *R (Girling) v Parole Board* [2006] EWCA Civ 1779, [2007] QB 783 concerned s. 32(6) of the Criminal Justice Act 1991, which gave the Secretary of State power to give the Board directions as to the manner in which it performs its functions. The power had been exercised to specify matters which the Board must take into account in deciding whether to direct release. The first instance judge had "read down" the statutory power as not applicable to the Board's judicial functions, so as to achieve consistency with Article 5(4) and the common law principle of the separation of powers. The Court of Appeal (Sir Anthony Clarke MR, Sir Igor Judge P and Carnwath LJ) noted at [12] that the independence of the Board as a "court" within Article 5(4) was now established. At [17], they said that it was common ground that:

> "if he were to make directions which encroached upon or interfered with the exercise by the board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner, he would be acting unlawfully and

> any such directions would be subject to a successful application for judicial review".

The direction-giving power could not be used "to direct the board how it was to decide a particular case or class of case, because that would be to impugn the independence of the board and to interfere with its functions as a court", but there was no objection to giving general directions "to assist it to exercise its powers within the law": [19]. The directions were unlawful insofar as they purported to require the Board to apply a test different from that required by the statute.

16 In *R (Brooke) v Parole Board*, a challenge was brought to the independence of the Board under Article 5(4) ECHR. The Divisional Court (Hughes LJ and Treacy J) held that the Secretary of State had exercised a number of his powers in a way that undermined the independence of the Board. These included his powers to appoint Board members, make procedural rules, give directions and decide on the Board's funding arrangements: [2007] EWHC 2036 (Admin), [2007] HRLR 46.

17 The Divisional Court said this about the rule-making power at [43]:

> "It is impossible to regard it as ideal that the Rules should be made by a party to the proceedings before the Board, since it is inevitable that from time to time there will necessarily be differences of opinion as to content, but the Parliamentary procedure appears to us to mean that, taken by itself, the rule-making power does not create an appearance of lack of independence."

At [45], the Divisional Court concluded that the power to give directions was not inconsistent with the Board's independence, but that, as *Girling* showed, the arrangements for the "sponsorship" of the Board by the MOJ could create the appearance of a lack of independence. At [49], they concluded that the funding arrangements were "not in themselves inconsistent with the independence required by Art. 5(4) and the common law, providing that they are not used to influence decision-making, but that in one respect they appear to have been so used". This was because the power to allocate funds had been used to put indirect pressure on the Board to induce it to reduce the number of cases in which it interviewed the prisoner, in the context of a difference of opinion between the Secretary of State and the Board about the value of such interviews: see [59]-[60].

18 The Court of Appeal (Lord Phillips CJ, Dyson and Toulson LJJ) broadly agreed with this reasoning: [2008] EWCA Civ 29, [2008] 1 WLR 1950. They said this:

> "51. The Secretary of State is a party to each application for release, but it does not follow that in each case he is in adversarial contest with the prisoner who is seeking release. The exercise that the board is performing is the same exercise that he previously performed on the advice of the board. His concern should be that the statutory test is satisfied before a prisoner is released. He will oppose release when he does not believe that the test is satisfied but would not normally be expected to do so where satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. As Mr A'Court, the head of the Release and Recall Section and the Public Protection Policy Section of NOMS remarked in his witness statement: 'the board is not concerned with a classic adversarial dispute between two parties,

> but reaches a risk based assessment of the suitability of individual prisoners for release.' For this reason it is not correct to equate the position of the Secretary of State to that of a party in an adversarial process.
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> 52. None the less, a court must be independent not only of the parties but of the executive. This is not merely because this is a requirement of the separation of powers but because the executive sometimes has an interest in the result of the proceedings. So far as the Parole Board is concerned the possibility exists that the Secretary of State may be anxious for the board to apply a stricter, or alternatively a more lenient, test to releasing prisoners than that required by the law."

19 The Court noted at [60] that the Secretary of State had exercised his power to give directions to the Board in a way that had gone beyond what was permissible. At [66], they endorsed Hughes LJ's conclusion about the impact of funding on independence. They continued:

> "79… The close working relationship between the board and the unit acting as its sponsor has tended to blur the distinction between the executive role of the former and the judicial role of the latter.
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> 80. The restriction of funding, intended to dissuade the board from interviewing prisoners fell into a different category of interference with the manner in which the board performed its functions. It was not aimed at influencing the results reached by the board but at procuring that the board, contrary to its wishes, refrained from, or reduced, an aspect of its procedure that the department did not consider warranted the expense that it involved. While this did not threaten the board's impartiality it was interference that exceeded what could properly be justified by the role of sponsor."

20 At [81] et seq. Lord Phillips identified the areas where action was required to achieve the degree of independence necessary to comply with Article 5(4) ECHR and common law requirements. In some areas, no further action was required, provided that the Secretary of State used his existing powers in a way which was consistent with the maintenance of the Board's independence from the executive, actual and perceived.

21 Reliance was placed on a number of more recent cases dealing with slightly different, though not completely unrelated, points. In *R (McGetrick) v Parole Board* [2013] EWCA Civ 182, [2013] 1 WLR 2064, the Court of Appeal considered whether the Board had power to exclude material submitted by the Secretary of State as part of the dossier relating to allegations in respect of which the prisoner had not been convicted. Pill LJ (with whom Toulson LJ and Tomlinson LJ agreed) noted at [34] that "the board has judicial responsibilities, and the Executive must not be permitted to impugn its independence by interfering with its functions as a court". The 2003 Act had to be read, if at all possible, so as not to infringe that principle. That meant that the Board could make arrangements whereby a document or documents were excluded from the dossier. Toulson LJ thought the case raised an issue of constitutional significance and said this:

> "44. In making recommendations for the release of prisoners the Parole Board exercises a judicial function: *R (Brooke) v Parole Board* [2008] 1 WLR 1950, para 78.

> 45. As a matter of general principle, every judicial body has inherent jurisdiction to establish its own procedures for dealing with cases justly: see, for example, *Attorney General v Leveller Magazine Limited* [1979] AC 440 and *Taylor v Lawrence* [2003] QB 528, para 17.
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> 46. This general principle is part of the wider principle of judicial independence, which is an important aspect of the rule of law…
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> …
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> 49. Parliament may legislate to regulate the way in which judicial bodies conduct their proceedings or authorise regulation by secondary legislation such as the Parole Board Rules. However, the principle that judicial decisions about a person's liberty, whether made by a sentencing court or by the Parole Board, should be made by a tribunal untainted by prejudice or the risk of prejudice is so fundamental that Parliament should not be taken to have intended to erode that principle unless primary legislation permits no other interpretation. This is an application of the principle of legality recognised, for example, in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131."

22 In *R (DSD) v Parole Board*, the Divisional Court had to consider *(inter alia)* whether s. 239 of the 2003 Act was broad enough to authorise the making of a procedural rule implementing a blanket ban on the provision of information to non-parties. The Court held that it was an essential part of the victims' right of access to the court that they should have access to <u>some</u> information about the substance of the release decision: [187]. Applying the principle of legality (see *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115), s. 239 had to be construed as not authorising the infringement of that right to a degree greater than necessary to safeguard the prisoner's legitimate confidentiality interests. Since the blanket rule went further than could be justified by the need to protect those interests, the rule was *ultra vires*.

23 Finally, *R (Huxtable) v Secretary of State for Justice* [2021] EWCA Civ 1394, [2022] 1 WLR 813 involved a challenge to a rule change making its decisions provisional until the expiry of a prescribed period to allow the parties to apply for reconsideration. The Court of Appeal dismissed the challenge. The rule change was *intra vires* because it was procedural only and did not remove any substantive power from the Board: see at [24]-[30]. It did not infringe Article 5(1) or (4) because it did not, on analysis, involve any delay in the prisoner's release and in any event was potentially to the prisoner's benefit (since the reconsideration mechanism was in practice used much more by prisoners than by the Secretary of State).

24 In our judgment, these authorities establish the following relevant principles:

(a) The fact that the Secretary of State has power to make rules governing proceedings to which he is a party or give directions as to the matters to be taken into account in determining them does not, in and of itself, call into question the independence of the Board (*Brooke*, Divisional Court, [43]-[45]).

(b) However, both the common law and Article 5(4) ECHR prevent those powers from being exercised in such a way as to encroach upon or interfere with the exercise by

the Board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner (*Girling*, [17]).

(c) An exercise of statutory powers will contravene this principle not only where it influences the results reached by the Board, but also where it is aimed at procuring that the Board, contrary to its wishes, refrains from or reduces an aspect of its procedure (*Brooke*, [80]).

Procedure prior to the Amendment Rules

25 When a case is referred to the Board, the chair must appoint one or more members as a panel to consider the case on the papers and, if they direct consideration at an oral hearing, to hear the case: rule 5(1) and (2) of the Parole Board Rules 2019 (SI 2019/1038: "the Rules").

26 The panel chair has power to make any direction necessary in the interests of justice, to effectively manage the case or for such other purpose as the panel chair considers appropriate, including as to the submission of evidence or the attendance of a witness: rule 6(2) and (3)(c) & (d).

27 Subject to rule 17 (which is not relevant here), the Secretary of State must serve on the Board, the prisoner and (if there is one) the prisoner's representative the information specified in the Schedule and any further information which the Secretary of State considers relevant: rule 16(3). This "dossier" comprises the information specified in Part A (name, date of birth, prison, sentence details, parole history and recall history if applicable) and the reports specified in Part B. These included, at para. 4, "Current reports on prisoner's risk factors, reduction in risk and performance and behaviour in prison, including views on suitability for release on licence as well as compliance with any sentence plan" and, at para. 5, "A current risk management report prepared for the Board by an officer of the National Probation Service or relevant Community Rehabilitation Company, including information on… (l) a view on the suitability for release" (emphasis added).

28 In the period from the coming into force of rule 2(22) (21 July 2022) to the withdrawal of the July Guidance (4 October 2022), 3,933 cases were decided on the papers only. In a further 912, an oral hearing was directed. In the period from the issue of the October Guidance (5 October 2022) to the end of February 2023, 5,777 cases were decided on the papers and in a further 1,432, an oral hearing was directed.

29 At the oral hearing, the panel "may ask any question to satisfy itself of the level of risk of the prisoner" and "must conduct the hearing in a manner it considers most suitable to the clarification of the issues before it and the just handling of the proceedings": rule 24(2)(b) & (c). Rule 24(6) permits the panel to produce or receive in evidence any document or information whether or not it would be admissible in a court of law. Rule 24(7) provides:

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

30 The Board explained how it exercises these powers in para. 11 of its Detailed Grounds of Response in the first claimant's case:

> "…the Parole Board's panels could and generally would issue directions requiring the provision of reports or update reports containing (amongst other things) recommendations based on the author's assessment of risk as it did in the Claimant's case – and it could and typically would ask questions testing those recommendations during oral hearings. The Board clearly recognises that it must come to its own conclusions on whether the test for release or transfer is met in any individual case; at the same time, and consistently with this, it is the Board's experience that the recommendations of experts can form a valuable part of the evidential matrix, including (but not only) when it is required to make a decision on the papers."

31 The word "recommendation" here means a recommendation about whether the witness considers the prisoner meets the statutory test for release. The Board recognises that, like any other judicial tribunal, it cannot delegate its function to an expert witness, but it notes that, as the Supreme Court has itself recognised, "on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court": see *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597, [49] (Lord Reed and Lord Hodge).

32 The propriety of receiving expert evidence on the very issue the tribunal has to determine was considered by the Court of Appeal in *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195. At 206, the Court (Butler-Sloss, Henry and Savile LJJ) noted that expert evidence before the family court often included a conclusion about whether or not the child had been abused. They explained:

> "At one time it was thought that an expert witness could not give evidence of his opinion on an issue in the case, especially not when it was the ultimate issue, determinative of the case. To give such evidence was said to 'usurp the function of the jury', a reason Wigmore was particularly scornful of, condemning it as 'empty rhetoric' (see *Evidence in Trials at Common Law* (Little, Brown, 3rd edn, 1983), vol 7, para 1920). First, the witness is not attempting to 'usurp' the judge or jury's function – at worst he is simply offering as evidence that which is not, and secondly he could not usurp it if he would, because no power could compel the judge or jury to accept it, and they know the decision is theirs. Wigmore was equally dismissive of the dicta that opinion evidence on the ultimate issue was inadmissible:
>
> 'The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad because, even when the very point in issue is to be spoken of, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle.'"

33 The Court noted that the Law Reform Committee (which included many distinguished judges and lawyers) considered the issue in 1970 and recommended statutory

confirmation that a statement by an expert witness addressing directly an issue in the proceedings should not, for that reason alone, be inadmissible. This was given effect in the civil courts in the Civil Evidence Act 1972. So, the Court said at 207:

> "…it is right to say (as the textbooks do) that the ultimate issue rule has been abandoned (unmourned by the ghost of Wigmore and the editor of *Cross and Tapper on Evidence* – see (Butterworths, 8th edn, 1995), p 552)."

It went on to note that the same approach – of allowing expert evidence even on the ultimate issue – had been followed for some time in criminal cases too.

34 The case law we have set out establishes that the Board is a "court" for the purposes of Article 5(4). There is a dispute between the parties about whether it is also a court for the purposes of the law of contempt. We shall return to this issue at the end of our judgment, but for present purposes it is sufficient to say that it was common ground that a witness directed to provide written evidence would be legally obliged to do so; and that, accordingly, a failure to provide that evidence would be a breach of the witness's legal obligation. A witness who considers that a direction made by the Board is unlawful can apply to vary or revoke it under rule 6(5). But unless and until it is set aside, the obligation to comply with it remains: see *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461, [43]-[56].

35 Mr James Strachan KC, for the Secretary of State, said that this reasoning covered orders or directions only and did not extend to questions asked at oral hearings. However, he accepted that a witness asked a question in an oral hearing before the Board would be under a legal obligation to answer (to the extent that they were able to do so), unless the answer fell within the categories of information which they could not be compelled to provide at the trial of an action (see rule 24(7)). We agree. In our judgment, the obligation arises as a necessary incident of the power conferred on the Board by rule 24(2)(b) and (c).

The Amendment Rules

36 On 28 June 2022, the Secretary of State made the Amendment Rules. These were laid before Parliament on 30 June 2022. Rule 2(22) amended paras 4 and 5 of Part B of the Schedule to omit the requirement for views on suitability for release and inserted a new introductory paragraph 1Z at the start of Part B in these terms:

> "(1) Reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs of Part B of this Schedule, but the report writer must not present a view or recommendation as to the prisoner's suitability for release or move to open prison conditions.
>
> (2) Where considered appropriate, the Secretary of State will present a single view on the prisoner's suitability for release."

37 The Explanatory Memorandum accompanying the Amendment Rules included these passages:

> "7.1 In the 2019 general election manifesto, the government promised to undertake a Root and Branch review of the parole system and to make provision for victims to observe parole hearings in full for the first time. This legislation derives from these commitments and the consultation and stakeholder engagement undertaken as part of the Root and Branch review which was published on 30 March 2022. The review follows on from the recommendations of the Tailored Review of the Parole Board (published in October 2020) and several other key reforms that have been implemented since 2018.
>
> …
>
> 7.8 Recommendations made on behalf of the Secretary of State: Part B of the Schedule to the 2019 Rules required that reports from prison and probation staff must include views on the prisoner's suitability for release. This requirement has been removed from the Parole Board (Amendment) Rules 2022 and prison and probation staff will no longer provide recommendations in any parole cases. Instead, the Secretary of State may decide to submit a single view in a case which takes account of all the written evidence. Single Secretary of State views will mainly, but not exclusively, be used in the top-tier of parole cases as identified in the Root and Branch review (those convicted of murder, rape, terrorism, or causing or allowing the death of a child)."

The rationale for rule 2(22)

Reviews of the parole system

38 The primary evidence for the Secretary of State in these proceedings comes in the form of witness statements from Stephen Bailey, Head of Release Strategy in the Bail, Sentencing, and Release Policy Unit at the MOJ (dated 27 September 2022) and Ian York, Head of the Public Protection Casework Section, which is part of the Public Protection Group in HMPPS (dated 23 February 2023).

39 The Parole Board Rules have been revoked and replaced on a number of occasions, most recently in 2011, 2016 and 2019. The background to the changes incorporated in the last of these are described in Stephen Bailey's witness statement. He explains that there was a review of law, policy and procedure announced in April 2018 in the light of the Worboys case, which included consultation on a new mechanism for reconsidering decisions to release prisoners.

40 In February 2019, the MOJ published the results of that consultation exercise and also announced a further "Tailored Review" of the Board to consider whether there was a case for further, more fundamental reforms that would require primary legislation. In November 2019, while the Tailored Review was ongoing, the Conservative Party released its manifesto for the 2019 election, which included a commitment to conduct a "root-and-branch review of the parole system to improve accountability and public safety, giving victims the right to attend hearings for the first time".

41 The Root and Branch Review was launched in October 2020. In the same month, the Tailored Review reported its findings. In March 2022, the MOJ published a document

entitled *Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales* (Cm 9611). At para. 45, it was noted that "[i]n the majority of cases the Board will follow the evidence and recommendations of the professional report writers". At para. 98, the MOJ said this:

> "For the future, we are developing a model in which there will be one Secretary of State view presented to the Panel. There are two parties to parole proceedings – the Secretary of State and the prisoner. The Secretary of State's view would reflect the assessments made by probation officers and psychologists and present one view on whether the prisoner is safe to be released."

42 Mr Bailey explained that the changes made by rule 2(22) "were discussed and consulted on extensively within the MoJ and with the SSJ between April and June 2022". Initially, the Secretary of State was advised to prohibit report writers from making recommendations in the "top tier" or most serious cases in which the Secretary of State would be likely to submit a single view to the Board. However, as internal discussions developed, "it became clear that the problematic nature of differing views and recommendations applied equally to all of the Parole Board's cases, and so a decision was taken to apply the prohibition to all cases". The reasons were three (see para. 33):

> "a. First, each report writer can only speak to a certain aspect of the prisoner's risk. That being the case, it is appropriate for the report writers to focus only on the relevant facts and risk factors that they can speak to, rather than seeking to offer a preliminary view on the statutory test on the basis of incomplete information. The decision as to whether a prisoner is suitable for release is for the Parole Board to make, having regard to the entirety of the factual evidence.
>
> b. Second, the reports are written by MoJ employees or agents, and are ultimately prepared on behalf of the SSJ. As a result, in Parole Board proceedings it was possible for the SSJ to be seen as presenting conflicting views as to whether or not the prisoner was suitable for release. In addition, where the SSJ has an overarching view as to a prisoner's suitability for release, the views presented in the reports could conflict with the SSJ's overarching view, which will be informed not only by the progress of the prisoner, but also by the broader impact on the public and victims of crime. Furthermore, these perceived inconsistencies in the SSJ's position can create problems in instances where a report writer has opined that a prisoner is suitable for release, and the SSJ subsequently wishes to apply to the Parole Board for a reconsideration under Rule 28, seemingly in contradiction with reports that the SSJ had served in the prisoner's dossier.
>
> c. Third, differing views between report writers give Parole Board proceedings an adversarial feel, with different writers being seen as canvassing for or against the prisoner. Where possible, this should be avoided in proceedings which should be inquisitorial in nature, with an independent Parole Board being furnished with the facts that it needs to reach a well-informed decision."

43 A fuller account of the way the policy developed can be gleaned from the internal documents disclosed by the Secretary of State. They show as follows.

44 On 19 April 2022, Gordon Davison, Head of the Public Protection Group, made a submission to the Secretary of State about "How to ensure that: (1) you are sighted on, and have an opportunity provide a view on, parole reviews for certain prisoners; and (2) you are represented at the oral hearings for those prisoners by persons with the appropriate skills and experience". The proposal was that officials would identify relevant cases to the Secretary of State at the point where the prisoner's parole review was open in "high profile cases" and, for cases in scope, officials would agree with the Secretary of State "the one Secretary of State view to be presented to the Parole Board, as to whether or not the prisoner might safely be released in the community or transferred to open conditions and that, on a case by case basis, the Secretary of State would then consider whether he wished to be represented by counsel.

45 On 28 April 2022, another submission was sent to the Secretary of State seeking approval, which was given, to proceed with laying a statutory instrument containing rule changes. The submission of 28 April 2022 is not among the papers before us.

46 On 18 May 2022, a submission was sent to the Secretary of State seeking his agreement to the additional changes needed to allow a "single SoS view" to be presented in certain cases. That submission provided materially as follows:

> "8. In addition to the previous list (Annex B), we have worked with lawyers to further amend the draft Rules so we will be able to implement your recent policy decisions on providing a single SoS view in some parole cases. You have decided that in cases identified as being the most serious HMPPS staff who provide evidence to the Parole Board will no longer provide their recommendations on a prisoner's suitability for release and instead a single SoS view will be provided which will be agreed with you in advance.
>
> 9. The current 2019 Parole Board Rules (Annex C) require that key prison and probation staff must always include a recommendation on the prisoner's suitability for release as part of their written reports (see Part B s.4 and 5 of the Schedule to the 2019 Rules). That requirement must be removed from the Rules to enable a single SoS view to be provided in some cases instead. It is not necessary to replace the current requirement with any new provisions in order to implement the new approach.
>
> 10. The Rules set out the information and evidence the SoS must submit to the Parole Board as a minimum in each case but that does not preclude us from submitting additional material not included in the Schedule. The absence of specific Parole Board Rules about written recommendations on suitability for release will provide total flexibility on how the recommendations will be made in future; it will allow a single SoS view to be provided in the cases of your choosing while also allowing for report writer recommendations to continue for the cases that are not in-scope of the new policy, provided you are content with that. In our view, it will be better to set out the policy approach and definition of the cohort of cases in which a single SoS view will be provided in guidance rather than the secondary legislation so our approach can be modified more quickly and easily should

> the need arise. Gordon Davison will provide you with further advice on this matter."

47 There was a meeting between the Secretary of State and officials on 26 May 2022. A further submission dated 31 May 2022 records that, at that meeting, the Secretary of State gave the following "steers":

> "5. The Parole Board Rules SI should include provision setting out the parameters for what the MoJ will provide to the Parole Board, in particular, that: (a) HMPPS report writers should provide only factual assessments and information in all top-tier cases and not offer a view or recommendation about suitability for release; and (b) the Secretary of State may provide a single view about suitability for release in certain cases.
>
> 6. The criteria for identifying cases in which one SoS view will be provided should include something around cases where there are strong victim views, although articulated in a way that does not 'draw in' too many cases for referral to ministers."

48 The submission of 31 May 2022 explained that a decision was required from the Secretary of State on the precise criteria for deciding which cases would be referred for a single Secretary of State view. The second matter on which a decision was sought was the Amendment Rules. The submission said this:

> "11. At the meeting with officials on 26 May, you asked for further amendments to be made to the draft Parole Board Rules Statutory Instrument to make clear that HMPPS report writers would not offer a view in all cases eligible to be considered for a single SoS view but should provide only factual assessments and information. We are proposing to give effect to this by specifying in the Rules that this is the approach for all top-tier cases (c.2,000 a year) but can also ensure that, as a matter of practice, report writers do not offer a view in all cases where a single SoS view will be entered, thereby avoiding the potential for conflicting views being presented to the Board. We do not think we can or should attempt to define on the face of the Rules which cases would be eligible for a single SoS view – as that would be complex and is yet to be tested out in practice – but are confident that reference to the four top-tier offence categories will capture the majority of cases in which you may wish to enter a single SoS view; and that, in practice, we can ensure that in the small number of other cases not in the top-tier which may meet the criteria for an SoS view, report writers can be instructed not to enter a view or recommendation.
>
> 12. We have worked with MoJ lawyers to produce a revised version of the Schedule to the Rules which is attached as Annex A. To give effect to your steers, we propose that the revised version of the rules will include the following provisions:
>
> 'Reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs below.

> In cases where the offender is serving a sentence for murder, rape, terrorism (or a terrorism related offence), or causing or allowing the death of a child (as listed in Part C of this Schedule), the report writer must not present a view or recommendation as to the prisoner's suitability for release or move to open prison conditions.
>
> Where considered appropriate, the Secretary of State will present a single view on the prisoner's suitability for release. In cases where the Secretary of State presents a single view, reports relating to the prisoner must not include a recommendation on suitability for release or a move to open conditions.'
>
> 13. We believe this meets your desired intention to make clear that HMPPS witnesses should, in cases eligible for a single SoS view, be providing factual information and professional risk assessments only and will no longer express a view or make recommendations about a prisoner's suitability for release or transfer to open conditions. In all other parole cases i.e. those not in the top-tier nor meeting the criteria for one SoS view – report writers may continue to present a view or recommendation on suitability for release as they do now (although will no longer be mandated to do so as they are under the current rules)."

49 On 1 June 2022, there was a further meeting between the Secretary of State and officials, including Gordon Davison ("GD") and Antonia Romeo ("AR"), the Permanent Secretary at the MOJ. The Secretary of State is referred to as "DPM", short for Deputy Prime Minister and is recorded as saying this:

> "DPM: Wanted to check this point about SoS view and why we cannot change the Parole Board Rules so that prison and probation staff provide factual reports, with no separate recommendation, and leave a single overarching recommendation, and leave a single overarching recommendation - based on an assessment of all the reports - the single SoS view. Outlined that he believes the Parole Board is not judicial in its function but is a fact finding process. Therefore all the views of report writers put to them should wholly factual without recommendation. The question on how we judge or balance there should be for the single SoS view. Asked why we cannot change the Parole Board Rules to implement this?
>
> …
>
> DPM: Wants to ensure that in all these cases eligible for a single SoS view (top tier) that the report writers cannot provide a recommendation. Not enough to just say in the rules that they are not required, in these cases wants to prohibit a recommendation.
>
> DPM: It is for the report writers to submit factual submissions, it is then for the Parole board to exercise the judgement.
>
> GD: This would fix major presentational issue.
>
> …

> AR: Strongly advised that including this in legislation was not necessary. It would be unusual for an SOS to use legislation to direct their own staff: the same outcome could be achieved with a direct instruction via the usual line. All officials in the department work for the DPM so would follow directions given - didn't need to legislate to do change the direction. Plus would send an odd signal of a dislocation between DPM and his officials. Including this in the SI would is disproportionate and unnecessary.
>
> DPM: Accepted arguments but argued that the Parole Board can still ask questions about the facts, this would prevent a judgement coming from report writers, an overarching judgement would either come from SoS or the Parole Board. Wants to use this to say to the Parole Board these are the parameters of what the MoJ will provide facts not judgement.
>
> …
>
> DPM: Wants this to be included in the SI and to frame as the role of report writers is to do [x], and in the cases the SoS provides a view their role is [x]."

50 There was a further meeting on 15 June 2022 between the Secretary of State and officials, including Amy Rees, Director General of Probation, Wales and Youth in HMPPS ("ARees"). The Secretary of State is recorded as giving the following steer: "Report writers should not offer a view or recommendation on suitability for release in all cases. The Parole Board rules should be amended to reflect this." The record of the discussion includes the following:

> "ARees: Confirmed that in all those c.2,000 cases in the top tier, there will not be a case where the SoS view can be contradicted by report writers / the SoS representative.
>
> DPM: Confirmed know that there will be no recommendations in those cases in the top tier, those cases eligible for a single SoS view, but what about those non top tier and non SoS view cases what shall we do here?
>
> ARees: Suggested in non top tier and non SoS view cases we continue to let report writers make a recommendation.
>
> DPM: Is there a risk that we are pushing this narrative that the job of report writers is to present facts, and the PB to fact find but then say we are trusting their judgement in less serious cases?
>
> ARees: The PB can still illicit [sc. elicit] a view from report writers in oral hearings but there will be no formal written recommended view from report writers.
>
> DPM: If the PB are going to illicit [sc. elicit] a recommendation then should we allow report writers to make a recommendation or not?
>
> GD: Suggested it is not for report writers to make recommendations, if the DPM believes they should play a fact finding role then there should be no recommendations in all cases.

> …
>
> DPM: Understand that no recommendations can be disempowering in one sense, but also we are putting the responsibility back into the PB in one sense.
>
> DPM: Agree with GD. Wants to include in the PB rules that report writers should not make recommendations. Will look at a revised WR letter today [Action 1].
>
> DPM: Mentioned that he had received thanks from the PM on the letter sent on 31 May updating the PM on the parole reforms, the DPM thanked the team for all their work."

51 On 20 June 2022, Gordon Davison sent an email to senior staff asking them to brief those for whom they were responsible on the proposed changes. It said this:

> "The Parole Board Rules are being amended, by Statutory Instrument, with effect so as to remove the requirement for report writers to make a recommendation to the Parole Board as to whether a prisoner is safe to be released or suitable for open conditions.
>
> Reports from HMPPS (COMs, POMs and, where relevant, psychologists) will still provide factual risk assessment but they will no longer contain the report author's personal recommendation about the prisoner's suitability for release or open conditions.
>
> In the most serious or high-profile cases, the Secretary of State may choose to provide the panel with a single Secretary of State view which takes account of all the evidence.
>
> …
>
> Where a single Secretary of State view is provided, the Secretary of State will be represented at the hearing by either a Secretary of State Representative from PPCS or by Counsel.
>
> This is intended to avoid situations where HMPPS witnesses recommend release in cases where we subsequently want to apply for reconsideration, or in future, to use the ministerial power to refuse release.
>
> We recognise that Parole Board Panels will likely ask HMPPS witnesses at oral hearings for the view on the prisoner's suitability for release or open conditions, and witnesses may given [sic] their views when asked, but they will not make any formal recommendation in their reports any longer.
>
> However, in those cases where a single Secretary of State view is provided, HMPPS report writers must not speak against it at oral hearings. We estimate that a single Secretary of State view will be provided in around 150 cases per year, and PPCS will work very closely with the witnesses, to prepare them for the sensitivity and nuance of the oral hearing in these cases." (Emphasis added.)

52 On 24 June 2022, there was another submission to the Secretary of State, this time with the final version of the Amendment Rules for signature.

53 On 30 June 2022, the Secretary of State wrote to Sir Bob Neill MP the Chair of the Justice Select Committee. The letter included this:

> "In the Root and Branch Review I signalled my intention to make changes to the way that the Secretary of State's view on the prisoner's suitability for release is presented at parole hearings. Currently, prison and probation staff who have worked closely with the prisoner prepare written reports and the Parole Board Rules require those reports to include a recommendation on the prisoner's suitability for release or transfer to open prison. This can lead to separate, conflicting recommendations from within the Ministry of Justice. While that may be to be expected when it comes to assessments of risk, I do not believe it is appropriate to have diverse recommendations on the ultimate and overarching question of release. Therefore, I have decided to amend the requirement so that operational staff will no longer provide a written recommendation of their own; their reports will now focus on providing a factual assessment of the prisoner's level of risk.
>
> In addition, I am adopting a new approach whereby, in the most serious cases, I have the opportunity to present a single Secretary of State view to the Parole Board which takes account of all the evidence and will be overseen by ministers. These changes in approach to how reports and evidence are presented to the Parole Board are reflected in the amendments to the Rules."

54 On 5 July 2022, the Secretary of State was asked in Parliament why report writers would be forbidden from providing a view on suitability for release of the most serious offenders. His answer (HC Report 5 July, vol. 717) was:

> "At the moment, when the vital question of risk is assessed, there is a risk that separate reports, whether from psychiatrists or probation officers and those who manage risk, psychologists may give conflicting recommendation. Therefore, in those serious cases which the hon. Lady refers to, there will be one overarching Ministry of Justice view, so that the Parole Board has a very clear steer and we make sure—the hon. Lady shakes her head, but I think she agrees with me—that the overriding focus is on public safety and protecting the public."

55 A further explanation of the rationale for rule 2(22) was given in a letter from Amy Rees to union officials on 27 July 2022, which included these passages:

> "I acknowledge that you perceive these changes as far-reaching. As you know, we continue to run drop-in sessions for probation staff to help them make the adjustments needed, particularly in the context of an oral hearing. However, I do not agree that the changes diminish the role which probation officers perform in parole proceedings. Moreover, I emphatically reject the assertion that they place the public at risk.
>
> The changes clarify lines of responsibility and enhance the importance of the risk assessments in that Parole Board Panels will need to enquire after the

> evidence in support of those assessments, without being able to 'rely' any more on recommendations in relation to what are the Board's responsibilities." (Emphasis added.)

56 On 28 July 2022, there was a letter from the Chief Probation Officer and the Executive Director of HMPPS Wales and Public Protection Group:

> "Firstly, the change reflects the fact that it is by law for the Parole Board to judge in each case whether the statutory release test is met. Where the Secretary of State requests the Parole Board's advice on an indeterminate sentence prisoner's suitability for open conditions, the Board is required to provide the advice in accordance with directions issued by the Secretary of State. Thus, the change we are making emphasises that the judgments which need to be made in the context of a prisoner's parole review are for the Parole Board – not for probation officers and psychologists employed by HM Prison and Probation Service. The system we are replacing has in some ways blurred the lines of accountability by providing the Board with recommended outcomes which are for the Parole Board alone to determine. Clarifying the lines of responsibility is particularly important when an offender released in accordance with a direction from the Parole Board goes on to commit a serious further offence.
>
> Secondly, the change reflects the fact that the two parties to parole proceedings are the Secretary of State for Justice and the prisoner. Probation officers and psychologists are not party to the proceedings. Thus, it is for the Secretary of State, if they choose, to put forward a view as to whether the statutory release test is met, and in the most complex and serious cases, this is what now will happen. This is not about politicising the parole process, since any Secretary of State view submitted will need to be justified on the basis of the prisoner's risk, and in formulating the view the Secretary of State will rely heavily on the risk assessments provided by probation officers, notably the community offender manager.
>
> Thirdly, the change reinforces that parole proceedings are inquisitorial and not adversarial. The Parole Board recognises this. However, where report writers make recommendations and sometimes a COM and a psychologist will recommend very different outcomes – it is easy for an inquisitorial review to become adversarial." (Emphasis added.)

57 This bears some similarity to the reasons given by Mr Bailey in his witness statement, though it gives further elaboration of the thinking behind the first rationale.

Findings as to the rationale for rule 2(22)

58 We have borne carefully in mind the last sentence of para. 50 of Mr Bailey's witness statement: "It was not the SSJ's intention to prescribe or control how report writers give their evidence to the Parole Board." We are sure that Mr Bailey did not intend to mislead us in this respect. We are equally sure, however, that the statement requires qualification in the light of the disclosed contemporaneous documents, which demonstrate as follows:

(a) The origin of rule 2(22) was the proposal for a "single Secretary of State view" in a small number of serious and high-profile cases.

(b) The removal of the requirement for report writers to provide a view on the question of suitability for release or transfer to open condition was proposed because it was regarded as necessary in those cases where there was to be a single Secretary of State view; initially the proposal was simply to remove the requirement for report writers to express a view on suitability for release in those cases.

(c) On 26 May 2022, the Secretary of State said that he wanted a prohibition on report writers expressing a view (and not merely removal of the requirement to do so) in cases eligible for a single Secretary of State view.

(d) At the meeting on 1 June 2022, the Secretary of State said that he intended that, in top-tier cases eligible for a single Secretary of State view, "the Parole Board can still ask questions about the facts", which would "prevent a judgement coming from report writers" and "an overarching judgement would either come from SoS or the Parole Board". This suggests that the Secretary of State intended that, at least in top-tier cases, the Board should not be permitted to ask report writers for their views about suitability for release at oral hearings.

(e) On 15 June 2022, the Secretary of State agreed, for reasons of consistency, to extend the prohibition on report writers making recommendations to all cases.

(f) On 20 June 2022, Gordon Davison, who had been at all the relevant meetings with the Secretary of State, recorded that, as a result of the rule change, report writers would no longer be permitted to include recommendations in their reports and that witnesses could still give their views at oral hearings, but where a single Secretary of State view was advanced, witnesses must not speak against it at oral hearings.

(g) The letters of 27 and 28 July 2022, from individuals who were part of the team involved in developing the policy, indicate that part of the rationale was also to "clarify lines of responsibility", so that when a prisoner released by the Board goes on to commit a crime, responsibility could be clearly attributed to the Board, not the Secretary of State.

59 On the basis of the contemporaneous documents we have seen, we find that a key reason for the decision to make rule 2(22) was the desire to avoid the expression by HMPPS witnesses of any views conflicting with the single Secretary of State view in cases where such a view was advanced. The documents show that the Secretary of State believed that rule 2(22) would prevent report writers from speaking against the single Secretary of State view at oral hearings, or at least that, once rule 2(22) was enacted, a lawful instruction could be given to achieve that aim.

The Parole Board's response

60 The Secretary of State's officials emailed on 16 June 2022 to share the "near final" version of the Amendment Rules with the Chief Executive and other senior staff of the Board. They made clear that the version being shared had already been agreed by the Secretary of State.

61 The response from the Chief Executive, Martin Jones, on the same day, showed a degree of exasperation:

> "I am grateful for the heads up on this.
>
> It would be extremely helpful to discuss all of this urgently.
>
> I am sorry to cut up rough, but I have to say it is extremely difficult and very disappointing that the Parole Board is the last to hear about important decisions which strike at the very heart of the difficult decisions we are asked to make. It makes our members already difficult job close to impossible..."

The Guidance

The July Guidance

62 The evidence does not explain by what process, or by whom, the July Guidance was drafted or whether it was approved by the Secretary of State. It was issued by HMPPS, headed *Changes to the open test for Indeterminate Sentence Prisoners (ISPs) and changes to recommendations in parole reports, oral hearings and recall reports Parts B and C* and was accompanied by a series of answers to frequently asked questions. Its purpose was "to inform all staff involved in writing parole and recall review reports, or who are attending oral hearings, about recent significant changes to the parole and recall process". We have attached the July Guidance, together with the frequently asked questions and answers, in full as Annex A to this judgment.

63 For present purposes, it is sufficient to say that the July Guidance includes the following statements:

> "From 14 July, on and after, views or recommendations about suitability for release or open conditions will no longer be allowed in parole reports and recall review reports
>
> From 21 July, on and after, views or recommendations about suitability for release or open conditions will no longer be allowed in oral hearings, unless the report was submitted prior to 14 July
>
> This means we cannot comment on whether the release test has been met, whether the risk management plan (RMP) would protect the public or whether risk is manageable in the community
>
> …
>
> In cases where a single Secretary of State view is provided, HMPPS report writers must not speak against it at oral hearings."

64 Also included was "Language guidance for reports and attendance at oral hearings", suggesting acceptable ways in which report writers could answer questions from the Board or from prisoners' representatives at oral hearings and giving examples of language which "must be avoided", because it came too close to giving a view on the ultimate issue. The phrases which staff were instructed to avoid were:

- 'My assessment is that Case X should / shouldn't be released'
- 'My view is that further time in open conditions is required prior to release'
- 'I recommend that Case X is released'
- 'My assessment is that risk is / is not manageable in the community'
- 'My assessment is that custody is / is not required to protect the public'
- 'My assessment is that the current risk management plan is / is not sufficient in this case to manage the risks posed by Mr/Ms X'
- 'My assessment of the likely outcome should Mr/Ms X be released is'
- 'If you directed release / recommended open conditions for Mr/Ms X, this is what in my view would be essential to manage their risk …..and this is what is currently available in this setting …..'

65 In the "Frequently Asked Questions" accompanying the July Guidance, the following appeared:

> "**Q: I am worried that because I am no longer allowed to say whether I assess someone as being unsafe to be released, that people who otherwise would have been kept in custody will now be released. What should I do?**
>
> If you are concerned that release has been directed for someone who presents a public protection risk, and you believe that the Parole Board's decision was irrational, in that there was no evidence presented to support the decision, or it was procedurally unfair, a request for reconsideration can be made. (Reconsideration Mechanism Guidance - GOV.UK (www.gov.uk)). This enables the Secretary of State to ask the Parole Board to reconsider the decision in certain circumstances. If you think this may apply to your case, or you have significant concerns about the possibility of release and think we may need to use this mechanism, please speak to ppcs.policy@justice.gov.uk as soon as possible."

66 A shorter guidance document, to broadly the same effect, was issued to psychologists on 13 July 2022 under the titles *Changes to Psychological Risk Assessment Reports* and *HMPPS Parole Reform: Practice Guidance for Psychological Risk Assessment (PRA) Reports*.

The October Guidance

67 Mr York explains in his witness statement that the review of the guidance "was initiated in light of the concerns raised in relation to the guidance in the Bailey case, and echoed in HHJ Bird's judgment on interim relief in that case". As a result of the review, the July

Guidance was "revoked" on 4 October 2022 and, on 5 October 2022, replaced with the October Guidance.

68 There was an email from the Probation Effective Practice Team to Regional Probation Directors on 3 October 2022, explaining the change. It did not say that the July Guidance was unlawful or that it should not be disregarded. Instead, it said this:

> "When the changes to the Rules were made, in recognition of the fact that the changes were significant, we issued non-statutory guidance to support report writers, with much of the guidance focused on assisting report writers to conduct themselves at oral hearings in a way which is consistent with the changes to the Rules. The guidance was extensive, and it was always our intention to review the guidance, determine whether it was still needed and, if so, whether it could be revised and reissued in a more concise form.
>
> We have reviewed the guidance and decided: (1) to revoke the previous guidance in its entirety from 6pm on 4 October; and (2) to replace it with the attached fresh guidance, which will apply to any oral hearing conducted from 9am on 5 October.
>
> The aim of the fresh guidance is identical to the aim of the original guidance: to support report writers when they appear as expert witnesses in oral hearings, to conduct themselves and give their evidence in a manner entirely consistent with the changes made to the Parole Board Rules and in such a way as to provide full assistance to the Parole Board."

69 The October Guidance is headed "PROHIBITION ON REPORT WRITERS MAKING A RECOMMENDATION TO THE PAROLE BOARD AS TO WHETHER THE STATUTORY RELEASE TEST IS MET: GUIDANCE FOR ORAL HEARINGS". We have attached it in full as Annex B to our judgment. It includes the following passage:

> "Panel Members might ask report writers whether they 'support release' or ask similar such questions of report writers. If a question of this nature is seeking a report writer's view as to whether the statutory release test is met, it is considered legitimate for report writers to identify that that is a judgment for the Parole Board alone based on all the evidence and the report writer can identify what evidence is covered in his/her report that may be relevant to that overall judgment to be made by the Parole Board. Consistent with the prohibition as to making a recommendation in a written report, a report writer should not attempt to make a recommendation on whether or not the statutory test is satisfied where that decision is for the Parole Board and necessary requires a multi-factorial and multi-dimensional assessment based on all of the available evidence." (Emphasis added.)

70 It also included this caveat in its first and last paragraphs:

> "nothing in this Guidance is intended to contradict or detract from the need for any report writer giving evidence at a hearing to comply with any legal or professional duties or obligations that apply to a report writer in giving that evidence or the need to comply with any lawful requirement or direction imposed by the Panel." (Emphasis added.)

71 The guidance given to psychologists on 13 July 2022 was also revoked and replaced by new guidance dated 28 October 2022. This was emailed to all psychology leads and uploaded to the digital platform used by psychology staff on 3 November 2022. The new version of *Changes to Psychological Risk Assessment Reports* included the following:

> "2.6 Psychologists, like all HMPPS report writers, are no longer able to make recommendations within PRA reports for the Parole Board, regarding suitability for release or open conditions, including ongoing suitability for closed or open conditions. Not all parole reviews will include a Single SoS view and therefore a SoS representative. The SoS decides on a case per case basis where a single view will be provided, and this has been in place from the 21st of July 2022.
>
> 2.7 Psychologists should continue to include information and evidence within PRA reports to assist the Parole Board in making recommendations relating to the new Open Test. Previously submitted reports which did include a recommendation do not need to be amended.
>
> 2.8 Report writers need to be aware that whilst recommendations for release and/or open **cannot** be made for any cases, panels may ask for additional information relating to risk judgments.
>
> …
>
> 5.4 From 21st July 2022, in all cases, (including all recall cases), the report writer does not present a recommendation around suitability for a move to open conditions or release and such recommendations cannot be discussed in Oral Hearings." (Emphasis in original.)

72 This document was reissued on 22 February 2023 with a modified version of para. 5.4, which omitted the prohibition on discussion of recommendations in oral hearings.

73 The 28 October 2022 version of *HMPPS Parole Reform: Practice Guidance for Psychological Risk Assessment (PRA) Reports* (said to have been reviewed in consultation with MOJ Legal) included the following:

> "4.2 To comply with legislative changes, reports in the current review cannot include a recommendation. In order to comply with HMPPS policy, neither can a verbal recommendation be discussed in hearings. However, if a historical report contained a recommendation we are able to discuss this and why the recommendation may have been made at that time."

74 This document too was reissued on 22 February 2023 with para. 4.2 omitted entirely.

75 Mr York explains that the October Guidance was disseminated to all staff and was introduced at an "all staff probation event" on 3 October 2022 and on the monthly senior leaders' call on 5 October 2022. On the same date, it was uploaded to EQUIP (HMPPS's process map and guidance database) and on 6 October 2022 references to it were included in the senior leadership bulletin and in Probation News. However, there were no repeats of the "drop-in workshops" that had been held in July 2022 to introduce the July Guidance. To date, there has been no training at all in the light of the October Guidance.

76 Mr York says this in his witness statement:

> "7. It was not the SSJ's intention in issuing the New Guidance to prohibit witnesses from answering questions during Parole Board oral hearings: the New Guidance was specifically redrafted in order to clarify that the SSJ did not prohibit witnesses from answering questions during Parole Board hearings, nor did the SSJ seek to control or direct what witnesses should say…
>
> 8… I can confirm that MoJ witnesses are not prohibited from answering questions put to them during a Parole Board hearing or complying with directions of the Parole Board, and that this is neither the policy nor the intention of the SSJ."

The parties' submissions

Submissions for the claimants

77 The claimants' ground 1 is that the denial of evidence to the Board constitutes an unlawful interference in the judicial determination of the legality of detention, contrary to common law and/or Article 5(4) ECHR. Rule 2(22) of the Amendment Rules materially interferes with the way in which the Board conducts its risk assessments in prohibiting report writers from making recommendations as to suitability for release or transfer to open conditions not only in the reports forming part of the dossier, but in any report filed by them, including those filed pursuant to directions given by the Board itself.

78 Under ground 2, the claimants say that rule 2(22) of the Amendment Rules is unlawful as contrary to Article 5(4) and/or Article 5(1) ECHR and is *ultra vires* s. 239 of the 2003 Act. Mr Rule relies on *R (Wells) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553 and *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1 for the proposition that Article 5(1) guarantees the right of prisoners to be afforded reasonable opportunities to present evidence to the Board of their successful rehabilitation and the reduction in the risk they pose. Up-to-date recommendations as to suitability for release are part of the evidence which they must be given a reasonable opportunity to present. Furthermore, s. 239(5), properly construed in the light of ss. 239(3) and (4) and s. 3 of the Human Rights Act 1998 ("HRA"), confers a general rule-making power which, in the absence of express words, should not be construed as enabling the Secretary of State (who is a party to proceedings before the Board) to make rules which interfere with its evidence gathering function: see by analogy *R (DSD) v Parole Board*, [189]-[200].

79 Ground 3 challenges the retrospective application of rule 2(22) of the Amendment Rules as contrary to the claimants' legitimate expectation that recommendations as to their suitability for release would be given in writing and orally by MOJ staff. Reliance is placed on *L'Office Cherifien v Yamashita-Shinnihon Steamship Co. Ltd* [1994] 1 AC 486, 527-528 (Lord Mustill). Construed in accordance with the principle there set out, s. 239(5) does not authorise interference in ongoing proceedings before the Board. Prisoners whose parole reviews were listed on or shortly after 21 July 2022 were particularly disadvantaged because there was no time for them to instruct independent experts who would be able to make recommendations.

80 Ground 4 challenges both the July Guidance and the October Guidance as unlawful. For the claimants, Mr Rule submits that there is no legal basis on which the Secretary of State can give instructions to witnesses as to the questions they may answer, the answers they may give or the opinions they may express in judicial proceedings. It is axiomatic that the executive cannot lawfully authorise non-compliance with a binding judicial direction to provide a view or recommendation. The claimants say that the instructions about the form of oral evidence that may be given by MOJ witnesses contravenes the principle established by *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 that statutory powers must be exercised in accordance with the objects of the statute and "may fall foul of the tort of perverting – altering – the course of justice".

81 Ground 5 challenges the Secretary of State's failure to consult before making rule 2(22) of the Amendment Rules. The claimants rely on a practice of consultation on previous occasions when amendments have been proposed to the Rules.

82 Ground 6 challenges the decision to make rule 2(22) of the Amendment Rules as irrational, given the opposition of the Board and the lack of any cogent justification for the changes.

Submissions for the Secretary of State

83 One of the principal complaints in the claim was that rule 2(22) had been applied to the claimants' cases so as to prohibit report writers from giving their view on the "ultimate issue" even in reports filed long after the referral had been made and even where the report-writer had been directed to provide views on that issue; and that it had been understood as prohibiting the giving of such views in oral evidence.

84 As noted above, at the hearing before HHJ Bird, the Secretary of State had submitted that the effect of rule 2(22) impliedly prevented report writers from giving a view or recommendation as part of their oral evidence at a hearing. In his Detailed Grounds of Response in the first claimant's claim (adopted in the second claimant's claim also), the Secretary of State said that rule 2(22) of the Amendment Rules "only applies to reports prepared by individuals employed or engaged by the [MOJ]". No distinction was made between reports prepared as part of the dossier sent with the referral and reports directed by the Board in the exercise of its case management powers. The clear implication was that the rule change applied to all such reports.

85 This interpretation of rule 2(22) was not disavowed until the Secretary of State filed his skeleton argument on 23 February 2023 (one week before the substantive hearing). In that document, without expressly acknowledging his change of position, the Secretary of State submitted for the first time that: it was wrong to suggest the rule change applied to reports other than those forming part of the dossier, or to oral evidence (para. 3); the claimants' suggestions that it does "are misconceived and stem from a fundamental misreading and misunderstanding of Rule 2(22)" (para. 43); and "the Parole Board remains free to request or direct such recommendations [as to suitability for release or transfer to open conditions] in such cases as it sees fit, in accordance with its judicial function and the principles and rules which govern its proceedings" (para. 58).

86 As to grounds 1 and 2, James Strachan KC for the Secretary of State submits that rule 2(22), thus construed, has no impact on the powers of the Board, once it has received the initial referral dossier, to give such directions as it considers appropriate under rule 6 and

to asks such questions as it considers relevant under rule 24. That being so, it does not inhibit or otherwise affect the primary factual evidence available to the Board and so does not interfere with the independence of the Board. Rule 2(22) is therefore neither inconsistent with Article 5(4), nor *ultra vires* s. 239(5) of the 2003 Act.

87 As to ground 3, Mr Strachan submits that the claimants had no legitimate expectation that the 2019 Rules would apply without variation to their cases, given that rule 3 makes clear that proceedings before the Board are subject to the most recent set of procedural rules. Reliance is placed on the decision of the House of Lords in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230, where it was held that the only legitimate expectation of an applicant for leave to remain in the UK was that his application would be determined according to whatever rules were applicable at the time of the decision.

88 As to ground 4, the Secretary of State submits that, since the July Guidance has been revoked, the challenge to it is academic and there is no public interest reason to hear it. In the event that we were against him on that, Mr Strachan declined to make any submissions as to its lawfulness. Since the Secretary of State has no duty to provide legal advice and has not purported to provide a full account of the legal position, the October Guidance would only be unlawful if it positively approved, or authorised, unlawful conduct by those to whom it is directed: *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, [38]-[46]. The October Guidance does not do this: see in particular its first and last paragraphs. It does not instruct staff not to provide oral recommendations, not to answer questions asking for a recommendation, tell them which questions they may answer, permit non-compliance with a direction to provide a view or recommendation, run contrary to the statutory framework, interfere with witnesses' evidence or coach witnesses using express language guidance.

89 As to ground 5, there is no statutory duty to consult before amending the Rules. This is significant, given that the power to make procedural rules is subject to the negative resolution procedure in Parliament: see *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [58] and [65]. There was no promise of consultation, nor any practice that was "sufficiently consistent to be regarded as more than an occasional voluntary act": *ibid*., [39].

90 As to ground 6, rule 2(22) is not irrational. Report writers do not have access to all the evidence in the dossier when they are preparing their initial reports and do not as a matter of fact always have regard to the views of others. It is rational for the Secretary of State to direct that report writers should opine only on factual matters within their remit.

Submissions for the Board

91 As a judicial body, the Board has adopted a neutral stance. However, in its Detailed Grounds of Response filed on 27 September 2022, it said this:

> "4. The issues arising in this claim are of very substantial importance to the Board's work, and are liable to have a very substantial effect on its workload and resources, and the Board would welcome clarity upon them.

> 5. In particular, if the Secretary of State's witnesses are through secondary legislation and/or policy prevented from providing recommendations, in writing and/or orally, the Board expects this will lead to a substantial increase in the proportion of cases referred to an oral hearing, with resulting delays and accompanying expense and compensation due to prisoners. It may also have an effect on the ultimate outcome of cases: as a general rule, the Board considers that is less likely to be satisfied that it is 'no longer necessary for the protection of the public that a prisoner be confined' if it is deprived of valuable evidence concerning the risk posed and the suitability of any measures proposed in mitigation. This will, in turn, lead to more parole cases and additional delays."

92 The Board submits that the first issue on which clarification is required is how to construe rule 2(22). Does the prohibition on communicating a view on the question of suitability for release or transfer to open conditions apply only to the reports required by rule 16(3) to be included in the dossier at the point of referral or to every report produced by MOJ staff, including where the Board asks or formally directs the member of staff to provide such a view? Mr Chapman for the Board submits:

> "The Board's experience is that it cannot be said, as a general and invariable rule, that a witness's opinion on the ultimate issue is *never* relevant in parole cases; to the contrary, in many or most cases it is likely to be very helpful evidence."

93 Next, the Board notes that it is a fundamental principle, which reflects and promotes the rule of law, that the Board's extant directions are binding on the parties and any relevant third party unless and until set aside or varied: see *Majera,* [43]-[45] and [49]. This is true even where a direction is unlawfully made: *ibid* at [27]-[31]. Mr Chapman observes:

> "As a general rule the Board would therefore expect public bodies and officials to comply with an extant direction made by a court or tribunal, and notes that both the Civil Service Code and Ministerial Code impose a duty to 'comply with the law'".

94 We are invited to confirm this understanding and to clarify how the Board's directions can be enforced in the absence of any provision in the rules dealing with that topic.

95 The next issue concerns whether rule 2(22) has retrospective effect. On the narrower construction, does the prohibition apply in those cases where the Secretary of State had sent a referral letter (pursuant to r.16(1)) to the Board prior to 21 July 2022 (when r.2(22) of the Amendment Rules came into force)? On the wider construction, does the prohibition apply where the Board gave directions for the provision of reports prior to 21 July 2022? And, where a report or statement was provided before 21 July 2022, is the author prohibited from answering further questions, in writing or orally, in relation to the views or recommendations expressed therein?

96 As to the July Guidance, the Board's submissions are contained in their Detailed Grounds of Response. Insofar as it prohibits the Secretary of State's staff from giving a view on the question of suitability for release or transfer to open conditions in circumstances where they are not so prohibited by the Rules, the legality of the July Guidance depends

on whether (i) the policy is rational and (ii) it sanctions, positively approves or actively encourages unlawful conduct by those applying it. The Board submits as follows:

> "The Board's experience has been that witnesses understand the guidance to prevent them from providing evidence concerning their views or recommendations, and have refused to give that evidence even where panels have requested or directed that they do so. This is true even to the extent that witnesses who have provided reports prior to 14 July 2022 have refused to give oral evidence concerning their views or recommendations, based on an incorrect belief that the guidance prevents them from doing so."

97 The Board notes that the October Guidance:

(a) purports to provide a summary of the legal effect of the new para. 1Z;

(b) states in terms and without qualification that the Rules prohibit "report writers" from giving views or recommendations concerning release;

(c) is unclear as to whether that legal prohibition relates only to "report writers" or also to other officials, and whether it relates only to reports pursuant to r.16 or also to other reports or other written evidence;

(d) is capable of being read to suggest that the legal prohibition on providing a recommendation or view extends to the provision of oral evidence;

(e) does not address questions of restrospectivity; and

(f) does not directly address whether a witness is entitled, or required, to give opinion evidence going to the ultimate question, in writing or orally, if directed to do so.

98 The Board submits that the legality of the October Guidance depends on an answer to three questions. How is the legal analysis of rule 2(22) in the guidance likely to be understood by the officials to whom it is directed? If the legal analysis is liable to mislead officials as to the meaning and effect of rule 2(22), is the caveat sufficient to avoid inducing unlawful conduct? Is the guidance understood in practice to sanction, authorise, approve or induce any conduct which is, in fact, unlawful?

Discussion

General observations on the role of witnesses in Parole Board proceedings

99 HMPPS prison and probation officers and psychologists would not be entitled to give opinion evidence in civil proceedings to which the MOJ was a party, because they are employed or engaged by an entity for which the MOJ is responsible. Proceedings before the Board are not like civil proceedings in every respect; and rule 24(6) makes clear that the strict rules of evidence do not apply. Nonetheless, the authorities are clear that proceedings before the Board are judicial proceedings; and the witnesses who appear in them are qualified professionals who are experts in their field. It is common ground that the evidence they give properly includes both factual and opinion evidence.

100 As with an expert in court proceedings, the value of any opinion evidence given by an HMPPS staff member in proceedings before the Board depends on its being the witness's

honest and candid professional opinion, expressed in the witness's own words. Any suggestion that the witness was tailoring their evidence so as to be consistent with their employer's view would substantially reduce the weight that could be given to it. The suggestion that the Secretary of State can properly insist on a "party line" on the ultimate issue seems to us to emanate from a fundamental misunderstanding of the nature of these judicial proceedings and the role of professional witnesses in them.

101 There is, in our view, nothing wrong with advising staff that they should consider carefully what issues they are in a position to address and limit their evidence (written and oral) to those issues. In a particular case, a psychologist might consider themselves able to say whether the prisoner has a personality disorder, but unsighted as to the risk of violent reoffending more generally. If asked for their view on the ultimate issue, they might properly decline to offer such a view. This would not breach any legal obligation, because a professional witness cannot lawfully be required to give an opinion on a particular issue if they do not have one.

102 Other HMPPS staff members may, however, have a more comprehensive view of the facts and issues. In a particular case, an offender manager may have worked extensively with the prisoner, and may have attended a great number of meetings with other professionals and read and discussed their reports. In the light of this knowledge and experience, they may have, and be expected to have, an opinion on the ultimate issue. If so, and if asked by the Board to express it (whether in writing or orally), they would be legally obliged to do so.

103 The Board itself must be scrupulous to avoid delegating its function to such a witness. Its submissions make clear that it understands this. But even in court proceedings, the old rule that the evidence of an expert witness on an "ultimate issue" was inadmissible was long ago discarded (see *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195, 206-7) and the Supreme Court has recognised that it may be necessary for a witness to address such an issue "in order to avoid elusive language" (*Kennedy v Cordia Services LLP*, [49]). The July Guidance encouraged HMPPS witnesses to use elusive language and, if followed, was liable to lead those witnesses to tie themselves in knots.

104 More fundamentally, the task of deciding what evidence is relevant to the statutory questions and in what form that evidence can most usefully be given is a judicial one. The Board's partly inquisitorial procedure makes it particularly important that it should have a free hand in this respect. Rules 6 and 24 reflect this by conferring broad discretions to make directions for the submission of written evidence and ask questions at oral hearings. As the Court of Appeal made clear in *Brooke,* at [80], exercises of statutory power "aimed at procuring that the Board, contrary to its wishes, refrains from or reduces an aspect of its procedure" are likely to be contrary to the common law principle of the separation of powers and to Article 5(4) ECHR.

<u>The scope of the prohibition in rule 2(22) of the Amendment Rules</u>

105 In our judgment, the prohibition on including views on the ultimate issue applies only to the reports in the dossier which the Secretary of State is required to send to the Board at the time of referral. It does not apply to reports which the Board invites or directs MOJ staff to produce thereafter. And it does not affect in any way the Board's power to ask, or the witness's obligation to answer, any question the Board considers relevant to its task.

106 Our reasons for favouring this narrow construction focus on the text of the Amendment Rules without reference to the internal documents we have seen in the context of this litigation (which are not admissible aids to construction). The only reference to the Schedule is in rule 16(3), which specifies the information and reports the Secretary of State is required to send with the referral. The inclusion of a wholly new paragraph at the start of the Schedule was necessary because the rule change does more than merely omit the previous requirement for report writers to express a view on suitability for release or transfer to open conditions: it prohibits the expression of such a view. But the position of the new paragraph 1Z in Part B of the Schedule makes clear that the prohibition applies only to the reports to which the Schedule applies (i.e. those required by rule 16(3) to be included with the reference).

107 The obvious way of prohibiting MOJ staff more generally from giving a view about suitability for release or transfer to open conditions would have been to include the prohibition in the body of the rules, in such a way as to make clear that the case management powers in rules 6(2) and 24(2)(b) and (c) were subject to it. That was not done. On the contrary, the Board's powers in relation to case management and oral hearings were left materially unchanged.

108 Before leaving this issue, we should say that, insofar as the Secretary of State's skeleton argument contains criticism of the claimants for basing their arguments on a wider construction of rule 2(22), described as "misconceived", we do not regard that criticism as fair. The Secretary of State's own July Guidance is plainly premised on the wider construction. So were the Secretary of State's submissions before HHJ Bird. Those preparing addendum reports in the claimants' cases understood themselves to be prohibited from expressing a view on the ultimate issue even though the referrals in those cases had been made long before rule 2(22) came into force. The Detailed Grounds of Response refer to the prohibition on expressing a view on the ultimate issue without distinguishing between reports forming part of the dossier accompanying the referral and reports filed pursuant to a direction from the Board. There was no attempt to disavow this wider construction until the skeleton argument was filed on 23 February 2023, a week before the substantive hearing.

Grounds 1, 2 and 6

109 Grounds 1, 2 and 6 challenge rule 2(22) on the grounds that it is *ultra vires* s. 239(5), incompatible with Article 5(4) ECHR and irrational. The Secretary of State's response to these three challenges is premised on the narrow construction of the rule.

110 Before setting out our conclusions on this aspect of the case, it is important to distinguish between two ways in which the exercise of a statutory power to make delegated legislation could, in principle, be unlawful.

111 First, the result achieved by the delegated legislation may be one which cannot be lawfully achieved. That could be because the enabling statute, properly construed, does not authorise legislation having that result (i.e. the legislation is *ultra vires*) or because the result is irrational. In either case, the court starts by construing the delegated legislation. It then considers whether the enabling statute (itself construed using all the usual canons of statutory interpretation, including the presumption in s. 3 of the HRA) is broad enough to authorise legislation having that result and whether the result is so incoherent or otherwise objectionable that it can be stigmatised as irrational. If a

challenge of this kind succeeds, the court will normally quash the delegated legislation and the decision-maker will not be able to remake it in the same form.

112 But there is a second and different way in which delegated legislation can be challenged. Even where legislation having a particular result could in principle have been lawfully made under the relevant power, the claimant may still contend that the decision to make it was unlawful. Here, the challenge focuses on the decision-maker's process or reasons, rather than the result he has achieved. The complaint may be (for example) that the decision-maker had an unlawful purpose or failed to take into account a mandatorily relevant consideration or took into account an irrelevant one. If this kind of challenge succeeds, the decision-maker may be able to remake the legislation in the same form, this time for a proper purpose and taking into account all relevant considerations and no irrelevant ones.

113 Grounds 1, 2 and 6 challenge rule 2(22) in both of these ways. As originally pleaded, the claimants' principal case was that, on the wider construction, the rule achieved a result that was not authorised by s. 239(5) of the 2003 Act, read subject to the common law separation of powers principle and Article 5(4) ECHR. If the rule had prohibited report writers from expressing their views on the ultimate issue even when directed or asked to do so by the Board, we agree that the result achieved would be outwith s. 239(5) because it would constitute an interference with the Board's power, as a court, to decide what evidence it considers relevant and helpful and, therefore, an interference with the exercise of its judicial functions.

114 On the narrow construction which we consider correct, however, rule 2(22) does not prevent the Board from giving directions for reports that include the writer's view as to suitability for release or transfer to open conditions and does not affect the legal obligation of the writer to comply with such a direction. It does not limit the Board's power to decide what questions to ask of witnesses in oral hearings (including as to the witness's view on suitability for release or transfer to open conditions) and does not affect the legal obligation of the writer to answer such questions. It does not, therefore, deprive the Board of the ability to gather or receive evidence which it considers relevant or to conduct the oral hearing in the way it considers most effective.

115 We accept that, even on the narrow construction, the effect of the rule may be to require the Board to devote additional resources to identifying those cases where it is appropriate to make directions requiring report-writers to express their view on suitability for release. This may lead to delay in some cases. As the Board points out, such delay may mean that the Secretary of State has to compensate prisoners for breach of Article 5(4): see *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254. But most rule-changes can be expected to have some impact on the way the Board organises its proceedings. In this case, the extent of the impact is difficult to predict; and if the impact on resources were such as to require an increase in funding, there is, as Mr Strachan submitted, no reason to suppose it would not be forthcoming.

116 Insofar as Article 5(1) confers on prisoners a right to a reasonable opportunity to provide evidence to the Board of successful rehabilitation, there is nothing in the authorities relied upon by the claimants to indicate that this includes a right to insist on the provision at the time of the referral of reports containing the writer's views on the ultimate question.

117 We therefore consider that s. 239(5), construed in accordance with the common law principle of the separation of powers and Article 5(4), is broad enough to authorise the result achieved by rule 2(22), properly and narrowly construed.

118 The claim also, however, includes a challenge of the second type we have identified, to the decision-maker's purpose and reasons. As we have said, a key part of the Secretary of State's purpose in making rule 2(22) was to ensure that, in cases where a single Secretary of State view was presented, HMPPS witnesses did not dissent from that view. It follows that a principal purpose of rule 2(22) was to suppress or enable the suppression of relevant opinion evidence currently available to the Board which differed from the single Secretary of State view. In our judgment, that purpose was improper and incompatible with Article 5(4) ECHR. The decision to make rule 2(22) was made as part of an attempt by a party to judicial proceedings to influence to his own advantage the substance of the evidence given by witnesses employed or engaged by him. By exercising his powers for that purpose, the Secretary of State was attempting to interfere with the way in which the Board exercises its judicial functions. The rule change was "aimed at procuring that the Board, contrary to its wishes, refrains from or reduces an aspect of its procedure" (see *Brooke,* [80]). The fact that the attempt did not succeed, because the drafters did not achieve the Secretary of State's aim, does not save the decision from being unlawful.

119 The decision is also unlawful for a second reason. None of the contemporaneous documents suggests an awareness on the part of the Secretary of State or the officials advising him that rule 2(22) did not apply to written reports other than those in the dossier accompanying the referral. Nor do the Detailed Grounds of Response, nor Mr Bailey's witness statement, both produced in response to a claim premised on a wide construction of rule 2(22). This means that there is no evidence that the Secretary of State ever considered whether a prohibition on the expression of views on the ultimate issue was justified if its application was limited to the reports sent with the referral.

120 The second and third reasons advanced by Mr Bailey in para. 33 of his witness statement are not obviously applicable on the narrow construction of the rule. If the Board can still direct the production of reports including views on suitability for release, and can still ask questions of witnesses at oral hearings, even in cases where there is a single Secretary of State view, a prohibition on the inclusion of those views in the initial reports will not avoid the appearance of conflict and will not avoid the "adversarial feel" which the Secretary of State deprecates.

121 It is, in our view, telling that in para. 50 of his statement, Mr Bailey says that the officials who drafted the July Guidance thought that "if report authors gave views on suitability of release at an oral hearing, this would wholly undermine the change brought about by Rule 2(22) of the 2022 Amendments". The evidence before us does not show that anyone directed their mind to the question whether rule 2(22) might still be justified if, as the Secretary of State now says, report writers are free, and may be required, to express such views both at oral hearings and in written reports prepared pursuant to directions from the Board.

122 It may be that, if the Secretary of State had understood the narrow effect of rule 2(22), he could have formulated adequate reasons for a rule having that effect. He would then have to consider whether those reasons are sufficient to outweigh the Board's view that the rule will cause delay and might generate additional liability for compensation. The

reasons currently advanced in the evidence assume a rule with a wider effect and therefore do not provide a rational justification for rule 2(22) as now construed.

123 Grounds 1 and 6 therefore succeed to the extent and for the reasons indicated. Ground 2 (which we think is properly read as advancing the pure *ultra vires* argument) fails.

The impact of our conclusions on rule 2(22) for the July and October Guidance

124 Our conclusion that the decision to make rule 2(22) was unlawful means that both the July and October Guidance, which purported to give instructions or advice on the effect of rule 2(22), were also necessarily unlawful. However, the challenge to the July and October Guidance was advanced on the footing that rule 2(22) is lawful. We have gone on to consider it on that basis, in case the issue should become relevant on appeal.

Is the challenge to the July Guidance academic?

125 Mr Strachan submits that the question whether the July Guidance was lawful is academic and that we should not determine it. We do not accept that submission for three reasons.

126 First, in the first claimant's case, the Board had given directions for reports which included the writer's view on suitability for release. The July Guidance resulted in non-compliance with those directions. The July Guidance would also have affected the oral hearings in both the claimants' cases had it not been for the relief granted by HHJ Bird in the first claimant's case and the undertaking in the second claimant's case.

127 Second, the July Guidance is bound to have had concrete effects in many of the thousands of other cases where reports were prepared, or oral hearings held, on or after 14 July 2022 and before 4 October 2022. If the guidance applied in these cases was unlawful, there is a public interest in a declaration to that effect.

128 Third, the October Guidance was addressed to the same staff members who had read and received training based on the July Guidance. The latter is part of the context in which the former would be understood. If the July Guidance was unlawful, that would be relevant to the legality of the October Guidance.

The test for assessing the lawfulness of guidance

129 In *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, Lords Sales and Burnett (with whom the other members of the Court agreed) explained the correct approach to determining the legality of policy or guidance. They began at [33] by citing with approval the speech of Lord Scarman in the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. He had noted that the starting point was to determine the true meaning of the policy or guidance in question. The court had to be careful not to construe it as if it were a statute or judgment. The question was how those to whom it is addressed (in the *Gillick* case, doctors; in this case probation officers, psychologists and other MOJ staff) would understand it. The policy or guidance must be "read objectively, having regard to the intended audience": see at [34].

130 Lords Sales and Burnett made clear that it was not the role of policy or guidance to eliminate all possibility of legal error by those to whom it is addressed: *ibid*. At [46], they identified three situations in which policy or guidance will be unlawful. These are: (i)

where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way; (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.

Ground 4: the July Guidance

131 Applying this test, we have no doubt that the July Guidance was unlawful, because it includes positive statements of the law which are wrong and would induce a person who follows it to breach their legal duty. As we have noted, Mr Strachan advanced no argument to the contrary.

132 First, in its "Summary", it states: "From 14 July, on and after, views or recommendations about suitability for release or open conditions will no longer be allowed in parole reports and recall review reports". A similar statement appears under the headings "What are the changes to recommendations?" and "What do you need to do now?". On the construction of rule 2(22) which we consider correct, these unqualified statements are wrong, because the prohibition does not apply to parole or recall review reports which the Board has directed a witness to provide, only to those which form part of the dossier required to be sent to the Parole Board with the referral. If followed, these statements would induce report writers to breach their legal duty to comply with directions given by the Board.

133 Second, in its "Summary", it states: "From 21 July, on and after, views or recommendations about suitability for release or open conditions will no longer be allowed in oral hearings, unless the report was submitted prior to 14 July" and "this means we cannot comment on whether the release test has been met, whether the risk management plan (RMP) would protect the public or whether risk is manageable in the community". Similar statements appear under the headings "What are the changes to recommendations?", "Transitional Arrangements" and "What do you need to do now?". These statements are wrong, because, as the Secretary of State now admits and avers, rule 2(22) has no effect on the Board's powers to ask questions at an oral hearing and no effect on a witnesses' legal obligation to answer them. If followed, these statements would induce report writers to breach this legal obligation.

134 Third, under the heading "What are the changes to recommendations?", it states that "where a single Secretary of State view is provided, HMPPS report writers must not speak against it at oral hearings". This is wrong. HMPPS report writers, like all expert witnesses in judicial proceedings, are obliged to assist the tribunal before which they are appearing by giving their honest professional view, if they have one, whether it accords with the submissions being made by the person who employs them or not. As the Secretary of State now accepts, rule 2(22) does not affect that obligation in any way. This statement, made on behalf of a party to the proceedings, would induce report writers to breach that obligation in cases where their professional view differs from the "single Secretary of State view".

135 Fourth, under the heading "Language guidance for reports and attendance at oral hearings", detailed and highly prescriptive instructions are given to report writers about how they should answer questions at oral hearings, including by identifying linguistic formulations that "**must be avoided**" (emphasis in original). This is wrong, because nothing in rule 2(22) affects the ability of the Board to ask questions they consider relevant or the legal obligation of HMPPS witnesses to answer those questions, giving their honest professional view, if they have one, using the language they consider appropriate. Again, these statements would induce HMPPS report writers to breach that legal obligation.

136 Taken together, these aspects of the July Guidance amount, in our view, to a mistaken and misleading interpretation of the legal effect of rule 2(22) and to a serious and unwarranted interference with the judicial functions of the Board.

137 It will be apparent that, in line with the approach set out by the Supreme Court in *A's* case, the above analysis focuses on the text of the July Guidance, construed objectively. We have not found it necessary to rely on the Board's indication that, in its experience, report writers have in fact been induced to breach their legal obligations in the ways we have described. We are not, however, surprised by it.

138 It should also be clear that, in our view, the July Guidance falls squarely within the first of the categories identified by Lords Sales and Burnett at [46] in *A's* case (i.e., it includes positive statements of the law which are wrong and will induce those who follow it to breach their legal duty). It would also, however, fall within the third category. That is so because: its avowed purpose was to inform staff about the legal effects of rule 2(22) of the Amendment Rules; the staff to whom it was directed were non-lawyers; they would not be looking to any other source for advice about these legal effects; and, read as a whole, it purports to offer a comprehensive account of these changes.

139 Ground 4 therefore succeeds as respects the July Guidance.

Ground 4: the October Guidance

140 In our judgment, the October Guidance is also unlawful, because: (i) it includes positive statements of the law which are wrong and which would induce a person who follows it to breach their legal duty; and (ii) it purports to provide a full account of the legal obligations of HMPPS staff attending oral hearings of the Board, but fails to achieve that, because of specific misstatements of the law and omissions which have the effect that, read as a whole, it presents a misleading picture of the true legal position.

141 First, as we have said, the October Guidance was addressed to the same staff who had read and received training based on the July Guidance. In our view, where a public authority issues guidance which unlawfully misleads its staff as to their legal obligations, and then realises it has done so, it has a duty candidly and clearly to correct the position, however embarrassing that may be in the short term. Mr York's evidence, for the Secretary of State, is that the guidance was reviewed in the light of the arguments advanced by the claimants and the points made by HHJ Bird in his judgment. Yet, although it is said that the July Guidance was "revoked", we have seen no evidence that the MOJ ever told HMPPS staff that the latter document or the training based on it must be disregarded because it was wrong and misleading in critical respects. On the contrary,

staff were led to believe that the July Guidance was simply being reissued in a more concise form.

142 Second, and in any event, the October Guidance contains statements that are straightforwardly wrong. Its opening sentence is: "As a result of changes to the Parole Board Rules, which came into effect on 21 July 2022, HMPPS report writers are no longer permitted to give a view in their reports as to whether the statutory release test has been met". It includes the statement that "report writers are no longer required and now prohibited from making a recommendation on suitability or otherwise for release". These unqualified statements are wrong because, as in the July Guidance, no distinction is made between reports provided as part of the dossier accompanying the referral (to which the prohibition applies) and reports provided pursuant to directions given by the Board (to which it does not). These statements, if followed, would induce HMPPS report writers to breach their legal obligation to comply with directions issued by the Board.

143 Third, the October Guidance contains two unequivocal statements that, at an oral hearing, "a report writer should not attempt to make a recommendation on whether or not the statutory test is satisfied" (emphasis added). That is wrong and, if followed would induce a breach of legal obligations on the part of a report writer who has a view and is asked by the Board to provide it.

144 Fourth, we do not accept the submission that these unqualified statements are saved from being wrong or misleading by the caveat in the first and last paragraphs that the October Guidance is "not intended to contradict or detract from a report writer's legal or professional duties or obligations when appearing as a witness before a Panel or the need to comply with any lawful requirement or direction imposed by the Panel". When the document is read as a whole, and bearing in mind that it is addressed to non-lawyers, its natural meaning is that a requirement or direction to express a view on the question of suitability for release would not be a lawful one. For the reasons we have given, this is wrong and it would induce report writers to breach their legal obligation to comply with such a requirement or direction.

145 Fifth, there is another difficulty with the caveat that report writers should comply with "any lawful requirement or direction imposed by the Panel" (emphasis added). It suggests that it is for the report writers themselves to decide whether the requirement or direction is lawful. If the Board makes a direction which a party or third party considers unlawful, an application can be made to vary or revoke it under r. 6(5). But, as was pointed out in *Majera*, at [43]-[45] and [49], orders made by courts (including courts of limited jurisdiction) must be complied with unless and until set aside. A non-legally trained reader of the October Guidance would not understand that this principle applies to a requirement or direction to state a view about suitability for release. In that respect, the October Guidance, read as a whole, presents a misleading picture of the true legal position, in circumstances where it purports to give comprehensive guidance to report writers on how they should conduct themselves at oral hearings.

146 Ground 4 therefore succeeds as respects the October Guidance.

The effect of the unlawful July and October Guidance

147 The July and October Guidance was bound to cause report writers to breach their legal obligations. The evidence shows that it did so in the first claimant's case. In that case,

report writers considered themselves unable to include recommendations, even though they had been directed to do so. In both the claimants' cases, they answered questions at the oral hearing, but only because the first claimant secured an injunction and the second claimant an undertaking that the July Guidance would not be applied at their hearings.

148 More generally, it is plain that the July and October Guidance will have caused report writers to breach their legal obligations in a large number of cases. The Board's submissions confirm that this is so. It is not possible to say with certainty what effects this guidance has had in the cases determined while it was in force. But its promulgation may well have resulted in prisoners being released who would not otherwise have been released and in prisoners not being released who would otherwise have been released.

149 The risk that the July Guidance might lead to error is demonstrated by the question and answer which we have set out in para. 65 above. The anticipated concern of report writers that prisoners who they thought were not suitable for release might be released is evident in the question. The answer – which relied on the reconsideration mechanism – is unsatisfactory because that mechanism involves a review, not a rehearing.

Ground 3

150 In the light of our conclusion on grounds 1 and 6, and the narrow construction of rule 2(22) which we have adopted, ground 3 falls away. However, even if the decision to make rule 2(22) had been lawful, the rule would have had no application to the claimants' cases because the reports required to be included with the referrals in those cases had already been sent by the time the rule came into force; and the rule did not apply to reports provided thereafter.

Ground 5

151 The Secretary of State did not consult outside the MOJ before making rule 2(22). As Mr Jones's email of 16 June 2022 makes clear, even the Board was unsighted. Consultation at least with the Board itself would almost certainly have prompted questions about the intended scope of the rule change, of the kind which the Board instead had to advance in its submissions in these proceedings. It would undoubtedly have been preferable for the Secretary of State to consider the answers to those questions before making the Amendment Rules, rather than afterwards. If he had done so, he might have avoided the unedifying confusion which appears to have prevailed within the MOJ and HMPPS about the effect and consequences of rule 2(22).

152 The question before us is, however, whether the Secretary of State was legally obliged to consult. An obligation to consult can arise from statute or at common law. It is common ground that the 2003 Act imposes no duty on the Secretary of State to consult before making rules under s. 239(5), but does provide that instruments made under that power are subject to the negative resolution procedure: see s. 330.

153 In *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, the Court of Appeal had to consider whether, in such circumstances, a common law obligation to consult could arise. Sedley LJ thought that the answer, in principle, was yes, though no such duty arose in that case. Maurice Kay LJ agreed with Sedley LJ's reason for concluding that no duty arose in the circumstances of the case, but said this at [58]:

> "I doubt that, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which requires the intended rules to be laid before Parliament and subjected to the negative resolution procedure. I tend to the view that, in these circumstances, primary legislation has prescribed a well-worn, albeit often criticised, procedure and I attach some significance to the fact that it has not provided an express duty of prior consultation, as it has on many other occasions. The negative resolution procedure enables interested parties to press their case through Parliament, although I acknowledge that their prospects of success are historically and realistically low. They also retain the possibility of challenge by way of judicial review on the sorts of substantive ground to which I have referred. For these additional reasons I would be minded to reject the appeal to procedural fairness as the basis of a legal duty of consultation."

154 Rimer LJ preferred Maurice Kay LJ's "more hard-edged view": see at [64]-[65].

155 We do not regard these passages as part of the ratio of the decision. They were not necessary for the decision, given that Maurice Kay LJ agreed with Sedley LJ's fact-specific reasoning. Moreover, Maurice Kay LJ's language (e.g. "doubt" and "tend") does not suggest a concluded view, even if Rimer LJ understood him to be expressing one. We would not, therefore, regard ourselves as bound to reject the consultation challenge in this case simply because what is challenged is the making of subordinate legislation, which the statute makes subject to the negative resolution procedure.

156 We proceed, therefore, on the assumption that an obligation to consult could arise at common law if there had been either a promise or a practice of consulting on changes to the Rules. The claimants rely on an asserted practice, but to succeed they must show that the practice is consistent or, as it was put by Sedley LJ in *BAPIO* at [39], "sufficiently consistent to be regarded as more than an occasional voluntary act". In this case, there has been consultation on at least three occasions identified by the claimants. However, as Mr Bailey makes clear in his witness statement, "changes to the various iterations of the Parole Board Rules (including the extensive rewrite of the rules in 2019 following the findings of the February 2019 review) have not been the subject of consultation".

157 In our view, although there have been decisions to consult on a few of the occasions when amendments have been made to the Board's Rules, the evidence does not establish a practice that is sufficiently consistent to generate a legitimate expectation of public consultation.

158 At one stage, Mr Rule appeared to advance the argument that, even if there were no consistent practice of consultation with the public at large, there was an obligation to consult at least the Board. We do not think that the claimants have standing to raise such a complaint. In any event, nothing in the Board's submissions or in the evidence generally established a sufficiently consistent practice of consulting even the Board.

159 Ground 5 therefore fails.

Conclusion

160 For these reasons, grounds 1, 4 and 6 succeed. Grounds 2 and 5 fail. Ground 3 falls away. We shall invite further submissions on the appropriate form of relief.

Postscript: contempt of court

161 Prior to the hearing we asked the parties to consider and be prepared to address us on two questions:

> "1. If a professional witness employed by the MoJ is directed to produce written evidence or answer questions orally as to their view on suitability for release, and the witness can reasonably be expected to have such a view, but declines to provide it, would the witness be in contempt of court?
>
> 2. If so, by what procedure would the contempt be addressed? (Proceedings for contempt of other tribunals may be brought by the law officers before the High Court.)"

162 The Board and the claimants filed written submissions during the hearing arguing that a refusal to answer in the circumstances specified would be a contempt of court, which could be enforced by proceedings in the High Court under CPR Part 81. The Secretary of State filed written submissions arguing that such a refusal would not amount to a contempt of court, because the Board is not a "court" for these purposes.

163 Given the Secretary of State's concession that a witness who has a view on the ultimate issue would be legally obliged to provide it if asked by the Board to do so (subject to rule 24(7) of the Rules), it was not necessary for us to resolve these questions in order to determine the lawfulness of rule 2(22) or of the July and October Guidance. Moreover, it was important to avoid delay in handing down this judgment, given the large numbers of hearings before the Board which might be affected by it.

164 We consider, however, that the questions set out in para. 161 above should be resolved. In the first place, although penal sanctions would be very unlikely to be appropriate, it is not satisfactory to leave hanging the question whether guidance issued by the Secretary of State has induced HMPPS staff to commit contempt of court. Secondly, we agree with the submission made at the outset by the Board: there is a strong public interest in resolving whether and, if so, how the Board can in the future enforce compliance with its directions and sanction refusals by the witnesses who appear before it to answer questions in oral hearings.

165 Accordingly, we shall give directions for further written submissions and a further oral hearing on these two questions.