Neutral Citation Number: [2020] EWHC 711 (Admin)

Case No: CO/46/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2020

Before :

LORD JUSTICE IRWIN

MRS JUSTICE MCGOWAN

- -

Between :

The Queen, on the application of	**Claimant**
Andrew Royston Morris	
- and –	
The Parole Board	**First Defendant**
And	
The Secretary of State for Justice	**Second Defendant**

- -

Mr Philip Rule and Mr Jake Rylatt (instructed by **Bailey Nicholson Grayson**) for the **Claimant**
Mr Robert Moretto (instructed by **GLD**) for the **First Defendant**
Mr Myles Grandison (instructed by **GLD**) for the **Second Defendant**

Hearing date: 14/01/2020

Approved Judgment

Mrs Justice McGowan:

Introduction

1. This case involves issues relating to the conduct of the hearings before the Parole Board when information amounting to unproven allegations of criminal conduct form part of the material before the Board.

2. Andrew Royston Morris, **("the Claimant"),** challenges the decision of the First Defendant, the Parole Board, **("the Board"),** of 1 October 2018, to refuse to direct his release from prison but rather to direct his transfer into open conditions, on two surviving grounds:

   i) Firstly, that there was procedural unfairness and failing in the manner in which the Board reached its decision on the ground of systematic failings in the procedure which, it is alleged, are in breach of Art. 5(4) of the European Convention on Human Rights, **("ECHR"),** or contrary to common law and procedurally flawed; and

   ii) He also challenges the approach of the Board and the Second Defendant, the Secretary of State for Justice, **("SSJ").** In particular, it is argued that the 'Guidance on Allegations' provided to assist the Board in reaching its decisions is flawed.

   There was a third ground of challenge on the issue of a failure to provide a timely parole hearing which has been resolved and does not form part of these proceedings.

Factual History

3. The Claimant was sentenced on 19 December 2007 in the Crown Court, sitting in Gloucester, to an indeterminate sentence of imprisonment with a minimum term of 2 years, less the time already served on remand. The outline of the index offence was described in the decision under challenge in the following way:

   > *"In August 2007……you returned home to find that your then partner had changed the locks. You returned an hour later, broke in through the back door and armed yourself with a kitchen knife. You threatened your partner and her brother; and took their mobile phones to prevent them calling the police……When armed police tried to negotiate the safe release of your partner, her brother and your 8-week old daughter, you grabbed your partner and threatened to kill her with the knife. The hostage situation is said to have lasted some hours."*

4. The Claimant has one other previous conviction. In 2005 he was sentenced to a term of four months' imprisonment. As summarised by one of the Board's decision letters dated 7 January 2016, he was *"originally arrested for threats to kill the victim who was a former partner, but the charge was reduced to battery, to which you pleaded guilty.*

Official reports apparently report that you tried to strangle the victim and that you had possession of a knife."

5. In 2012, he was moved into open conditions. He was then released on licence on 28 November 2013. However, the licence was revoked on 19 March 2014 and he was returned to custody the following day. This followed an incident on 1 March 2014, which was described in a 'Building Better Relationships' programme report as follows:

> *"In summary, on 01/03/2014 Mr Morris attended his ex-partner's home (not the index offence victim) where he became verbally abusive, which culminated in him grabbing her by the throat. The victim's male friend intervened and Mr Morris was ejected from the premises. During interview Mr Morris denied being physically aggressive but admitted that the situation became verbally heated. Mr Morris placed most of the blame for this incident onto the victim's male friend who he claims became aggressive towards him. The victim did not want to proceed with the case as she did not want her teenage son and friend to become witnesses. However, having failed to inform his Offender Manager of this developing relationship, Mr Morris was in breach of his licence conditions."*

6. Following the incident, the Police took a statement from the Claimant's ex-partner. However, she later retracted her statement, so no criminal proceedings resulted. A Parole Assessment Report Offender Manager ('PAROM 1') form dated 26 October 2016 refers back to that earlier incident and records that:

> *"… the behaviour displayed was so similar to the index offence that it was felt that the risk factors arising from close intimate relationships had again been activated. It appears that the Police may have continued with their enquiries (which might have secured a conviction) were it not for the alleged victim retracting her statement in order to shield her child (and another under her care) from becoming a witness at Court and generating Social Services involvement."*

7. The Board reviewed the Claimant's case on 2 July 2014. On 14 July 2014 it recommended transfer to open conditions. On 18 May 2017, after three years in open conditions, he was returned to closed conditions because he was in breach of his temporary licence. One of the two alleged breaches was that he had visited a gay and bisexual sauna. The other was his failure to disclose an intimate relationship with another individual, ("AW"). The relevant LISP4 report of 2 June 2017 details the circumstances of this breach:

> *"It was reported to Mr Morris' Offender Manager … via a Domestic Abuse Intervention Service (DAIS) that [AW] and Mr Morris had been in a relationship which ended on 24.04.17. [AW] had contacted DAIS because after she ended the relationship, he had persistently tried to contact her and her friends [between 24 April 2017 and 2 May 2017] and given his previous offending history, she became worried. … It was confirmed by [AW] that their relationship became a sexually intimate one and that Mr Morris had been to her house … There is no suggestion from [AW] that Mr Morris behaved in a threatening or intimidating manner; however as noted above she became*

> *concerned when he persistently tried to contact her when she ended the relationship."*

8. The Claimant denied that this relationship was intimate: he said he viewed it as no more than a friendship and said that there had been no sexual contact between them. He did accept that they had discussed having a child on his release. At the end of the relationship AW made a complaint to the Police that she had received a number of unwanted letters and messages from the Claimant.

9. He maintains his innocence in relation to the accusations of harassment. On 26 September 2017, the Police confirmed that it had insufficient evidence to charge him with a harassment offence for sending unwanted messages to AW after their relationship ended suddenly. However, on 27 September, the Police did serve him with a "Prevention of Harassment Letter". The letter was issued by an officer of Stoke Newington Police Station and witnessed by another officer. It warned him that harassment was a criminal offence and that future acts amounting to harassment might lead to arrest and prosecution. The receipt of such a letter is not an admission of the conduct alleged.

Decision Under Challenge: Ground One

10. The decision under challenge followed a Board hearing on 10 September 2018. At the time of the hearing, five experts (including three psychologists) unanimously recommended that the Claimant be released from prison. However, in its decision, the Board refused to direct release. Instead, it recommended that the SSJ return him to open conditions.

11. In reaching its decision, the Board considered the 2014 and 2017 allegations as part of its overall assessment of risk:

> *"Noting your offending history, the circumstances of the index offences, including the trial judge's clearly expressed concerns around your violent behaviour and thinking towards the victim, your arrest in 2014 in relation to an alleged domestic incident, the harassment warning from 2017, and the clear difficulties you have in being fully open and honest with those tasked with managing you, and balancing this with risk-reduction work completed, custodial conduct and identified protective factors, the panel considered your risk of causing serious harm (to future partners) remains high and your risk of causing serious harm to the victim of the index offence must remain at least medium."*

12. In respect of the alleged 2014 assault, the Board observed:

> "*The Panel that met with you in December 2015 extensively explored these matters; they concluded that you gave an 'inconsistent' account of your relationship with [the ex-partner], including the circumstances of the alleged assault."*

13. The Board also considered that –

> *"…the key issue on progression has been your ability to be fully open and honest with professionals with your lifestyle, especially over relationships and/or friendships you form with women. This lack of honesty and poor insight over what you need to disclose to professionals remains a key concern in respect of managing future risk."*

14. In deciding not to direct release, the Board stated:

> *"…your progress beyond the closed estate has been marred by your lack of disclosure of relationships, allegations of assault and harassment against partners, and [breach of ROTL conditions for visiting the sauna].*
>
> *…*
>
> *With this positive endorsement of your motivation to be fully open and honest with professionals, the panel was therefore uncomfortable with your evidence during the hearing; in their view, you continue to minimise your offending behaviour, minimised the seriousness of your dishonesty over relationships, and minimised your actions in harassing AW after she ended your relationship.*
>
> *Your disclosure that you had sent professional reports to close friends and a future employer without first discussing it with your OM or indeed the report authors raised further concerns over your ability to see beyond your own perspective; all professional witnesses expressed 'confidence that you were being open and honest with them', yet none were aware of your actions in sending out reports containing highly sensitive information around victims and your offending history. In the panel's view, your actions bring them full circle to the concerns outlined by the trial judge that, despite appearing to have many protective factors in place such as employment, education and support, you hold a 'blank spot' in respect of relationships and still have an inability to see outside your own perspective.*
>
> *In the panel's view, it is this belief that you can do things 'your way' coupled with an inability to be fully open with professionals that has the potential to go to risk of serious harm; and it is these traits that raise the most concerns about your release. On that basis, the panel is satisfied that it is necessary for the protection of the public that you remain confined. Release is not directed."*

15. It should be noted that the Board's decision is expressed as having been based on a number of factors, including primarily the Claimant's evidence in the hearing.

16. The Board finished its decision by setting out *"Information to assist future panels"*. It stated that:

> *"If this recommendation is accepted by the Secretary of State, a future panel will wish to see evidence that you can comply fully with your ROTL licence, are being open and honest with professionals over relationships and close friendships and are managing any residual risks around alcohol or drugs."*

17. In preparation for the 12 September 2018 oral hearing, there were attempts to obtain further information relating to the alleged 2014 assault and 2017 harassment. The Board gave directions to the SSJ to obtain case summaries and/or statements relating to the allegations of assault and harassment in 2014 and 2017 respectively.

18. Following attempts to obtain these materials, the SSJ applied to the Board on 20 July 2018 to revoke these directions. In the application, the SSJ stated that,

> *"PPCS and NPS have put in a great deal of effort to try to retrieve statements and reports from the Police however all efforts have remained unsuccessful. PPCS are not in a position to compel the Police to provide information and therefore we will not be able to meet this direction."*

19. On 7 August 2018, the Panel Chair decided that:

> "*The panel Chair accepts that PPCS and Probation appear to have exhausted all routes to obtain this information. The direction in respect of witness statements is not however revoked as this response effectively meets the direction."*

The Guidance on Allegations: Ground Two

20. The Board's 'Guidance on Allegations', dated March 2019, was published on 11 April 2019. The Guidance states at the outset that:

> *"5. Panel decisions must be made objectively, based on (a) the information and evidence provided to the panel and (b) information and evidence obtained as a result of the panel's inquiries and (c) what can properly be inferred from that information and evidence.*
>
> *6. Panels faced with information regarding an allegation, will have to assess the relevance and weight of the allegation and either:*
>
> *a. Choose to disregard it; or,*
>
> *b. Make a finding of fact; or*
>
> *c. Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review. "*

21. The Guidance states, in summary, that allegations should be disregarded only where not relevant (at [8-10]). If relevant, the Board should go on to consider whether it can make a finding of fact [11-12]). If the Board cannot make a finding of fact, it is nevertheless encouraged to consider the *"level of concern"* raised by the allegation. In this regard, the guidance provides as follows:

> *"Making an Assessment of the Level of Concern*
>
> *18. Panels may need to make an assessment of an allegation when the allegation is capable of being relevant to the parole review, but the panel is not in a position to make a finding of fact either because there is insufficient material available to make such a finding on the balance of probabilities, or because it would not be fair to do so. This most often arises when there is information regarding an allegation, but, critically important aspects of the evidence cannot fairly be tested. The allegation and the circumstances around it can form a basis for testing the reliability of the prisoner's evidence. It can be material on which an expert's evidence can be tested. The wider circumstances of the allegation might also give rise to areas of concern.*

19. To make an assessment of concerns arising from an allegation, panels will need to decide:

a. What, if any, relevance the allegation has to the parole review; and

b. The weight to attach to the concerns arising from the allegation;

and then form a judgement as to the relevance and weight, if any, to be attached to these concerns, and the impact this has on the panel's overall judgement.

20. If an allegation is relevant to the parole review, the panel will need to form a judgement as to what weight to give the allegation. This will require an examination of the allegation. The following factors can be considered when judging what weight to give an allegation:

a. Source: can the credibility and reliability of the source be assessed and, if so, what is their credibility as a source; were the actions of the source consistent with the allegation; does the source have a motive to act against the prisoner; how contemporaneously was the making of the allegation with the events concerned; has the source's account been consistent? Allegations from a credible source are likely to be given greater weight than allegations from a less credible source.

b. Supporting information: is there other evidence that supports the specific allegation whether from other sources and/or documentary evidence that record the allegation? Allegations that are supported by other information will normally have more weight than allegations that come from a single source.

c. Nature of the allegation: an allegation that is of more serious misconduct is capable of having a greater effect on the panel's risk assessment.

d. Contemporaneity: is the allegation relating to events in recent times or at some time in the distant past? Allegations that relate to more recent times are likely to be more relevant than allegations relating to events in the distant past.

e. Context: does the allegation fit with other information known about the prisoner (which could include convictions or known behaviour including patterns of behaviour or other known allegations) in which case it may have more weight than an allegation that does not fit; and

f. The prisoner's evidence: panels should take account of the prisoner's denial or limited admissions/minimisation of the allegation, and, in doing so, make an assessment of the prisoner's credibility and reliability as a witness.

21. Having analysed the relevance and weight of the allegation, the panel should then reach a judgement about the impact this level of concern has on the parole review.

22. This exercise of judgement requires the panel to draw on its skills and experience to form a view about the level of concern that should attach to the allegation and how that then impacts on the parole review.

23. An allegation that is relevant to the parole review and of significant weight is likely to be a matter of concern to the panel and therefore impact on its judgement regarding parole in one or more ways identified as 'relevant' above.

24. An allegation that is only marginally relevant, or is relevant but which carries little weight, is likely to be of little concern to the panel and therefore have little to no impact on the parole decision."

Legal framework

The Board's general function, powers and rules

22. The power to impose an IPP derived from s. 225 of the Criminal Justice Act 2003 ("the 2003 Act"). IPPs were later abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, this was done with prospective effect and so the Claimant remains subject to the IPP. He is therefore subject to a *"life sentence"*, as defined by s. 34(2)(d) of the Crime (Sentences) Act 1997 ("the 1997 Act").

23. By s.239(1)(b) of the 2003 Act, the Board has the functions conferred on it in respect of life prisoners by Chapter 2 of Part 2 of the 1997 Act. In this regard, by s.329(2) of the 2003 Act, the Board has a duty *"to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners"*.

24. Once the minimum term of the Claimant's IPP elapsed, the Board became responsible for considering his release pursuant to s.28(5)-(8) of the 1997 Act. If the Board directs the SSJ to release a prisoner pursuant to s.28(5), the SSJ has a duty to release that prisoner on licence.

25. When deciding whether to grant a direction to the SSJ to release the prisoner under s.28(5) of the 1997 Act, s.28(6) provides that:

> *"(6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—*
>
> *(a) the Secretary of State has referred the prisoner's case to the Board; and*
>
> *(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*

26. In deciding whether to give a direction, s.239(3)-(4) of the 2003 Act provides that:

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

> *(4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it."*

27. The Parole Board Rules are made under s.239(5) of the 2003 Act. The current rules in force are the Parole Board Rules 2019. However, at the time of both the decision under challenge and the point at which the 'Guidance on Allegations' was published, the relevant rules were the Parole Board Rules 2016 ("the 2016 Rules"). In his submissions on behalf of the Board, Mr Moretto assured us that there was no material difference between the 2016 and 2019 rules for the purposes of this claim. No one has submitted to the contrary. I am content to accept that this is the case.

28. It is self-evident that any hearing must be fair and comply with the Parole Board Rules. Art. 5(4) of the ECHR states that:

> *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

29. Rule 10 of the 2016 Rules provides the Board with the power to make directions.

30. Rule 23 of the 2016 Rules concerns the procedure at the oral hearing. Rule 23(6)-(7) provides that:

> *"(6) An oral panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law.*
>
> *(7) No person is compelled to give any evidence or produce any document which they could not be compelled to give or produce on the trial of an action."*

31. The Board's guidance is produced pursuant to s.239(7) of the 2003 Act, which provides that *"Schedule 19 shall have effect with respect to the Board"*. Schedule 19, paragraph 1(2) provides that:

> *"It is within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of—*
>
> *...*
>
> *(b) its functions under Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) in relation to life prisoners within the meaning of that Chapter.*

Assessing Risk

32. In *R v Parole Board ex parte Watson* [1996] 1 WLR 906, Sir Thomas Bingham MR said (at p916) that the test in s.28(6) of the 1997 Act should be applied by

> *"... balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause to such injury. In other than a clear case this is bound to be a difficult and very anxious judgment. But in the final balance the Board is bound to give preponderant weight to the need to*

> *protect innocent members of the public against any significant risk of serious injury."* [Emphasis added]

33. At p918 of the judgment, Rose LJ stated that *"the need to protect the public is paramount".* Subsequent judgments have emphasised the upmost importance of protecting the public (for example: *R(Brooks) v Parole Board* [2004] EWCA Civ 80, per Wall LJ at [71]; and *R(King) v Parole Board* [2016] EWCA Civ 51 per Dyson MR at [31-41]).

34. The Divisional Court in *R (DSD and NBV & Ors) v The Parole Board of England and Wales & Ors & John Radford* [2018] EWHC 694 (Admin): considered how the Board undertakes its evaluation of risk:

> *"117. The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.*
>
> *118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise 'of' judgement in this specialist domain. ...*
>
> *...*
>
> *133. A risk assessment in a complex case such as this is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgement for the panel itself."*

35. The authorities also make clear that, in considering risk, the Board is not determining a criminal charge. As Kennedy LJ set out in *Brooks v Parole Board* at [28]:

> *"In so far as it is relevant to do so the Parole Board applies the civil standard of proof. It is not determining a criminal charge (see R (West) v Parole Board [2003] 1 WLR 705). It is concerned with the assessment of risk, a more than minimal risk of further grave offences being committed in the future, and, as Judge Bing said in the presence case, ultimately the burden of proof has no real part to play. In R(Sim) v Parole Board [2003] EWCA Civ 1845 at paragraph 42 Keene LJ said –*
>
> > *"The concept of a burden of proof is inappropriate where one is involved in risk evaluation."*
>
> *What the Parole Board must do is to decide in the light of all of the relevant material placed before it whether it is satisfied as envisaged by section 28(6)(b) of the 1997 Act."*

36. In reaching its decision, the Board can take into account the matters provided for at s.239(3) of the 2003 Act. The wide language of this provision was considered in *DSD (Radford aka Worboys),*

> *"151. Section 229(3)(a) uses the term "information", as opposed to "evidence", as does s. 239(3)(b) in the context of the Parole Board. It is clear*

> *from Lord Judge's judgment in Considine that the sentencing judge is given considerable latitude as to the range of the information to be considered, subject always to considerations of fairness. In our judgment, the same principle applies to the Parole Board. "*

37. In *Brooks*, the Court of Appeal made clear that the Board *"is not confined to material which would be admissible in criminal or disciplinary proceedings"* (at [29]). It then went on to consider the specific issue of hearsay evidence:

> *"31. In Sim it was specifically held at paragraphs 52 to 55 that hearsay evidence can be taken into account, even when it relates to matters which are disputed. ... at paragraph 56 Keene LJ said –*
>
> > *"I cannot see that the Strasbourg Jurisprudence in fact adds anything of significance to the test of fair procedure which is required by the common law."*
>
> *Keene LJ went on to say that at common law there is considerable authority which establishes that it is not necessarily unfair to admit hearsay evidence, even when the deprivation of liberty is at stake, as in R (McKeown) v Wirral MBC [2001] 2 Cr App R 12. At paragraph 57 he said −*
>
> > *"Merely because some factual matter is in dispute does not render hearsay evidence about it in principle inadmissible or prevent the Parole Board taking such evidence into account. It should normally be sufficient for the Board to bear in mind that that evidence is hearsay and to reflect that factor in the weight which is attached to it. However, like the judge below, I can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross−examination, before it is taken into account at all. As so often, what is or is not fair will depend on the circumstances of the individual case.""*

38. In determining whether the Board's procedure was fair, the leading authority in which the Supreme Court reviewed the procedure is *Osborn v The Parole Board* [2013] UKSC 61. In that case, Lord Reid said, at [65], that "*The Court must determine for itself whether a fair procedure was followed… Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.".* The Court's assessment will turn on the facts of each case. If the Court is satisfied that the Board has followed a fair procedure, the issue of weight (if any) to be given to information or evidence is a matter of the Board's expert judgment.

Matters which have not been proved

39. The particular issue which arises in this case is how the Board should treat allegations of misconduct or criminal offending which have not been proved, in other words, which have not been established to either the civil or criminal standard of proof.

40. In *Brooks*, Mr Brooks' girlfriend ('SL') had complained to the police and to probation officers that he had raped her when previously released on licence. However, SL did not attend the oral hearing and so was not subject to cross-examination. On the basis of this evidence, the Board concluded it was not safe to direct that Mr Brooks be released.

Mr Brooks complained that more should have been done to secure the attendance of SL and that, in her absence, the Board should not have considered the allegation at all. The Court of Appeal dismissed the appeal. Having rejected Mr Brooks' criticism of the Board's decision to proceed without SL, the Court then turned to how the Board should have approached her allegations (per Kennedy LJ):

> *"38. Once the situation has been properly analysed in relation to the non−attendance of SL, and the decision taken to proceed without her, it seems to me that there can be little difficulty in deciding whether in the absence of SL the panel should have had regard to her allegations of rape. The duty of the panel was to decide whether it was satisfied that it was no longer necessary for the protection of the public that the claimant should be confined. In making that assessment it was entitled, and indeed bound, to have regard to all relevant information placed before it, including hearsay (see Sims) provided that the claimant was given a proper opportunity to respond, and that opportunity was in fact given. The situation in relation to consideration of the allegations is just the same as it would have been if SL were dead or physically unable to attend, and, as Elias J pointed out, if the allegations of SL were not to be considered in her absence that must mean that the claimant could not even be asked to comment upon them.*
>
> *39. What the panel had to do was to evaluate the allegations carefully in the context of the rest of the information before it, taking fully into account the absence of cross−examination, and that exercise was carefully and fully performed ..."*

41. In *R (McGetrick) v Parole Board* [2012] 1 WLR 2488, Stanley Burnton LJ offered some observations on these passages from *Brooks* (at [33]):

> *"Kennedy LJ's summary remains relevant under current legislation. It is essential to bear in mind that it is not the function of the Board to find a prisoner guilty or innocent of any offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence. For that purpose, the Board must take into account hearsay and other evidence of misconduct or criminal offences on the part of the prisoner, whether that misconduct or offence took place before or after or at the same time as the offending for which he was sentenced. Similarly, the Board must take into account evidence as to the relevant good conduct of the prisoner, whenever it took place. The weight, if any, to be given to that evidence is a matter for the Board."*

42. In *DSD*, the Divisional Court stated (at[154]) stated that the above observations from *McGetrick* –

> *"... are clearly in line with other authority and reflect the breadth of the statutory provisions which govern the functions of the Parole Board. In short, there is no implied limitation on the nature or temporal character of the information the Parole Board may take into account in assessing risk: the only constraint is that the board must act fairly."*

43. Whilst the Divisional Court reaffirmed that it was not the role of the Board to determine a criminal charge, it held that evidence of other offending could be considered *"as part and parcel of a global assessment of risk"* [150]. Similarly, at [155], the Court held that:

> *"…whereas we agree with Mr Collins that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission, shared by Mr Fitzgerald albeit advanced in slightly different terms, that it is precluded from considering evidence of wider offending when determining the issue of risk."*

The refusal to direct release

Submissions

44. The first ground of review is that the Board's conclusion had been reached through a procedurally unfair process. It is argued that the Board should not have taken into account the 2014 allegation of assault and the 2017 allegation of harassment when reaching its decision.

45. Mr Rule's preliminary submission was that it is not always necessary or appropriate for the Board to grapple with unproven allegations of offending or misconduct. In this regard, he relies on the Court of Appeal's decision in *R v Considine* [2008] 1 WLR 414, where the court observed that a sentencing court would normally not need to resolve disputed facts, given that information will be available from other sources. Mr Rule submits that the decision in *DSD* was exceptional and can be distinguished. In particular, he emphasises that there was a very large number of victims, who had been affected over almost a decade, but whose complaints had not led to prosecution due, primarily, to the CPS' decision to limit the number of offences on the indictment; and that this went to the specific issue of the reliability of Mr Worboys' account of his offending.

46. Mr Rule's main submission is that, even if it was necessary or appropriate for the Board to take into account the 2014 and 2017 allegations, the Board was not in a position to establish the relevant disputed facts. It should therefore, on his submission, have disregarded such allegations as unproven. Mr Rule contends that the SSJ was required to take further steps to obtain relevant documents from the Police or CPS by way of witness summons, or that the Board was required to direct the SSJ to do the same. However, in the absence of such steps, and therefore the absence of any fact-finding exercise, the 2014 and 2017 allegations should be treated as mere allegations and therefore disregarded. As Mr Rule states at [70] of his skeleton argument: *"If a matter has not been proved in court, and cannot be fairly proved as a fact in parole proceedings, it should be ignored."*

47. The SSJ only responds to one aspect of this ground of review; namely that he should have applied for a witness summons in order to obtain relevant documents from the Police or CPS. The SSJ argues that it was always open to the Claimant to seek to call any witnesses he required for the purposes of cross-examination. The Board, in keeping with its own policy, remained neutral with respect to this ground of challenge.

Discussion

48. I do not accept that the Board's decision to refuse to direct release was marred by procedural unfairness.

49. Firstly, I reject Mr Rule's contention that the Board should have ignored the 2014 and 2017 allegations, because Mr Morris' case was not extraordinary in the Worboys sense. Whilst I appreciate that the *DSD* decision arose out of an extraordinary factual context, it was brought by complainants and not the prisoner, the Court's judgment in *DSD* reaffirmed the general principle (as set out at [154]) that *"there is no implied limitation on the nature or temporal character of the information the Parole Board may take into account in assessing risk: the only constraint is that the board must act fairly."* It cannot be said that this principle is particular to the unusual facts of that case. It is clear from the preceding passages that the Divisional Court's conclusions were predicated on earlier authorities, namely *Brooks* and *McGetrick*, as well as the broad wording of the relevant statutory provisions. These authorities all establish that consideration of potentially relevant allegations is not an exceptional course of conduct. Instead, where the Board is aware of allegations which may be relevant to its decision-making, consideration of them will be expected. Indeed, in this case, though we are not asked to decide this point, it might be ventured that the Board was in fact *bound* to consider the allegations in question as part of its public law duty to act rationally (applying *DSD*).

50. Secondly, it cannot be said that the decision in *Considine* undermines this analysis. As the Divisional Court made clear in *DSD*, Lord Judge's judgment in *Considine* emphasises the *"considerable latitude as to the range of the information to be considered, subject always to considerations of fairness"*. As the Court of Appeal in *Considine* made clear (at [37]): *"We have deliberately declined to lay down any hard and fast rules about how the court should approach the resolution of disputed facts when making the section 229 assessment"*. There is nothing in *Considine*, or any other authority that we were taken to, or good reason in principle, to suggest that the Board might somehow be barred from considering potentially relevant allegations in reaching its decisions.

51. The third issue is whether the Board was required to disregard the 2014 and 2017 allegations because they had not been proven as a matter of fact. In my judgment, this point has been decisively addressed in previous authorities. Most recently, in *DSD*, at [155], the Divisional Court rejected the suggestion that only proven offences could be taken into account:

> *"…whereas we agree with Mr Collins that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission, shared by Mr Fitzgerald albeit advanced in slightly different terms, that it is precluded from considering evidence of wider offending when determining the issue of risk."*

In this respect, it is important to stress that *DSD* did not mark a sea-change or exception to the way in which the Board had previously conducted its hearings. This can be seen from the 2004 judgment in *Brooks*, where the Court of Appeal (at [28]) based its conclusion (that, in the Board's assessment of risk, *"ultimately the burden of proof has no real part to play"*) on the judgments of Sir Thomas Bingham MR in *Watson*, Sedley LJ in *R (West) v Parole Board [2003] 1 WLR 705*, and Keene LJ in *R(Sim) v Parole Board [2003] EWCA Civ 1845* and the language of the 1997 Act.

52. This well-established approach derives from the paramount importance of protecting innocent members of the public from the risk of serious harm. This is an imperative because the Board is concerned with prisoners who have already been convicted and sentenced for what are invariably serious offences. It is not, as the authorities make clear, in the same position as a criminal court which is asked to reach a verdict on guilt. It is therefore wrong, in my view, to regard the SSJ as somehow tantamount to a prosecutor, and to apply principles such as 'the presumption of innocence' or 'he who asserts a fact must prove a fact' in the context of Parole Board proceedings.

53. There will clearly be times where allegations, either individually or cumulatively, indicate significant risk to the public, but cannot be 'proved' for whatever reason. For example, the Board might find that there is a significant chance, short of a probability, that a given allegation was true, and legitimately consider this as part its *"global assessment of risk"*. Consideration of 'unproven' allegations is of course subject to the overriding requirement that the Board act fairly. What is fair or unfair will depend on the facts of each case. But, in my view, a consideration of allegations which have not been established is not itself intrinsically unfair.

54. In deciding whether the Board acted fairly, Mr Rule submits that it did not have before it sufficient material to reach any conclusion whatsoever on the 2014 and 2017 allegations. He argues that the failure to have available witness statements or police reports from the earlier incidents renders the process unfair and unlawful. However, the Board made clear it did not find the allegations from 2014 and 2017 proved. It merely considered the material that those incidents did establish, namely the attendance, in 2014, of the Claimant at the home of his former partner giving rise to the attendance of police officers and the taking of a witness statement from her with a view to criminal proceedings, which she later retracted. In the 2017 incident, the receipt of correspondence from the Claimant which was reported to the police and gave rise to the issue of the warning about future conduct. In any event, it was open to the Claimant to seek to call evidence about these complaints.

55. There is force in Mr Rule's further submission that there is a distinction between a *"mere allegation"* (i.e. one which has no evidential basis whatsoever) and allegations with a *prima facie* evidential basis; and that the former cannot be relevant to the Board's decision-making process. This distinction has been recognised by Andrew Baker J in *R (Delaney) v Parole Board* [2019] EWHC 779 (Admin), where he found that the simple fact of an allegation against a prisoner *"cannot properly, in itself, found a conclusion that he presents any particular type or degree of risk of being violent"* (at [10]). The judge stated that:

> *"…the panel must in reality either disregard the allegation as being so far as it can see no more than an allegation, or undertake an investigation and consideration of any evidence that may be presented to it of the conduct of the offender, enabling it to make at least some findings of fact as to what did happen by reference to which, as a factual basis for any conclusions, it might then consider the question of risk."*

I agree with this approach. Though, for sake of clarity, I consider that by referring to *"findings of fact"*, the judge is not suggesting that allegations must be proven; merely that there must be some evidence that allows the court to decide whether the allegation

has *some* factual basis. This approach should also be considered in the light of the reference to *"information"* at s.239(3) of the 2003 Act (as opposed to *"evidence"*).

56. Applying the approach from *Delaney* to the present case, I am satisfied that there was sufficient evidential material for the Board to have made *"at least some findings of fact"*. In relation to the 2014 assault allegation, the Board was entitled to rely on the fact of Mr Morris's arrest at the time, his admission that things became verbally heated at his ex-partner's house, and its knowledge of the existence of the ex-partner's retracted statement and relevant police reports. In relation to the 2017 harassment allegation, the Board was entitled to rely on knowledge of the existence of police statements and, in particular, the 'Prevention of Harassment Letter'. In my judgment, we are bound to assume that the police sent this letter in good faith and with a proper basis in fact, having detected a risk that the Claimant might commit acts of harassment in future. The Board was also entitled to consider both the 2014 and 2017 allegations in context of well-established concerns about his relationships or friendships with women. These concerns were derived particularly from the index offence and previous conviction in 2005.

57. The factual basis underpinning the 2014 and 2017 allegations was not particularly strong. And there is no doubt that the Board would have been in a better position to assess the truth of the allegations had it obtained the reports and statements in advance of the oral hearing. However, these are matters which go to the *weight* which the Board was entitled to place on the allegations. So long as there was a sufficient factual basis, however limited, on which to take the allegations into account, the Board was not acting unfairly.

58. As to whether the Board did in fact place undue weight on the allegations, we did not understand the Claimant to have challenged the decision in this way. However, in any event, I do not consider that the Board's approach was irrational, bearing in mind the Court's deference to its expert judgement. I note in particular the *"Information to assist future panels"* section of the decision. It makes clear that the key issues for the Board were Mr Morris' compliance with his ROTL licence, concern as to his ability to be *"open and honest with professionals over relationships and close friendships"*, and management of *"any residual risks around alcohol or drugs"*. These matters do not appear to have depended substantially on the 2014 and 2017 allegations.

59. For the same reason – namely that, on the facts of the case, this complaint goes to the issue of weight rather than unfairness – I do not accept that the Board was precluded from considering the allegations without first having obtained the relevant statements and summaries from the police. But for sake of completeness, I note that the SSJ's 20 July 2018 application to the Board, requesting it to revoke directions regarding this evidence, would have been served on his legal representatives pursuant to Rule 10(5) of the 2016 Rules. Pursuant to Rule 10(6), he was then entitled to make representations that the directions should continue in force. Yet no such representations were made. In these circumstances, I agree with Mr Grandison for the SSJ that criticism of the SSJ for failing to issue a witness summons is misguided (see, by analogy, *Brooks*).

60. In reaching my conclusion on this ground, I have declined Mr Rule's invitation to provide further statements of general principle on how the Board should approach unproven allegations. That is because what is permitted will depend on the facts of each case. As was said in *McGetrick, "the only constraint is that the board must act fairly"*.

Lawfulness of the 'Guidance on Allegations'

61. This ground of review is that the 'Guidance on Allegations' is unlawful. Mr Rule submits that the guidance encourages the Board to rely on adverse *"preconceptions"* or *"speculations"* in circumstances where the allegation is not proven and where it has no factual basis. In particular, Mr Rule focuses at [18] of the guidance, which states that the Board:

> "*…may need to make an assessment of an allegation when the allegation is capable of being relevant to the parole review, but the panel is not in a position to make a finding of fact either because there is insufficient material available to make such a finding on the balance of probabilities, or because it would not be fair to do so. This most often arises when there is information regarding an allegation, but, critically important aspects of the evidence cannot fairly be tested."* [Emphasis added]

62. Mr Moretto submits that unproven allegations can be relevant to the question of risk and that this guidance does not suggest that the Board makes an assessment of risk based solely on the mere existence of the allegation. Instead, he submits, the guidance instructs the Board to consider all the circumstances of the case and reach a conclusion on how much weight the allegation should carry as part of its *"global assessment of risk"*.

63. I agree with Mr Moretto's analysis. For the same reasons I have given in relation to the first ground of review, the Board *is* entitled to consider allegations where it is not in a position to make a full finding of fact. Nor do I accept that the 'Guidance on Allegations' encourages the Board to adopt a 'no smoke without fire' approach to allegations. As I have also explained above, it is unfair and therefore impermissible for the Board to give weight to 'mere allegations' which do not have any factual basis whatsoever. The guidance could make this clearer. One might read [18] as suggesting that an allegation can be taken into account in circumstances where it would be unfair to attempt to establish *any* of the underlying facts (for example, where there is factual basis to the allegation); or more generally permitting an unfair approach to the assessment of allegations. However, that is not my reading. Instead, this paragraph [18] merely confirms the ability of the Board to consider allegations when it has not been possible to prove that allegation on the balance of probabilities. Furthermore, it is clear from reading the guidance as a whole that the Board should approach allegations with care (see, for example, [5]). Moreover, at [19], the guidance sets out that the Board may decide to attach no relevance and/or weight to an allegation if appropriate.

64. In my judgment, then, the 'Guidance on Allegations' is consistent with decided authority on these issues and is not unlawful.

Conclusion

65. I would therefore reject the application for judicial review. The Board's refusal to direct release was not procedurally unfair and a re-hearing is not ordered. Further the 'Guidance on Allegations' is not unlawful.

Irwin LJ

66. I agree, and for the reasons given by McGowan J. In particular, I would emphasise the implications of the principal argument advanced by the Claimant: taken to the logical extreme, that argument would mean that the Parole Board could only proceed where a criminal verdict or civil judgment was available in respect of a relevant matter affecting risk, or where the Board itself was equipped and prepared to try out all other 'allegations'. That is not the law, and would be both wrong in principle and unworkable in practice. The Board is an expert body, charged with acting fairly. It is clear they will reject mere allegations unsupported by any material or evidence. Beyond that, they will be careful to consider matters said to be relevant to risk fairly, and above all in the context and in the light of facts established in the individual case.