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Neutral Citation Number: [2020] EWHC 2494 (Admin)

Case No: CO/3861/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2020

Before :

THE HONOURABLE MR JUSTICE FRASER

Between :

**The Queen on the application of
NEIL HUXTABLE
- and -**

Claimant

SECRETARY OF STATE FOR JUSTICE

Defendant

-and-

PAROLE BOARD FOR ENGLAND AND WALES

**Interested
Party**

JUDGEMENT

Jude Bunting (instructed by SL5 Legal/Tuckers Solicitors) for the Claimant
Sir James Eadie QC and Jason Pobjoy (instructed by the
Government Legal Department) for the Defendant
The Interested Party did not appear and was not represented

Hearing date: 26 June 2020

The Honourable Mr Justice Fraser :

Introduction

1. In these proceedings, the Claimant, a prisoner, seeks judicial review of the reconsideration procedure that was introduced by the Secretary of State for Justice into the granting of parole through the Parole Board Rules 2019 (“the 2019 Rules”). These replaced the earlier version of the rules, namely the Parole Board Rules 2016 (“the 2016 Rules”). The procedure under scrutiny in these proceedings is called the Reconsideration Mechanism and is explained in further detail below. The Claimant was sentenced in 2008 to imprisonment for public protection (“an IPP sentence”) with a minimum term of 2 years 245 days. IPP sentences are no longer available, although there are a number of prisoners still serving such sentences, which were passed upon them before this particular type of sentence was abolished in 2012. The Claimant was recommended for release in a provisional decision by the Parole Board on 21 August 2019, following a hearing of his case on 20 August 2019. He was released, after this decision became final, on 12 September 2019 and although he was subsequently recalled on 8 June 2020 that is not relevant to the issues in these proceedings. The Claim Form was issued on 3 October 2019, and an application for expedition was refused by Lang J on 11 October 2019, not least because he had already been released. The case was transferred administratively to the Administrative Court in Cardiff by an order dated 14 October 2019.
2. The Secretary of State for Justice (“the Defendant”) has oversight of all the functions of the Ministry of Justice, and also fulfils the functions of the Lord Chancellor. The Interested Party, the Parole Board for England and Wales (“the Parole Board”), was established in 1968 under the Criminal Justice Act 1967. Its present establishing statutory provisions are section 239 and Schedule 19 to the Criminal Justice Act 2003 (“CJA 2003”). Section 239 and other relevant provisions are recited below at [52].
3. The 2019 Rules are considered in greater detail below, but essentially these introduced a 21-day period, following a provisional decision by the Parole Board to release a prisoner on licence, to permit representations to be made to the Parole Board, either by the Defendant, or by the prisoner. These representations are the means whereby either the Defendant, or the prisoner, invite reconsideration by the Parole Board of the provisional decision. The grounds for reconsideration are irrationality or procedural error. This change followed the decision by the Divisional Court in ***R (on the application of DSD and NBV) v (1) Parole Board of England and Wales (2) Secretary of State for Justice*** [2018] EWHC 694 (Admin). That judgment concerned three separate challenges in respect of a decision by the Parole Board to recommend the release on licence of a prisoner called John Radford, who upon his conviction for serious sexual offences had been called John Worboys. That prisoner had been a taxi driver who had raped and sexually assaulted a large number of women, having drugged female passengers in his taxi for that purpose. This was a very high profile case, and resulted in the Divisional Court upholding the challenge brought by two of his victims to the rationality of the decision by the Parole Board to release him on licence. This decision also resulted in the Divisional Court declaring Rule 25(1) of the 2016 Rules *ultra vires* section 239(5) of the Criminal Justice Act 2003. That rule had prohibited making information public about Parole Board proceedings.

4. The 2019 Rules were introduced by the Defendant as a result of changes made to the 2016 Rules which came about because of that judgment. This was done after a period of consideration by the Defendant, and consultation. The result was the introduction into the 2019 Rules of what is called the Reconsideration Mechanism. This did not exist in the 2016 Rules. This provides that decisions on release by the Parole Board in certain cases will be provisional for a period of 21 days, although there is the ability for that period to be shortened in some cases if an application to do so is granted by the Parole Board for this. The purpose of the Reconsideration Mechanism is to permit representations to be made to the Parole Board if there were serious concerns about procedural regularity or irrationality of the decision of the Parole Board in any particular case, something that was not possible under the 2016 Rules. Those representations for reconsideration can be made either by the Defendant, or by the prisoner, and that latter feature is something relied upon by the Defendant in defending these judicial review proceedings. The Defendant will, in some cases, make representations following consultation with victims, but can also make representations not initiated by victims. The representations lead, in some cases, to the Parole Board reconsidering its earlier, provisional, decision. In some cases, the Parole Board will decline to reconsider its own earlier decision and will reaffirm it. If no application for reconsideration is made, the provisional decision of the Parole Board becomes a final one after 21 days (or fewer days if the Parole Board grants an application to shorten the period).
5. At its most basic, the Claimant (and other prisoners who have provided witness statements) are of the view that by introducing this 21-day period into the parole process, delay is caused and the Parole Board has lost its ability to order that a prisoner be released immediately. The lawfulness of the 2019 Rules is challenged in these judicial review proceedings. The Defendant argues that the Reconsideration Mechanism has introduced a step in the process whereby either the Defendant, or the prisoner, can seek to have the Parole Board reconsider its provisional decision, without having to embark upon expensive judicial review proceedings in the Administrative Court of the Queen's Bench Division. This is said to introduce an inexpensive and streamlined procedure that is for the benefit of prisoners as well as victims, whose wish for further reconsideration is made through the Defendant. If no application for reconsideration is made within the 21-day period, the provisional determination by the Parole Board becomes final. The same result occurs if an application for reconsideration is made but rejected by the Parole Board. Decisions by the Parole Board on the Reconsideration Mechanism are made available publicly on www.bailii.org.
6. A number of witness statements were served by both parties. For the Claimant, these included statements from eight other prisoners who had experienced delay in their release due to the operation of the 21-day period, and relate to their individual circumstances. These were each serving either life sentences or IPP sentences. The Claimant himself maintained that there was delay in his release that had been caused by the operation of the Reconsideration Mechanism.
7. Evidence was submitted by the Defendant from the Head of the Parole Board Rules Review Team employed by the Ministry of Justice, and the Head of Reconsideration and Specialist Casework in the Public Protection Casework Section at HM Prison and Probation Service.

8. The Parole Board is a court, and is independent. As is conventional in such circumstances, although the Parole Board is an Interested Party, the Parole Board was not itself represented in these proceedings and did not appear. Two witness statements were submitted by the Head of Legal at the Parole Board, who is employed by the Government Legal Department. These contained purely factual information to assist the court. The Parole Board adopted a neutral stance in relation to the challenge brought by the Claimant, consistent both with the existing case law and the judicial character of the decisions made by the Parole Board. Following the hearing, the Parole Board provided more up-to-date statistics, by way of a letter to the court, rather than in a witness statement. I permitted the Claimant to make written submissions in respect of these. Similar statistics had been included in some of the evidence for the hearing, and those in the letter provided the most recent numbers available to the Parole Board.
9. The challenge brought by the Claimant is to the lawfulness of the Reconsideration Mechanism itself, as well as the specific way in which it had been operated in his individual case. Mr Bunting on behalf of the Claimant submitted that the reconsideration procedure is unlawful for two reasons.
10. Firstly, Mr Bunting submitted that the 2019 Rules are *ultra vires* sections 239(5) and 330(3) and (4) of the CJA 2003. It is said on the Claimant's behalf that the Defendant has used powers which permit the making of procedural rules to make substantive amendments to the powers of the Parole Board. In particular, the Claimant submits that the Defendant has removed the Parole Board's power to order a prisoner's immediate release where this is justified in terms of risk (or to be more accurate, absence of risk). It is said that the Parole Board can no longer order immediate release of a prisoner, because of the 21-day period that is now required to elapse in order to accommodate the reconsideration process required for representations to be made. These submissions are made from the perspective of the Claimant, whereby such representations would be made by the Defendant (sometimes at the behest of the victims, as may have otherwise been the case in the *Worboys* case). It should be noted that the reconsideration process is also available for prisoners who wish to have a provisional decision by the Parole Board reconsidered, however that would not of course occur in respect of a decision to release such a prisoner, but would arise where the Parole Board had refused to order release.
11. Secondly, Mr Bunting submitted that the 2019 Rules are in breach of Articles 5(1) and (4) of Schedule 1 of the Human Rights Act 1998. They permit the Defendant to detain an indeterminate sentence prisoner even in circumstances in which an independent court – the Parole Board - has decided that their detention is no longer justified on the grounds of risk. This is said to be a break of the causal connection that is required in law between the sentence and the ongoing detention of a prisoner. This period leads to delay in release for reasons unrelated to the risk actually posed by an individual prisoner. It is also said to add delay to a prisoner's release that is unjustified by the facts and circumstances of their individual case.
12. The Claimant seeks a declaration of illegality, a mandatory order requiring the Defendant to revoke the reconsideration procedure in the 2019 Rules, and damages.

13. Sir James Eadie QC for the Defendant maintains that the Reconsideration Mechanism falls within the scope of the Secretary of State's rule making powers under section 239(5) of the 2003 Act, which provides that the Secretary of State "may make rules with respect to the proceedings of the Board ...". The Defendant submits that the new rules are plainly "with respect to the proceedings of the Board" and were reviewed by the Joint Committee on Statutory Instruments, which had no concerns that they may be *ultra vires*. The Defendant relies upon the fact that the 2019 Rules do not infringe on the substance of the decision-making function of the Parole Board, but rather provide an opportunity for the Parole Board, at the invitation of the prisoner or the Secretary of State, itself to reconsider its own decision. This introduces a process whereby, without needing to embark upon proceedings seeking judicial review, speedy correction can be made if the Parole Board decides, on reflection, that there has been irrationality or procedural error on its own part.
14. The Defendant also submits that the Reconsideration Mechanism is consistent with Articles 5(1) and (4). There is no direction for release from the Parole Board until the end of the 21-day period. In advance of the decision becoming final, the Parole Board has made a provisional decision, and the chain of causation between the sentence imposed by the court and the detention remains lawful.
15. The Claimant was given permission to bring judicial review proceedings by Jefford J on 13 December 2019 on the two grounds I have identified at [10] and [11] above. A third ground, that the Reconsideration Mechanism was a procedure that interfered with the independence of the Parole Board, was refused permission and no renewal of that has been sought by the Claimant. Due to the Covid-19 pandemic, the hearing of the judicial review proceedings was done remotely.
16. Finally by way of introduction, there is at least one other case concerning the same subject matter before the courts. In *R (on the application of Kevin Craigie) v Secretary of State for Justice* (CO/4713/2019) the claimant in that case brought a similar claim against the Secretary of State for Justice based on the unlawfulness of the Reconsideration Mechanism. Those proceedings are currently subject to a stay granted by Holman J, pending the judgment in this case. He expressed certain views in doing so, but given he did not have the benefit of full argument, it is not necessary to repeat them.

The Claimant's individual case

17. Imprisonment for Public Protection was a sentence created by section 225 of CJA 2003. It is colloquially known as an IPP sentence, or simply an IPP. It was subsequently modified and then finally abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, although that was done with prospective effect from December 2012. Thus, it remains the lawful sentence which Mr Huxtable is required to serve. Such a sentence has a minimum custodial term specified by the court at the time of passing the sentence. This is the period that must be served before the prisoner is entitled to have their case considered by the Parole Board. It is the element of the sentence designed to achieve two of the three aims of sentencing, namely punishment and deterrence. The third aim, protection, is achieved by the nature of the sentence once the minimum custodial term has been served. The sentence can potentially lead to some confusion on the part of some people, in that the minimum custodial term could (incorrectly) be interpreted as a period of

imprisonment in the same way that a fixed determinate term would be. Importantly, if a person has been sentenced to an IPP sentence, they could potentially remain in detention long after the minimum custodial term had been served. Their release is permitted only when the Parole Board decide they are no longer a risk to the public. Simply because the minimum custodial term has been served, does not mean that they are entitled to release, or indeed safe to be released. Once released, such a prisoner remains on licence and can be recalled to prison, either for breach of any conditions of that licence, or if other offences are committed.

18. Due to the nature of the challenges that are advanced in these proceedings, it is not necessary to concentrate in great detail upon the Claimant's individual case, and in my judgment a summary will be sufficient. In Mr Huxtable's case, the minimum custodial term for the IPP sentence was 2 years and 245 days, that sentence being passed in 2008 upon his conviction for robbery, when he was 30 years of age. The robbery had involved him using a baseball bat to smash a till in a shop, and to threaten the manager of the shop the subject of the robbery. The Claimant had been under the influence of drugs at the time of this offence, and he had a large number of previous convictions of a wide variety.
19. Because a prisoner sentenced to a fixed determinate term of imprisonment is entitled to be released at the half way stage, with the second half of their sentence served on licence, there is a temptation sometimes to equate minimum custodial terms in IPP sentences to the equivalent of a fixed determinate term of twice that length. Thus in the *Worboys* case itself, the Divisional Court identified at [4] of that judgment parenthetically that the minimum term of 8 years imprisonment in the IPP sentence passed upon him was equivalent to a determinate sentence of 16 years. A similar exercise here, were that to be undertaken, would obviously give a figure slightly less than 6 years. Such an exercise, however, can be misleading unless the following is borne in mind.
20. This is because the legal effect of an IPP sentence is an indeterminate life sentence. Such sentences were passed when the offender was found to satisfy the test of dangerousness under section 229 of the 2003 Act. Imprisonment for Public Protection was created by the same Act, and was required if the court concluded that "there is a significant risk to members of the public of serious harm occasioned by the commission by [the offender] of further specified offences", unless the court was satisfied that it was appropriate to impose a sentence of imprisonment for life. Therefore equating the minimum custodial period to a determinate term is not entirely helpful unless that important difference is borne in mind.
21. Once the punitive element of the IPP sentence has been served, a prisoner is entitled only to be considered for release, but not entitled to be released. Accordingly, release of such a prisoner from imprisonment depends upon the Parole Board's assessment of risk. The Parole Board will not recommend a prisoner for release if there remains a significant risk of serious harm to members of the public.
22. The 2019 Rules came into force on 22 July 2019. The Parole Board reviewed the Claimant's detention at an oral hearing on 20 August 2019. The Parole Board was asked to consider whether to direct his release, and if release were not to be directed, whether to recommend a move to open conditions. The Claimant had been in open

conditions before (on more than one occasion) but had always been returned to closed conditions again, for a variety of reasons that justified such a move. During his sentence he had completed a variety of vocational training courses in warehousing, painting and decorating, cleaning, spray painting and scaffolding.

23. The Parole Board assessed the risk of general and non-violent re-offending as medium, and his risk of violent re-offending as low. Its conclusion in the provisional decision of 20 August 2019 was that the risk management plan was capable of managing the risk in the community, and it was no longer necessary for him to remain in custody in order to protect the public. This was subject to standard licence conditions, and additional conditions including a residential condition, a curfew and a daily reporting requirement (both those latter two conditions subject to weekly review).
24. The provisional nature of the decision taken on 20 August 2019 by the Parole Board, in accordance with the 2019 Rules, was made clear by the following passage in the decision letter to the Claimant:
“This decision is provisional for 21 days from the date it is issued to the parties. Within this time, either party may apply for the decision to be reconsidered on the basis that it is either ‘irrational’ or ‘procedurally unfair’, or both. If no applications are received, the decision will become final after the 21 days. If an application is received, the party which has not made the application will have 7 days to submit their own representations before the application is sent to a member for consideration. When a decision is made, both parties will be notified of whether the Parole Board has decided to reconsider the decision or not.”
(emphasis present in original)
25. The residential requirement imposed by the Parole Board upon the Claimant was that he reside at Mandeville House in Cardiff, which is an approved premises. A place was available for him there from 23 August 2019, but due to the provisional nature of the decision, he was not released until 12 September 2019.
26. The Claimant maintains that this type of delay is not unusual generally within the prison system, and from the eight witness statements from other prisoners that are referred to in the evidence before the court in which similar, or longer, delays have been experienced.
27. One of these statements is from Mr Dhillon, who is serving a life sentence. His tariff expired on 6 March 2020. The Parole Board, on a paper review, directed his release to his family home on 30 March 2020. Mr Dhillon therefore had a home to go to immediately, although because of the procedure introduced as part of the Reconsideration Mechanism, he was not released until 23 April 2020.
28. In another case, Mr Pusey is serving an IPP sentence. The Parole Board directed on 18 January 2020, following an oral hearing, that he be released. On 10 February 2020, he was informed that he would be released the following day (which happened to be his sister’s birthday). A space was immediately available in approved premises in Ealing. However, at 16:33 on the same day, the Defendant applied for reconsideration. There was delay until this application for reconsideration was refused by the Parole Board on

25 February 2020, but because Mr Pusey had lost his place in approved premises he was not released until 10 March 2020.

29. There is also some evidence advanced that one of the points relied upon by the Defendant in these proceedings, namely the ability of a prisoner to apply to reduce the 21-day limit, is not something that is necessarily applied by all the relevant personnel. Mr Lloyd is serving an IPP sentence. On 20 November 2019, the Parole Board directed Mr Lloyd's release to his mother's home address, following an oral hearing that day at which the professional witnesses had supported his release. On 9 December 2019, his solicitors applied under Rule 9 of the 2019 Rules for the abbreviation of usual 21-day period for reconsideration decisions. A representative of the Parole Board responded in the following terms: "A prisoner cannot be released within the 21 days, even if the direction is for 'immediate release'...". This, in my judgment, is wrong, because it fails to recognise that Rule 9 of the 2019 Rules provides that an application can be made by the prisoner to shorten the 21 day period. In this case this was corrected the following day, when a team manager at the Parole Board wrote to confirm that the Parole Board *did* have the power under Rule 9 to shorten the 21-day period. This letter stated, however, that:

"...we do not have to. It is entirely at our discretion. I would however, advise that it is not in the interests of justice to do so. The reconsideration mechanism allows a 21-day period for the Secretary of State to apply for reconsideration of the decision. They will need time to study the case. They may also need to take into account any representations received from victims. There is no indication ... that the Secretary of State has said that they will not make such an application ... [T]he statutory timescale applies in all other cases where the PB have made a provisional decision for release and there does not appear to be anything that would suggest that (1) the expectation it would apply does not apply here (2) this case should be treated any differently from any other."

30. In so far as that letter could potentially be read as stating that the Parole Board believed that the 21-day period could never be reduced because the Defendant would always need 21 days; or that the discretion would always be exercised (insofar as it was considered) to refuse an application to reduce the period; or that it would not be in the interests of justice to reduce the 21-day period generally; it is incorrect in law. An application under Rule 9 should be considered on its own merits, and whether it is in the interests of justice do so must be considered in that specific case. The terms of the letter are also contrary to the Defendant's own Parole Process Guidance, which accepts that applications can be made to reduce the 21-day period.
31. In another case, Mr Logan is serving a life sentence (he was recalled to custody on 21 February 2019, having earlier been released). The Parole Board directed his release to approved premises on 16 March 2020, following an oral hearing at which the four professional witnesses had supported his release. At the time of that hearing, there was evidence that a place was immediately available for him in a residential rehabilitation unit. During the 21-day period for making an application for reconsideration, his solicitor asked the Defendant to expedite his release. Seeking a reduction in the time limit is permitted in the 2019 Rules under Rule 9. An employee of the Defendant said that this was not possible, writing:

“... we must still follow the appropriate procedures for release decisions, Mr Logan’s 21 days ends COP 06/04/2020 and the first date he can be released is the 07/04/2020 ... no release can be made before the 21-day process”

(emphasis added)

The underlined sentence is not correct in law, given the 21-day period can be reduced if the Parole Board grants such an application. Even the Defendant will make an application to do so in exceptional circumstances. The letter does not take into account that an application could be made to reduce the period. Mr Logan was not released until 7 April 2020. However, the Defendant points out that Mr Logan did not make an application to reduce the 21-day period, even though he shared the same legal representatives as Mr Lloyd who had done so. The implication being made by the Defendant is that these advisers must have known such an application was possible; against that must be balanced the terms of the letter which expressly stated that “no application can be made before the [end of] the 21-day process”.

32. These observations should not be interpreted as the court making findings in this judgment that the period should have been reduced in the cases of either Mr Logan or Mr Lloyd. They are merely to reiterate that there is a mechanism in the 2019 Rules to shorten the 21-day period in certain circumstances. The process must be operated in accordance with the 2019 Rules, and the rules include that provision.
33. These judicial review proceedings are not concerned with these individual cases, or with the operation of the 2019 Rules in specific instances (other than that of the Claimant). These proceedings are concerned with the lawfulness of the 2019 Rules, and with whether the Reconsideration Mechanism, with its introduction of provisional decisions by the Parole Board and the 21-day period, is lawful.
34. It is necessary therefore to consider the 2019 Rules, the powers under which these have been introduced, and the relevant authorities relied upon by the parties in their respective cases.

The Parole Board Rules 2019

35. The Parole Board was originally set up in 1968, and since its establishment by section 59 of the Criminal Justice Act 1967 its powers and responsibilities have undergone many changes. Its current establishing statutory provisions are section 239 and Schedule 19 to the CJA 2003. It is an independent body that carries out risk assessments about prisoners to decide who may safely be released into the community. It will consider cases both on paper review, and also oral review (which are sometimes called Parole Board hearings), which is what occurred in this case.
36. Its decisions are focused on whether the prisoner would represent a significant risk to the public after release. That risk assessment is based on evidence which is presented to it. There is no right of appeal against a decision of the Parole Board, although its decisions can be the subject of challenge by way of judicial review on public law grounds. The Parole Board is an expert body entrusted by Parliament with the function of undertaking the relevant evaluative assessment, and judicial review proceedings in individual cases are not concerned with the merits of those evaluations, but whether they have been made lawfully. There have been many such challenges brought by

prisoners on the basis either that the procedure undertaken by the Parole Board has been unfair or that, for some other reason, a decision not to release them is wrong or flawed. The challenge that led to the Divisional Court judgment in the *DSD and NBV v Parole Board* case was the first time that a challenge had been brought to a decision of the Parole Board to release a prisoner. This is made clear at [3] of that judgment.

37. The main cases which the Parole Board considers are cases involving prisoners serving life sentences and IPP sentences (such as the Claimant); extended determinate sentences (for offenders categorised as dangerous); and sentences for offenders of particular concern. This latter category includes terrorists and serious child sex offenders. The Parole Board also considers the re-release of prisoners who have been recalled to prison for breach of their licence conditions.
38. The evidence served by the Defendant explained that following the decision of the Divisional Court in the case of *DSD and NBV v Parole Board*, changes were required and also that “political and public confidence in the parole system had been significantly shaken”. It was decided that there was a need to rebuild confidence in parole decision making, and the administration of justice more generally. It should not be controversial to state that there is a wide spectrum of views in society about sentencing both generally, but also in specific cases. Sometimes prisoners are released and go on to commit other crimes. Sometimes the media expresses strong opinions about what should happen in terms of release of prisoners who have committed particularly dreadful offences. The Parole Board sits at the very centre of decision-making in deciding which prisoners are safe to be released into the community, and obviously is an important part of the administration of criminal justice. The Defendant is required to give effect to decisions of the Parole Board.
39. Following the Worboys case, the Defendant set up the Parole Board Rules Review Team in 2018 in order to restore confidence in the parole system, and also (as the name suggests) review the Rules. This was to undertake a public consultation on what became the Reconsideration Mechanism, as well as review of the 2016 Rules, one aspect of which had been declared unlawful by the Divisional Court.
40. The process of consultation took place between 28 April 2018 and 29 July 2018. A response to that consultation was published by the Defendant in February 2019 entitled “Reconsideration of Parole Board decisions: creating a new and open system: Government response to the public consultation”. The Executive Summary to the consultation response states the following:

“At present, the only way to challenge parole decisions is through the courts by seeking a judicial review. While this is an effective form of scrutiny, it can be a costly, complex, time-consuming and intimidating process, especially for victims of crime. The Worboys case was unusual in many ways but it shone a light on the need to have a more accessible way to review parole decisions in those rare cases where the decision may be flawed. The majority of consultation respondents welcomed the possibility of having an alternative way to review decisions and the Government has decided that we should proceed to make provision in the Parole Board Rules to implement a new reconsideration mechanism”.

41. The Ministry of Justice also published a report on the review of the 2016 Rules which was entitled “Review of the Parole Board Rules and Reconsideration Mechanism: Delivering an effective and transparent system”. This included some explanation of the Reconsideration Mechanism and stated that it would be judicial members of the Parole Board who would make decisions on any applications that were submitted to it seeking reconsideration under the Reconsideration Mechanism.
42. This process, and the detailed consideration that was made of this matter, is explained in considerable detail in the evidence, and resulted in the 2019 Rules. When the 2019 Rules were published, documents accompanying them included an Impact Assessment. That addressed the practical implications of the Reconsideration Mechanism on timescales for release. It estimated that in 81% of cases eligible for reconsideration, release takes longer than 21 days to effect in any event, and that there would therefore be no delay to release in those cases. In the remaining 19% of cases, the average period until release was approximately 14 days. The delay to release in those cases would therefore be approximately 7 days on average. The Impact Assessment stated that the 21-day period was “comparable to current timescales for making the practical arrangements for release following a successful oral hearing for the majority of prisoners.” Of course, liberty is a precious right and it would be no consolation to an individual prisoner, detained longer than otherwise, that most other prisoners would suffer no practical delay. It would also be no answer to a challenge of lawfulness. The Impact Assessment also explained that the Reconsideration Mechanism was also expected to improve prisoners’ access to justice as part of a more just and transparent process. It stated that “prisoners will now have an easier route to challenging decisions they believe to be legally flawed than pursuing a judicial review.”
43. Following the imposition of the 2019 Rules, Rule 28 provides that a prisoner or the Secretary of State may apply to the Parole Board for a case to be reconsidered on the grounds that the decision is irrational or procedurally unfair. This procedure is only available where the prisoner is serving an indeterminate sentence, an extended sentence, or a determinate sentence subject to initial release by the Parole Board.
44. The Defendant, both in evidence and by way of submission, explained that the purpose of the Reconsideration Mechanism is to allow a prisoner and the Secretary of State to challenge a Parole Board decision through an administrative mechanism. This avoids the need for complex and costly judicial review proceedings, although these remain available in any event and the 2019 Rules do not oust the process of judicial review.
45. The 2019 Rules themselves are contained in Statutory Instrument 2019 No.1038. They came into force on 22 July 2019 as a result of Rule 1. Rule 2 defines “party” as either a prisoner or the Secretary of State.
46. Rule 3(3) provides that “Applications for reconsideration under rule 28 can only be made where a decision that is eligible for reconsideration is made on or after the date these Rules come into force.” The other relevant rules are as follows. The headings themselves also appear in the Statutory Instrument.

“Appointment of panels

5.-(1) For all cases which have been referred to the Board, the Board chair must appoint one or more members of the Board to constitute a panel to consider, in accordance with rule 19, the release of a prisoner on the papers, or to advise the Secretary of State.

(2) If, following consideration on the papers under rule 19, a case is directed to be considered at an oral hearing, the Board chair must appoint one or more members of the Board to constitute a panel to hear that case in accordance with rules 22 to 26.

(3) If following consideration of whether a case should be decided on the papers following receipt of further evidence, in accordance with rule 21, a direction is made for the case to be decided by a panel on the papers, the Board chair must appoint one or more members of the Board to constitute a panel to make a decision on the release of the prisoner on the papers.

(4) For any application made for reconsideration of a provisional decision under rule 28, the Board chair must appoint one or more members of the Board to constitute an assessment panel to consider the application”.

....

“Case management and directions

6.-(1) A panel chair or duty member may be appointed in accordance with rule 4 to carry out case management functions and may at any time make, vary or revoke a direction.

(2) The panel chair or duty member appointed under paragraph (1) may make any direction necessary in the interests of justice, to effectively manage the case or for such other purpose as the panel chair or duty member considers appropriate.

(3) Such directions may in particular relate to-

(a) the timetable for the proceedings;

(b) the service of information or a report;

(c) the submission of evidence;

(d) the attendance of a witness or observer.

(4) A direction given under this rule may not relate to withholding information or reports; such directions are governed by rule 17.

(5) A party or third party who is subject to a direction may apply in writing for a direction to be given, varied or revoked.”

....

“Directions hearings

7.-(1) A panel chair or duty member may hold a directions hearing.”

....

“Time limits

9. A panel chair or duty member may alter any of the time limits prescribed by or under these Rules where it is necessary to do so for the effective management of the case, in the interests of justice or for such other purpose as the panel chair or duty member considers appropriate.”

“Representatives

10.-(1) Subject to paragraph (2), a party may appoint a representative (whether a solicitor or barrister or other representative) to represent that party in the proceedings.”

“Consideration on the papers

19.-(1) Where a panel is appointed under rule 5(1) to consider the release of a prisoner, the panel must decide on the papers either that-

- (a) the prisoner is suitable for release;
- (b) the prisoner is unsuitable for release, or
- (c) the case should be directed to an oral hearing.

(2) Where a panel has received a request for advice from the Secretary of State concerning whether a prisoner should move to open conditions, the panel must recommend whether-

- (a) the prisoner is suitable for a move to open conditions, or
- (b) the prisoner is not suitable for a move to open conditions.

(3) Where a panel makes a decision that the case should be directed to an oral hearing under this rule, the panel may at the same time make any directions relating to the oral hearing.

(4) Any decision made under paragraph (1)(a) which is eligible for reconsideration under rule 28 is provisional, and becomes final if no application for reconsideration is received within the period specified by that rule.

(5) Any decision made under paragraph (1)(a) which is not eligible for reconsideration under rule 28 is final.

(6) Any decision made under paragraph (1)(b) is provisional.

(7) Where the Board receives a request for advice with respect to any matter referred to it by the Secretary of State, the Board may advise or make a recommendation to the Secretary of State without an oral hearing.

(8) The decision or advice of the panel must be recorded in writing with reasons for that decision or advice, and the written record provided to the parties within 14 days of that decision or advice”.

“Procedure after a provisional decision on the papers

20.-(1) Where a panel appointed under rule 5(1) has made a decision that a prisoner is unsuitable for release under rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing to determine the case.

(2) A prisoner who makes an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of the provision of the written record under rule 19(8).

(3) If no application has been served by the prisoner under paragraph (2) after the expiry of the period specified by that paragraph, a provisional decision made under rule 19(1)(b)-

(a) remains provisional if it is eligible for reconsideration under rule 28, and becomes final if no application for reconsideration is received within the period specified by that rule, or

(b) becomes final if it is not eligible for reconsideration under rule 28.

(4) Where no application is served by a prisoner under paragraph (2), the decision must be provided to the parties by the Board within 35 days of the written record under rule 19(8).

(5) If an application is served in accordance with paragraph (2), the decision about whether the case should be determined at an oral hearing must be taken by a member of the Board who-

(a) is a duty member, and

(b) was not part of the constituted panel appointed under rule 5(1) who made the provisional decision.

(6) If the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, a provisional decision under rule 19(1)(b)-

(a) remains provisional if it is eligible for reconsideration under rule 28 and becomes final if no application for reconsideration is received within the period specified by that rule, or

(b) becomes final if it is not eligible for reconsideration under rule 28.

(7) Where the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, that decision must be provided to the parties by the Board within 35 days of the written record under rule 19(8).

(8) A decision under paragraph (5) cannot be deferred or adjourned by a panel chair or duty member under rule 6 and the time limit in paragraph (7) cannot be extended under rule 9”.

“Decision on the papers after a direction for an oral hearing

21.-(1) Subject to the provisions of this rule, where further evidence is received by the Board after a panel have directed that a case should be determined at an oral hearing under rule 19(1)(c) or 20(5), a panel chair or duty member can direct that the case should be decided on the papers if an oral hearing is no longer necessary.

(2) Where further evidence is received under paragraph (1), the Board must notify the parties of the receipt of the evidence as soon as practicable.

(3) Within 14 days of notification of the receipt of further evidence under paragraph (2), the parties may make representations on-

(a) the contents of the further evidence, and

(b) whether they agree to the case being decided by a panel on the papers.

(4) After the 14-day period for the parties to make representations under paragraph (3), the panel chair or duty member will consider the further evidence and any representations made, and make a direction that the case should-

(a) be decided by a panel on the papers, or

(b) continue to be determined by a panel at an oral hearing under rule 25.

(5) Where a direction is made under paragraph (4)(a) for a decision to be made by a panel on the papers under paragraph (7), the panel may be constituted of the panel chair who made the direction or by a new panel appointed under rule 5(3).

(6) A direction for a case to be decided on the papers under paragraph (4)(a) cannot be made where there is less than 3 weeks until the oral hearing.

(7) Where a direction is made that the case should be decided on the papers under paragraph (4)(a), the panel must decide either that-

(a) the prisoner is suitable for release, or

(b) the prisoner is not suitable for release.

(8) Any decision made under paragraph (7) is provisional if it is eligible for reconsideration under rule 28, and becomes final if no application for reconsideration is received within the period specified by that rule.

(9) Any decision made under paragraph (7) which is not eligible for reconsideration under rule 28 is final.”

...

“Decision by a panel at an oral hearing

25.(1) Where a panel has considered a prisoner's case at an oral hearing, the panel must decide either that-

- (a) the prisoner is suitable for release, or
- (b) the prisoner is unsuitable for release.

(2) Any decision made by the panel under paragraph (1) which is eligible for reconsideration under rule 28 is provisional, and becomes final if no application for reconsideration is received within the period specified by that rule.

(3) Any decision made by the panel under paragraph (1) which is not eligible for reconsideration under rule 28 is final.”

.....

“Reconsideration of decisions

28.(1) Subject to paragraph (2), where a decision has been made under rule 19(1)(a) or (b), 21(7) or 25(1), a party may apply to the Board for the case to be reconsidered on the grounds that the decision is-

- (a) irrational, or
- (b) procedurally unfair.

(2) Decisions are eligible for reconsideration only where the prisoner is serving-

- (a) an indeterminate sentence;
- (b) an extended sentence;

(c) a determinate sentence subject to initial release by the Board under Chapter 6 of Part 12 of the 2003 Act.

(3) An application for a provisional decision to be reconsidered under paragraph (1) must be made and served on the other party no later than 21 days after the written decision recorded under rules 19(8), 21(12) or 25(6) is provided to the parties.

(4) Where a party makes an application under paragraph (3), the other party may make representations, and those representations must be provided to the Board and the party who made the application within 7 days of service of the application.

(5) Where an application made under paragraph (3) is received by the Board, the application must be considered on the papers by an assessment panel.

(6) After assessing the application under paragraph (5), the assessment panel must-

- (a) direct that the provisional decision should be reconsidered, or
- (b) dismiss the application.

(7) The assessment panel may direct that the provisional decision should be reconsidered under paragraph (6)(a) only if it has identified a ground for reconsideration under paragraph (1).

(8) Where the assessment panel dismiss the application under paragraph (6)(b), the provisional decision becomes final.

(9) Where the assessment panel directs that the provisional decision should be reconsidered under paragraph (6)(a), the assessment panel must direct that the case should be-

(a) reconsidered on the papers by the previous panel or a new panel appointed under rule 5(1), or

(b) reconsidered at an oral hearing by the previous panel or a new panel appointed under rule 5(2).

(10) The decision of the assessment panel must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the decision.”

47. It can therefore be seen that Rule 9 of the 2019 Rules gives the Parole Board the power to alter *any* of the normal time limits contained within the rules. This includes the 21-day period for the Reconsideration Mechanism contained in Rule 28, and the Defendant accepts that in these proceedings. The Parole Process Guidance published by the Ministry of Justice states the following at paragraphs 5.7.10 and 11:

“There is a general power under Rule 9 of the Parole Board Rules 2019 for the Parole Board to alter any of the normal time limits set out in the 2019 Rules ‘where it is necessary to do so for the effective management of the case, in the interests of justice or for such other purpose as the panel chair or duty member considers appropriate’. An application to alter the normal time limits could be made by the Secretary of State or a prisoner. This guidance identifies the cases in which the Secretary of State is likely to apply to the Parole Board to shorten the 21-day reconsideration period, pursuant to Rule 9.

The Secretary of State is likely to apply to the Parole Board to shorten the 21-day reconsideration period where the following three conditions are satisfied.

1. There are no victims signed up to the Victim Contact Scheme or the Secretary of State has received and considered an application from a victim for reconsideration, and there is no likelihood of further victim applications; and

2. The Secretary of State is satisfied that there are no grounds on which to make a reconsideration application; and

3. There are exceptional reasons which justify an application to shorten the 21-day reconsideration period, including circumstances where:

(1) the prisoner is at risk of losing their place in an Approved Premises or other specialist accommodation;

- (2) the prisoner may lose an opportunity to take up employment;
 - (3) the continuity of a prisoner's healthcare, treatment or medication will be compromised.
 - (4) continued detention may significantly impede arrangements to deport the prisoner;
 - (5) there are other exceptional reasons which justify an application to shorten the 21-day reconsideration period to allow the prisoner's earlier release."
48. The three conditions above govern the circumstances that must apply where it is the Defendant who decides to make an application to reduce the 21-day period. No such conditions apply to where a prisoner wishes to have this period shortened. It is open to any prisoner affected to apply to have the 21-day period shortened. In the evidence before the court for this hearing, Ms Goodrham, the Head of Reconsideration and Specialist Casework in the Public Protection Casework Section at HM Prison and Probation Service, stated the following:
- "18. The SSJ acknowledges that there may be exceptional circumstances where detaining the prisoner for the duration of the 21-day window following a provisional parole decision may impede the prisoner's release plan. We anticipate that this will only occur in a very limited number of cases, given that in most cases it will take longer than 21 days to put the release arrangements in place and so the provisional decision window would not affect the date of release. In this respect, it is important to note that the expectation is that all efforts will be made to progress release plans during the provisional window, and to organise release for the earliest day outside the 21-day provisional window.
19. There is a procedural mechanism which allows the SSJ or a prisoner to apply to alter any of the normal time limits set out in the 2019 Rules, which includes the 21-day provisional decision period: see Rule 9 of the 2019 Rules."
(emphasis added)
49. It is therefore accepted by the Defendant that in exceptional circumstances, in "a very limited number of cases", detaining a prisoner for the duration of the 21-day period would impede the prisoner's release plan. It is also accepted by the Defendant that a prisoner can apply to have the period of 21 days reduced. Given the application to reduce the period of 21 days is one that would be made to the Parole Board under Rule 9, and without attempting to interfere in any way with the outcome of any such applications, I would simply observe that these are the type of matters that may be taken into account by the Parole Board in considering whether it is in the interests of justice to grant such an application, if or when one comes to be made.

The First Ground of Challenge

50. This is that the 2019 Rules were made *ultra vires*, and it is argued that the Defendant did not have the power to make amendments of this nature to the powers of the Parole Board. The Claimant submits that the Defendant has used powers permitting the making of procedural rules to make substantive amendments to the powers of the Parole Board. In particular, it is submitted on behalf of the Claimant that the Defendant has removed the Parole Board's power to order a prisoner's immediate release where this is justified in terms of risk. This is

because the 21-day period is said to be automatically interposed into the period from when the Parole Board directs a prisoner should be released, following a determination that there is no risk, before he can be released.

51. The Claimant submits that even if the Parole Board considers, as an independent Court, following analysis of the evidence and submissions from the parties including the Defendant, that a prisoner's risk does not require his further detention, the Parole Board can only make a provisional release decision, which will not take effect for (at least) a further 21 days. It is submitted that the Defendant has removed an aspect of the Parole Board's power, which is set out in primary legislation, by way of secondary legislation.
52. The power of the Defendant to make the 2019 Rules is contained in the CJA 2003, and appears in Chapter 6 of that statute headed "Release, licences, supervision and recall." This states as follows:
- “Section 239:
- (1) The Parole Board is to continue to be, by that name, a body corporate and as such is—
- (a) to be constituted in accordance with this Chapter.....
- (2) It is the duty of the Board 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.
- (3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider—
- (a) any documents given to it by the Secretary of State, and
- (b) any other oral or written information obtained by it;
- and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.
- (4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it.
- (5) Without prejudice to subsections (3) and (4), the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times”.
53. Sub-section (5) therefore gives the Defendant the express power to “make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times”.
54. Section 330(3) and (4) were also relied upon by the Defendant in making the 2019 Rules. These appear in Part 14, General and state the following:
- “Section 330:

(1) This section applies to—

(a) any power conferred by this Act on the Secretary of State to make an order or rules;

.....

(2) The power is exercisable by statutory instrument.

(3) The power—

(a) may be exercised so as to make different provision for different purposes or different areas, and

(b) may be exercised either for all the purposes to which the power extends, or for those purposes subject to specified exceptions, or only for specified purposes.

(4) The power includes power to make—

(a) any supplementary, incidental or consequential provision, and

(b) any transitory, transitional or saving provision,

which the Minister making the instrument considers necessary or expedient.”

55. The issue under this ground therefore is whether the introduction of the Reconsideration Mechanism in the 2019 Rules is something that is properly characterised as making “rules with respect to the proceedings of the Board.” If it is, then the Defendant has made a procedural change to the way that the Parole Board works, which the CJA 2003 permits him to make. A procedural change of this nature does not require primary legislation to take lawful effect, as section 330(2) permits the power to be exercised by way of statutory instrument.
56. The Defendant argues that the 2019 Rules regulate the decision-making process of the Parole Board and the manner in which the decisions of the Board become final. It is denied by the Defendant that the Reconsideration Mechanism infringes on the substance of the decision-making function of the Parole Board. The 2019 Rules are said to “provide the opportunity for the Parole Board, at the invitation of the prisoner or the Secretary of State, itself to reconsider its decision enabling speedy correction to be made if the Parole Board decides, on reflection, that there has been irrationality or procedural error”.
57. The Defendant relies upon the fact that the relevant decision making remains throughout with the Parole Board. The Parole Board retains all of its substantive powers. This is met by the Claimant arguing that the Parole Board no longer has an important substantive power that it had before the introduction of the 2019 Rules, namely the power to order immediate release of a prisoner.
58. Although at first sight that latter point appears to have some force, upon closer analysis it is not correct, and I reject it. The concept that the Parole Board has, as a result of the 2019 Rules, lost a substantive power that it had previously under the 2016 Rules, or has had a substantive power changed, is a flawed one. This is for the following reasons.
59. The powers of the Parole Board did not include, prior to the introduction of the 2019 Rules, the power to order “immediate release”. The Parole Board’s power is to order “early release” from a sentence of imprisonment. This is clear from the wording of the legislation itself. The terms of the legislation which specifies this power, section 28(5) of the Crime (Sentences) Act 1997 states the following:
“(5) As soon as—

- (a) a life prisoner to whom this section applies has served the relevant part of his sentence; and
- (b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.

(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.””

60. The courts have repeatedly found that this section of primary legislation cannot be construed as the Parole Board requiring “immediate release”. This is clear from the case law. I take the most important decisions in chronological order.

61. In *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 (Admin) Langstaff J was faced with an argument that immediate release was required after a decision by the Parole Board. He refused permission to bring judicial review. Although it was a permission decision, I reproduce it because it is referred to in the case immediately following and therefore forms part of the reasoning of Whipple J in that case. Langstaff J said:

"[23] ...s 28 of the 1997 Act cannot sensibly be interpreted to provide that as soon as a Parole Board takes a decision in which it directs release, albeit under conditions or at some future time, the Secretary of State is under a duty there and then and thereby to ensure that that release takes place forthwith. That would give no effect to the provisions of s.31; it would not recognise the difference in language between s.28 and s.32; it would in my view simply have been beyond the contemplation of Parliament that the alternative, which would need to have been in place immediate release to be effected, would operate in an impractical way – as Ms Davies points out, if it were to be the case that it was anticipated that a Parole Board might make a direction which was conditional as to time or circumstance, that (so far as a circumstance such as accommodation in a hostel was concerned) the hostel would have to be held available just in case the Board at its hearing might decide that particular prisoner under review was to be released, even though it equally might not. Supervision arrangements would have to be made in anticipation of a possible outcome; appointments with psychiatrists and the like would have to be in place – all of which would be on a provisional basis which, given that the decision lies in the power of the Parole Board which has not yet considered it, might or might not be given effect to. I cannot sensibly construe s.28 in such a way that it would have that effect."
(emphasis added)

62. This point was expressly conceded in the next case in this series, *R (Bowen and Stanton) v Secretary of State for Justice* [2016] EWHC 2057 (Admin). One of the two claimants was a prisoner serving a life sentence for murder, and the other was serving an IPP sentence. They brought proceedings in relation to periods of time after the Parole Board had concluded their detention was no longer necessary, and had directed their release, but whilst the additional licence conditions (residence at Mandeville House) were arranged. Whipple J recorded at [25] that counsel for the claimants conceded that “there must be some reasonable time allowed for the

Secretary of State to implement the directions of the Parole Board”. She referred to the “scorching refusal of permission” by Langstaff J in the passage in *Elson* above.

63. She considered at [26] the argument raised by the claimants that by the time the Parole Board had given the direction for their release, they were satisfied that it was no longer necessary for the protection of the public to confine the prisoner, and accordingly no legitimate basis upon which such a prisoner could be detained. In that case, there had been delay of 2 and 4 months respectively for each claimant, whilst the residential place was awaited. She concluded at [40] that the claimants’ construction of section 28 was wrong, and that it did not provide for immediate release in the way contended for. She found that the analysis that the Secretary of State was obliged to release a life prisoner the moment the Parole Board directed release was over-simplistic. She found that the Secretary of State was only obliged to release a prisoner, where approved premises were specified and required for their residence, once those premises became available for the particular prisoner, and not before.
64. The prisoners in that case also argued that Article 5(1) was infringed, because the chain of causation between continued detention and risk was broken as a result of the Parole Board’s decision. That ground is considered between [49] and [61] of the judgment. That too failed. In her conclusion at [80] she stated that the obligation to release a prisoner arose only when the conditions on release were satisfied, in that case, when the places in the approved premises became available.
65. Leave to appeal was granted in that case by the judge herself, and the Court of Appeal considered the matter in *R (Bowen and Stanton) v Secretary of State for Justice* [2017] EWCA Civ 2181. McCombe LJ gave the judgment of the court, with whom both the Master of Rolls and Ryder LJ agreed, and in doing so he stated the following:

“[49] It is accepted by Mr Flanagan on behalf of the respondent (in my view, correctly) that if release is directed with a recommended condition of residence at Approved Premises the release must not be delayed beyond a reasonable time on the facts of each individual case, but he submits that, with that limitation, the s.28(5) duty is fulfilled once the release occurs within such reasonable time.

[50] He referred us to the decision of Langstaff J in *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 (Admin). This was a decision refusing permission to apply for judicial review and would not normally be citable as authority. However, the judge referred to it in paragraph 25 of her judgment and, to my mind, we could not sensibly ignore it, since (in effect) the judge adopted the decision as part of her own reasoning”.
66. Having reproduced the same passage from Langstaff J that I have quoted at [61] above McCombe LJ continued:

“[52] I agree with Langstaff J and the judge that Parliament cannot have intended the section to work in a way that would have the impracticable results that flow from the construction which Mr Rule would have us adopt. Of course, prior planning is made by the offender manager to see when a place at Approved Premises would be available, as happened here. It enables the panel to know that, if it directs release to Approved Premises, the release can be safely achieved with the relevant risk management precautions in place. However, to my mind, an intention to require

immediate release at a time before such precautions are known to be available is not something that one should readily attribute to Parliament. As Langstaff J also pointed out, if a prisoner is released on condition of residence at a place which is not available to him it would have the result that he would have to be brought back to prison immediately the condition was broken on the first day out of custody. Such a result can hardly have been intended.

[53] In my judgment, all this shows that the construction of s. 28 advanced on behalf of the appellants cannot be correct.

[54] Under that section the Board will direct release in such a way as to satisfy it, in accordance with s. 28(6), that it is no longer necessary to confine the prisoner to custody. If conditions are necessary to achieve protection of the public it will recommend their imposition, it being implicit that its direction is subject to those conditions. The alternative is simply to refuse to direct release which can hardly be in the interests of the prisoner. I simply do not accept Mr Rule's contention that if release subject to residence at Approved Premises cannot be achieved immediately, then the prisoner has to be released without any such condition. To attribute such an intention to Parliament in enacting s. 28 seems to me to be fanciful.”

67. In my judgment, imposing a procedural interval into the process whereby the Parole Board comes to a final decision to satisfy itself that the assessment of risk is such that the prisoner can be released does not remove a substantive power of the Parole Board. That period runs in parallel with a period in any event required for such prisoners for the satisfaction of conditions, what is called the release plan. The provisional decision to release by the Parole Board commences this process. Once the process is completed, with the 21-day period having elapsed, if no application for reconsideration is made, the provisional decision becomes a final one. This disposes of the Claimant's argument that the 2019 Rules are not procedural but are substantive, which underpins its claim that the 2019 Rules are ultra vires. The arguments of the Claimant assume no reconsideration would be sought by a prisoner if a provisional decision to release had been made. Rule 28 provides that “a party may apply to the Board for the case to be reconsidered” but reconsideration is only concerned with decisions which concern suitability for release.
68. Decisions such as *R v Secretary of State for the Home Department, ex parte Robinson* [1999] 1 All ER (D) 921 do not assist the Claimant. In that decision, the Divisional Court decided that a second Parole Board could not reopen the conclusion of risk reached by the first Parole Board a few weeks earlier. Simon Brown LJ identified that the “vital question” was whether the first panel's decision was a preliminary or provisional one, or final and conclusive. He concluded it was the latter, which meant the second panel could not revisit it (they had been empanelled not to consider risk, but to decide on release arrangements). In the instant case, the decision of the Parole Board on 20 August 2019 was expressly provisional, and stated as such, as it was made under the 2019 Rules that provide for such provisional decisions. Indeed, in the case of *Robinson* that decision of the first panel was to “release this man on licence in 28 days' time”. That first Parole Board had indicated a decision to release that prisoner on that subsequent date. Even though this decision is of some age, and the Parole Board rules twenty years ago were somewhat different to the 2019 Rules, the approach in that specific case of the first panel is very similar to the

approach now expressly contained under the 2019 Rules, in terms of the date the decision to release is to take effect. *Robinson* is not authority for any proposition that provisional decisions cannot be made under a different set of Rules that provide for this expressly. The provisional decision in the instant case on 20 August 2019 was that the prisoner would be released 21 days later if that decision became a final one, unless the Parole Board was invited (on application by one of the parties before it, in this case the Defendant) to reconsider under Rule 28 on the grounds of irregularity and the Parole Board decided to reconsider.

69. What the 2019 Rules plainly do is to build into the Parole Board's procedure for consideration of whether it is, indeed, satisfied under section 28(6), a period of 21 days (or fewer days if exceptional circumstances exist, the prisoner requests this and the request is granted) for the Reconsideration Mechanism to be operated, if either the prisoner or the Defendant asks the Parole Board to reconsider on the grounds of irrationality or procedural unfairness under Rule 28. Absent such a request (or upon refusal by the Board, if such a request is made), the decision of the Parole Board becomes final. It is the Parole Board that makes the provisional decision initially; it is the Parole Board that will consider any application to reduce the period under Rule 9; it is the Parole Board that considers any request under the Reconsideration Mechanism; and it is the Parole Board that would reconsider its own decision if the request for reconsideration were granted. Although the Defendant is a party to the proceedings, the Board makes up its own mind. This is consistent with the dicta of the Master of the Rolls at [13] in *R v Parole Board (ex p Girling)* [2006] EWCA Civ 1779 where he quoted with approval Sir Thomas Bingham MR in *R v Parole Board (ex p Watson)* [1996] 1 WLR 906, 916 when he had said in that earlier case:

“It is the judgment of the board as an independent quasi-judicial review body, not the judgment of the Secretary of State as an arm of the executive, which matters. He is a party to the review, and of course his evidence and submissions must be received and weighed. But the board must make its own mind up, and give its own reasons. It would seriously undermine the integrity of the system if the board were to defer to the Secretary of State's view unless it were shown to be wrong. It is itself the primary decision-maker.”

Although Sir Thomas Bingham there described the Board as a quasi-judicial body, it is now correctly accepted as a court.”

(emphasis added)

70. The case of *Girling* considered the predecessor to section 239(6) of the CJA 2003, as it concerned section 32(6) of the Criminal Justice Act 1991, and the extent to which directions given by the Home Secretary to the Parole Board could compromise the true independence of the latter. Section 32(6) of that earlier statute stated that the Secretary of State “may also give broad directions as to the matters to be taken into account by it in discharging any functions under this Part or Chapter II.....”.
71. In deciding that issue, Sir Anthony Clarke MR, with whom Sir Igor Judge P and Carnwath LJ agreed, stated the following:

“[19] Like all English words used in a statute (or indeed elsewhere), the meaning of the word 'directions' depends upon its context. The conclusion reached by the judge

would we think be correct if the power to give directions included a power 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. However, if the power to give directions is construed as including, and being limited to, a power to give general directions to the Board to assist it to exercise its powers within the law, we can see no objection in principle to such a power being conferred on the Secretary of State.

[20] Thus, the Secretary of State could not properly be given a power to determine by what legal principle the Board should decide whether or not to direct the release of a prisoner. Section 28(6)(b) of the 1997 Act provides that the Board shall not direct the release of a prisoner unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The Secretary of State could not lawfully direct the Board to apply some different test. Equally, in deciding whether it is so satisfied, the Board must have regard to considerations which are relevant to the determination of the question whether it is necessary to confine the prisoner any longer and it must not have regard to considerations which are not legally relevant to the determination of that question. The Secretary of State could not properly direct the Board to have regard to an irrelevant consideration or not to have regard to a relevant consideration.

[21] On the other hand, there are many considerations which are potentially relevant as a matter of law in a particular case and which it is the duty of the Board to weigh in the balance in deciding whether the statutory test is satisfied. We can see no reason why the Secretary of State should not be given power to give directions to the Board that it should take account of such considerations in so far as it may be appropriate to do so on the facts of a particular case. In these circumstances, if the power to give directions in section 32(6) of the CJA 1991 can properly be construed as contemplating and being limited to directions of this class, we can see no objection to it in principle and no warrant for the declaration granted by the judge.

[22] We can see no reason why the word 'directions' should not be given that limited meaning. As an English word, it can be given more than one meaning. It can certainly mean what the judge took it to mean, namely mandatory directions to act in a particular way. However, in a different context, it can mean directions from A to B. If a person gives such directions, he merely expresses his or her opinion as to how to proceed from A to B. Similarly, in the present context, if the power to give directions is construed to mean a power to give guidance to the Board as to the matters to be taken into account, in so far as they are legally relevant, the Secretary of State can in our opinion properly be empowered to give such directions in order to assist the Board to reach a structured decision on the question which is its duty to decide.

[23] We so construe section 32(6) of the CJA 1991.”

(emphasis added)

72. Section 239(5) of the CJA 2003 states that “the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times”. If those rules merely identify how the Parole Board will move from commencing consideration of a prisoner’s case, towards satisfying itself in

a final decision that the risk is such that release can be directed, then they are procedural. I consider that analysis consistent with the dicta in *Girling*.

73. The Claimant sought to draw an analogy with the concession in *Girling* at [17] by the Defendant that, if he were to make directions which encroached upon or interfered with the exercise by the Parole Board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner, he would be acting unlawfully. It was submitted that by analogy, Parliament cannot have intended s.239(5) CJA 2003 (and the related provisions in s.330(3) and (4)) to give the Defendant the power to give mandatory directions to the Parole Board as to when it can exercise its judicial function of directing a prisoner's release after a hearing. However, I do not accept that is an accurate characterisation of what the 2019 Rules do, and this argument also ignores the provision in Rule 9 to apply to shorten the 21-day period.
74. Under the 2019 Rules, the Parole Board remains the primary – indeed the only – decision-maker. The fact that the first step in making that decision is for the Parole Board to consider, and make, a provisional decision, with a short period available thereafter within which either party can seek reconsideration, does not mean that the substantive decision is being taken by an entity other than the Parole Board, or that the substantive powers of the Parole Board have been changed.
75. No aspect of the substantive decision making has been removed from the Parole Board by reason of the 2019 Rules. The pre-2019 Rules powers of the Parole Board cannot be construed in the way contended for by the Claimant, based on the authority of *Bowen* in the Court of Appeal. A decision of the Parole Board with conditions does not mean that the prisoner must be released immediately, for all the reasons (including those of practicality) identified in the cases at [61] to [66] above. What the 2019 Rules have done is now to create a two-step process, whereas before there was one. The first step is arriving at the provisional decision. The second step is the finalisation of that provisional decision. Both steps are necessary procedural stages for the Parole Board to arrive at the point whereby it has satisfied itself, although the second step becomes a purely administrative one if no request for reconsideration is made under Rule 28 by either party. At all stages the decisions are made by the Parole Board, and it has lost none of the substantive powers that it had before introduction of the 2019 Rules. When analysed in this way, it can be seen that the Reconsideration Mechanism in the 2019 Rules is indeed procedural, and within the power granted to the Defendant under section 239(5) of the CJA 2003. It follows therefore that the *ultra vires* ground of challenge fails.

The Second Ground of Challenge

76. This is that the 2019 Rules are in breach of Articles 5(1) and (4) of Schedule 1 of the Human Rights Act 1998. It is submitted by Mr Bunting that the 2019 Rules permit the Defendant to detain an indeterminate sentence prisoner even in circumstances in which the Parole Board – an independent court, as has been seen above – has decided that their detention is no longer justified on the grounds of risk. This is said to break the causal connection between the sentence and the ongoing detention and to be contrary to Article 5(1). It is also submitted by the Claimant that this leads to a delay in release for reasons unrelated to the risk actually posed by an individual prisoner. It also adds in delay to a prisoner's release that is unjustified by the facts and circumstances of their case. This is said to be contrary to Article 5(4).

77. That latter submission would, in my judgment, have force if there were a blanket 21-day period imposed on all prisoners regardless of their circumstances, and if there were no ability for an application to be made to the Parole Board under Rule 9 to reduce the time period. However, as has been seen, it is the Parole Board to whom an application for a reduction in the 21 day period would be made, and it would be the Parole Board who would decide, in any particular case and based on the individual circumstances of that particular case, whether the 21 day period should be reduced in the interests of justice. In those circumstances, the submission that the Reconsideration Mechanism adds delay to each prisoner's release unjustified by the facts and circumstances of their case is an unsustainable one, and fails to consider the full effects of the 2019 Rules including Rule 9.
78. Article 5(1) states:
- "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
79. Article 5(4) states:
- "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."
- Post-tariff detention must be speedily reviewed by a court; this is required under Article 5(4). The court for these purposes is the Parole Board.
80. The issue under this ground regarding Article 5(1)(a) is whether, after the provisional decision of the Parole Board to release a prisoner, there is "a sufficient causal connection between the conviction and the deprivation of liberty at issue." Article

5(1)(a) requires that there be such a connection between the conviction and the deprivation of liberty at issue in order for a prisoner's detention under a life or indeterminate sentence to be lawful. This is clear from [26] of *R (Haney and others) v Secretary of State for Justice* [2015] AC 1344, where Lord Mance and Lord Hughes, which whom the rest of the Supreme Court agreed, when explaining the context of "arbitrariness" stated that:

"The deprivation of liberty must genuinely be for one of the purposes permitted by article 5(1) and must, in the case of a sentence, retain a sufficient causal connection with the original conviction."

81. At [30] of the same case, Lords Mance and Hughes stated the following:

"The present appeal does not in any event concern procedural fairness. It concerns alleged failures in the provision of appropriate opportunities to prisoners to progress towards release from sentences about the imposition of which, as such, no complaint is or can be made. In this context, there is a real difficulty about accepting a proposition that the Convention rights require a life or IPP prisoner's release, before the Parole Board is satisfied that his detention is no longer required for the protection of the public."

(emphasis added)

82. The Parole Board must therefore first be satisfied that detention is no longer required before the rights granted under the Human Rights Act (which has the Convention rights in Schedule 1) require a prisoner's release.
83. Mr Bunting submitted that a Parole Board decision that a prisoner is safe for release amounts to a conclusion that the casual link between the sentence and the continued detention has been broken. Article 5 permits detention only where it is "lawful" and justified on one of the sub-paragraphs to article 5(1). It requires release once a judicial body has found that a prisoner's detention is no longer justified on the grounds of risk. It requires that judicial finding to be binding.
84. Mr Bunting also submitted that an indeterminate sentence prisoner's post-tariff detention is lawful only where it is justified on the grounds of risk. I accept that submission, but in terms of causal connection, a more accurate way of expressing it would be that the continuing detention must "retain a sufficient causal connection with the original conviction", the phrase used by Lords Mance and Hughes.
85. Article 5 requires the Parole Board to have the power to direct release where risk no longer justifies detention. I have already dealt with the argument that release must be "immediate" when dealing in particular with the cases of *Bowen* under Ground 1.
86. Mr Bunting relied upon cases dealing with the Parole Board directing release to support his submissions in this respect. The Parole Board must have the power (the term used in the relevant case is competence) to decide the lawfulness of the prisoner's detention, and to order release. It must have the power to order release; *Weeks v United Kingdom* (1988) 10 EHRR 293 at [61]. In that case the European Court decided that the advisory nature of the Parole Board at that time, which had an advisory role, was contrary to Article 5(4).

87. The domestic cases relied upon by Mr Bunting included *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 802, in which Sales LJ (as he then was) had stated at [57] that "... the Board has an overriding statutory duty under Article 5 and section 28 of the 1997 Act to direct release of a prisoner if satisfied that the risk criterion set out in that provision has been satisfied ...".
- (emphasis added)
88. Another was *R (Wells) v Secretary of State for Justice* [2010] 1 AC 553 in which Lord Hope had stated at [14] that: "[A prisoner's] continued detention cannot be said to be arbitrary, or in any other sense unlawful, until the Parole Board has determined that detention is no longer necessary. As soon as it makes that assessment the causal connection is, of course, broken. A direction must then be given in terms of the statute that he be released on licence".
- (emphasis added)
89. I do not consider the Defendant to be arguing, in defending these proceedings, that it is lawful to detain a prisoner even after a *final* decision by the Parole Board has been made that the prisoner be released and that there are no grounds to detain him. The stance of the Defendant is rather different, and is that the process whereby the Parole Board arrives at that *final* decision is justified because the period of 21 days (or shorter) allows the parties to apply to the Board to reconsider its earlier, provisional decision. This is all part of the process of the Board coming to a final decision on risk, rather than delaying implementation of a final decision on risk.
90. The emphasised passages in the quotations from *Gilbert* and *Wells* above make it clear that it is the directing of release, and the final determination that detention is no longer necessary, that breaks the causal link. As with the case of *Robinson* (already considered above at [68] above), the Parole Board is entitled to direct release in the future. In that case, the interval between the first panel (which decided risk) and the second panel (which was to have considered release arrangements and conditions, but instead, wrongly, revisited risk) was a procedural one. It could not be suggested in that case that the prisoner should have been released after the consideration by the first panel. Under the 2019 Rules, the period of which complaint is made by the Claimant is part of the Parole Board arriving at its final decision.
91. Mr Bunting also relied upon *Brown v Parole Board for Scotland* [2018] AC 1 where Lord Reed noted at [8] the finding in *James v United Kingdom* (2012) 56 EHRR 12, that Article 5(1) required the conditions of detention to be consistent with the purpose of the detention. The *James* case also concerned IPP prisoners, and its ratio is explained at [1] of *Haney* which I have addressed at [79] above. The European Court of Human Rights had found that there was a breach of Article 5(1) of the ECHR involved in a failure properly to progress prisoners towards post-tariff release. This was contrary to the finding of the House of Lords which had found that there was not.
92. For an IPP prisoner such as the Claimant, after the minimum custodial term has been served, the purpose of the detention is protection of the public. Detention can therefore only be justified on the grounds of risk after that period has expired, which it plainly had here. However, the Defendant argues that detention during the period imposed by the Reconsideration Mechanism in the 2019 Rules should be seen as justifiable on the

grounds of potential risk, as that period is designed to ensure that the provisional decision is a rational one and has been taken in accordance with procedural fairness.

93. Sir James Eadie QC submitted that the detention during the 21-day period was justifiable on the grounds of risk because that period was designed to ensure that the Parole Board's provisional decision was rational and procedurally fair. The deprivation of liberty remains causally connected with the objectives of the legislature and the sentencing court. If the decision has not been rationally or fairly taken, it will remain necessary for the protection of the public for the prisoner to be confined until a fair and rational decision has been taken. This is said by the Defendant to be "entirely consistent" with the line of authorities relied upon by the Claimant. I accept that categorisation of the detention during the relevant period, and I accept that submission by the Defendant.
94. A different way of expressing what is essentially the same point is that the final decision that there is no risk such that detention is no longer justified is not taken until the second stage of the two-step process I have already identified at [75] above.
95. All of the Claimant's submissions proceed on the basis that the provisional decision of the Parole Board can be equated to a final decision. When proper consideration is given to the fact that the decision is – as with this one – expressly stated to be provisional, then any force in the Claimant's submissions, eloquently and carefully put as they were, falls away.
96. The Defendant made a number of submissions which the Claimant sought to categorise as constituting utilitarian arguments (although that word was not expressly used). The interests of victims of crime cannot be ignored, but such interests are of an entirely different character and nature to that of liberty and unlawful detention, which are two sides of the same coin. The right to liberty is a fundamental and important one. It is enshrined now in the Human Rights Act, but was prized at common law for many centuries before that.
97. The aim of the 2019 Rules is accepted by the Claimant as seeking to enable the parties to avoid judicial review, and I have identified from the evidence above that there were other aims such as restoring confidence in the system. The consultation documents stated that "In developing this model, we have sought to create an effective mechanism which provides the opportunity to challenge decisions which appear to be seriously flawed but is also proportionate and workable and does not create unnecessarily delays or uncertainty in the system for the vast majority of cases for which reconsideration will not be needed."
98. The issue regarding Article 5(4) is the delay that the Claimant submits would be or is caused. The Defendant submitted that it was only in a small number of cases that delay would be caused, and any delay would be minimal. This comes close to a purely utilitarian type argument, along the lines that the interests of the majority are generally satisfied and if there are difficulties or delays, they only affect a few prisoners. This is not the correct approach to adopt to such a fundamental right as liberty. It is for that reason that I do not find the statistics lodged to be of particular assistance. I record them for completeness, but I do not consider that this case can be resolved on some sort of overall qualitative statistical analysis.

99. The evidence at the hearing showed that between the introduction of the 2019 Rules on 22 July 2019 and 13 May 2020, it has been applied to 3,113 prisoners and of those cases, the Defendant has applied for reconsideration in 16 cases. Two of those requests followed requests from victims. Of those 16 applications for reconsideration, only two of the Defendant's applications for reconsideration led to orders for reconsideration from the Parole Board.
100. Prisoners have made 161 applications for reconsideration, and of that number, only 18 of these applications led to orders for reconsideration from the Parole Board. Obviously prisoners will only challenge Parole Board decisions *not* to release. These statistics do however show that the Reconsideration Mechanism in the 2019 Rules is being used (or at least, to date has been used) about 10 times more often by prisoners than it is by the Defendant. There is a high threshold which must be met for reconsideration to take place; the total number amounts to the Reconsideration Mechanism being applied for in about 5.6% of cases on these figures (176 total applications out of 3,113 cases).
101. In a letter dated 29 June 2020, which post-dated the hearing, the Parole Board sent updated statistics to the court via the Government Legal Department. They are not entirely unambiguous, and the Claimant had no opportunity to address them; given my views on the relevance to the legal issues, I will not reproduce them. One point I will reproduce, however, is that the Parole Board has "reduced the 21-day period for reconsideration in at least 1 case" of which the Parole Board is aware. I reproduce that because it is a subject to which I return.
102. In my judgment, the submissions of the Claimant that a blanket policy that affected all prisoners to be released (with the risk of arbitrary detention as a result) would have some force, were it not for the mechanism contained within the 2019 Rules for the 21-day period to be shortened. That decision on whether to reduce the period is also one which will be made by the Parole Board. Indeed, in my judgment, that ability to reduce the time period is a crucial one. I do not consider that the Claimant has correctly understood this, as it was submitted in Mr Bunting's skeleton argument that "for the Parole Board to shorten the 21-day time period would arguably frustrate its purpose." This is not correct, and the Parole Board does have the power to reduce the period.
103. Absent that provision, then I would have accepted the Claimant's description of the 21-day period as a "blanket policy". Such a blanket policy would not be lawful. In the case of *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284, the Court of Appeal considered the policy of only listing Parole Board hearings every three months, and after the expiry of a prisoner's minimum term. Buxton LJ stated at [37] that "it is impossible to escape from the fact that the scheme treats every case alike, and imposes delays for reasons that are unrelated to the nature or difficulty of the particular case. In that respect therefore it suffers from the characteristic that this court found unacceptable in C's case", the case referred to being *R (C) v London South and West Region Mental Health Review Tribunal* [2002] 1 WLR 176. Mr Bunting criticised what he referred to as a "blanket policy that builds in a delay of 21 days to the release of every indeterminate sentence prisoner, irrespective of the risk they pose, the complexity of their case, or any individual consideration".

104. However, when one considers the 2019 Rules as a whole, I do not see how it can be described as including such a blanket policy, given the 21-day period can be reduced in certain cases on application by the prisoner, and the decision whether to reduce the period is one made by the Parole Board itself. This facility to shorten the 21-day period on application by a prisoner means that the ratio of *Noorkoiv* cannot be applied to the 2019 Rules.
105. Criticisms made by the Claimant of this important aspect of the 2019 Rules were essentially that it was an illusory power (the term used was “chimeric”), that the Parole Process Guidance governing it was not publicly available and the threshold was “almost impossible to meet”. However, the Parole Process Guidance *is* publicly available and that submission is misconceived. So far as the difficulty of meeting the threshold, it is clear from the rules that exceptional circumstances are required for the Defendant to make such an application, but there is no such stricture upon prisoners. The wording of Rule 9 requires that consideration is given to that “where it is necessary to do so for the effective management of the case, [or] in the interests of justice”. The decision is made by the Parole Board, an independent court. I do not see that an imposing an impossibly high threshold.
106. It would be wrong to equate the statements in the Defendant’s evidence that explain that the reconsideration procedure will not delay release in the vast majority of cases, with the Defendant making a legal submission that this means the Claimant’s challenge should of itself fail. The risk of delayed release may, as accepted in the Defendant’s evidence, sometimes *potentially* occur in a specific individual case, and the obvious scenario would be where the work required towards the release plan and satisfaction of conditions was going to be completed in less than 21 days. However, the answer to that is itself contained in the 2019 Rules, namely to use the mechanism to apply to the Parole Board for a reduction in the period.
107. I do not therefore consider that any potential delay that might occur in some isolated cases where these circumstances eventuate and where a prisoner chooses not to make an application to reduce time to be sufficient to justify a finding that the 2019 Rules infringe Article 5(4). In my judgment, Article 5(4) is not contravened by the 2019 Rules.
108. Turning to the Claimant’s specific case, Mr Bunting submitted that between 23 August 2019 and 12 September 2019, the Claimant’s detention was not justified on the grounds of risk, but rather (as it was put in the skeleton argument) “because the Defendant (a party to the Court proceedings before the Parole Board) has decided that the possibility of a procedural error in a vanishingly small minority of cases justifies every prisoner’s continuing detention”.
109. There are two difficulties with this submission. Firstly, it equates the provisional decision with a final one. For the reasons explained above, this is not correct, and the decision of 20 August 2019 was the first step in a two-step process designed to arrive at a final decision by the Parole Board on risk. Indeed, on its face it expressly states that it is a provisional decision and not a final determination.
110. Secondly, the Statement of Grounds makes it clear that the Claimant’s solicitor sent an urgent pre-action protocol letter before claim on 11 September 2019 to the Defendant, seeking relief including his immediate release on the grounds of unlawfulness. The

Claimant was released in any event on 12 September 2019, and therefore by the time of the Defendant's answer to the pre-action letter dated 13 September 2019 he was no longer in detention. The Claimant does not appear, either by himself or his solicitor, to have sought at any time prior to his release a reduction in the 21-day period under Rule 9 by making such an application to the Parole Board.

111. In those circumstances, the application of the 2019 Rules to the Claimant's individual case was not unlawful. It is correct that, should the Claimant be recalled for any reason and hence fall to be reconsidered for release at some future date, that would be done by considering his case under the 2019 Rules. However, given my findings on the lawfulness of the 2019 Rules generally under the two grounds of challenge, such application of the 2019 Rules to the Claimant would not be unlawful.

Conclusion

112. Accordingly, the challenge brought by way of judicial review by the Claimant fails, and he is not entitled to any of the relief sought.
113. There is one point to which I wish to return, and it concerns the ability to have the period of 21 days reduced upon application to the Parole Board under Rule 9. Such an application can be made either by the Defendant, or by the prisoner. As has been explained above, that provision is an important one in terms of how the 2019 Rules are intended to work. The 2019 Rules are relatively new, and it may be that this provision to shorten the period, expressly accepted by the Defendant in these proceedings as applying to the 21 days for operation of the Reconsideration Mechanism, has not been widely known. Certainly, as the letter of 29 June 2020 at [101] makes clear, there are only very few cases in which this has occurred in the first 11 months of operation of the 2019 Rules. The decision on any application to reduce the period is made by the Parole Board. Whether the number of such applications now increase remains to be seen.

