Neutral Citation Number: [2020] EWHC 3437 (Admin)

Case No: CO/3267/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2020

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

The Queen **on the application of**	**Claimant**
Dean Pearce **- and -** **(1) Parole Board of England and Wales** **(2) Secretary of State for Justice**	**Defendants**

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- -

Philip Rule (instructed by **Instalaw Solicitors**) for the **Claimant**
Sarah Sackman and Conor Fegan (instructed by **Parole Board Legal Services**) for the **First Defendant**
Myles Grandison (instructed by **Government Legal Department**) for the **Second Defendant**

Hearing date: 18 November 2020

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Approved Judgment

Mr Justice Bourne:

Introduction

1. The Claimant's application for judicial review arises from the decision of the First Defendant ("the Board") dated 20 May 2019, refusing to direct his release and instead directing his transfer to open prison conditions. By his two grounds, permission for which was granted by Johnson J on 3 October 2019, he contends that:

   i) "there was procedural unfairness and failing in the manner or system by which the Parole Board reached its decision, contrary to common law and/or Article 5(4) of the European Convention on Human Rights ("ECHR") requirements of fairness"; and

   ii) "the policy or guidance issued by the Parole Board to purportedly govern the treatment of non-conviction allegations in parole reviews does not meet the requirements of fairness to be observed as a matter of common law and/or of Art. 5(4) ECHR".

2. In 2009 the Claimant, then aged 27, committed offences of sexual assault by penetration and sexual assault of two women whom he met in the street. He pleaded guilty to these offences. The Court was told about previous convictions including one for a sexual assault on a 13 year old girl in 2005. On 13 October 2010 he was sentenced to imprisonment for public protection ("IPP") with a minimum term of 3½ years (less time spent on remand) which expired on 7 November 2013. He is now aged 38 and remains in prison.

3. From time to time the Claimant's imprisonment was reviewed by the Board pursuant to the statutory provisions to which I come in a moment. The decision now before me was the fourth such review.

Statutory framework

4. I repeat, in very similar terms, the summary of the relevant provisions which was set out by McGowan J in *R (Morris) v Parole Board and Secretary of State for Justice* [2020] EWHC 711 (Admin) ("*Morris*").

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

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

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

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

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

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

> "(3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider—
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> (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."

Guidance

10. The central subject of the present case is the question of how the Board should deal with allegations against a prisoner of offending which has not resulted in a conviction. That subject among others is covered by the Board's Guidance on Allegations ("the Guidance") whose lawfulness the Claimant challenges by his second ground.

11. The Guidance was published by the Board on 11 April 2019 following the Divisional Court's decision in *R (DSD and NVB) v Parole Board and Secretary of State for Justice* [2019] QB 285, better known as the case of the taxi driver John Worboys ("*DSD*"). It is intended to assist Board members in acting consistently with that decision on the treatment of allegations.

12. In *Morris* the lawfulness of the Guidance was challenged in very similar terms to the present challenge. I am again indebted to McGowan J in that case for the following summary of the relevant parts of the Guidance.

13. The Guidance states at the outset:

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

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

> "Making an Assessment of the Level of Concern
>
> 18. Panels may need to make an assessment of an allegation when the allegation is capable of being relevant to the parole review, but the panel is not in a position to make a finding of fact either because there is insufficient material available to make such a finding on the balance of probabilities, or because it would not be fair to do so. This most often arises when there is information regarding an allegation, but, critically important aspects of the evidence cannot fairly be tested. The allegation and the circumstances around it can form a basis for testing the reliability of the prisoner's evidence. It can be material on which an expert's evidence can be tested. The wider circumstances of the allegation might also give rise to areas of concern.
>
> 19. To make an assessment of concerns arising from an allegation, panels will need to decide:
>
> a. What, if any, relevance the allegation has to the parole review; and

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

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

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

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

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

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

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

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

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

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

> 22. This exercise of judgement requires the panel to draw on its skills and experience to form a view about the level of concern that should attach to the allegation and how that then impacts on the parole review.
>
> 23. An allegation that is relevant to the parole review and of significant weight is likely to be a matter of concern to the panel and therefore impact on its judgement regarding parole in one or more ways identified as 'relevant' above.
>
> 24. An allegation that is only marginally relevant, or is relevant but which carries little weight, is likely to be of little concern to the panel and therefore have little to no impact on the parole decision."

15. For completeness I note also that separate guidance on *DSD* has been issued by the Second Defendant in a letter to prison Governors dated 19 April 2018. The Claimant rather grudgingly accepts that that guidance is lawful, or at least does not challenge it.

Relevant case law

16. It is necessary to consider the decisions of the Divisional Court in *DSD*, which led to the publication of the Guidance, and *Morris*, which reviewed its lawfulness.

17. The challenge in *DSD* was concerned in large part with the effect on the Board's decision of allegations of many offences in addition to those for which Worboys had been sentenced. For example, there were allegations which had led to civil proceedings which Worboys settled, though without admission of liability. The Court recognised that it is not the role of the Board to determine guilt in respect of such further allegations, but it said that "evidence of other offending" can be "considered as part and parcel of a global risk assessment" (paragraph 150). It noted an important distinction between "taking account of evidence of wider offending" (which was permissible, and in some cases necessary in order to fulfil other public law duties) and "making determinations" about guilt (which was not) (paragraph 155).

18. In particular the Court said:

> "151. Section 229(3)(a) uses the term "information", as opposed to "evidence", as does section 239(3)(b) in the context of the Parole Board. It is clear from Lord Judge CJ's judgment in *Considine*'s case [2008] 1 WLR 414 that the sentencing judge is given considerable latitude as to the range of the information to be considered, subject always to considerations of fairness. In our judgment, the same principle applies to the Parole Board.
>
> 152. Our attention was drawn to a number of authorities which show that hearsay evidence is admissible in proceedings before the Parole Board and that matters which are disputed by the prisoner do not necessarily require cross-examination of

> witnesses, subject to the demands of fairness in the individual case …
>
> …
>
> 154. … In short, there is no implied limitation on the nature or temporal character of the information the Parole Board may take into account in assessing risk: the only constraint is that the board must act fairly."

19. *Morris* involved a prisoner who was serving a sentence for domestic violence. As in this case, the Board rejected a direction to release and instead recommended a transfer to open conditions. It had regard to allegations, which had not led to any conviction, of assault and harassment. The Board had directed the Secretary of State for Justice to obtain case summaries and/or statements about these but efforts to do so were unsuccessful. At a hearing, which predated publication of the Guidance, the Board decided that matters including those allegations meant that the prisoner continued to pose a high risk of harm to future partners. The challenge was directed at the decision and at the Guidance via two grounds which were essentially the same as those in the present case.

20. Mr Morris, like the Claimant in the present case, was represented by Mr Rule. Mr Rule submitted that *DSD* was an exceptional case which could be distinguished, and that normally it would not be appropriate for the Board to have regard to unproven allegations. Even if it did so, if the Board could not establish the relevant disputed facts, then he submitted that the Board was bound to disregard the allegations. If the facts were to be established, then the SSJ was required to obtain relevant evidence from the Police or CPS, if necessary by witness summons, or the Board was required to direct that this be done.

21. McGowan J (with whom Irwin LJ agreed) said that *DSD*, despite its exceptional facts, was authority for a general principle that there is "*no implied limitation on the nature or temporal character of the information the Parole Board may take into account*", with the only constraint being that the Board must act fairly. She found no authority for the contrary proposition that the Board could not, or indeed need not, have regard to potentially relevant allegations.

22. McGowan J noted the ruling in *DSD* that the Board could consider "*evidence of wider offending when determining the issue of risk*". This, she said, "*derives from the paramount importance of protecting innocent members of the public from the risk of serious harm*". She noted also that the Court of Appeal in *Brooks v Parole Board* [2004] EWCA Civ 80 had concluded that "*the burden of proof has no real part to play*" in the assessment of risk. So, she concluded at [53]:

> "There will clearly be times where allegations, either individually or cumulatively, indicate significant risk to the public, but cannot be 'proved' for whatever reason. For example, the Board might find that there is a significant chance, short of a probability, that a given allegation was true, and legitimately consider this as part its "global assessment of risk". Consideration of 'unproven' allegations is of course subject to

> the overriding requirement that the Board act fairly. What is fair or unfair will depend on the facts of each case. But, in my view, a consideration of allegations which have not been established is not itself intrinsically unfair."

23. The Court in *Morris* did not accept that it was unfair for the Board to have regard to what was known about the alleged incidents of assault and harassment. There was sufficient evidential material for the Board to find as a fact, for example, that incidents had occurred which led in one case to an arrest and in another to the Police sending a "Prevention of Harassment Letter", and that the latter showed that the Police had detected a risk that the Claimant might commit acts of harassment.

24. This, McGowan J ruled at [55] and [56], was consistent with *R (Delaney) v Parole Board* [2019] EWHC 779 (Admin), where Andrew Baker J held that the mere fact of an allegation having been made against a prisoner could not, by itself, found a conclusion that the prisoner posed a risk. Instead:

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

25. In *Morris*, McGowan J held that there was sufficient evidential material for the Board to have made "*at least some findings of fact*" and thereby, as she put it, to "*decide whether the allegation has <u>some</u> factual basis*". The lack of a strong factual basis for the allegations and the lack of reports and statements only affected the weight which the Board was entitled to place on the allegations, not the question of whether it could have regard to them at all.

26. The Divisional Court in *Morris* also ruled that the Guidance was consistent with the law in these respects, though McGowan J did comment at [63] on a lack of clarity:

> "… For the same reasons I have given in relation to the first ground of review, the Board is entitled to consider allegations where it is not in a position to make a full finding of fact. Nor do I accept that the 'Guidance on Allegations' encourages the Board to adopt a 'no smoke without fire' approach to allegations. As I have also explained above, it is unfair and therefore impermissible for the Board to give weight to 'mere allegations' which do not have any factual basis whatsoever. The guidance could make this clearer. One might read [18] as suggesting that an allegation can be taken into account in circumstances where it would be unfair to attempt to establish any of the underlying facts (for example, where there is factual basis to the allegation); or more generally permitting an unfair approach to the assessment of allegations. However, that is not my reading. Instead, this paragraph [18] merely confirms the ability of the Board to consider allegations when it has not been

> possible to prove that allegation on the balance of probabilities. Furthermore, it is clear from reading the guidance as a whole that the Board should approach allegations with care (see, for example, [5]). Moreover, at [19], the guidance sets out that the Board may decide to attach no relevance and/or weight to an allegation if appropriate."

27. The Divisional Court therefore rejected both grounds of challenge.

28. In relation to the lawfulness of the Guidance, as a first instance judge I should follow this Court's previous decision in *Morris* unless I am convinced that it is wrong. The Divisional Court in *R v Manchester Coroner ex p Tal* [1985] 1 QB 67 said at 81 (per Goff LJ):

> "… the relevant principle of stare decisis is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction …
>
> … In our judgment, the same principle is applicable when the supervisory jurisdiction of the High Court is exercised not by a single judge, but by a divisional court, where two or three judges are exercising precisely the same jurisdiction as the single judge. We have no doubt that it will be only in rare cases that a divisional court will think it fit to depart from a decision of another divisional court exercising this jurisdiction. Furthermore, we find it difficult to imagine that a single judge exercising this jurisdiction would ever depart from a decision of a divisional court. If any question of such a departure should arise before a single judge, a direction can be made under R.S.C., Ord. 53, r. 5(2), that the relevant application should be made before a divisional court."

29. There has been no application to list the present case before a Divisional Court. This however creates no difficulty because, as I shall explain, I agree with the decision in *Morris* and there is no respect in which I would wish to depart from it.

Principles decided by the cases

30. It is possible to pull together a number of strands and answer a number of questions.

31. In a parole review, the Board must "balance the hardship and injustice of continuing to imprison a person who is unlikely to cause serious injury to the public against the need to protect the public against a person who is not unlikely to cause such injury", and in the final balance must "give preponderant weight to the need to protect innocent members of the public against any risk of significant injury": *R v Parole Board ex parte Watson* [1996] 1 WLR 906 at 916H per Sir Thomas Bingham MR.

32. In doing this, the Board will examine all the available evidence. It is not the role of the Board to determine guilt in respect of further allegations, but "evidence of other offending" can be "considered as part and parcel of a global risk assessment": *DSD*.

33. When finding facts, the Board applies the civil standard of proof. It is not determining a criminal charge: see *R (West) v Parole Board* [2003] 1 WLR 705.

34. Finding facts logically comes before assessing risk. It is when the Board ultimately assesses risk that "the burden of proof has no real part to play": *R (Sim) v Parole Board* [2003] EWCA Civ 1845 at [42] per Keene LJ.

35. When making its evaluation, the Board is not limited to material which would be admissible in criminal or disciplinary proceedings: see *R v Hull Prison Visitors ex parte St. Germain* [1979] 1 WLR 149. It can have regard to hearsay evidence: see *Sim* at [52]-[55]. It should however be alert to any limitations or shortcomings in the evidence: *Coyle v Parole Commissioners of Northern Ireland* [2018] NIQB 29.

36. More generally, the Board's procedure must be fair. The requirements arising from that duty will depend on the circumstances of each case. For example, the evidence in question may be "so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross examination before it is taken into account at all": see *Brooks* at [37], though in that case the Court upheld a decision by the Board which found that an allegation of rape was probably true despite the complainant declining to attend to give evidence at the hearing.

37. In a judicial review challenge, the Court will decide the question of procedural fairness by objective test, rather than merely reviewing on rationality grounds: *Osborn v Parole Board; Booth v (the same); In Re. Reilly* [2014] AC 1115 at [65] per Lord Reed.

38. If an allegation is neither proved, nor disregarded as irrelevant, what use <u>can</u> be made of it?

39. The answer in my judgment is that the Board will find such facts as it can and then consider the logical effect of those facts on its risk assessment. Take the example of a domestic violence case in which it is alleged that the prisoner assaulted his partner during an altercation. If the Board can only conclude that there <u>might</u> have been an assault, that conclusion may be of little assistance to it. But if it is satisfied that there <u>was</u> an altercation which led to the police being called, it could find that participating in the altercation (even without any assault) was behaviour which was relevant to the assessment of future risk.

40. In *R (Broadbent) v Parole Board* [2005] EWHC 1207 (Admin), Stanley Burnton J (as he then was) said at [26] that "…the fact of a charge and a pending prosecution alone cannot without more justify a conclusion that there is a risk of reoffending". However, any proven collateral facts about such a case may be highly relevant to risk. It is always for the Board to consider the facts and make the assessment.

The Claimant's parole review

41. As I said at the outset, this was the Claimant's fourth parole review. The case was referred to the Board in March 2018. Work began on compiling a dossier of relevant documents, including reports, assessments and recommendations arising from the Claimant's progress in custody, including offending-behaviour work.

42. A report dated 19 June 2018 by his Offender Manager stated that he had completed his core risk reduction work and was consolidating this at a psychologically informed planned environment ("PIPE") at HMP Hull. The report recommended release on licence to a PIPE-approved premises, and opined that a move to open conditions would be detrimental to his progress. His Offender Supervisor on 29 June 2018 made a similar recommendation.

43. On 22 August 2018 the Board directed an oral hearing with a specialist Chair (though in the event there was no specialist Chair).

44. In November 2018 addendum reports repeated the previous recommendations.

45. At an oral hearing on 10 December 2018, the Board adjourned the case with directions for a psychological assessment. It sought "further information" about "evidence of convicted and non-convicted offending" which it had received, and confirmation that the non-convicted matters had been taken into account in all risk assessments.

46. A risk assessment report by a forensic psychologist, Leona Picksley, was filed on 28 March 2019 which took account of all alleged further offending. She listed the following matters about which she had seen information from Staffordshire Police:

> "1. On one occasion the alleged 13 year old victim (for an offence of rape) was unwilling to support a prosecution and therefore due to lack of evidence to support a prosecution; the matter was finalized as no further action by the police.
>
> 2. Mr Pearce was arrested for an offence of rape of a 12 year old girl, this charge was discontinued on CPS advice and the alleged victim denied any sexual activity had taken place between her and Mr Pearce.
>
> 3. Mr Pearce was released without charge, on CPS advice, for a further offence of two counts of rape (15 year old girl).
>
> 4. Mr Pearce was acquitted at trial for an offence of sexual assault committed against a 20 year old woman
>
> 5. Mr Pearce was arrested for an offence of rape committed against a young female but no further action was taken on the advice of the advice of the [sic] CPS.
>
> 6. He was released without further action following allegations of sexual assault made by two half-sisters (aged three and six at the time of the alleged offences)."

47. Ms Picksley reported good progress made by the Claimant and pointed out that since any non-convicted behaviour was of a similar kind to the convicted behaviour, his treatment would have targeted all relevant risk factors. The report recommended release to a PIPE-approved premises.

48. So did a further addendum report by the offender manager on 15 April 2019. The offender manager echoed the psychologist's view that treatment would have targeted relevant risks, albeit that the Claimant maintained his innocence in relation to the unconvicted matters. That report said the following about the non-convicted matters:

> "I can confirm that the Police have been provided with the details of the non-convicted sexual offending that were previously indicated in my oasys document and I have listed an update of these and Police comments in relation to the information I provided below:
>
> …
>
> - Previous concerns but no conviction. 17/1/02 - 13 year old girl walking through Cannock town centre, taken by the arm, dragged into a gully and raped. Mr Pearce arrested but released on CPS advice.
>
> Police updated comments state - "The IP was unwilling to support a prosecution and therefore due to lack of evidence to support a prosecution; the matter was finalised as no further action by police.
>
> - 23/04/02 - arrested for rape on 12 year old girl - matter discontinued on CPS advice.
>
> Police updated comments state - "There was DNA evidence found in the underwear of the IP, however, the IP denied any sexual activity with Pearce saying they were 'best friends.'
>
> - 25/11/05 – Mr Pearce invited 15 year old female into his flat, led her to the bathroom, undressed her and produced a condom. The female stated she did not want sex, but he ignored this and had intercourse on 2 occasions. Interviewed, but released without charge.
>
> Updated Police comments state – 'This is recorded as 25/11/2002 not 2005. Release without charge on CPS advice, offender claimed intercourse was consensual and he believed the IP to be over 16.'
>
> - 6/3/04 - alleged sexual assault on 20 year old woman he had befriended in a nightclub. They moved onto another address along with a number of others. When she went to a phone kiosk, he followed and is alleged to have forced her to the ground and attempted to rape her. Acquitted at trial.

Police updated comments state – 'This offence appears on his PNC as a not guilty disposal.'

- Also, West Midlands Police interviewed him in relation to the rape of a young female- said to have followed her back to a flat, gained entry and raped her.

Updated Police comments state – 'We have this reported on bad character report for court as being reported on the 23/09/2003 in Wolverhampton; advice file submitted to CPS – outcome was no further action as offender claimed intercourse was consensual and the IP evidence is conflicting.'

The Police have advised me that there is new information relating to alleged non-convicted offending that was not available at the time of Mr Pearce's conviction. These are as follows:

IP's females born 1991 and 1988; the IP born 1991 reported in December 1994 to her mother that the Offender Dean Alan Claxton b. 01/07.1982 in Cannock between 01/08/1994 and 30/11/1994 had 'put his private in my private'.

The mother asked the IP's half- sister (born 1988) if anything had happened to her and she replied that the Offender had tried to do the same to her but she had pushed him off.

A statement was obtained from the IP. The IP's half-sister was video interviewed but made no disclosures. The IP and her half-sister were medically examined and there was no evidence of sexual abuse although touching could not be excluded. Mr Pearce was interviewed. He denied the allegations. It was decided that NFA could be taken.

09/04/2004 – Dean Pearce reporting that he has escorted a drunken female home in a taxi and on arrival to her home Pearce requested the help of the female's friend and father to remove her from the taxi, the father then accused Pearce of hassling the female and became angry at Pearce – there were no complaints forthcoming. I mention this as the MO of being the in company of a lone drunken female.

02/07/2004 @ 02.43 hrs– a report from Pearce via his personal mobile that he has encountered a lone female about 18 years of age in Cannock who was upset and very nervous, he believed she may have been sexually assaulted from what she was telling Mr Pearce. Mr Pearce offered to walk her home but the female refused. The female was seen later that day but refused to make any complaint or speak to the police."

49. The same recommendation of release to a PIPE-approved premises was made in a further addendum report by the offender supervisor on 23 April 2019.

50. The Board conducted a final oral hearing on 7 May 2019. It set out the same list of six "additional allegations regarding further sexual offending" as in Ms Picksley's report (see 46 above). At the hearing, the panel members questioned the Claimant about (at least) five of the six matters. The decision letter dated 20 May 2019 records:

> "The panel discussed each of the allegations with you and you informed the panel that you were arrested on many occasions when you were young and that you struggled to recall details of the five allegations. You said that you have tried to forget about the past. The panel did not find it plausible that you would have no recollection of being arrested for multiple offences of rape and pressed you on each of the allegations. You did say that you remembered being interviewed about the 2005 matter regarding a 15 year old female, you stated, 'I almost lost my bed in the YMCA over it. Met her when I was out'. You denied having sex with her in your evidence to the panel; the panel notes that at the material time you did admit to having sex with her to the police but said that it was consensual. The information regarding this allegation was within a bad character report provided to the Court at trial.
>
> The allegation of sexual assault, you say, was an instance when you waited with the female to support her whilst she waited for her boyfriend to pick her up. – the panel notes that there are similarities with the index offence where you initially acted to "help" the victim and then assaulted her. In relation to the allegations on 02/07/2014, you say that you "found a girl who had been sexually assaulted and I rang the Police". It is noted that once again a female who has been assaulted is being "helped" by you. You were adamant that you do not recall being arrested in connection with the rape of 12 year old girls. In respect of the 12 year old in 2002 when your DNA was found inside her undergarments, you say you cannot remember any details. In discussing the allegation dated 09/04/2004, you stated that you were in a taxi with the alleged victim, you say that you had an argument with her father as he seemed unhappy that she was in a taxi with you.
>
> The panel considered the information provided in the Dossier regarding the allegations discussed in the hearing. The panel makes a finding of fact in respect of the 12-year-old child where your DNA was found inside her undergarments. The finding is that you must have had some form of sexual contact with her, which cannot have been consensual given her age. In regards to the 4 other allegations the panel makes a finding that they are of concern. The panel found that all the allegations were relevant to you and your risk of sexual offending and serious harm when you are in the community. The panel did

> not find your lack of recollection plausible and noted your extreme discomfort in discussing the allegations. This is, of course, not entirely surprising, however it is important to your future self–management that you further develop our abilities to discuss your sexual thoughts and behaviours openly."

51. The decision letter recommended a move to open conditions but refused to direct release to a PIPE-approved premises. The panel noted the risk assessments which were included in the dossier, including a high risk of serious harm to children. The decision stated:

> "… having concluded its risk assessment the panel is of the opinion that it is premature to consider a risk management plan/release plan. It is also of the view that your release needs to be gradually managed, beginning with carefully risk assessed day releases. Following those, your conduct, particularly with young women and girls, can be reviewed and taken into account when deciding next steps. The risks you pose will continue to be managed by the prison service whilst you address your risk factors and you will work with your offender manager to develop a release and risk management plan at the appropriate time."

And:

> "You continue to pose a risk of harm to the public that is such that you need to be confined in custody. However, on balance it was satisfied that you have addressed your risk factors to a degree that they would be manageable in the less restrictive regime in open prison conditions; and whilst on agreed absences on town visits or ROTLs where you would be un-escorted. You are assessed as posing a low risk of abscond. The panel has identified in this letter a range of issues that can usefully be addressed in open prison conditions ahead of release.
>
> The panel is of the opinion that it is now necessary for you to be tested in open conditions to ascertain whether you have internalised the lessons you have been taught and can act upon them in conditions that are more realistic and where you will be exposed to more realistic external stimuli, challenges and indeed potential victims. You will also be tested in terms of your ability to comply and self-manage in less restrictive prison conditions."

52. It is convenient to consider Ground 2, i.e. the lawfulness of the Guidance, first, before proceeding to Ground 1 and the lawfulness of the decision in the present case.

Ground 2

53. Mr Rule sought to persuade me to depart from this Court's recent decision in *Morris*. He argued that the judgment in that case wrongly:

    i) held that the Board is entitled to ignore the dichotomy between facts and non-facts;

    ii) held that the Board may arrive at its decision without first finding the relevant facts;

    iii) held that the standard of proof in the Board's hearings is neither the criminal nor the civil standard; and

    iv) was inconsistent with, or failed to take into account, binding authorities.

54. Ms Sackman, for her part, invited me to apply *Morris* and reminded me of the strictures upon a first instance judge in relation to departing from previous High Court decisions. *Morris* is, she says, indistinguishable from the present case, and is also correct. The Court did not make any of the errors alleged by Mr Rule and was not inconsistent with previous authority.

55. Mr Grandison's submissions were directed at the aspects of the claim which more directly concern the SSJ, rather than the Board's Guidance. He rightly points out that the SSJ's own guidance, as referred to at [15] above, is not under challenge.

56. I am satisfied that the Guidance is lawful.

57. I would in any event arrive at that conclusion by following *Morris*. For the reasons I have set out above, it would not be appropriate for a single judge rather than a Divisional Court to depart from the earlier decision, but it is also my view that the Guidance is consistent with the principles as stated above.

58. In particular I do not accept Mr Rule's contentions that the Guidance wrongly encourages the Board to proceed without finding facts. On the contrary, paragraph 20 of the Guidance (quoted at [14] above) gives examples of relevant circumstances which the Board should consider and on which conclusions about risk might be based.

59. In fairness to the Claimant, I would nevertheless echo the view of McGowan J that the Guidance could be clearer. That comment applies in particular to the distinction between (1) upholding an allegation and (2) making findings about any of the underlying facts. It could more clearly emphasize that risk assessment should always be based on found facts, even if the Board's findings do not extend to upholding a particular allegation in full. It may be that a future edition of the Guidance will say more about some of the practical questions addressed above.

60. In my judgment the Guidance does not misstate the burden of proof or display any failure to understand the point made in *Brooks* about the burden of proof not being applicable to risk assessment. On the contrary, it states it correctly at paragraph 11b and 15, though it would be clearer if it stated at paragraph 20 that the same burden applies to the finding of any collateral or underlying facts.

61. Nor is the Guidance inconsistent with authority. In particular it is not inconsistent with the dicta in *Brooks* which reiterate that witness evidence in some cases may be so fundamental to the decision that the prisoner should have the opportunity to test it by cross examination, or with the approach taken in that case to the investigation of background facts. Nor is the Guidance inconsistent with what was said in *Delaney*, as referred to at [24] above.

62. I therefore dismiss Ground 2, and will also decline Mr Rule's request for permission to appeal on that ground. For my part I am not persuaded that there is a real prospect of his overturning either my ruling or *Morris* on appeal, though I note that Mr Rule has made an application to the Court of Appeal for permission in *Morris* which has not yet been decided.

The parties' submissions on Ground 1

63. The final question, therefore, is whether there was any procedural unfairness in the present case. The substance of the decision is not challenged on rationality grounds.

64. The core of the procedural complaint is found at paragraph 47 of the Claimant's Statement of Facts and Grounds ("SFG"). It is that (1) the SSJ, whose officers compiled the dossier which went to the Board, did not include sufficient material about the allegations and (2) the Board failed to make sufficient requests for the necessary material.

65. Mr Rule essentially submits that the Board, and the SSJ, were faced with a choice between setting out to prove the disputed allegations by evidence or, if they could not prove them, disregarding them. He complains of an absence of any fact-finding process relating to the allegations. The Board received no witness evidence, nor any original documentation from the police, , nor any direct evidence of police or CPS charging decisions, nor any documentary evidence of any contemporaneous account given by the Claimant in response to these matters, nor any notes or record of the trial at which the Claimant was acquitted of one of the matters.

66. The Claimant further argues that, in part because of the shortcomings of the Guidance (see the discussion of Ground 2 above), the Board failed to carry out a proper inquiry as to whether allegations were or were not made out (SFG paragraphs 53-55).

67. Mr Rule contends that when the Board's direction of 10 December 2018 did not lead to the obtaining of sufficient evidence, it should have decided to disregard the non-convicted allegations. In short, he submits that it was unfair for the Board to place any weight on the fact that these allegations had been made against the Claimant, or on the very limited information suggesting that there was substance to any of them, or to his reaction when questioned about them by the panel at the review hearing.

68. Ms Sackman, on behalf of the Board, remained neutral on Ground 1.

69. Mr Grandison emphasizes that it is for the Board to determine how much information it requires to enable it to carry out a review. It is empowered to direct the parties to seek further evidence but there was no such direction requiring the SSJ to obtain more evidence in this case. He also points out that it is open to a prisoner to seek a direction from the Board requiring further evidence.

70. There was something of a mismatch between the submissions for and against Ground 1. Mr Grandison emphasized that there was no basis for criticism of his client but, given the neutral stance taken by the Board, relatively little was said on behalf of the Defendants about the fairness of the process.

Conclusion on Ground 1

71. The difficulty with the Claimant's case is that there is no fixed rule which decides what type or quantity of evidence should be obtained in cases such as this. It certainly is not the law that the Board and the SSJ must choose between (1) proving allegations as if at a trial and (2) disregarding them. On the contrary, the cases clearly show that if relevant information is brought to the Board's attention, then it not only can but must have regard to it.

72. If the evidence relating to one or more allegations were particularly flimsy or unsatisfactory, then a submission might be made that it would be irrational to give any weight at all to such allegations. That, however, is not the nature of this challenge. The lack of a rationality challenge suggests, on the contrary, that there was a rational basis for the conclusions which the Board drew in this case.

73. This Court has to decide for itself whether the procedure was fair, and not just to review the Board's position on that question. In making that judgment, however, it is necessary to consider the use which the Board actually made of the relevant information.

74. The Board pressed the Claimant about five allegations. In its decision letter, the relevant observations about the facts were:

    i) He claimed to have no recollection of multiple arrests on allegations of rape and the panel found this implausible.

    ii) In relation to an incident with a 15 year old girl in 2005, he denied having sex with her to the panel but at the time had admitted sexual intercourse to the police and the incident was included in a bad character report at his trial.

    iii) At least one allegation arose from an incident when he volunteered to help a young woman who was distressed after an assault, and that situation resembles that of his index offence.

    iv) In 2002 he must have had sexual contact with a 12 year old girl, which cannot have been consensual, because his DNA was found in her underwear.

    v) He exhibited "extreme discomfort" when discussing these allegations.

    vi) The five allegations were of "concern" and were relevant to the question of risk.

75. The key conclusion of the review was, as I have said, that although the Claimant's management of his risk factors appeared to be improving, this should now be tested in open conditions rather than by way of release.

76. In my judgment, there was plainly no unfairness in the procedure which led to the first, second and fifth of the conclusions set out at [74] above. The Board was not bound to conduct any more energetic investigation before simply testing the Claimant's response to the allegations and assessing his response. Its rejection of his lack of recollection of the arrests and its observation of the inconsistencies in his responses were not predicated on any assumption that he was or might be guilty of the rape allegations. In that respect the case differs from *Delaney*, where mere allegations, denied by the prisoner, were found by the Board to establish risk.

77. The reasoning on the third conclusion is slightly harder to follow. That conclusion may have been nothing more than an observation that the Claimant had put himself in situations having a resemblance to the circumstances of his offending. It does not seem to me that fairness demanded any more rigorous investigation in order to reach that conclusion. The Board's thinking on this issue could have been clearer, but that is not the point of this challenge.

78. Similarly the reasoning could have been clearer on the sixth, overarching conclusion. Rather than expressing "concern" in general terms, panels should explain what facts they have found and precisely what concerns arise from them. But that, again, is a criticism of the reasoning and is not about procedural fairness. It seems to me that the sixth point is in reality a summary of the preceding points. I do not conclude that, before reaching that conclusion, fairness required a more rigorous investigation.

79. I have more hesitation about the fourth conclusion. Here, the panel came closest to finding that a further offence had been committed. Given the impact of DNA evidence apparently demonstrating sexual contact with a child, it would at least be good practice for the Board to find out as much as it could.

80. However, I am not persuaded that the procedure was unfair and unlawful.

81. In this case it was quite clear that the restrictions on the Claimant's freedom were going to be relaxed to some degree. It appeared to be common ground that this repeat sex offender would need to be "tested"; the issue was which was the best setting in which to test him. The panel's adverse finding really focused on the Claimant's frankness about his conduct. Its practical conclusion from the raft of allegations was that he was not candid about any of them, being unwilling even to discuss the known fact that he had been arrested several times. This led to the logical conclusion that he could be trusted only to a limited extent. The specific finding about the 2002 DNA incident was not used by the panel, and did not need to be used, as the basis for any specific conclusion about the danger of the Claimant reoffending.

82. In those circumstances, I do not consider that fairness required a more rigorous investigation of the allegation, also bearing in mind its age, the fact that the police took no further action after interviewing the alleged victim and the consequent unlikelihood of the Board learning anything else of value about it.

83. I also do not consider that there was any unlawful omission by the SSJ in its preparation of the dossier for the panel.

Conclusion

84. For these reasons the claim will be dismissed.

85. By way of postscript, if I had concluded that there had been some evidential omission which rendered the procedure unfair, I would not have found that it was up to the Claimant to try to remedy it. No doubt there are cases in which a Claimant can be expected to make a procedural application, e.g. where he is taken by surprise by an allegation or by some evidence and requires a proper opportunity to challenge it. That, however, was not this case. Where allegations are fundamental to a parole review, it is the Board's duty to carry out a sufficient investigation of them, and a prisoner cannot reasonably be expected to encourage an investigation of his own conduct.