Neutral Citation Number: [2022] EWHC 63 (Admin)

Case No: CO/1451/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2022

Before :

MR JUSTICE SPENCER

- -

Between :

The Queen
on the application of

Philip Austin	**Claimant**
- and –	
Parole Board for England and Wales	**Defendant**
-and-	
Secretary of State for Justice	**Interested Party**

Jude Bunting and Stuart Withers (instructed by Kesar and Co Solicitors) for the **Claimant**
Benjamin Seifert (instructed by the Government Legal Department) for the **Defendant**
The Interested Party was not represented

Hearing date: 26 October 2021

Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailli. The date and time for hand-down is deemed to be 17 January 2022 at 10.30am.

Mr Justice Spencer :

Introduction and overview

1. This claim for judicial review raises important issues about the lawfulness of the Parole Board's policy and practice in relation to the provision of a summary of a Parole Board decision to victims and victims' families and the media.

2. The claimant is serving a life sentence for the murder of his wife and two children. Having served his minimum term, or "tariff", of 20 years, he became eligible in July 2020 to apply for parole. His application was considered by the Parole Board at an oral hearing on 9 April 2021. In the event the claimant did not seek release on licence but requested a move to an open prison. The Parole Board's decision was to recommend such a transfer.

3. As a matter of policy, careful arrangements have to be made to ensure that the victim's family in such circumstances learn of the decision from the Parole Board itself and not from the media, or (worse still) social media. Clearly the prisoner himself must be the first to be told the outcome. The victim's family, and the media, only ever receive a summary of the Parole Board's reasons for the decision. That summary is published two hours after the prisoner and the victim's family have been informed of the outcome (i.e. release or no release).

4. The summary has to strike a balance between, on the one hand, providing enough information to explain the decision and maintain public confidence and, on the other, not disclosing confidential personal information about the prisoner, for example his medical condition or details of his response to sentence-related therapeutic work.

5. The Parole Board recognises, in a published policy, that the prisoner should have the opportunity to comment on the proposed summary and to make reasoned objections before it is published, to ensure that this balance has been appropriately struck.

6. To that end, in accordance with an unpublished protocol supplementing the policy, where the prisoner is legally represented the proposed summary is provided to the prisoner's solicitor two hours before publication, together with the decision letter containing the full reasons for the Parole Board's decision. There is a concern, however, that in those two hours, on seeing the full reasons for the decision along with the proposed summary, the prisoner might be tempted to disseminate to family, friends or the wider public, by whatever means, the outcome and details of the decision from his own perspective, creating the risk that the victim's family may learn of these details before they see the "official" summary.

7. In order to guard against that risk, the protocol provides that it is only on the morning of publication that the prisoner's solicitor is permitted to have sight of the decision letter containing full reasons and the proposed summary, and only if the solicitor has given a formal written undertaking not to discuss the content of the summary or the decision letter with the prisoner or anyone else until after the summary has been published.

8. In the present case, as soon as this undertaking was sought the claimant's solicitor challenged in email correspondence the Parole Board's right to require such an undertaking. A matter of only hours before the summary was due to be published the claimant's solicitors lodged an urgent application for judicial review and interim relief.

In the event no undertaking was provided and the summary was published before any representations could be made by the solicitors.

9. In fact there was very little in the summary to which objection would or could have been made, but it is common ground that issues of principle arise for determination by the Court. That was the basis on which permission was granted.

10. On behalf of the claimant, Mr Bunting and Mr Withers submit, in short, that:

    (1) the Parole Board has no power to require such an undertaking;

    (2) it would be a breach of the solicitor's professional duty to withhold information from his client pursuant to such an undertaking;

    (3) the practice adopted by the Parole Board in the protocol is procedurally unfair in that the prisoner and his solicitor have insufficient time to make representations about the proposed summary, particularly if they have not had sight of the proposed summary or the full reasons for the decision because no undertaking has been given.

11. On behalf of the Parole Board, Mr Seifert submits, in short, that:

    (1) the practice set out in the protocol is lawful, necessary and reasonable;

    (2) the prisoner's solicitor has the opportunity of taking instructions in advance of the day of publication in relation to potential areas of objection to the summary.

12. I am grateful to counsel for their very full written and oral submissions. I have taken all those submissions into account in reaching my conclusions but I do not propose to rehearse in detail every argument which has been advanced.

13. The Secretary of State has adopted a neutral stance in these proceedings and has not been represented.

14. Prior to the hearing various procedural applications were made, only one of which was opposed. For completeness, I grant the claimant's application to amend his grounds of claim; I extend time for the defendant's detailed grounds of resistance; I grant the claimant's application to rely on his witness statement dated 22 September 2021. For the reasons explained at [93] below, I grant the claimant's application to rely on the letter from the Law Society dated 4 October 2021.

The statutory framework

15. The proceedings of the Parole Board have traditionally been conducted wholly in private, with the reasons for its decisions withheld from the public. This approach was the subject of challenge in *R v (DSD) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285, arising from the well-known Worboys case.

16. Giving the judgment of the Divisional Court, Sir Brian Leveson, President of the Queen's Bench Division, said at [176]-[177]:

"176. There are no obvious reasons why the open justice principle should not apply to the Parole Board in the context of providing information on matters of public concern to the very group of individuals who harbour such concern, namely the public itself. Indeed, it seems to us that there are clear and obvious reasons why the Parole Board should do so. This information can readily be provided in a fashion which in no way undermines the article 8 rights of the prisoner and the confidentiality which attaches to it.

177. Our conclusion is that the open justice principle, or more particularly the right of the public to receive information which flows from the operation of that principle, applies to the proceedings of the Parole Board."

17. The Divisional Court consequently struck down as ultra vires rule 25 of the Parole Board Rules 2016, which was too broad in its prohibition of disclosure to the public of confidential information relating to the Parole Board's decisions.

18. Against this background, rule 27 of the Parole Board Rules 2019 (in force from 22 July 2019) now addresses the concerns of the Divisional Court. It provides:

27. Summaries and disclosure

(1) Where a victim or any other person seeks disclosure of a summary of the reasons for a decision-

(a) made under rule 19(1)(a), 21(7), 25(1) or 31(6);

(b) made under rule 19(1)(b) where a prisoner does not make an application for an oral hearing under rule 20(1), or a prisoner makes an application for an oral hearing but it is decided that the case should not be considered as an oral hearing under rule 20(6),

the Board must produce a summary of the reasons for that decision, unless the Board chair considers that there are exceptional circumstances why a summary should not be produced for disclosure.

(2) The Board is not required to produce a summary under paragraph (1) where the request is made more than 6 months after the decision.

(3) Where a victim seeks disclosure of a summary produced under paragraph (1), the Secretary of State must notify the Board that the victim wishes to receive a summary, and must disclose the summary that is produced by the Board to that victim.

(4)Where any other person seeks disclosure of a summary under paragraph (1), the Board must disclose the summary that is produced to that person.

> (5) Subject to paragraph (1), information about proceedings under these Rules must not be disclosed, except insofar as the Board chair directs.
>
> (6) Other than those of the parties, the names of persons concerned in proceedings under these Rules must not be disclosed under paragraphs (1) to (5).
>
> (7) A contravention of paragraphs (5) or (6), is actionable as a breach of statutory duty by any person who suffers loss or damage as a result.
>
> (8) For the purposes of this rule-
>
> "*victim*" means a person who is participating in the Victim Contact Scheme in respect of a prisoner who is a party to proceedings under these Rules;
>
> "*Victim Contact Scheme*" means the scheme set out in the Victims' Code in accordance with section 32 of the Domestic Violence, Crime and Victims Act 2004.

19. It is to be noted that:

    (i) Rule 27 makes no provision for the prisoner to be afforded the opportunity to comment on or object to the proposed summary;

    (ii) the obligation is simply to "produce a summary of the reasons" for the decision and rests solely on the Parole Board;

    (iii) the summary so produced "must be disclosed" to the victim and to anyone else legitimately seeking its disclosure;

    (iv) no "information about the proceedings" may be disclosed other than "the summary of the reasons", except insofar as the chair of the Parole Board directs.

20. Nothing in the 2019 Rules specifically authorises the procedure adopted by the Board in allowing only a short window of time on the morning of publication of the summary for the prisoner's solicitor to make representations about the summary. Still less does anything in the 2019 Rules specifically authorise the Parole Board to require an undertaking from the prisoner's solicitor as a precondition of advance disclosure of the reasons for the decision and the proposed summary.

21. Mr Seifert contends that the Parole Board has power to request such an undertaking under its general powers conferred by Schedule 19, paragraph 1(2) of the Criminal Justice Act 2003, which provides:

> "It is within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of –

(a) its functions under Chapter 6 of Part 12 in respect of fixed-term prisoners, and

(b) its functions under Chapter 2 of part 2 of the Crime (Sentences) Act 1997… in relation to life prisoners within the meaning of that Chapter."

22. Mr Bunting submits on behalf of the claimant that the procedure for the provision of a summary of a relevant decision of the Parole Board, and specifically the requiring of an undertaking, is not "incidental to or conducive to the discharge of" any of the functions specified in paragraph 1(2)(a) or (b) above; consequently the Parole Board acted unlawfully in requiring the undertaking.

23. I shall return to this issue of law.

The Parole Board's policy on decision summaries

24. The Parole Board issued its Decision Summary Policy in October 2019 (hereafter referred to as "the Policy"). So far as material, the Policy provides as follows (correcting grammatical and typographical errors):

> *The Parole Board Rules permit the provision of a document, referred to as a summary, to interested parties. The summary document is a succinct explanation of how a panel reached its decision to release or not release a prisoner.*
>
> *Summaries will be produced for each case when an actionable request has been made prior to, at or following the adjudication of a panel. A summary will provide detail as to the reasons the Parole Board has reached its decision, based on the facts of the particular case. It will include information about the hearing, risk factors considered and a prisoner's progress in custody.*
>
> *Any summary provided may refer to the prisoner by their name at the time of their original offence or that by which they are publicly known. The Board will use its discretion to protect any new identity taken on by the offender as part of their rehabilitation and release.*
>
> ***When a summary will be provided***
>
> *The Board, to meet its obligation of creating a more open and transparent process, will be working on the assumption that summaries will be made available when requested. However, the Board has the discretion to refuse provision of a summary or redact details or amend as necessary a summary of a panel's decision where the information contained could or does:*

• Adversely affect access for rehabilitation or progress towards rehabilitation of any offender;

• Place the safety of any person/s in jeopardy, through threats or other harmful behaviour;

• Pertain to a young offender-under the age of 18;

• Pertain to any offender released from a secure Mental Health Unit;

• Breach any outstanding court orders;

• Relate to any ongoing investigations;

• Threaten national security.

The Board will notify the requestor where any summary is deemed not to be disclosable.

In all summaries provided, the Board will not disclose information which breaches any person's rights as covered in Article 8 of the European Convention on Human Rights (ECHR), Data Protection Act (DPA) and General Data Protection Regulation (GDPR).

In order to assist the Parole Board in determining if any of the above criteria apply, representations should be made by the offender, their representative or any interested party at the time of the making of the decision to allow or refuse release from custody.

The Board will not be seeking representations from offenders. However, where any offender believes that information not known to the Board may affect disclosure as per the above criteria, they may make representations to the Board.

………

The Parole Board will consider requests from interested parties up to six months after any decision is made. A summary will be provided as soon as practicable.

This policy is subject to regular review by the Board.

25. It is to be noted that, as applied to the present case:

 (i) the Policy specifically permits the prisoner or his solicitor to make representations in respect of the proposed summary;

 (ii) a prisoner who is unrepresented (by a solicitor or otherwise) has the same entitlement to make representations;

(iii) the purpose of those representations is to assist the Parole Board in determining whether the content of the proposed summary might adversely affect the successful rehabilitation of the prisoner, or place in jeopardy the safety of the prisoner or any other person, or breach the prisoner's rights under Article 8 of the European Convention on Human Rights, the Data Protection Act or the General Data Protection Regulation;

(iv) the representations should be made "*at the time of the making of the decision to allow or refuse release from custody*". The meaning of this is, in my view, regrettably obscure.

The Protocol

26. The Parole Board has issued a "Communication protocol for Noteworthy decisions" (hereafter referred to as "the Protocol"). The relevant version is dated March 2021. Unlike the Policy discussed above, the Protocol was not published or made known to prisoners or their representatives. It was disclosed to the claimant's solicitors on 28 May 2021 pursuant to the Parole Board's duty of candour as defendant in these proceedings.

27. The Protocol covers "noteworthy decisions" of the Parole Board. Another internal guidance document explains what makes a case "noteworthy". In broad terms the assessment is based on media interest currently and at the time of the offence, and upon victim engagement, the nature of the offence and ministerial involvement and interest. There is a classification system of "red, amber, green", known as "RAG rating". A case classified as "black" is an even more high profile case. It is not entirely clear whether the claimant's case was "red" or "black", but it undoubtedly qualified as one or the other and therefore as "noteworthy".

28. The Protocol sets out the procedure for releasing the decision and the summary as follows, incorporating redactions in the exhibited copy (and correcting grammatical and typographical errors):

> *Day of decision being released*
>
> *At 9 am a manager of the **Noteworthy…team** will send the decision to [….] .and PPCS senior managers.*
>
> *[….] should let us know when both the prisoner and victim have been notified of the decision.*
>
> *In parallel, at 9 am a manager of [the Noteworthy] team will send the summary in red/black-rated cases to the prisoner's legal rep and a response on factual inaccuracies/objections by 11am (this step is subject to the legal rep signing the undertaking).*
>
> ***Noteworthy..team** – if the legal rep has any objections, they will be passed on to […] and […] to consider.*

Once […] or […] advise that the victim and prisoner have been informed of the decision, Noteworthy…team will alert the Parole Board case manager that the decision is to be issued to all parties.

At 11 am ***Noteworthy…team*** *should have received a response from the legal rep with regards to the summary and if there are no observations, the [Noteworthy]…manager will inform the* ***summaries case manager*** *and […] who will proceed to issue the summary to the VLO [victim liaison officer].*

After half an hour, the summaries team will send the summary to the VLO if there is a victim summary request, and then allow a further 30 mins before the request [sic, but this must surely mean "summary"] is sent to the media requestors (these timeframes are for guidance only). Time should be allowed between the victim receiving the PBDS [Parole Board Decision Summary], to allow the VLO time to talk through with the victims, before it is shared to the media outlets.

The summary should be issued by 2pm at the latest to all requestors.

……

Objections

In the event there are any objections raised by the legal rep in relation to the summary, this will be escalated to […] who will then assess the content and refer to […] and […] where necessary for a decision.

The summary will be put on hold pending the decision in relation to the said objections.

The undertaking

29. The undertaking which the solicitor is required to sign is in the following terms:

CONFIDENTIALITY AGREEMENT

I, ……

Of …….. Solicitors of …………

Representing: *……………..*

Hereby undertake that I will not disclose the decision in this case, which will be sent to me at 9 am on [00/00/2020] to anyone, including [prisoner's name], before the Parole Board formally releases the decision to all parties later that day. Further, I will

not disclose the contents of the Parole Board decision summary to anyone before this is formally released by the Board on [COMMS PLAN DATE].

I will speak to my client before [00/00/2020] to take any formal instructions about sensitive material that he may not wish to have included in the summary before it has been issued to me, if I so wish.

I understand that my agreement to this undertaking is due to this case carrying a significant risk that if the relevant precautions are not taken, the media may obtain details of the decision before the victim in this case is made aware.

I can confirm that I sent my signed undertaking to [insert name] (the Parole Board single point of contact).

Signed:

Dated:

<u>Further explanation of the Policy and the Protocol</u>

30. In the evidence filed by the Parole Board, and in some of the exhibited correspondence between the Parole Board and the claimant's solicitors, the procedure and the thinking behind it is explained in more detail.

31. Ms Kalvinder Puar, a qualified legal executive, is the Parole Board's relevant Lead for Summaries. She explains in her witness statement that a signed undertaking is only requested in a small number of cases which carry a significant risk that if precautions are not taken the media may get hold of the decision before the victim is aware of it. The signed undertaking prevents the solicitor from discussing or disclosing the content of the decision and the summary to anyone else prior to the release of the documents. In the event that a solicitor declines to sign the undertaking, the summary will not be provided *"until after the victim has been told the outcome of the review."*

32. Ms Puar confirms that if objections to the content of the summary are raised by the solicitor, it is usually she who decides whether the summary should be amended. If there is an objection to the summary being issued at all, the matter is escalated to the Chair of the Parole Board.

33. Ms Puar says that her investigations reveal that (as at the date of her statement, 1 September 2021) there had been 30 cases where an undertaking had been requested, and in 12 of those cases the undertaking had been provided. In 17 cases either the undertaking had not been provided or the legal representative had not responded to the request. Apart from the present complaint by the claimant in these proceedings, there had been only one other complaint.

34. Ms Tara Leon is the Parole Board's Senior Case Manager for "Noteworthy" cases. In her witness statement she explains that the aim of the Protocol is to ensure that the

Victim Liaison Officer is "… *able to inform the victims of the outcome of a hearing before it is reported in the media, and before the victim can be informed of the outcome via any other route*." She explains that the Protocol was devised by the former Head of the Critical Public Protection team. Ms Leon understands that the aim of the Protocol is to ensure in particular that *"... victims do not learn of the decision from media outlets requesting comment."* She says: *"... With social media platforms increasingly prevalent, the risk of such a situation arising again has increased significantly. The offender could have access to a mobile phone, or the offender's relatives could have a social media account that the victim follows."*

35. Ms Leon gives rather different figures in her witness statement (also dated 1 September 2021). She says that since 2019 the Parole Board had recorded 147 "noteworthy" cases that are subject to the protocol. In 42 cases an undertaking had been requested. In 24 cases undertakings were given; in 18 undertakings were not given. Apart from the claimant's present complaint there had been only one other complaint, which was investigated and not upheld.

36. Ms Leon confirms in her witness statement that in a "Noteworthy" case (such as the present) a member of the Parole Board would be allocated to produce the summary. Counsel have confirmed (at my request) that this would not necessarily be a judicial member of the Parole Board or a member of the Panel which made the decision.

37. Examination of the correspondence leading up to the claimant's solicitors' challenge to the request for an undertaking, reveals a slightly different approach to the extent of objections to the summary, when compared with the Policy and the Protocol.

38. For example, in the email to the solicitors which first requested an undertaking (20 April 2021, at 11.35 hrs) it was stated that the two hour time frame on the morning of publication of the decision was "… *for any issues to be raised in regards to the summary*"; it was expected that "…*most if not all of your points will be around whether it is an accurate summary of the decision letter. We hope that you have already considered the potential issue with your client and identified anything that may be of concern."* The email stated: *"...We only ask for signed undertakings in a very small number of noteworthy cases… which carry a significant risk that if we do not take precautions, <u>the media may get hold of the decision before the victim is aware."</u> (emphasis added)*

39. In relation to the underlined words in that email, I observe that, according to the Protocol and in practice, the victim is in fact informed of the decision, i.e. the outcome (release or no release) at 9 am, at the same time as the prisoner. There has been a pervading looseness and potential confusion of terminology in relation to the term "decision". This had to be clarified at the hearing (on specific instructions over the short adjournment) in the course of oral submissions.

40. I was informed that:

(i) the victim and the prisoner always receive the decision, i.e. the outcome (release or no release) at 9 am;

(ii) if the solicitor gives the undertaking, the prisoner also receives the full decision letter and draft summary at 9 am and has 2 hours to respond;

(iii) if the undertaking is not given, or if the prisoner is not represented, the prisoner does not receive the full decision letter until 11 a.m. when the summary is also provided to him and to the victim.

41. In a further email (20 April 2021 at 14.09hrs) Ms Puar explained that:

> *"… the two hour timeframe is provided as we realise that you may need some time to work through the decision letter and the summary. In doing so, we are providing you with an opportunity to look at the decision letter and comment on the summary before it is released. You will realise that we are obliged to provide the summary upon request, and we expect that most if not all your points will be around whether it is an accurate summary of the decision letter. We hope that you have already considered the potential issue with your client and identified anything that may be of concern."*

42. In a further email the same evening (20 April 2021, 20.49 hrs) Ms Puar explained:

> "*The decision summary is simply a summary of what is in the decision letter. The issues that will be addressed in the decision letter will be familiar to the prisoner, as they are the ones discussed during the proceedings. The prisoner will already be aware of any other difficulties that the provision of a summary may cause, for instance, the likely reaction of the victim and the potential for media interest. We have consistently advised the APL [Association of Prison Lawyers] that, given the tight time frame for the production of summaries, these matters should be canvassed with prisoners in advance so that representatives are able to respond swiftly."*

43. It is to be noted that the undertaking (quoted in full at [29] above) states in the first paragraph that, provided the undertaking is given, the "*decision*" will be sent to the solicitor at 9 a.m. "*… before the Parole Board formally releases the decision to all parties later that day…*". In fact, however, as became clear during argument (explained at [40] above), the decision (i.e. the outcome: release or no release) is not "*released later that day*" to the victim's family. It is released to the victim's family at 9 a.m., at the same time as the prisoner is informed of the "decision", and this is the position whether or not the undertaking has been given. It is only the *summary* which is provided to the victim's family two hours later at 11 a.m.

44. Mr Bunting submits that this error or inconsistency demonstrates the fallacy which underlies the whole Protocol. He submits that the elaborate procedure laid down in the Protocol is totally unnecessary because the victim's family will always receive the headline news of the decision (i.e. the outcome: release or no release) at the same time as the prisoner, at 9 a.m. So, Mr Bunting argues, anything the prisoner may improperly reveal to the media in the intervening two hours before the summary is published cannot and will not have undermined the victim's entitlement to receive "official" notice of the *decision* (i.e. the outcome) from the Parole Board itself.

45. For completeness, I also note that contemporaneous disclosure of the outcome, at 9 a.m., to the prisoner and to the victim's family is part of the information provided to the panel

chair in the letter of appointment. The timetable set out within the letter specifies the date "*the decision will be released to the victim and offender… at 9 a.m.*" and specifies that the summary will be "*released to victim/media requestors*" on that same date "*once decision has been released to parties and summary is finalised.*"

46. The claimant explains in his own witness statement his apprehension on learning that he would not receive the full decision letter until the summary had been released to the victims' family and the media. He says in his statement:

> "*I was not content with this, as it would prevent me from being able to make any focused representations about what should and should not be released into the public domain. Additionally, I was concerned about what would be disclosed to the media about my case. As a result my solicitors lodged an urgent claim for judicial review on my behalf challenging the Parole Board's policy.*"

The lead up to proceedings in the present case

47. The Parole Board's decision in the claimant's case, along with the decision summary, was due to be published on the morning of Thursday 22 April 2021. An undertaking was sought from the claimant's solicitors on Wednesday14 April 2021.

48. Following exchanges of email over the next few days, the claimant's solicitors sent a pre-action protocol letter before claim on 21 April 2021. The principal complaints were that the Parole Board's requirement of an undertaking would put the claimant's solicitors in breach of their professional obligations, and that the inability of the solicitors to make informed representations, if they did not give the undertaking, resulted in procedural unfairness.

49. The breach of the solicitors' professional obligations would arise, it was said, because of the terms of paragraph 6.4 of the Solicitors' Regulation Authority Code of Conduct, which imposes the following obligation, with none of the exceptions applying:

> *"Where you are acting for a client on a matter, you make the client aware of all information material to the matter of which you have knowledge, except when:*
>
> *(a) the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;*
>
> *(b) your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;*
>
> *(c) you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or*

(d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed."

50. The claimant's letter before claim proposed that the Parole Board's decision should be issued to the parties the following day, Thursday 22 April, as planned, but that the Parole Board should refrain from providing a decision summary until 4pm on Monday 26 April or further order of the court.

51. In response to the claimant's pre-action protocol letter, the Parole Board's Head of Legal, Mr Michael Atkins, wrote later the same day, indicating that any application for judicial review would be defended and the Parole Board would proceed as planned:

"…As acknowledged in your letter, the central purpose of the Parole Board's proposed course of action is to ensure that the details of the decision are communicated to the victim before any other third party (such as the media) is made aware of those details.

The Parole Board, in balancing the two, has decided that it is necessary to seek your undertaking in order to prevent details of the decision from being made public before they are communicated to the victim. Sadly, we are aware that in the past where this precaution has not been taken, details of the decision have been made public before they could be communicated to the victim. This has caused pain and distress to victims, who can rightly expect that the decision would be communicated to them first. We are mindful of our obligations under the Victims Code and do not consider this to be disproportionate in the circumstances.

We note that you have had plenty of opportunity to canvass the claimant's views against any particular aspect of his case that may cause him distress or problems if they are included in the summary. The Parole Board has consistently urged prison lawyers (via your representative body the APL) to have these discussions well in advance of the date of the decision and/or the date a summary is issued, to enable a quick response to a draft decision summary.

….

You have provided no evidence to justify your assertion that the proposed undertaking would breach the code of conduct, nor that the SRA [Solicitors' Regulation Authority] would view it as such… It is of course for you to decide whether or not you give an undertaking, as matters of your professional conduct are ultimately for you.

You have not been deprived of an opportunity to make submissions. In fact, a window of opportunity has been created specifically for you to do so. You have had ample opportunity to advise and seek instructions from your client on the issues in his case, which are well known to you and your client, and the

potential for media coverage of them. There is no procedural unfairness in taking a reasonable and proportionate step to protect a victim from the pain and distress of learning about the decision from the media or others before seeing a summary. It is open to you to give an undertaking and take the opportunity to see the summary and make representations. If you choose not to do so, and so choose not [to] take the opportunity offered to make representations, that is no procedural unfairness on behalf of the Board."

52. The claimant's solicitors filed an application for judicial review electronically at 11.45 p.m. on 21 April, seeking interim relief in the form of an injunction. They did not, however, apply to the out-of-hours judge for interim relief.

53. Next morning there was a flurry of further email exchanges between the parties but no compromise was reached. Although no undertaking had been given, the decision letter was nevertheless provided to the claimant in prison at 9 a.m. (contrary to the Protocol) but not to the claimant's solicitors. The victims' family were informed of the outcome (i.e. release or no release) at the same time. The summary was released to the victims' family and to the claimant and his solicitors at 11a.m. as planned. The claimant's solicitors had attempted to make last minute representations, without sight of the decision letter or the summary, but emails between the solicitors and the Parole Board had crossed and their representations had not been received.

54. The papers were not put before the "immediates" judge until shortly before 11a.m. on 22 April, by which time it was too late for any interim relief to be considered or granted.

55. Although (contrary to the Protocol) the claimant was given possession of the full reasons for the decision at 9 a.m., two hours before the summary was published at 11 a.m., there is no suggestion that the claimant attempted to disseminate to the media or any other third party the detail of the decision. That, of course, was the mischief at which the Protocol was aimed.

<u>The issues for decision</u>

56. It is agreed that the following issues arise:

    (1) Did the Parole Board have the power to introduce in the "Protocol" the practice of:

    (a) requiring such an undertaking;

    (b) in default of such an undertaking, refusing to provide to the prisoner or his solicitor the full decision letter or proposed summary until the summary has been published to the victim's family and the media;

    (c) allowing the prisoner's solicitor a window of only two hours to make representations on the content of the summary before it is released?

    (2) Does Schedule 19, paragraph 1(2) of the Criminal Justice Act 2003 provide the

Parole Board with the power to require such an undertaking?

(3) Was the Parole Board's decision to release the summary in this case as it did, procedurally unfair?

(4) Is the Protocol unlawful in that it is obvious that a material and identifiable number of cases will be dealt with in a way that is procedurally unfair?

Discussion and analysis

General observations

57. There is no dispute that the Parole Board is entitled to devise and promulgate a policy for the practicalities of discharging its duty (under Rule 27 of the Parole Board Rules 2019) to produce and disclose a summary of the reasons for a specified decision. Mr Bunting accepts this and positively relies on the Policy (set out at [24] above) as opposed to the Protocol (set out at [28] above). It is only the Protocol that is challenged.

58. The Policy gives a prisoner the right to make representations about the content of the summary, in order to assist the Parole Board in determining whether any of the criteria it has set in the Policy apply. That right is given to a prisoner whether or not he is represented by a solicitor.

59. It follows that in providing for the more detailed application of the Policy in a separate unpublished Protocol, the Parole Board is obliged to facilitate the fair and effective exercise of that right to make representations.

60. If, in accordance with the Protocol, the undertaking is given, the solicitor is provided with the full decision letter and the draft summary at 9 a.m. on the day of publication and has two hours in which to make written representations on the content of the summary. However, in order to perform this task the solicitor is not permitted to share the content of those documents with the prisoner (or anyone else) on pain of professional disciplinary sanctions for breach of the undertaking.

The requirement of an undertaking

61. It is said on behalf of the claimant that this procedure is unfair and unlawful because the solicitor is professionally obliged to make his client (the prisoner) "… *aware of all information material to the matter…"* on which the solicitor is advising him, namely his parole application: see paragraph 6.4 of the SRA Code of Conduct set out at [49] above. It is submitted that none of the exceptions in paragraph 6.4 apply.

62. On behalf of the Parole Board, Mr Seifert submits that no breach of professional duty arises if the undertaking is given, because the exception in paragraph 6.4 (b) applies provided the solicitor has obtained from his client, the prisoner, "… *informed consent, given or evidenced in writing, to the information not being disclosed*…" to him. It is said that the solicitor will have had ample opportunity to take instructions from the prisoner on the "issues" of concern which are likely to arise in relation to the summary. It is said that in reality the solicitor's task on the morning of publication (if the undertaking has been given) will be confined to checking the accuracy of the summary against the full decision letter.

63. Mr Seifert submits that it is wrong to say that the Parole Board "required" an undertaking. Rather, there was a "request" for an undertaking as a precondition of receiving advance notice of documents and information which was always going to be supplied in due course. He submits that all the information was contained within the dossier prepared for the panel and disclosed to the claimant and his solicitor for the parole hearing.

64. There are several fundamental problems with the Parole Board's argument and approach here.

65. First, although the solicitor can seek informed consent from his client to withhold disclosure, the prisoner may refuse to give it. The solicitor cannot then rely on the exception in paragraph 6.4 (b) of the Code of Conduct and would be professionally obliged to disclose the information, in conflict with the undertaking.

66. Second, it is wrong to suggest (as some of the email correspondence from the Parole Board seems to imply) that the exercise to be performed by the solicitor on the morning of publication would be confined to checking the *accuracy* of the summary against the full decision letter. What is required is an *informed* assessment by the solicitor of the content of the summary and any issues which it raises. That is likely to require the solicitor to take instructions from his client once the content of the full decision letter and the proposed summary is known. Otherwise the solicitor can only guess at the likely content of the full decision letter.

67. This is demonstrated by what actually happened in this case on the morning of publication, the Parole Board having declined to postpone publication pending the emergency application for judicial review. Because the undertaking had not been given the solicitor was not provided with the full decision letter or with the draft summary. However, contrary to the Protocol, the claimant was provided with the full decision letter soon after 9 am. The solicitor was able to take instructions from the claimant as to information of a sensitive nature in the decision letter which the claimant would not wish to see included in the summary. The solicitor duly made hasty representations by email identifying these points, without sight of the full reasons in the decision letter or the draft summary. In fact, however, and unbeknown to the solicitor, the draft summary did not include those matters in any event. The solicitor's representations were not, therefore, relevant, and in any event they were not considered by the Parole Board because emails crossed: see [53] above.

68. Third, although it is suggested that the solicitor should be able to take instructions well in advance of the day of publication, to "*… canvass the [prisoner's] views against any particular aspect of the case…"* (see [51] above) and to "*…identify anything that may be of concern…*" (see [38] above), this is an unrealistic expectation. Until the prisoner and his solicitor see the detailed reasons in the full decision letter, which is disclosed only on the morning of publication at 9 a.m., they cannot know with certainty what potential issues of concern arise. At best they can only consider and take instructions in advance on general topics or areas of potential concern.

69. In this regard, there is reference in the Parole Board's email correspondence to their "consistent" advice to the Association of Prison Lawyers (APL) that "*… these matters should be canvassed with prisoners in advance so that the representatives are able to respond swiftly…*" (see [42] above). This was repeated by the Parole Board's Head of

Legal, Mr Atkins, in his reply to the pre-action protocol letter (see [51] above). I have not been shown any of this advice to the APL or the APL's response to it. It is to be inferred, however, that this aspect of the process laid down in the Protocol, and the adequacy of time to respond, has been a bone of contention.

70. Fifth, it is artificial to draw a distinction between "requesting" and "requiring" the undertaking. This is semantics. The fact is that unless the "requested" undertaking is given, the material will not be provided to the solicitor (and the prisoner) in advance of 11 a.m. It is therefore, in practical terms, a "requirement" of the Protocol that the undertaking is provided, and that is the tenor of the document: "*…this step is subject to the legal rep signing the undertaking…"* (see [28] above).

<u>*The timing of representations on the summary*</u>

71. Quite separately from these difficulties, there is one aspect of the Policy (as opposed to the Protocol) which, as already mentioned, is regrettably obscure. The Policy provides that *"... representations should be made by the offender, their representative or any interested party at the time of the making of the decision to allow or refuse release from custody...".* In the course of argument it was suggested that this must mean "at the time the decision is made", i.e. after the panel has deliberated and reached its decision. The problem with this interpretation, at least in a case such as this, is that the panel reaches its decision by private deliberation after the parole hearing; there is thus no opportunity for the prisoner (or his solicitor) to make submissions about the summary at that point in time, assuming the summary is to be published on the same day the decision is published.

72. It may be that the Policy is worded in this way to cater for the situation where a summary is requested at a later stage than the date of publication of the decision. It must be remembered that Rule 27(2) of the 2019 Rules (quoted at [18] above) obliges the Parole Board to produce and disclose a summary on request up to 6 months after the decision. It is understandable that in the event of a later request for a summary, the Policy should require the prisoner to have made representations at the time the decision was published, to avoid having to go back to the prisoner and/or his solicitor weeks or months later to afford them a belated opportunity of making representations.

73. However, in a high profile "noteworthy" case such as the present, where it is always the intention to provide a summary on the day the decision is published, the requirement that representations be made "*at the time of the making of the decision*" is unworkable.

74. One practical solution might be to formalise a procedure whereby, as part of the hearing of the parole application, the prisoner (whether legally represented or not) is always asked by the Panel to identify any aspects of the case which, for good reason consistent with the Policy, he would not wish to be included or referred to in the summary of the reasons for the decision (whichever way the decision goes). The prisoner and/or his solicitor could be invited to complete a proforma document within a prescribed time frame setting out those aspects concisely so that they could be taken into account by the Parole Board member who is assigned the task of producing the summary.

75. The fact that a summary may be requested at any time up to 6 months after the decision itself (i.e. the outcome) is notified to the prisoner (and presumably to the victim's family) also casts doubt on the entire rationale of the Protocol's requirement for an undertaking. The rationale is that in the two hours between receipt of the full decision letter and

publication of the summary, the prisoner might make unauthorised disclosure to the media of the reasons for the decision (or his slant on those reasons) to the distress of the victim's family. But if a summary is not requested until weeks or months later, there is (on this argument) nothing to prevent the prisoner from making such unauthorised disclosure once he has received the full decision letter.

76. In any event, rule 27(5) to (7) of the 2019 Rules (quoted in full at [18] above) imposes a strict prohibition on disclosure of any information about the proceedings by anyone, (which must include the prisoner), on pain of civil liability for breach of statutory duty if any person suffers loss and damage as a result. Unauthorised disclosure by a prisoner would also, no doubt, attract prison disciplinary sanctions, particularly if it involved use of an illicit mobile phone. Unauthorised disclosure by a prisoner's solicitor would also, no doubt, attract severe disciplinary sanctions.

The lawfulness of the requirement of an undertaking

77. Linked to the rationale of the Protocol, there is, as already discussed (see [43] above), a more fundamental problem with the undertaking. It appears to be based on the premise that, but for the restriction imposed by the undertaking, the victim's family may learn of the decision otherwise than through the official channel of formal disclosure via the Parole Board. That is factually incorrect. In a high profile "noteworthy" case, the victim's family will always be informed of the decision (i.e. the outcome: release or no release) at the same time as the prisoner himself.

78. It is submitted on behalf of the claimant that the procedure laid down in the Protocol is unlawful because the Parole Board has no power to require such an undertaking from a solicitor; the Parole Board is a creature of statute with no inherent jurisdiction. Mr Bunting advanced in oral submissions a closely reasoned argument that the general enabling provision in Schedule 19 paragraph 1(2) of the Criminal Justice Act 2003, relied upon by the Parole Board, does not give such a power.

79. For ease of reference I set out again paragraph 1(2), which provides:

> "It is within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of -
>
> (a) its functions under Chapter 6 of Part 12 in respect of fixed term prisoners, and
>
> (b) its functions under Chapter 2 of Part 2 of the Crime Sentences Act 1997 (c.43) in relation to life prisoners within the meaning of that Chapter."

80. Mr Bunting identified in his oral submissions the relevant "functions" of the Parole Board referred to in paragraphs (a) and (b) above.

81. Under Chapter 6 of Part 2 of the Criminal Justice Act 2003 the functions are confined to:

- s.244A: release on licence of prisoners serving a life sentence under ss.265 or 278 of the Sentencing Code;

- s. 246A: release on licence of prisoners serving an extended sentence under ss.254, 266 or 279 of the Sentencing Code;

- s.247A: release on licence of terrorist prisoners;

- s.250: imposition of licence conditions on release of prisoners;

- s.255C: release on licence of prisoners not suitable for automatic release.

82. Under Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 the functions are confined to:

    - s. 28: duty to release certain life prisoners;

    - s. 31: imposition of licence conditions;

    - s.32(5): recall of life prisoners while on licence.

83. In summary, the "functions" of the Parole Board referred to in paragraph 1(2) of Schedule 19 are confined to decisions to release or recall prisoners and to impose licence conditions. Mr Bunting submits that once any of those functions has been performed by the making of the relevant decision, it cannot be said that the requiring of an undertaking in relation to the publication of the decision and the summary is "*incidental to or conducive to the discharge of*" those functions of the Parole Board. Mr Bunting submits that once the relevant decision has been made the Parole Board is *functus officio* even if the decision has not yet been communicated to the parties.

84. In support of this submission Mr Bunting relies upon the approach of Stacey J in *R (Dickins) v Parole Board* [2021] EWHC 1166 (Admin); [2021] 1 WLR 4126, at [51ff]. However, there the issue was quite different. The panel had made its decision on release of a life sentence prisoner and had sent its reasoned decision to the case manager. A question then arose as to whether new information could be received by the panel entitling it to reopen its decision. It was held that the panel was *functus officio*, and there was no power to reopen the decision, even if the decision had not yet been communicated to the parties; communication of the decision was an administrative task, separate and distinct from the functions of the Board in making the decision on release: see [55]. However, that case did not involve, still less did it turn upon, the interpretation of the breadth of the enabling provision in paragraph 1(2) of Schedule 19.

85. The administrative procedure for communication of a decision of the Parole Board, including the production and disclosure of a summary as required by Rule 27, is plainly "*incidental to or conducive to the discharge of*" the functions of the Parole Board in making such a decision. That is why the Parole Board was entitled to promulgate the Policy (as opposed to the Protocol) which Mr Bunting does not challenge and positively relies upon. But does it extend to a power to require an undertaking?

86. The formula "*incidental to or conducive to the discharge*" of a statutory body's functions is common to many statutes, e.g. s.111 (1) Local Government Act 1972. In *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 the House of Lords had to consider the lawfulness of a local authority's conduct in entering into

speculative financial "swap" investment transactions. Reliance was placed on s.111(1) of the 1972 Act. Lord Templeman said, at page 31 D-E:

> "*The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed….The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable…*"

87. Mr Bunting framed some of his submissions on the premise that the power claimed to be "incidental" had to be *necessary* for the discharge of the Parole Board's functions. In my view the test is not as strict as that. However, looking at the matter broadly I am not persuaded that the Parole Board had the power to require an undertaking of this kind in the context of the elaborate procedure set out in the Protocol, with the defects I have already identified. In particular, the Protocol's insistence on an undertaking is founded on the false premise that, without such an undertaking, there is a risk that the victim's family might learn of the decision (i.e. the outcome, release or no release) irregularly through misconduct on the prisoner's part in disclosing that decision, whereas in fact victim's family always learn of the outcome at the same time as the prisoner, at 9 a.m.

88. Although by no means conclusive, it is instructive that elsewhere in the 2019 Rules specific provision is made for the requirement of an undertaking. Rule 17 provides a detailed and comprehensive procedure for the withholding of material from the prisoner, or from the prisoner and their representative, where the Secretary of State (or any third party authorised by the Secretary of State) considers:

    (a) that its disclosure would adversely affect national security, the prevention of disorder or crime, the health or welfare of the prisoner or any other person; and

    (b) that withholding the material is a necessary and proportionate measure in the circumstances of the case.

    Provision is made in Rule 17 (7) for service of the material on the prisoner's representative, but Rule 17 (10) provides:

    > "The material must not be disclosed to the prisoner's representative under paragraph (7) unless the prisoner's representative first gives an undertaking to the Board that the prisoner's representative will not, without the consent of the panel chair or duty member, disclose it to the prisoner or to any other person."

89. Mr Bunting submits that the very fact that this exceptional procedure of an undertaking is the subject of a specific Rule, authorised by Parliament, strongly suggests that the general enabling provision in Schedule 19 paragraph 1(2) of the 2003 Act would not have been sufficient to give the Parole Board the power to require such an undertaking.

90. I accept this argument to a degree. But the situation envisaged in Rule 17 is very different. There has to be a detailed formalised statutory procedure because the material withheld, subject to the undertaking, goes to the making of the decision on release, rather than merely to the administrative exercise of communicating the decision to interested

parties. So, for example, Rule 17(8) provides, in prescribed circumstances, for the appointment of a special advocate (appointed by the Attorney General) to represent the prisoner's interests. By contrast it would be wholly disproportionate to go to the lengths of appointing a special advocate to assist a prisoner in making representations about the content of the summary of a Parole Board decision.

91. Nevertheless, the complexity and formality of the provisions in Rule 17 illustrate the solemnity of any undertaking by a solicitor in connection with proceedings of the Parole Board. There must, in my view, be a high threshold of practical if not legal necessity for the requiring of such an undertaking.

92. It is not without significance that the ramifications of the undertaking procedure in Rule 17, from the perspective of the solicitors' Code of Conduct, have recently been considered by the High Court in *R (Gifford-Hull) v Parole Board* [2021] EWHC 128 (Admin). The prisoner's solicitor declined to give an undertaking because he considered it to be contrary to his professional duty to his client to disclose all information to his client about his case: see [22]. HH Judge Cotter QC (as he then was) found it unnecessary to adjudicate on the correctness of the solicitor's approach, but said, at [69]:

> *"… In my view it is important, given that Rule 17 expressly provides for release to legal representatives, that the Law Society and Bar Council consider the issue and provide professional guidance on the issue…"*

93. In a letter dated 4 October 2021 to the claimant's solicitors, in response to a request for their view, the Law Society indicated that:

> *"… to make the provision of a summary decision conditional on the giving of an undertaking by the prisoner's representative… would, potentially, lead to the possibility of a breach of paragraph 6.4 of the SRA Code of Conduct. If the undertaking were given but not honoured, there might also be a breach of paragraph 1.3 in respect of the keeping of undertakings… It seems to us that these are matters that we would need to address and consider in the context of what solicitors tell us about their experience of obtaining copies of summaries of Parole Board decisions before we could issue guidance for the profession."*

94. There was a contested application before me to rely upon this letter. I am prepared to admit it in evidence, although it really does no more than state the obvious. It does, however, serve to confirm the potential disciplinary implications of a prisoner's solicitor giving the undertaking required in the present case. Although the undertaking is not given to a court, and is thus not enforceable by proceedings for contempt, the solicitor could face disciplinary proceedings, which is plainly a serious matter.

95. Although Mr Bunting referred in his written and oral submissions to a number of authorities on the extent to which a court, or a tribunal, has power to require an undertaking, those authorities are not, in my view, of any real assistance in resolving the issues in this case.

96. I therefore conclude that the requirement of an undertaking as part of the procedure laid down in the Protocol was and is unreasonable and unlawful.

Procedural unfairness

97. I turn to consider the broader issue of procedural unfairness. The court must itself determine whether a fair procedure was followed. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required: see *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 115, per Lord Reed, at [65], in the context of a decision to refuse an oral hearing.

98. In *R (Roberts) v Parole Board* [2005] UKSC45; [2005] 2 AC 738, Lord Bingham said, in relation to procedural unfairness, at [40]:

> "*The principles have been set out in many cases of high authority, with greater elegance, but I would summarise them as follows. (i) An administrative body is required to act fairly when reaching a decision which could adversely affect those who are the subject of the decision.(ii) This requirement of fairness is not fixed and its content depends upon all the circumstances and, in particular, the nature of the decision which the body is required to make.(iii) The obligation of fairness to which I refer can be confined by legislation and, in particular, by rules of procedure, provided that the language used makes its effect clear and, in the case of secondary legislation it does not contravene the provisions of the [ECHR] Convention…"*

99. It follows that the Parole Board is required to act fairly in implementing the Policy. For the reasons already explained, the Parole Board did not act fairly in requiring a solicitor to undertake not to provide information to his own client. Nor did it act fairly in failing to provide a reasonable opportunity for the solicitor to make *informed* representations on the draft summary with knowledge of the full reasons contained in the decision letter. The Protocol requires the Parole Board to work in a highly restrictive way. The Protocol is inflexible and does not allow for any change. The Protocol says nothing about how procedural fairness will be achieved if the undertaking is not given. It says nothing about how procedural fairness is to be achieved if the prisoner is unrepresented. The requirement in the Protocol that representations on the summary should be made in just two hours, regardless of the solicitor's availability, or his access to his client (the prisoner) to take instructions, and regardless of the complexity of the particular case, is also likely to cause unfairness.

100. I am satisfied that the combination of all these factors is sufficient to make the procedure laid down in the Protocol, as it affected the claimant, unfair and therefore unlawful.

Systemic procedural unfairness

101. Finally, I turn to the issue of systemic procedural unfairness. The relevant principles have recently been confirmed by the Supreme Court in *R(A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931. At [63] the Court said:

> *"…If it is established that there has in fact been a breach of the duty of fairness in an individual's case, he is of course entitled to redress for the wrong done to him. It does not matter whether the unfairness was produced by application of a policy or occurred for other reasons. But where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way."*

102. The Court went on to review a number of authorities, approving (in relation to asylum appeals) the following statement of principle by Lord Dyson MR in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, at [27]:

> *"…(i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenges directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts."*

103. I am satisfied in the present case that the threshold of systemic unfairness is met in relation to the procedure laid down in the Protocol (as opposed to the Policy). For the reasons I have already explained at [99] and [100] above, the Protocol imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way. Of particular importance is the lack of any meaningful opportunity for an unrepresented prisoner to make informed representations on the content of the summary, and the unreasonable insistence on the undertaking from a prisoner's solicitor which risks a serious conflict with the solicitor's professional duty under paragraph 6.4 of the Code of Conduct.

Conclusions

104. For all these reasons my conclusions in summary are:

(1) The requirement in the Protocol of an undertaking by the solicitor not to disclose the content of the full decision letter and the draft summary to his client was, in the context of the mischief at which the Protocol was aimed, unreasonable, disproportionate, unfair and consequently unlawful.

(2) The requirement in the Protocol of such an undertaking was not properly to be regarded as "incidental or conducive" to the discharge by the Parole Board of the functions set

out in Schedule 19, paragraph 1(2) of the Criminal Justice Act 2003, and was therefore unlawful.

(3) The overall procedure in the Protocol was unfair and unreasonable, and therefore unlawful.

(4) In relation to the procedure laid down in the Protocol, the threshold of systemic unfairness is met, and the Protocol is therefore unlawful.

105. Subject to any further written submissions by the parties on the issue of disposal and relief, I propose to grant the following relief:

(i) a declaration that the Parole Board's decision not to provide the full decision letter and draft summary to the claimant's solicitor unless the undertaking was given, was unlawful; and

(ii) a declaration that the procedure set out in the Protocol, including the requirement of an undertaking, is systemically unfair and therefore unlawful.

Postscript

106. It is not for the Court to suggest an alternative procedure which would meet the necessary standards of fairness. However, I observe that the procedure which the Parole Board has devised, by a combination of the Policy and the Protocol, for the comparatively simple exercise of producing for disclosure a summary of the decision on release (as required by Rule 27 of the 2019 Rules), seems to me to be over complicated and over elaborate.

107. With the reassurance that the summary is prepared by a member of the Parole Board itself, rather than by an official, thought might perhaps usefully be given (by the Parole Board and the Association of Prison Lawyers) to the possibility that, with representations from the prisoner (whether represented or unrepresented) provided along the lines suggested at [73] above, a fair and balanced summary could be produced by an experienced Parole Board member which meets the objectives of the current Policy without the need for any further representations on behalf of the prisoner on the day of publication before the summary is disclosed.