Neutral Citation Number: [2024] EWHC 3209 (Admin)

Case No: AC-2024-LON-002174

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :
MRS JUSTICE MAY

- -

Between :

THE KING on the application of Lee Hickman	**Claimant**
- and -	
The Parole Board for England and Wales	**First Defendant**
-and-	
(1) The National Probation Service	**First Interested Party**
(2) The Secretary of State for Justice	**Second Interested Party/ Second Defendant**
(3)The Chief Constable of Merseyside Police	**Third Interested Party**

- -
- -

Phillip Rule KC and David C. Gardner (instructed by **Conningham Solicitors**) for the **Claimant**
Iain Steele (instructed by **Government Legal Department**) for the **1st Defendant**
Naomi Parsons (instructed by **Government Legal Department**) for the **2nd interested party/2nd Defendant**
James Berry (instructed by **Merseyside Police Legal Services**) for the **3rd interested party**
The **1st interested party** was unrepresented

Hearing dates: 03/12/24, 04/12/24

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20/12/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE MAY

Mrs Justice May

Introduction

1. This claim began as a judicial review of certain case management decisions made by the First Defendant ("the Board") when determining the procedure by which it was proposing to review the necessity for the Claimant's continued detention following his recall to prison. Subsequently, there was an application to add a further ground of challenge ("Ground 6"), seeking to review the lawfulness of Rule 17 of the Parole Board Rules 2019.

2. At the time these proceedings were issued, and then amended, the Claimant was in custody. However on 14 October 2024 the Board issued its provisional decision directing the Claimant's release. The Secretary of State made no application for reconsideration of that decision. Accordingly the Board's decision became final on 13 November 2024, 21 days after the provisional direction was issued to the parties.

3. In these circumstances, I directed that the hearing should start with a preliminary consideration of the question as to whether the claim should properly continue. Having heard argument, for the reasons which appear below, I decided that Grounds 1, 2 and 4 were academic and should be dismissed without more. The hearing continued as a rolled-up hearing on Ground 6, pursuant to the order of Turner J to which I refer below.

The Claimant

4. The Claimant ("LH") is subject to an extended sentence of 20 years passed in May 2010, comprising a custodial element of 15 years with a 5 year extended licence period. In December 2020 LH was released from custody on licence for the second time but was recalled in August 2022 when the Second Defendant/Interested Party ("the SSJ") revoked his licence.

5. At the point these judicial review proceedings were issued, therefore, LH was back in prison. The end of his sentence was not until May 2030; in the meantime he could only be released if the SSJ decided to cancel the revocation and rescind his recall or if she exercised her executive release powers, or unless his release was to be directed by the Board (see [20] to [22], below).

6. Pending the SSJ's compliance with the Board's direction, LH remains for the time being in prison. I was told that he is expected to be released to approved premises in late-January 2025.

The Claim

7. The claim was filed in Manchester on 21 November 2023 and set out five grounds for judicial review. The original grounds were all directed against certain case management directions which had been made by the Board respecting the oral hearing to be held in LH's case. The directions, made under provisions including Rule 17 of the Parole Board Rules 2019, concerned the manner in which the Board proposed to consider information from the Third Interested Party ("Merseyside Police") under a Closed Material Procedure ("CMP"). By order of HHJ Bird dated 30 January 2024 permission to apply for judicial review was granted on Grounds 1 to 4 but refused on Ground 5, which had challenged the absence of a Special Advocate ("SA") in relation to the CMP to be conducted by the Board. Permission was refused on Ground 5 as the claim comprised in that ground had become academic, the Board having by that time revoked its decision as to the presence of a SA. The Board subsequently also revoked the direction challenged by Ground 3, leaving only Grounds 1, 2 and 4 the subject of continued challenge.

8. The Grounds did not at that stage seek to challenge the Board's power to hold a CMP in general, as opposed to holding one in LH's case in particular. However, by order of Turner J dated 4 June 2024 LH was granted permission to amend to add a new Ground 6 advancing a challenge to the lawfulness of Rule 17. Turner J did not grant permission for this further ground, instead directing that it be considered and decided at a "rolled up" hearing, to be listed at the same time as the substantive hearing of Grounds 1, 2 and 4 (see paragraph 11 of his Order).

The remaining grounds and relief sought

9. Accordingly, as at the start of the hearing before me, the pleaded issues which remained for determination were as follows:

Ground 1 (permission granted): whether, on the facts of this case, the Board's direction requiring attendance at the Oral Hearing of certain Merseyside Police witnesses led to procedural unfairness.

Ground 2 (permission granted): whether, on the facts of this case, there was no rational basis for believing that any of the Merseyside Police witnesses could give evidence that would be relevant to the Board's task.

Ground 4 (permission granted): whether, on the facts of this case, it was lawful for the Board to hold a CMP in LH's case, assuming that the power to do so existed.

Ground 6 (permission remained to be considered): (a) whether Rule 17 is ultra vires the rule-making power in section 239(5) of the CJA 2003 and/or (b) whether Rule 17 and/or conducting a CMP is unconstitutional and infringes natural or open justice;

10. The relief sought by LH in these proceedings is to be found at paragraph 138 of the Amended Grounds:

"(1) A quashing order for the decision of [the Board] to direct the attendance of [named police officers] and/or

(2) A declaration that [Rule 17] is ultra vires the rule-making enabling provision of primary legislation or otherwise unlawful./A quashing order for the same reason

(3) A declaration that no power exists for the Board to lawfully employ a CMP in this case.

(4) A declaration that the proposal to consider police intelligence undisclosed to [LH] beyond the gist dated 19 July 2023 (as amended) results in unfairness and is unlawful;

And/or A quashing order for the direction under Rule 17 not to disclose further detail of the material or require it to be withdrawn from consideration;

And/or A mandatory order that the undisclosed material be withdrawn from the parole process to enable a fair hearing; and/or

(5) A declaration that it is unfair and unlawful in the particular circumstances to seek to proceed by way of seeking to place reliance upon hearsay Police intelligence and/or to do so by way of a closed procedure; and/or

(6) such further declaratory relief as shall be fit; and

(7) Costs."

11. The case was listed for a three-day hearing. As the Merseyside Police's response to Ground 4 involved a case that the CMP had not resulted in an unfair procedure taken overall because the CLOSED material had been sufficiently gisted and disclosed, the listing allowed for the third day to be used for a CMP in the event of the court deciding

that holding such a procedure was necessary and appropriate for the determination of the issues arising, particularly on Ground 4.

The Legal Framework

The Board and its function

12. The Board was established in 1968 under section 59 of the Criminal Justice Act 1967. Its present establishing statutory provisions are section 239 and Schedule 19 to the CJA 2003.

13. The Board has a duty to advise the SSJ respecting any matter referred to it to do with the release or recall of prisoners: section 239(2) of the CJA 2003. In doing so it acts as an independent body, giving advice to the SSJ who is required to give effect to that advice. In performing its duties the Board is required to treat the need to protect the public as "paramount": see Lord Rodger in *R(Roberts) v Parole Board and anor* [2005] 2 AC 738 at [100].

The SSJ's rule-making power

14. Section 239(5) of the CJA 200 provides that the SSJ *"may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with a prescribed times".*

15. Rules made pursuant to section 239(5) are made by statutory instrument (section 330(2) CJA 2003). They must be laid before Parliament under the negative resolution procedure and are *"subject to annulment in pursuance of a resolution of either House of Parliament"* (section 330(6) CJA 2003).

The Parole Board Rules 2019 ("the 2019 Rules")

16. The 2019 Rules were made by the SSJ on 20 June 2019 in the exercise of the powers conferred by section 239(5) CJA 2003, coming into force on 22 July 2019. The 2019 Rules were amended in 2022 and 2024. The 2019 Rules (as amended) set out procedures to be adopted by the Board when dealing with its cases.

17. The rule under challenge here is Rule 17 which provides as follows:

*"**Withholding information or reports***

17.—(1) The Secretary of State and any third party authorised by the Secretary of State ("authorised third party") may apply to the Board for information or any report ("the material") to be withheld from the prisoner, or from both the prisoner and their representative, where the Secretary of State or the authorised third party considers—

(a) that its disclosure would adversely affect—

(i) national security;

(ii) the prevention of disorder or crime, or

(iii) 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.

(2) An application under paragraph (1) may not be made later than 8 weeks before the date allocated for an oral hearing under rule 22.

(3) Where the Secretary of State or the authorised third party makes an application for the material to be withheld under paragraph (1), the Secretary of State or authorised third party must serve on the Board—

(a) the material, or a separate document containing the material, and

(b) a written application for non-disclosure, explaining why it is proposed to be withheld.

(4) On receipt of an application under paragraph (3)(b), either a panel chair or duty member appointed for that purpose, must consider the application and may make directions as necessary to enable determination of the application.

(5) Where the panel chair or duty member is satisfied that all relevant information has been served on the Board, they must consider the application and direct that the material should be—

(a) served on the prisoner and their representative (if applicable) in full;

(b) withheld from the prisoner or from both the prisoner and their representative, or

(c) disclosed to the prisoner, or to both the prisoner and the prisoner's representative (if applicable) in the form of a summary or redacted version.

(6) If—

(a) a direction is given under paragraph (5)(a) and the Secretary of State or authorised third party intends to appeal against it in accordance with paragraph (11), or

(b) a direction is given under paragraph (5)(b) or (c),

the Secretary of State, or the Board (where an authorised third party made the application under paragraph (3)), must, as soon as practicable, notify the prisoner and the prisoner's representative (if applicable) that an application has been made under paragraph (3)(b) and the direction that has been made under paragraph (5).

(7) If the panel chair or duty member appointed under paragraph (4) gives a direction under paragraph (5)(b) or (c) that relates only to the prisoner, and that prisoner has a representative, the Secretary of State or authorised third party must, subject to paragraph 11, serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the prisoner's representative, provided that—

(a) the representative is—

(i) a barrister or solicitor;

(ii) a registered medical practitioner; or

(iii) a person whom the panel chair or duty member appointed under paragraph (4) directs is suitable by virtue of their experience or professional qualifications; and

(b) the representative has first given an undertaking to the Board that they will not disclose the material to the prisoner or to any other person, other than other representatives also responsible for that prisoner's case.

(8) The panel chair or duty member making the determination in regards to the non-disclosure application, or the panel chair or duty member at a later date,] may direct the appointment of a special advocate appointed by the Attorney General to represent the prisoner's interests where the panel chair or duty member appointed under paragraph (4)—

(a) makes a direction under (5)(a) and the Secretary of State or the authorised third party appeals the direction under paragraph (11), or(b) makes a direction under (5)(b) or (c) that relates to a prisoner and their representative, or the prisoner does not have a representative.

(9) If a direction to appoint a special advocate is made under paragraph (8), the Secretary of State or authorised third party must serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the special advocate.

(10)[withdrawn by amendment]

(11) Within 7 days of notification by the Secretary of State or Board in accordance with paragraph (6), either party or the authorised third party may appeal against that direction to the Board chair and notify the other party of the application to appeal.

(12) If the Secretary of State or authorised third party appeals the direction in accordance with paragraph (11), the Secretary of State or authorised third party need not serve the material under paragraphs (5) or (7) until the appeal is determined.

(13) Where a direction is made under paragraph (5)(b) or (c) to withhold material from a prisoner who does not have a representative, the decision will automatically be considered in an appeal to the Board chair.

(14) Within 7 days of being notified that a party has appealed under paragraph (11), the other party may make representations in respect of the appeal to the Board chair.

(14A) In determining an appeal under paragraph (11) or (13), the Board chair must consider the application and may make directions as necessary to enable determination of the application, including a direction under paragraph (8).
(14B) The Board chair may determine an appeal by—

(a) upholding the decision made by the panel chair or duty member under paragraph (5); or

(b) substituting their own decision, which may contain any direction that the panel chair or duty member could have made under paragraph (5).

(14C) When the Board chair has made a decision under paragraph (14B) the Secretary of State, or the Board (where an authorised third party made the application to appeal under paragraph (11)), must, as soon as practicable, notify the prisoner and the prisoner's representative (if applicable) that a decision has been made and its outcome.

(14D) The panel chair or duty member may consent to the disclosure of any material withheld under this rule at a later date provided that the direction is subject to a separate right of appeal under paragraph (11).

(15) If—

(a) a panel chair or duty member appointed under paragraph (4) to determine an application under paragraph (1),

(b) the Board chair determining an appeal under paragraph (11) or (13),

(c) a panel chair or duty member consenting to disclosure under paragraph (14D),
decides that any material which is subject to the application by the Secretary of State or authorised third party under paragraph (1) should be disclosed to the prisoner or the prisoner's representative (in full or in the form of a summary or redacted version), the Secretary of State or authorised third party may withdraw the material

(16) If the Secretary of State does not withdraw any material in accordance with paragraph (15), they must serve on the prisoner or the prisoner's representative or both (as directed by the Board chair)—

(a) the decision, subject to any redactions the Board considers necessary so as not to undermine the decision;

(b) any material directed to be disclosed, subject to receipt of an undertaking if so directed.

18. As is evident from the length of Rule 17 and the number of different provisions contained within it, the rule is intended to encompass and deal with a range of different situations where certain information, or particular details, may need to be withheld from the prisoner.

19. There are related rules, including these:
    (1) **Rule 6**, granting the Board wide case management powers.
    (2) **Rule 15**, which requires the Board to hold hearings in private unless a direction is made to hold the hearing in public.
    (3) **Rule 16**, which imposes a duty on the SSJ to provide the Board with information specified in Schedule 1 (such as nature of offence, sentencing remarks) together with *"any further information which the [SSJ] considers relevant to the case"*
    (4) **Rule 24**, which sets out the procedure for oral hearings, including the following provisions in particular:
        (i) *"the Panel chair may exclude from any oral hearing…or part of it..(c) any person during any part of the hearing where evidence which has been directed to be withheld from the prisoner or the prisoner and their representative under rule 17 is to be considered"* (Rule 24(4)(c)); and

        (ii) *"A panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law"* (Rule 24(6)).

Parole Board determination on release after recall

20. A person who remains on licence after release from prison remains subject to revocation of their licence and recall to prison: s.254 CJA 2003. If they are recalled, then they are liable to release prior to the end of their sentence only in one of three ways (see ss.254 and 255C CJA 2003). If the SSJ does not (i) cancel the revocation under section 254(2A)-(2B) or (ii) order an executive re-release under section 255C(2)–(3), the person must be (iii) referred to the Board for a review of the lawfulness of their continuing detention. By section 255C(4A) the Board must not give a direction for release unless it is satisfied that it is not necessary for the protection of the public that the person should remain in prison ("the statutory release test").

21. The Board has a power and a duty to consider the recall decision: *R(Calder) v Secretary of State for Justice* [2015] EWCA Civ 1050, per Lord Thomas LCJ at [45]. It does so as part of the background when considering whether the statutory release test has been met; counsel agreed that these are separate considerations in that an unjustified recall will not of itself always mean that the statutory release test is met, just as a justified recall will not necessarily indicate that the person should not be released.

22. The Board must exercise its review power in a procedurally fair manner: *Osborn v Parole Board* [2013] AC 1115. On any review, the court must decide for itself whether the procedure has been fair, it is not a *Wednesbury*-type review (*Osborn*, at [65])

Whether the claim is academic in light of the direction for LH's release

23. In circumstances where the Board has now directed LH's release, I asked the parties to address me on the question of whether all or part of the claim is now academic and/or whether the court ought nevertheless to proceed to hear it. LH's skeleton argument, whilst recording the fact of the Board's recent decision directing his release, had not specifically addressed this point although I had seen, attached to the Board's skeleton argument, correspondence from LH's solicitors briefly touching on it.

24. Philip Rule KC, for the Claimant, started with Ground 6, submitting that the challenge is not academic in LH's case. He pointed out that the Board has held a CMP and that doing

so caused a delay in the process directing LH's release. Moreover the holding of a CMP precluded LH from having a fair process in that he was denied access to CLOSED material which, as appears from its OPEN reasons, the Board took into account in its decision. Mr Rule emphasised that there are two aspects to a Board's decision on release after recall: first whether the recall itself was justified (see *Calder*) and second, the application of the statutory release test. Although, when the Board applied the test, it directed his release, LH believes that the Board's sight of CLOSED material may have deprived him of a finding that his recall was unjustified. Mr Rule said that all these matters give rise to a justifiable grievance on the part of LH about how he has been treated to-date, which of itself entitles LH to declaratory relief. But in addition to this, he argued, it is clear from the Board's OPEN reasons that there are matters which it heard in CLOSED (and which LH therefore could not directly challenge) which have resulted in adverse findings that will remain on LH's dossier: Mr Rule referred to the Board's OPEN reasons citing "concerns about drug-dealing" and possession of mobile phones in prison. He says it is evident from the OPEN reasons that these recorded concerns arising from CLOSED material have at least contributed to the Board's decision as to the appropriate licence conditions to be imposed on LH. Mr Rule highlighted particularly the condition as to residence in approved premises outside LH's home area, pointing out that it is the delay in satisfying this condition which is currently delaying LH's release from custody. Mr Rule argued further that holding the CMP has, as it were, set a precedent for LH's future treatment by the Board in the event of his being recalled once more, moreover the CLOSED reasons on his dossier will always remain available to be used against him. Obtaining a declaration that holding a CMP was unlawful would neutralise that future prejudice and would enable LH to make submissions about his licence conditions now.

25. Mr Rule went on to submit that even if I were to decide that the claim had ceased to have any practical impact on LH, there is a more general public interest point regarding the use of Rule 17 to hold a CMP. He pointed out that the use of Rule 17 (or any of its forerunners under Parole Board Rules prior to 2019) for a CMP is not of long-standing; he said that there has been no consideration of the vires of the rule in any previous case. He submitted that the decision of the Supreme Court in *Al-Rawi and others v Security Service and others (JUSTICE and others intervening)* [2012] 1 AC 531 makes it clear that a court cannot abrogate the rules of natural justice without an express and detailed statutory provision introduced by Parliament under primary legislation. He submitted that the Board is a court

for these purposes and he suggested that Rule 17 has the potential to affect thousands of prisoners subject to Board determinations each year.

26. As to Ground 4, Mr Rule submitted that if there were circumstances under which the CMP had legitimately been held, then the gisted material was insufficiently specific such that LH could not properly meet and respond to the intelligence which Merseyside Police introduced in CLOSED. This has resulted in the findings as to drug-dealing and possession of mobile phones in prison now on his dossier, and has potentially deprived him of a finding that his recall in August 2022 was unjustified.

27. Mr Rule took Grounds 1 and 2 together, accepting that they relied to some extent on Ground 6. These grounds concern the calling of police witnesses to give oral evidence in CLOSED directed at testing the reliability of the Merseyside Police intelligence. Mr Rule said that here too the matter was not academic as LH had been deprived of the ability to test the reliability of hearsay evidence adverse to him which (as appeared from the OPEN reasons) the Board had taken into account in setting his licence terms.

28. Ms Parsons, for the SSJ, whose interest is focussed on Ground 6, submitted that the claim could have no practical relevance to LH himself, further that there was no sufficient public interest to justify the court exceptionally hearing an academic claim. So far as the material being on LH's dossier in the future, Ms Parsons pointed out that LH may never be recalled again. If he is, then his risk will be considered at that future point in time. LH's recall/release history may or may not be relevant in the event of another recall; it may largely depend on what the reasons may be for that future recall. She argued that if, for instance, LH breaches a licence condition which he maintains has been imposed in reliance on CLOSED material, then it may be relevant, but if he is recalled for any other reason then the historical CLOSED material will be completely irrelevant. Ms Parsons submitted that the hypothetical possibility of LH's future recall for one amongst a range of possible scenarios is not a firm enough reason to justify hearing these proceedings now. The SSJ did not seek to deny that the recall and release proceedings will have significantly impacted LH but she submitted that the fact he has been impacted by the manner in which the Board decided to direct his release cannot bring an academic claim back to life.

29. Regarding the exercise of my discretion to hear the challenge in any event, Ms Parsons drew my attention to the dicta of Lord Slynn in *R (Salem) v Home Office* [1999] 1 AC 450, a case concerning an asylum-seeker's claim to income support which was initially rejected, but, by the time of the hearing, had been allowed and support given. Lord Slynn said this, at 457:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

30. Ms Parsons submitted that the present case comes nowhere near the situation contemplated by Lord Slynn as requiring a decision on a discrete point applicable to a large number of cases irrespective of their particular facts. Just because LH's challenge engages fundamental principles does not make it an exceptional case, the courts regularly address principles of natural justice, she pointed out.

31. Mr Berry, for the Merseyside Police, whose interest was principally directed at Grounds 1, 2 and 4 and who adopted the SSJ's submissions in relation to Ground 6, submitted that the whole claim became academic once the Board's decision to direct release was formalised. He pointed out that Grounds 1, 2 and 4 were challenges made to the Board's case management decisions made in August and November 2023 that they would hear from police witnesses and hold a CMP in LH's case. Those decisions had no wider impact, he argued; they were decisions on their own facts, including (for the purposes of Ground 4) a consideration of whether a sufficient gist was reached in respect of some police material. Moreover since those decisions had been taken the Board had made further management decisions regarding the gisted material and the witnesses to be called, such that the claim on these grounds was already academic even before the Board reached its final decision directing LH's release.

32. Mr Berry further pointed out that LH has not made any claim for damages for delay to the process in his case, nor has he sought to amend to challenge the outcome or to quash any

of the conditions imposed. There could not be any relief biting on the licence conditions in the absence of any such amended claim, he suggested.

33. Mr Steele, for the Board, was at pains to stress that he was present to assist the court with the function and powers of the Board and the provisions in the 2019 Rules, and with the Board's understanding of the law in relation to CMPs, but would be making no active submissions for one side or the other on any of LH's grounds. He explained that this was consistent with the position of the Board as an independent body exercising a judicial function.

Discussion and decision

Grounds 1, 2 and 4

34. I can take my reasons for dismissing grounds 1, 2 and 4 shortly. I accept that those grounds are academic, essentially for the reasons given by Mr Berry in argument. Grounds 1, 2 and 4 comprised challenges made to decisions of the Board in August and November 2023 to hear from police witnesses and to gist CLOSED material, all arising from the decision to hold a CMP in LH's case. These case management decisions concerned the way in which particular evidence was to be presented for consideration by the Board in discharging its risk-assessment function. They were fact- and context-specific and had no wider impact at all. Further, the original, impugned, decisions were overtaken by subsequent case management decisions rendering the claims on these grounds academic, even before the final decision was made by the Board to direct LH's release.

Ground 6

35. Following the rolled-up hearing on Ground 6, I have decided to refuse permission.

36. Paragraph 6.3.4.1 of the Administrative Court Judicial Review Guide 2024 provides that:

> *"Where a claim is academic, i.e. there is no longer a case to be decided which will directly affect the rights and obligations of the parties to the claim, it will generally not be appropriate to bring judicial review proceedings….Where the claim has become academic since it was issued, it is generally inappropriate to pursue the claim."*

There is a footnote to this paragraph, referring to the case of *R(Gardner) v Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin), pointing out that the public interest may in some circumstances justify hearing a claim *"where the only relief is declaratory relief and an acknowledgment of past wrong".* Although he did not refer me to this footnote or rely specifically on *Gardner*, Mr Rule was essentially making this point in the case of LH. However the case of *Gardner* concerned the policy around releasing hospital patients into care homes during COVID, involving very particular circumstances affecting a large number of people during a global pandemic. Such circumstances are far removed from this case.

37. LH's case on Ground 6 has been academic since the Board's provisional direction became final on 13 November 2024. I accept Ms Parsons' submission that if I were to make a declaration that Rule 17 is ultra vires or that holding a CMP is contrary to natural justice then it would have no practical implication for LH now. This claim is not about LH's licence conditions; there has been no application to amend to challenge the outcome or to quash the Board's decision, in particular as to one or more of the conditions which the Board imposed when directing his release 6 weeks ago. The claim for relief (see [10] above) includes nothing about licence conditions, nor about delay.

38. Ms Parsons is right also to say that there are a range of possible future situations under which LH may be recalled again, if indeed he ever is. Even if he were, it would be impossible to say now that the CLOSED reasons which the Board gave on this occasion will be relevant to any future consideration of risk. As Mr Steele indicated in assisting with the Board's procedures, if LH is recalled in future for breaching a condition which he says was imposed unfairly, in reliance on CLOSED material which he says the Board received unlawfully, then it will be open to him at that time to challenge the recall. Similarly in respect of any future determination (if there is one) where the Board relies (if it does) on the CLOSED reasons given, or any CLOSED material received, when arriving at the decision to direct his release this time.

39. I bear in mind also that no relief which this court might award LH could enable him to see that which he was prevented from seeing during the Board's consideration of his case on this occasion. As Mr Berry said, that would be for the disclosure process in any other

claim LH might bring, e.g. civil proceedings for damages resulting from delay, but it is not a reason for a judicial review here, where the claim has become academic.

40. Next, I cannot see that there is a good enough reason in the public interest to permit the claim on Ground 6 to proceed nevertheless. CMPs are very rarely employed by the Board. As appears from Mr Atkins' evidence in his witness statement prepared for this application, there have been just eight occasions (including in the case of LH) since 2005 where the Board has held a CMP. In two of those cases, including LH's, the Board has directed release. There has been no direction for release in the remaining six cases. I was told that none of the six prisoners concerned has challenged the result on the basis that the CMP in their case was unlawful; one prisoner apparently applied to review the Board's decision as to the sufficiency of the content of gisted information, but not its decision to hold a CMP itself. Mr Steele confirmed, on instruction, that there are currently no cases before the Board in which a CMP is being considered.

41. I note also that there are provisions in other Rules which are to be read alongside Rule 17 as bearing on the Board's power to hold a CMP (see [19] above). Rule 24(4)(c) is an obvious example. Yet LH's case as currently pleaded does not address or seek to challenge any rule other than Rule 17. Further, the breadth of the provisions in Rule 17 also cover many ordinary situations where material is withheld, in whole or part, which have nothing to do with a CMP, for instance where evidence is withheld because of PII, or names/places redacted for reasons of privacy, or where a document is shown to a prisoner's representative but not to the prisoner themself. I did not understand Mr Rule to be suggesting that directions of that nature made in accordance with Rule 17 would be objectionable; yet his argument did not address the extent to which particular part or parts of Rule 17 might be struck down, as opposed to the whole rule. As appears from [17] above, Rule 17 contains 16 separate sub-paragraphs, unlike the rule which was struck down in the case of *R (D) v Parole Board* [2019] QB 285 (the Worboys decision). That case concerned a single short provision (Rule 25, subsequently amended) restricting all publication of Board proceedings which the Divisional Court decided had been drawn too widely.

42. Finally, despite Mr Rule's interesting path of argument through Privy Council, House of Lords and Supreme Court authority, I think that his Ground 6 point is answered by the

House of Lords decision in *Roberts*, if not directly then at least by strong implication, considering the arguments which were addressed to their Lordships in that case and the points which they must have considered in arriving at their decision. It is of note that *Roberts* was later specifically considered and explained, without dissent, by various of their Lordships in the course of their judgments in the Supreme Court case of *Al-Rawi*.

Conclusion

43. For these reasons I dismiss Grounds 1, 2 and 4 and refuse leave on Ground 6.