



Neutral Citation Number: [2022] EWCA Civ 4

Case No: C1/2021/0297

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**MR JUSTICE BOURNE**  
**[2020] EWHC 3437 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14 January 2022

**Before :**

**LORD JUSTICE LEWISON**  
**LADY JUSTICE MACUR**  
and  
**LORD JUSTICE SNOWDEN**

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**Between :**

<b>THE QUEEN (on the application of DEAN PEARCE)</b>	<b><u>Claimant/ Appellant</u></b>
<b>- and -</b>	
<b>(1) THE PAROLE BOARD OF ENGLAND AND WALES</b>	<b><u>Defendant/ Respondent</u></b>
<b>(2) THE SECRETARY OF STATE FOR JUSTICE</b>	

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**Mr Philip Rule and Mr Jake Rylatt (instructed by Instalaw Solicitors) for the  
Appellant**  
**Ms Sarah Sackman and Mr Conor Fegan (instructed by the Government Legal  
Department) for the Parole Board**  
**Mr Myles Grandison (instructed by the Government Legal Department) for the Secretary  
of State for Justice**

Hearing date: 24 November 2021  
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# Approved Judgment

## Macur LJ

### Introduction

1. This appeal is made against the decision of Bourne J ([2020] EWHC 3437 (Admin)) refusing Dean Pearce’s application for judicial review of the decision of the Parole Board of England and Wales (“the Board”) dated 20 May 2019, which refused to direct his release from prison. The legal issue in the appeal is the lawfulness of the Board’s Guidance on Allegations, (“the Guidance”), which was published on 11 April 2019 for the use of panels conducting a parole review following the Divisional Court’s decision in *R (D and another) v Parole Board and another* [2019] QB 285.
2. Dean Pearce’s case was determined in accordance with the 2019 Guidance. The Guidance has since been amended to “reflect the judgments” in the cases of *R (Morris) v Parole Board* [2020] EWHC 711 (Admin) and *Pearce* (extant) and was re-issued in July 2021.
3. I consider that the 2019 Guidance is wrong in its advice to panels regarding the use of unproven allegations in the assessment of risk and I do not regard the amendments made in 2021 rectify the error. Consequently, I regard both versions of the Guidance to be unlawful as a misstatement of the law in this respect.
4. Nevertheless, for the reasons I give later in this judgment, and subject to my Lords, I would dismiss this appeal on the merits for although at paragraph [28] of his judgment Bourne J found that the Guidance was lawful, his analysis of the Board’s decision in this case proceeded on a different footing and is unassailable on appeal.

### The Statutory framework

5. Paragraphs [4] to [9] of the judge’s judgment correctly summarise the relevant statutory provisions that apply in parole reviews. For the purpose of the arguments advanced in the appeal it is sufficient to note the following.
6. By virtue of section 239 (3)-(4) of the Criminal Justice Act 2003 (“the 2003 Act”) the Board when advising the Secretary of State for Justice (“the SSJ”) on the early release or recall of prisoners must consider (a) any documents given to it by the SSJ, and (b) any other oral or written information obtained by it, including the report of any delegated member who has interviewed the offender in relation to that ‘information’. It must also act on consideration of “all such evidence as may be adduced before it.”
7. A panel convened to determine an offender’s future risk to the public will be expected to follow the procedure set out in the Parole Board Rules in force from time to time, as made by the SSJ under section 239(5) of the 2003 Act.
8. The Board is entitled to produce, but is not under a duty to issue the Guidance under review pursuant to Schedule 19, paragraph 1(2) of the 2003 Act; however, in so far as it has decided to promulgate the same, it must take care not to misstate the law, or to present a misleading picture of the legal position: see *R(A) v Secretary of State for Home Department* [2021] 1 WLR 3931 at [46].

The decision in *R (D and another) v Parole Board and another* [2019] at 285

9. John Radford (formerly Worboys), a licensed taxi-cab driver, was convicted of 19 serious sexual assaults against 12 female passengers in an 18-month period between October 2006 and February 2008. He was sentenced to an indefinite term of imprisonment for public protection with a specified minimum term of 8 years before he could be considered for release.
10. In civil proceedings brought against the Metropolitan Police Commissioner by a number of his victims, Green J (as he then was) held that between 2003 and 2008, John Radford had committed more than 105 rapes and sexual assaults whilst working as a taxi driver: *D v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB). John Radford was not a party to these proceedings.
11. In December 2017, 20 months after his tariff expired, the Board directed John Radford's release. DSD and NVB, two of his victims whose allegations had not been considered during John Radford's criminal trial, sought judicial review of the Board's decision on the basis that no account had been taken of the allegations of the prisoner's wider offending. Apart from the High Court civil judgment, by then upheld on appeal, there was a substantial body of material relating to numerous other complaints of sexual assault by John Radford contained in the dossier before the Board. Counsel for the Board in the judicial review proceedings submitted that it was "simply impermissible" for the Board to consider whether John Radford had committed further crimes.
12. The Divisional Court agreed that "it is not the role of the board to determine a criminal charge": see *R (West) v Parole Board* [2003] 1 WLR 705" but rejected "the proposition that evidence of other offending cannot be *considered* as part and parcel of the global assessment of risk". Further, noting that section 229(3)(a) of the 2003 Act, which provides for the assessment of 'dangerousness' in sentencing specified offences, uses the term "information" as opposed to "evidence", as does section 239(3)(b), the Divisional Court held that the Board is thereby given "considerable latitude as to the range of information to be considered, subject always to considerations of fairness; see [150] and [151]. This included hearsay evidence which, even if disputed, may not require cross examination of witnesses, "subject to the demands of fairness in the individual case".
13. John Radford had not been questioned during his parole hearing on matters relating to whether "his offending (or any inappropriate sexual behaviour short of the commission of the crime)" was confined to the 12 victims. There was material which could be (and implicitly should have been) put to him to test the credibility and reliability of his post-2015 account if only because of the expressed concerns that John Radford was "manipulative, engaged in impression management and for more than six years had been steadfastly maintaining his innocence of any crime"; see [54]. The Board should have undertaken some "basic lines of inquiry...", this material would have provided a sound platform for testing and probing Mr Radford's account, either at a pre-hearing interview by a member of the panel or at the hearing itself. The psychologists would also have been asked to reconsider their assessments in the light of it"; see [160] and [161].

The Guidance

14. A letter sent on behalf of the SSJ on 19 April 2018 to Governing Governors, Directors of Contracted-Out Prisons and NPS Divisional Directors and headed “The case of John Worboys: Follow-up” made clear the SSJ’s decision to review aspects of parole decision making, having specific regard to transparency and communication with victims. In the meantime, following on from the decision in *R(D)* and to give effect to commitments which the SSJ made to the House of Commons, there were certain actions to be taken. In summary, the SSJ would include “all relevant evidence of past offending”, “every necessary piece of evidence” and “boost the role of the SSJ’s representative at the Board’s hearings”. In explanation it was said that “offender managers, offender supervisors and psychologists should, when producing risk assessments and reports for offenders where the criminal convictions may not present a comprehensive understanding of an offenders risk, consider carefully whether relevant evidence from untried allegations is available to provide that comprehensive understanding... in cases where there is a relatively large body of complaints which have not resulted in prosecution, report writers should liaise with local police to obtain reports and analyse the contents of those reports to determine whether they contain relevant evidence to put before the Parole Board.”
15. The Guidance was issued approximately 12 months later. The March 2019 Guidance has no foreword, but it is described in the “Document History” of version 1.1, issued in July 2021, as ‘Guidance and support for members on consideration of allegations made against a prisoner.’ The ‘overview’ in paragraphs 2 and 3 of the Guidance, defines a relevant allegation as one of harmful or risky behaviour which has not been adjudicated upon by a criminal or civil court or prison adjudication and which, if true, could affect the panel’s risk analysis.
16. The amendments made in the revised July 2021 version, are described as “minor clarifications” to reflect the two Divisional Court judgments in *Morris* and *Pearce*.
17. For ease of reference, I set out below what I regard to be the relevant paragraphs of the 2019 Guidance for the purpose of this appeal, showing any amendment made by the 2021 Guidance in bold:
  6. Panels faced with information regarding an allegation, will have to assess the relevance and weight of the allegation and either:
    - a. Choose to disregard it; or,
    - b. Make a finding of fact; or
    - c. Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review.”
  - ...
  9. Panels faced with a relevant allegation will need to (1) disregard it, or (2) make a finding of fact or (3) make an assessment of it.
  - ...

Findings of Fact

15. Panels must apply the ‘balance of probability’ test when making a finding of fact. **Panels should remember that the burden of proof is not on the prisoner.**

#### Making an Assessment of the Level of Concern

18. Panels may need to make an assessment of an allegation when the allegation is capable of being relevant to the parole review, but the panel is not in a position to make a finding of fact either because there is insufficient material available to make such a finding on the balance of probabilities, or because it would not be fair to do so. ... The allegation and the circumstances around it can form a basis for testing the reliability of the prisoner’s evidence. It can be material on which an expert’s evidence can be tested. The wider circumstances of the allegation might also give rise to areas of concern. **However, in cases where there is a mere allegation without any factual basis that can be identified by the panel, or the allegation is not relevant to the question of risk before the panel, the allegation should be disregarded, and no weight placed on it.**

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

- a. What, if any, relevance the allegation has to the parole review; and
- b. The weight to attach to the concerns arising from the allegation;

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

20. If an allegation is relevant to the parole review, the panel will need to form a judgement as to what weight to give the allegation. This will require an examination of the allegation **and any underlying facts that the panel can find (on the balance of probabilities)**. The following factors can be considered when judging what weight to give an allegation: ...

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

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

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

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

24. An allegation that is only marginally relevant, or is relevant but which carries little weight, is likely to be of little concern to the panel and therefore have little to no impact on the parole decision. **Mere allegations without any underlying factual basis, or irrelevant allegations, should be disregarded. The panel’s risk assessment should**

**always be based on found facts, even if they are unable to make a finding of fact about all the matters raised.**

## Discussion

18. Mr Rule, on behalf of Dean Pearce, submits that paragraphs 6(c) and 9 (3) read together with paragraphs 18 – 24 of the Guidance clearly raise the prospect that an ‘unproven allegation’ will form the basis of an adverse assessment of a prisoner’s risk to the public and consequently inform the Board’s decision not to direct his/her release regardless that no findings of fact can or have been made on the available information. This does not meet the requirements of common law fairness and /or Article 5 (4) of the European Convention on Human Rights. Mr Rule distinguishes between what he refers to as the ‘collateral facts’ of an allegation, which may be established fairly upon the information/evidence made available to the Board and unproven facts which inform ‘levels of concern’. The final sentences in amended paragraph 24 of the Guidance may appear to identify a ‘mere allegation’ to be one without any factual basis but, in the context of the previously mentioned paragraphs, still permit a ‘relevant’ but unproven allegation to be considered in the assessment of risk.
19. Any suggestion that paragraph 20 of the Guidance was intended only to refer to the assessment of information in reaching findings of fact, was rejected by Ms Sackman, on behalf of the Board; her submissions proceeded on the basis that the Guidance positively requires a panel to consider an unproven allegation if it is ‘relevant’ in the assessment of a prisoner’s future risk, even if no findings of fact are possible. Allegations may be relevant in one or more ways as indicated in paragraph 8 of the Guidance. Paragraph 20 is intended to guide a panel as to the weight to attach to relevant but still unproven allegations. She argues that this stance is dictated by statutory intent and the authorities, which dictate the paramount importance of public protection. She relies upon four propositions to justify her argument, namely (i) the Board is carrying out an assessment of risk and not determining a criminal charge; (ii) the risk assessment is to protect the public; (iii) the Board is a specialist body and is best placed to assess questions of relevance in accordance with public law safeguards; (iv) the Board has a wide latitude in relation to the information it can consider.
20. The decision in *R(D)* related to what the Divisional Court described as “a difficult, troubling case with many exceptional features”, although the principles which it expounded were not expressed to be applicable only in exceptional circumstances. It prompted the SSJ to review the nature of information to be provided to the Board as indicated in [14] above, specifically in relation to untried allegations, which might provide a “comprehensive understanding” of an offender’s risk. This broke new ground for the Board. Far more extensive information is now supplied than was previously the case.
21. The Court of Appeal in *R(McGetrick) v Parole Board for England and Wales* [2013] 1 WLR 2064 held that in a “rare case” the Board acting judicially may exclude documents from the dossier prepared by the SSJ, but otherwise the panel must “consider” them pursuant to section 239 (3)-(4) of the Criminal Justice Act 2003 (“the 2003 Act”); see [6] above. Sir Brian Leveson P in *R(D)* described *McGetrick* as “a case which has generated some difficulty”. I agree that that decision appears to run counter to the

rationale in *R(D)* which determined that the Board were under a duty to seek out further information, or at least to utilise that which had already been provided, rather than to permit the redaction of a dossier for fear that it contained prejudicial material. However, I read the Court of Appeal decision to ratify the undoubted principle which runs throughout all previous Court of Appeal authorities on the point, that is, that the relevance of an allegation to the assessment of risk is a matter for the Board.

22. Mr Rule originally submitted that *R(D)* is authority for the principle that it will only be in an exceptional case that the panel should consider allegations of wider offending. However, during discussion with the court he finessed his argument to the extent that he conceded that whilst it is necessary for the panel to consider the materials to determine whether they do aid a more complete understanding of risk, it is for the panel to decide whether the investigation of any aspect of an unproven allegation of wider offending will be necessary in this regard. I consider this a realistic concession which addresses Ms Sackman's pertinent observation – on what basis is a case to be deemed exceptional in the absence of the necessary information. There is no suggestion that paragraph 8 of the Guidance which gives examples of potentially 'relevant' allegations, including those of harmful or risky behaviour, or which undermine the credibility of the prisoner's evidence or their reliability to comply with licence conditions, or which impact upon the weight that can be placed upon a professional witness who has not taken account of the allegations, misstates the authorities.
23. The question therefore is whether the verb 'to consider' in this context may be legitimately interpreted to allow an unproven allegation, as distinct from those established facts which may form one component of or be peripheral to the allegation, to form any part of an assessment of risk?
24. The principles upon which *R(D)* was decided had been well established by previous authority. Accordingly, the judgment acknowledged the four principles stated in paragraph [19] above by reference to the authorities of *R v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916-917, *R (Brooke) v Parole Board* [2008] 1 WLR 1950, para [53] and *R(Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553 at paras [21] and [134].
25. Furthermore, noting that Section 229(3)(a) of the 2003 Act, which provides for the court's assessment of dangerousness in sentencing specified offences, uses the term "information", as opposed to "evidence", as does section 239(3)(b), the court found the Board had "considerable latitude" as to the range of the information to be considered, subject always to considerations of fairness; see *R v Considine* [2008] 1 WLR 414. There is no implied limitation on the nature or temporal character of the information the Board may consider in assessing risk; see *R(McGetrick) v Parole Board* [2012] 1 WLR 2488 (DC) at paragraph 33. This includes hearsay evidence of matters which are disputed by the prisoner, but which will not necessarily require cross examination, subject to issues of fairness in the individual case; *R(Sim) v Parole Board* [2004] QB 1288, p1337-1338, paras 52-55; *R (Brooks) v Parole Board* [2004] EWCA Civ 80.
26. I do not read *R(D)* or any of the authorities upon which it depends, to support the proposition that the primacy of public protection displaces any requirement to establish facts from which to assess risk. Further, I do not accept that the use of the word 'information' rather than 'evidence' in section 239(3)(b) of the 2003 Act, is to denote

that the material does not require any evaluation of the evidential worth of an allegation from which to make a determination of risk.

27. Miss Sackman concedes that a ‘mere allegation’, which she identifies to be an allegation without any factual basis, is not to be considered in the assessment of a prisoner’s risk, but in argument it became clear to me that she used the expressions “factual basis” and “evidential basis” interchangeably. Therefore, I understood the effect of her submissions to be that if there is evidence which supports any part of a relevant allegation, the panel should proceed to weigh the allegation as a whole in the risk assessment since it may be reliable information, regardless that it is not possible to make all necessary findings of fact which constitute the entirety of the allegation. However, I regard this to elide a two-stage process.
28. I do not doubt that, as Mr Rule concedes, an analysis of the information may establish facts which are a constituent part of, or consequential to, the allegation made but are nevertheless indicative of harmful behaviour, or a lack of self-awareness of risky behaviour, or the incredibility or unreliability of other evidence given to the panel. These facts may or may not impute the same degree of risk as the full allegation made and may be susceptible to management in the community (unlike the full allegation made).
29. In *R(West) v Parole Board* [2003] 1 WLR 705, Simon Brown LJ held that in reviewing the revocation of a licence the Board was not determining a criminal charge and that any resultant resumption of a prisoner’s incarceration was concerned with prevention of risk rather than punishment. A quasi-inquisitorial process was involved which did not call for the procedural and evidential safeguards of a criminal trial but would call for the resolution of important issues of fact; see paragraph [40]. Delivering a concurring judgment, Sedley LJ referred to the necessity of the Board’s practice delivering a standard of “due process which, while not reproducing criminal trial procedure, does proper justice”.
30. There is some tension between the decisions of this Court in *Sim* and *Brookes* as to the correct approach to disputed allegations, but not as to the necessity for the Board to reach conclusions arising from the information. To be clear, when at paragraph [42] in *Sim* Keene LJ said that “the concept of a burden of proof is inappropriate where one is involved in a risk evaluation”, he was addressing the construction of section 44A (4) of the Criminal Justice Act 1991. That is, he endorsed what Elias J, as he then was, said when sitting at first instance in *Sim*, namely, “if after hearing all the evidence the board remains genuinely unsure whether the prisoner needed to be detained or not it must on the ordinary construction of s 44A continue his detention”.
31. In *R (Brooks) v Parole Board* [2004] EWCA Civ 80 the panel had considered hearsay evidence of allegations of rape which had prompted the revocation of the prisoner’s licence and recall to prison but reached no concluded view upon them. However, it determined that in light of past criminal convictions, the prisoner’s behaviour towards the complainant, of which they were satisfied, was “a cause of concern” and was a factor to be considered in assessing future risk. Kennedy LJ referring to *West* and *Sim*, said that the Board was not confined to material which would be admissible in criminal or disciplinary proceedings, but went on in paragraph [39] to make clear that “what the panel had to do was evaluate the allegations carefully in the context of the rest of the information before it, taking fully into account the absence of cross-examination...”.



32. Wall LJ, delivering a concurring judgment, positively endorsed the Board's findings of fact in paragraphs [80] – [85], having previously identified the Board as having followed the “overall approach laid down in *Re H* ([1996] AC 563) namely (1) it looked at the totality of the evidence; (2) it assessed that evidence critically in order to decide what facts were established on the *Re H* balance of probability/standard of proof test; and (3) it then, on the basis of the facts it had found, made its assessment as to whether or not it was any longer necessary for the protection of the public for the claimant to be detained”.
33. Before hand down of the judgment in *Brooks*, Elias J then sitting in the Divisional Court in *Sim*, dismissed the submission made on behalf of the prisoner that there was a need to resolve factual disputes by primary evidence in accordance with the approach in *Re H*, describing it as “remote from this jurisdiction and in any event turned significantly on the interplay of statutory provisions in issue...The position of the Parole Board is closer to that of magistrates hearing bail applications but even that is not wholly analogous”. The argument was resurrected before the Court of Appeal by reference to the decision in *Brooks* but was not specifically addressed in its judgment. Instead Keene LJ referred to the “considerable authority which establishes that it is not necessarily unfair to admit hearsay evidence, even when the deprivation of liberty is at stake” and approved Latham LJ's judgment in *R(Director of Public Prosecutions) v Havering Magistrates Court* [2001] 1 WLR 805, p 841, at paragraph [41] as to the correct approach in assessing the risk of a suspect failing to surrender to bail or otherwise breaching any condition of his bail, which required the justice to evaluate the material, taking into account the nature of the material, as “generally applicable to proceedings before the Board when assessing risk”.
34. As it was, in *Sim*, the Court of Appeal noted that the Board's reasoning depended upon the lack of any evidence of a positive change of attitude towards the offences and a considerable body of evidence which the panel accepted and made it satisfied that the prisoner had taken many actions which “jeopardised the objectives” of his supervision.
35. It may be that the difference sounds more in form rather than substance. The question of what constitutes a fair procedure to make findings of fact, or evaluations of the information, will be fact specific as explained in *West* and is unlikely to entail the formality of public law family proceedings. The test posed in *Considine* at paragraph [37] provides that a fair analysis of all the information should inform the necessary judgment in relation to risk. Nevertheless, what is clear to me is that the panel must conscientiously evaluate the information before it to make findings of fact upon which to make the assessment of the prisoner's risk; in these circumstances neither public protection nor public law fairness will be compromised. Established or undisputed constituent or consequential facts to an overarching allegation may provide compelling and convincing indications of risk in themselves, whereas simply to assess the seriousness of the nature of an allegation, provided there is some evidential basis for it is to embark down the route of ‘no smoke without fire’.
36. In many respects I would assess the substantive content of the 2019 Guidance as unobjectionable albeit somewhat ungainly in chronological presentation and in parts repetitive and confused. However, paragraphs 6 (c), 9 (3), 18-24, are notably flawed in the directions they contain.

37. The offending paragraphs are all concerned with the assessment of the relevance, weight, and impact that an unproven allegation is to have on the parole review. The majority of them appear in a section entitled “Making an Assessment of the Level of Concern”. This section uses the undefined and vague concept of ‘concerns’ arising from or attaching to an allegation in respect of which findings of fact are not possible as a means of factoring that unproven allegation into the parole review. Paragraphs 18 and 19 expressly suggest that even where a panel cannot make findings of fact, it should make an ‘assessment of concerns arising from an allegation’. Paragraphs 20 to 23 of the Guidance then specifically require the panel to attribute weight to any such relevant unproven allegation and to determine the impact ‘this level of concern’ has on the parole review, rather than basing the review only upon the facts that are established after the panel’s analysis of the evidence/information. Paragraph 20 (c) highlights the mischief; when assessing the weight to give an allegation where it has not been possible to make findings of fact, it suggests that a serious allegation should bear considerable weight because it is ‘capable of having a greater effect on the panel’s risk assessment’.
38. Miss Sackman placed reliance on the final sentence of paragraph 24 of the 2021 Guidance (“The panel’s risk assessment should always be based on found fact, even if they are unable to make a finding of fact about all the matters raised”). Viewed in isolation that sentence would be accurate. However, it is contradicted by the contents of paragraphs 6(3), 9(c) and 18 – 24 that precede it, and hence provides no meaningful clarification, counterbalance or correction of what has gone before.
39. This court was informed that there have been only three cases seeking judicial review of parole decisions since the decision of R(D), (which led to subsequent implementation of the Guidance) namely *R (Delaney) v Parole Board* [2019] EWHC 779 (Admin) followed by *Morris* and *Pearce*. In the witness statement of Michael Atkins, the Director of Legal at the Parole Board for England and Wales, dated 13 August 2021, the Board is said to remain “confident” that the Guidance is lawful, buoyed by the decisions in *Morris* and *Pearce* to that effect. Miss Sackman relies heavily upon *Morris* in support of her arguments.
- 40.
41. *Delaney* was decided first in time. In that case Andrew Baker J in paragraph [12] of his judgment said that:
- “if...there is nothing in the undisputed facts surrounding the allegations to justify that conclusion [that there is some identifiable, specific, and present risk of violence] then the panel cannot simply rely on the fact, nature, or seriousness of the allegation as leading to any conclusion one way or the other. In such a case the panel must in reality either disregard the allegation as being so far as it can see no more than an allegation, or undertake an investigation and consideration of any evidence that may be presented to it of the conduct of the offender, enabling it to make at least some findings of fact as to what did happen by reference to which, as a factual basis for any conclusions, it might then consider the question of risk.”

42. McGowan J, giving the leading judgment in *Morris* said (at paragraph 55) that she agreed with this approach, but went on to add the gloss that:

“by referring to “*findings of fact*”, the judge is not suggesting that allegations must be proven; merely that there must be some evidence that allows the court to decide whether the allegation has *some* factual basis. This approach should also be considered in the light of the reference to “*information*” at s.239(3) of the 2003 Act (as opposed to “*evidence*”).

43. She also said in paragraphs [53] and [63]:

“53. There will clearly be times where allegations, either individually or cumulatively, indicate significant risk to the public, but cannot be ‘proved’ for whatever reason. The Board might find that there is a significant chance, short of a probability, that a given allegation was true and legitimately consider this as part of its global assessment of risks...”

and

“63. ...paragraph [18] (of the Guidance) merely confirms the ability of the Board to consider allegations when it has not been possible to prove that allegation on the balance of probabilities.”

44. I agree with Mr Rule, that this is to approve an entirely unorthodox ‘sliding scale’ of the balance of probabilities which is said to be warranted for reasons of public protection. To attempt to justify this as acceptable on the basis that the panel is an expert body and will deal with the matters of risk fairly is a circuitous argument. Paragraph 15 of the Guidance provides that the panel should apply the civil standard of proof in making findings of fact. Furthermore, I cannot conceive how the touchstone of ‘public law fairness’ can operate in the circumstances in which an allegation which is not proved on the balance of probabilities is taken into consideration in the assessment of risk.
45. To illustrate the point, suppose that a dossier prepared for the parole review of a prisoner who had been convicted of sexual assaults against children, contains information that prior to the onset of his first conviction he had been arrested on suspicion of indecent assault of a child and otherwise questioned as a person of interest regarding another sexual assault in the periods between his convictions. Although he had not been tried for any of the offences these are potentially relevant allegations to the assessment of risk since they suggest that the prisoner has been involved in more extensive harmful behaviour and undermines his explanation of the trigger event which led to the offending for which he had been convicted. The information reveals that the reason for his first arrest was because the prisoner was often seen in the children’s playground in which the child who had been assaulted had played; but that he was questioned in relation to the later allegation only because he was one of a number of men who had previous convictions for similar offences.
46. I would expect the panel to identify the last allegation as a ‘mere’ allegation without any evidential basis and to immediately disregard it. However, the information

concerning the first allegation would justify the panel in questioning the prisoner about his alleged behaviour. If the fact that he was often in the proximity of the children's playground is undisputed or established as a fact on the balance of probabilities then, unless there is a plausible explanation for his presence, it suggests that he had engaged in risky behaviour some significant time before his first conviction. In such a case, the panel would have made a factual finding (of frequenting the children's playground) falling short of the original allegation, but upon which it could base its assessment of future risk.

47. However, if the prisoner denies any attendance at the playground and the information is insufficient to enable the panel to be satisfied that the prisoner did frequent the playground, or if he was seen proximate to it that he was not taking a well-recognised route elsewhere, then if the current Guidance were correct, since there is some evidential basis for the allegation the panel may proceed to make an 'assessment' of the 'level of concern' that the prisoner had been alleged to have committed a sexual assault, attaching great weight to the serious nature of the allegation in accordance with paragraph 20(c) and, on the basis of *Morris*, concluding that if there was 'a significant chance short of a probability' that he had committed such an assault, proceed to take that into account when assessing risk. I consider this unjustified on a correct reading of the authorities. I regard Andrew Baker J's judgment at paragraph [12] in *Delaney*, unqualified by commentary in the case of *Morris*, to be correct. In short, if the panel cannot be satisfied on the balance of probabilities that the prisoner was frequenting the playground at all, the allegation should be disregarded.
48. Consequently, I agree with Mr Rule's submissions, that paragraphs 6(c), 9(3) and 18-24 of the Guidance are incompatible or inconsistent with correct legal principles. An assessment of risk can only be made upon undisputed or established facts.
49. In paragraph [29] of his judgment in the extant case, Bourne J declared himself in agreement with *Morris* and said, "there is no respect in which [he] would wish to depart from it". However, the dicta in *Morris* to which I have referred appear to me to depart from the principles to be obtained from the authorities which were summarised by Bourne J in paragraphs [31] – [37] of his judgment, with which I agree.
50. Subject to one correction, I also agree with the analysis that Bourne J provided in paragraphs [38] and [39] of his judgment. The correction relates to Bourne J's example of a domestic violence case in which it is alleged that the prisoner assaulted his partner during an altercation. Bourne J stated that "If the Board can only conclude that there might have been an assault, that conclusion may be of little assistance to it." In my judgment, in such a case the Board should disregard the unproven allegation of assault entirely. As Bourne J went on to say, however, if the Board was satisfied on the balance of probabilities that there was an altercation, it could take that established fact into account in its risk assessment.
51. I do, however, disagree with Bourne J's judgment at paragraph [56] et seq that the Guidance was lawful and in accordance with the principles to be derived from the authorities. For the reasons that I have given, I disagree with Bourne J's view at [58] that the Guidance does not encourage panels to proceed without finding facts. Although, at paragraph [59] Bourne J stated that, "the Guidance could be clearer [in distinguishing between] (1) upholding an allegation and (2) making findings about any of the underlying facts. It could more clearly emphasize that risk assessment should

always be based on found facts, even if the Board's findings do not extend to upholding a particular allegation in full. ...", I consider that this understates the problems of the approach adopted in the parts of the Guidance to which I have referred.

52. Bourne J did not otherwise address paragraphs 6(c), 9(3), 18 -24 of the Guidance in this respect, and I am unclear as to how he considered the invitation to panels to take into account allegations which could not be proven on the balance of probabilities in those parts of the Guidance to be lawful. I agree with Mr Rule that Bourne J did not "recognise the inconsistency between the correct legal principles accepted by him and the contrary Guidance terms".

The merits of the appeal on its facts

53. In October 2010, Dean Pearce pleaded guilty to sexual assaults against two women he had met in the street, and was sentenced to imprisonment for public protection, with a minimum term of three and a half years, less time spent on remand. He had a previous conviction in 2005 for sexual assault against a 13-year-old girl. He has remained in prison despite his case being considered four times by the Board, including the hearing which formed the basis of his application for judicial review.
54. The Board declined to direct his release but directed his move to "open conditions to ascertain whether [he] had internalised the lessons [he had] been taught and can act upon them in conditions that are more realistic and where he could be exposed to more realistic external stimuli, challenges and indeed potential victims". The decision was based, in part, on "non convicted offending".
55. Details had been obtained from police files relating to several incidents when allegations had been made of serious sexual assaults involving young females, many of them under the age of consent, only one of which had been prosecuted, and which had resulted in an acquittal. The Panel had questioned Dean Pearce about these matters and found it implausible that he could not remember the detail of the incidents for which he had been arrested. The Panel made a finding of fact that he must have had sexual contact with a 12-year-old girl, to which she was unable to consent, because his DNA was in her underwear. The five 'allegations' were 'of concern' and all were relevant to the risk of sexual offending and serious harm.
56. Analysing the panel's approach, Bourne J found there to be no issue of unfairness. Specifically, he did not consider that the Board must establish the facts of the allegations before testing and assessing Dean Pearce's response. He found the Board's reasoning that Dean Pearce had put himself into a situation resembling the circumstances of his offending more difficult to follow and that the overarching conclusion of 'concern' should have been particularised by the facts they had found and "precisely what concerns arise from them". Only in regard to an allegation which involved scientific evidence of DNA suggestive of sexual contact with an underage girl did he consider it would have been necessary for the Board to make further inquiries before "coming close to deciding that a further offence had been committed."
57. There can be no reasonable challenge to Bourne J's analysis in paragraphs [74]– [82] that, reading the Board's decision letter as a whole, it is clear it did make findings of facts upon which to base an assessment of future risk, despite describing four of the allegations as "matters of concern". I agree with Bourne J, that the Board was entitled

to question the reliability of Dean Pearce's evidence as to his recollection of the incidents and gauge his reaction to the allegations, as contra-indicating his ability to self manage sexual thoughts and behaviour.

58. Therefore, although satisfied that the Guidance is unlawful for the reasons given above, I would dismiss the appeal on its merits for the reasons given by Bourne J.

**Snowden LJ:**

59. I agree.

**Lewison LJ:**

60. I also agree.