Neutral Citation Number: [2024] EWHC 1223 (Admin)

Case No: AC-2023-LDS-000146

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

Wednesday, 22nd May 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of MICHAEL CHISWICK)	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR JUSTICE	
(2) PAROLE BOARD FOR ENGLAND & WALES	**Defendants**

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Philip Rule KC (instructed by Luke and Bridger Law) for the **Claimant**
Scarlett Milligan (instructed by GLD) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

- -

Hearing date: 23.4.24
Draft judgment: 9.5.24

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Introduction

1. This is a case about the legal impact, on the lawful decision-making function and process of the Parole Board, of unlawful action by the First Defendant ("the Justice Secretary") which took place in June, July and October 2022 and was the subject of the Divisional Court's judgment in R (Bailey) v Secretary of State for Justice [2023] EWHC 555 (Admin) [2023] 1 WLR 2519 ("Bailey"). That action (§4 below) involved a prohibition on state professional witnesses communicating to a parole board panel a view on suitability for release. I am using the phrase "state professional witnesses" to mean prison and probation officers and psychologists who are employed or engaged by an entity for which the Ministry of Justice is responsible (Bailey §99). By "suitability for release" I mean the statutory test for release: whether it is no longer necessary for the protection of the public that the prisoner should remain in prison (Bailey para 8). By "view on suitability for release" I mean an expression of an opinion or recommendation.

2. The target for judicial review is the decision made on 13 March 2023 by a Panel of the Second Defendant ("the Parole Board"), not to make a direction for the Claimant's release. The Panel was not satisfied that it was no longer necessary for the protection of the public that the Claimant should be confined. That was because it was not satisfied that his risks could be safely managed in the community. In considering the lawfulness of that impugned decision-making, I have been assisted by materials filed by all three parties, and by helpful and focused written and oral submissions by Counsel for the Claimant and the Justice Secretary.

3. Proceedings before the Parole Board can involve distinct stages. For present purposes it is helpful to distinguish three of these. Stage 1 involves the Justice Secretary serving reports which he considers relevant, pursuant to rule 16 of the Parole Board Rules 2019 (see Bailey §27). Stage 2 involves the Panel Chair making a direction for the submission of evidence or the attendance of a witness pursuant to rule 6 (see Bailey §26). Stage 3 involves an oral hearing in which the Panel may ask or allow questions (see Bailey §29). I will describe reports at the first stage as "Served Reports" and reports directed at the second stage as "Directed Reports".

4. The unlawful action which was identified in Bailey involved the making of a rule and the issuing of two sets of Guidance. The rule was made on 28 June 2022. It said that a report writer "must not present a view or recommendation as to the prisoner's suitability for release or move to open prison conditions" (see Bailey §36). It came into effect from 21 July 2022. The July 2022 Guidance said that views on suitability for release (or transfer to open conditions) were no longer allowed in reports or at oral hearings (see Bailey §63). The October 2022 Guidance referred to the prohibition in written reports and said that report writers should not attempt to give a recommendation on suitability for release at an oral hearing (see Bailey §69).

5. In the present case there was an oral hearing on 27 February 2023, pursuant to Stage 2 (rule 6) directions made by the Panel Chair on 30 May 2022. Those "May 2022 Directions" required a Psychological Assessment Report, to be written by a Prison Psychologist ("PP"), among other things to assess risk levels and consider whether release could be justified based on current risk. The May 2022 Directions also required

a Community Offender Manager ("COM") Report, written by the COM, among other things to provide an updated risk assessment and risk management plan. I will use the phrase "Directed Report" to mean a report, such as these, which the Parole Board has directed be provided.

6. The Psychological Assessment Report was written by PP, Pavinpreet Owen. It was dated 8 November 2022. It recorded in a passage under the heading "conclusions":

> ***I am not able to make comment upon Mr Chiswick's suitability for release into the community or continuing suitability for closed conditions.***

The COM Report was written by the new COM, Christy Shaw. It was dated 5 December 2022. It included this:

> ***Following changes to legislation issued in June 2022, I am no longer able to comment on likelihood of compliance or manageability of risk in the community. I am also no longer able to make a recommendation as to the outcome of the Oral Hearing and Parole Board Decision.***

So, the two Directed Reports were expressed as not "able" to answer a key question which the Panel had directed those report-writers to answer.

7. Under the May 2022 Directions the PP and COM who wrote the Directed Reports were required to attend the oral hearing. So was a third witness: the Prison Offender Manager ("POM"), Jennifer Williams. She was not being required to write a report, having written a POM Report for the Panel on 9 March 2022. I will use the phrase "Served Report" to mean one like the March 2022 Report, which was served by the Justice Secretary, not having been directed by the Parole Board. The POM was directed to attend the oral hearing, among other things to assess work undertaken to address offending behaviour and risk levels, and to answer questions relating to issues raised in the reports and in respect of any changes in presentation.

8. In its March 2023 Decision, the Panel refers to key aspects of the written reports and oral evidence which was given by the professional witnesses: the POM (Ms Williams), the PP (Ms Owen) and the COM (Ms Shaw). The Decision recorded that the Panel had itself conducted a robust and independent risk assessment, having received comprehensive evidence at the hearing from the professional witnesses.

9. The reason why in November 2022 the PP saw herself as "not able" to make a comment on suitability for release into the community, and the reason why in December 2022 the COM saw herself as "no longer able" to comment on matters such as manageability of risk in the community, nor make a recommendation, was because of actions of the Justice Secretary (§4 above) which were the subject of analysis in Bailey (§§10-14 below).

The Analysis in *Bailey*

10. The analysis in Bailey was, in essence, as follows. On its objectively and legally correct interpretation, the new rule prohibited only the giving of a view on suitability for release in a Served Report (§105). That was a narrow construction (§106) which had the consequence that the rule was within the Justice Secretary's rule-making power, compatible with the common law principle of the separation of powers and compatible with Article 5(4) of the ECHR (§117). Although the rule was lawful, the decision to

make it was not. That rule-making decision was an unlawful exercise of the decision-making statutory power, for two reasons. First, a principal purpose in making the rule was to suppress or enable the suppression of relevant opinion evidence currently available to the Parole Board which differed from the single view being presented by the Justice Secretary to the Parole Board, which was improper and incompatible with Article 5(4) (§118). Secondly, because the Justice Secretary wrongly believed that the new rule contained a prohibition applicable to Directed Reports, he had failed to consider whether a rule limited to Served Reports was justified (§119).

11. The July and October 2022 Guidance were each unlawful on the recognised grounds of containing (i) a positive incorrect statement of law and (ii) a legally misleading picture portrayed as comprehensive (§§130, 138, 140). The July Guidance contained positively incorrect statements of law which would induce a person who followed the Guidance to breach their legal duty and which amounted to a serious and unwarranted interference with the Parole Board's judicial functions (§§131, 136). That was because the Guidance described a prohibition on giving a view on suitability for release even in a Directed Report and even at an oral hearing (§§132-135). The October Guidance failed to correct the position and itself described a prohibition including Directed Reports and at an oral hearing (§§141-143).

12. Central to the analysis which led to these conclusions in Bailey were the following key themes. (1) The Parole Board makes binding decisions about whether to release prisoners, where it has the function of a court (§§7, 14). (2) The Parole Board discharges a judicial task, of deciding what evidence is relevant and in what form that evidence can most usefully be given, including through Stage 2 rule 6 directions and Stage 3 rule 24 questioning at and conduct of oral hearings (§§26, 29, 104). (3) It is incompatible with the common law principle of the separation of powers and Article 5(4) for the Justice Secretary to exercise powers in such a way as to encroach upon or interfere with the exercise by the Parole Board of its judicial responsibilities when deciding whether or not to direct a prisoner's release (§24(b)). (4) This unlawful encroachment or interference can be one which influences the results reached by the Parole Board (§24(c)). (5) Alternatively, this unlawful encroachment or interference can be one which is aimed at procuring that the Parole Board, contrary to its wishes, refrains from or reduces an aspect of its procedure (§24(c)). (6) A report writer or witness can properly give evidence – which can be "valuable" evidence – which is a view on suitability for release, notwithstanding that this is the very issue for the Parole Board to determine (§§30-33). (7) If the Panel Chair gives a Stage 2 rule 6 direction for a Directed Report to include the report-writer's view on suitability for release, or if the Panel asks or allows a Stage 3 rule 24 question at an oral hearing to elicit a view on suitability for release, a legal obligation would arise to state that view (if one is held) and failure to provide that evidence would breach that legal obligation (§§34-35).

13. This is the context in which the Divisional Court recorded: that a principal purpose in the rule-making decision, to suppress or enable the suppression of relevant opinion evidence currently available to the Parole Board which differed from the Justice Secretary's view, was improper and incompatible with Article 5(4) (§118); that the July Guidance involved a serious and unwarranted interference with the judicial functions of the Parole Board (§136); and that the July and October Guidance was bound to cause report writers to breach their legal obligations, where a report writer considered themselves unable to include in their Directed Report a view on suitability for release

even though directed to do so, or to give their view on suitability for release when asked at an oral hearing (§§147-148).

14. This was all laid bare on 15 March 2023 when the Bailey judgment was handed down, after a hearing in the Divisional Court on 1 and 2 March 2023. It all came too late for the PP in November 2022 and for the COM in December 2022. But where does it leave the Panel's decision of 13 March 2023, after the oral hearing on 27 February 2023?

Agreed Issues

15. In their list of agreed issues, Counsel have cast the question of vitiating impact through a prism of procedural unfairness, but including by reference to Article 5(4), independence and adversarial process, where relevant evidence was unlawfully prohibited. Here is their list of issues:

> ***(1) Whether the Claimant's parole review suffered procedural unfairness at common law and/or in breach of the requirements of Article 5(4) ECHR? Specifically whether there was a breach of the obligation that the judicial body enjoy objective actual and apparent independence of the executive and of the parties, and/or that there be an adversarial quality and equality to the process, because relevant evidence was unlawfully prohibited or prevented from being received by the panel of the Parole Board determining his case by the SSJ? (2) Whether the Claimant is entitled to a declaration to record the fact that his parole review was rendered procedurally unfair by the unlawfulness identified by the Divisional Court in Bailey? (3) Whether the decision of 13 March 2023 should be quashed in light of the Court's conclusion as to issue (1)? (4) If the Court finds that the conduct of the parole proceedings involved a violation of Article 5(4) ECHR, what is the appropriate just satisfaction for the particular breach (and its consequences) in all the circumstances? (5) Whether pursuant to section 31(2A) Senior Courts Act 1981 the Court must refuse to grant relief on the application for judicial review on the basis that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. (6) The appropriate order as to costs following determination of liability.***

The List of Issues and Procedural Flexibility

16. The Agreed List of Issues – required by CPR PD54A §14.7 – is a helpful tool and an important discipline. But it should not become a straitjacket or a trap. The framework for the case is the grounds of claim and resistance, within which arguments crystallise in the skeleton arguments, and the judicial review court can look to get to a legally correct characterisation provided always there has been no ambush or unfairness. Both Counsel recognised that the essential question was about the vitiating impact of the Bailey Unlawfulness, and different positions were put forward as to alternative ways in which that impact could be analysed. Procedural flexibility cuts both ways. Delay and alternative remedy (§§51-52 below), although not expressed within the agreed list of issues, squarely raise from the Justice Secretary's pleaded case and written submissions. These too should not be shut out, but determined on their legal merits.

Common Ground

17. A number of things are agreed. (1) The legal analysis in Bailey is accepted, adopted and being applied; it is not being relitigated. (2) The Bailey Unlawfulness can have the legal consequence – in an individual case – that the decision-making of the Parole Board is vitiated in law. Ms Milligan told me that there have been sequel judicial review claims where, by reference to the Bailey Unlawfulness, the consequential unlawfulness of Parole Board decisions has been conceded. (3) That vitiating legal consequence is not

automatic. Mr Rule KC gives, as an example, the two claimants in Bailey itself. There, report writers had considered themselves unable to include views on suitability of release in Directed Reports, but had given their views at the oral hearing by reason of an interim injunction (HHJ Bird 10 August 2022) and an undertaking in lieu of one (2 September 2022) (Bailey §147).

Vitiating Impact: What is the Question?

18. I have said that the essential question is about the vitiating impact of the Bailey Unlawfulness, and that different positions were put forward as to alternative ways in which that impact could be analysed. As has been seen, the agreed issues refer to whether there was procedural unfairness. They also refer to Article 5(4). They refer to an obligation that there be an adversarial quality and equality to the process. As to that, Mr Rule KC relied on A v United Kingdom (2009) 49 EHRR 29 at §§202-204, cited in R (James) v Justice Secretary [2009] UKHL 22 [2010] 1 AC 553 at §§17-20 and R (Osborn) v Parole Board [2013] UKSC 61 [2014] AC 1115 at §102. The Strasbourg Court referred in A to proceedings which "must be adversarial and must always ensure 'equality of arms'", going on to say (in the context of remand and allegations against the individual) that "the detainee must be given an opportunity effectively to challenge the basis of the allegations against him" which "may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention". On this basis, Mr Rule KC spoke of the need for the prisoner to be able to put their "best case". Both Counsel cited the Court of Appeal in R (TN (Vietnam)) v Home Secretary [2018] EWCA Civ 2838 [2019] 1 WLR 2647 §§83-90 (approved at [2021] UKSC 41 at §§81-85). In that case, after rules were struck down for an "unacceptable risk of unfairness", the Court had to decide "whether there was procedural unfairness on the particular facts of [an individual] case", which "will depend on a careful assessment of the individual facts". Ms Milligan commended that approach. Mr Rule KC cautioned against it, because the Bailey unlawfulness was not based on risk.

19. Bailey is certainly a case involving Article 5(4) and that is the relevant human right of the prisoner. I can quite see that the consequence of Bailey Unlawfulness can be unfairness in an individual case. One virtue of asking whether there has been procedural unfairness is that it avoids any speculation about what the outcome would have been. When the common law identifies procedural unfairness, it is of vitiating materiality unless the outcome would inevitably have been the same. Another virtue is that procedural fairness recognises the values of: (i) the liability to result in better outcomes by ensuring that the decision-maker receives all relevant information and that it is properly tested; (ii) the avoidance of a sense of injustice that the person who is the subject of the decision will otherwise feel; and (iii) the rule of law (Osborn §§67-71).

20. But Bailey is not a case analysed in terms of procedural unfairness, or adversarial process, or the prisoner putting their best case, or unacceptable risk of unfairness. Bailey itself runs deeper than that. Bailey is about independence, about rights to a decision-making process before a judicial body whose independence has not been encroached upon and interfered with; about procuring breaches of witness obligations when directions are made by, and questions asked or permitted to be asked by, the Panel; about impeding relevant evidence from being given. One phrase used by the Court of Appeal in TN (Vietnam) asks "whether the ultra vires act influenced or infected the later decision which it is now sought to challenge" (TN §88). As has been

seen, Bailey recognised that the unlawful encroachment or interference can be one which "influences the results" reached by the Parole Board, or it can be one aimed at procuring that "the Parole Board, contrary to its wishes, refrains from or reduces an aspect of its procedure" (Bailey §24(c)).

21. Mr Rule KC submitted that in considering the legal link between the Bailey Unlawfulness and the Panel's decision-making, a helpful idea is whether the unlawfulness on the part of the Justice Secretary "bore on and was relevant to" the Panel's decision-making. He borrowed this language from the context of decisions to detain and public law unlawfulness arising from policies: R (Kambadzi) v Home Secretary [2011] UKSC 23 [2011] 1 WLR 1299 §§42, 118. I think this idea is helpful. So is the idea that unlawfulness can "influence" or "infect" a later decision. So is the idea that unlawfulness can "influence … results", or it can procure the Panel refraining from or reducing an aspect of procedure.

22. I think the better question to ask is this: In the individual case, was the Bailey Unlawfulness operative, in the sense of bearing on and being relevant to the Panel's decision-making? But in the alternative, I ask this: In the individual case, did the Bailey Unlawfulness make the Panel's decision-making procedurally unfair?

Vitiating Impact: Analysis

23. In my judgment this is a clear-cut case where the Panel's decision-making was rendered unlawful by the Bailey Unlawfulness. In my judgment, in this individual case, the Bailey Unlawfulness was operative, in the sense of bearing on and being relevant to the Panel's decision-making. Further and in any event, in my judgment, the Bailey Unlawfulness made the Panel's decision-making procedurally unfair. I will explain why. I will do so in three stages. (1) I will start with points which I think are of themselves legally sufficient to establish the vitiating impact. (2) I will identify some further points which reinforce that conclusion and, if more were needed, provide it. (3) I will then explain why I am unable to accept remaining points put forward by the Justice Secretary.

The Legally Sufficient Points

24. I start with points which, in my judgment, were of themselves sufficient in law to establish the vitiating impact.

25. First, the Panel had in this case required of a witness a Directed Report, giving the report-writer's view on suitability for release, the giving of which opinion evidence the Bailey Unlawfulness operated to prohibit. This was the suppression of relevant opinion evidence, by an operative improper purpose. This amounted to a serious and unwarranted interference with the Parole Board's judicial functions. It was an unlawful encroachment or interference, being aimed at procuring that the Parole Board, contrary to its wishes, refrained from or reduced an aspect of its procedure. It procured breach of the report-writer's legal obligations to the Panel. It caused a report writer to breach their legal obligations, because – as a result of the Bailey Unlawfulness – the report writer considered themselves unable to include in their Directed Report a view on suitability for release, even though directed to do so. It was an operative breach of common law and Article 5(4) standards, bearing on the decision-making process.

26. Secondly, this was a type of evidence which is recognisably a valuable part of the evidential matrix. This was recognised in Bailey, by reference to the following expressed position of the Parole Board (§30):

> ***the Parole Board's panels could and generally would issue directions requiring the provision of reports or update reports containing (amongst other things) recommendations based on the author's assessment of risk as it did in the claimants' case – and it could and typically would ask questions testing those recommendations during oral hearings. The Board clearly recognises that it must come to its own conclusions on whether the test for release or transfer is met in any individual case; at the same time, and consistently with this, it is the Board's experience that the recommendations of experts can form a valuable part of the evidential matrix, including (but not only) when it is required to make a decision on the papers.***

27. Thirdly, no arrangement was identified or implemented which served to remediate this position. Nothing has been identified which was done and which secured that – before or for or at the oral hearing – the Panel had the view on suitability for release which it had required but been prohibited from receiving in a Directed Report, so that the report-writer's obligation to the Panel was discharged rather than breached. The position was not remediated, as it was for the two Bailey co-claimants. It was not addressed, even though in the Bailey proceedings the Justice Secretary on 23 February 2023 changed position and, for the first time, took the position that questions could be asked and answered at oral hearings (Bailey §85). The operative breach continued unabated, and continued to bear on the decision-making process.

28. Fourthly, the Panel in the event decided not to direct that the Claimant be released. That was the issue to which the view on suitability for release went. It was decided adversely to the Claimant, who is the person whose Article 5(4) rights were operatively breached.

29. Fifthly, the Bailey Unlawfulness cannot be said to lack materiality at common law, so far as outcome is concerned. The Divisional Court identified the common law and Article 5(4) principle – preventing powers from being exercised in such a way as to encroach upon or interfere with the exercise by the Parole Board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner – as contravened where the exercise of powers "influences the results reached by the Board" (Bailey §24(b)(c)). So far as materiality and outcomes are concerned, the common law test of materiality asks whether the person resisting judicial review has discharged the onus of showing that the outcome would inevitably have been the same. In procedural unfairness terms, it is correctly identified as follows in the Justice Secretary's Summary Grounds of Resistance:

> ***where a court considers that procedural unfairness has been established, it must ask itself whether the unfairness was material and whether, but for that procedural unfairness, the outcome might have been different.***

What I cannot accept is the submission that follows:

> ***The SSJ submits that the continued provision of all risk-related information (only with the absence of an opinion on whether the statutory release test was met) renders it inevitable that the Board would have reached the same decision on risk and the statutory release test, having regard to its expertise over and above individual witnesses.***

In my judgment, it is impossible to say that the Bailey Unlawfulness was immaterial, viewed in terms of outcomes. I am satisfied that the outcome might have been different.

In this case, it does not matter who bears the onus. What the Justice Secretary is describing as the "only … absence" is significant.

30. Sixthly, the Bailey Unlawfulness involves material impacts, as to principle and practicality, which are not a function of outcome. The Divisional Court identified the common law and Article 5(4) principle – preventing powers from being exercised in such a way as to encroach upon or interfere with the exercise by the Parole Board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner – as contravened, not only where the exercise of power "influences the results reached by the Board", "but also where it is aimed at procuring that the Board, contrary to its wishes, refrains from or reduces an aspect of its procedure" (Bailey §24(b)(c)). All three of these familiar values (§19 above) are, in my judgment, relevant and were materially compromised: (i) the liability to result in better outcomes by ensuring that the decision-maker receives all relevant information and that it is properly tested; (ii) the avoidance of a sense of injustice that the person who is the subject of the decision will otherwise feel; and (iii) the rule of law (cf. Osborn §§67-71). The "sense of injustice" is a practical reality. And there are practical knock-on implications. The Panel would have been receiving, the Claimant would have been hearing, and the decision would have been recording the current views of professional witnesses on suitability for release. Even if not directed for release, those views could be relevant to a recommendation for transfer to open conditions and the lawfulness of any decision not to accept such a recommendation.

The Reinforcing Points

31. I turn to the further features which reinforce that conclusion and, if more were needed, provide it.

32. First, it was not one witness – but two witnesses – in respect of whom the Panel had in this case required of a witness a Directed Report giving a view on suitability for release, which opinion evidence the Bailey Unlawfulness operated to prohibit.

33. Secondly, the May 2022 Directions required – in the case of three witnesses including the two writers of Directed Reports – that they attend the oral hearing so as to give a view on suitability for release. The PP was required to attend the hearing to address orally their conclusions in their assessment of risk in the Directed Report. The COM was required to attend the oral hearing among other things to answer questions relating to issues raised in the Directed Report. The POM was also directed to attend the oral hearing, among other things to answer questions relating to issues raised in the reports.

34. Thirdly, professional witnesses' views as to suitability for release had played a prominent role in the Parole Board's previous decision, which was an important part of the context. The previous oral hearing had taken place on 24 August 2021. For that hearing, the POM (Ms Williams) the then COM (Aimee Lawrence) and the then PP (Leona Hunter standing in for Feroza Hussain) were all state professional witnesses giving evidence. The upshot was an adverse Panel decision of 1 September 2021 deciding not to direct the Claimant's release. The significance of the assessment of professional witnesses on suitability for release was recorded within the text of the May 2022 directions, as it was in the body of the impugned March 2023 decision. The views of the professional witnesses as to suitability for release were highly relevant in the Panel's September 2021 decision. The decision recorded: (a) that PP Ms Hussain had

concluded that the Claimant needed to remain in custody to complete one-to-one intervention and PP Ms Hunter endorsed those recommendations; (b) that COM Ms Lawrence recommended that the Claimant remain in prison to engage in that work; (c) that POM Ms Williams also recommended that the Claimant complete the psychology work in prison. That was all three state professional witnesses. Only an independent psychologist (Rhys Matthews) recommended release. The Panel had expressed its September 2021 decision by emphasising that the state professional witnesses "recommend against your release at this stage and the Panel concluded that it is necessary for you to remain confined for the protection of the public".

35. Fourthly, notwithstanding an invitation from the Justice Secretary, there is no information from the Parole Board about the outcome being the same or not substantially different. The Justice Secretary's pleaded Summary Grounds of Defence (14 July 2023) include this invitation:

> ***it will be for the Parole Board to confirm whether its own decision making on the statutory release test would have been altered by the view of an individual report writer as to the statutory release test. If the answer to that question is negative, then the outcome would not have been substantially different …***

No confirmation has come from the Parole Board. The Parole Board, entirely properly, has not taken the position that it is able to, or should, give any such confirmation.

36. Fifthly, steps initiated by the Government Legal Department for the Justice Secretary serve to reinforce the conclusion that the three witnesses were operatively prohibited from giving their views on suitability for release at the oral hearing. On 11 July 2023, 3 days before the Summary Grounds of Defence were filed, this email was written by the deputy head of the parole eligible casework (Daniel Martin) to all three professional witnesses:

> ***I note that you recently provided reports and attended the oral hearing of [the Claimant]. [He] has lodged a legal challenge against the Secretary of State, partly due to the fact that you were unable to provide recommendations to the Parole Board. The Government [Legal] Department (GLD), who are handling the claim, have asked me to find out what recommendation you would have provided to the Panel had you been able to do so? If you are able to provide this information today or tomorrow, it would be greatly appreciated.***

There is no suggestion that the three professional witnesses were able to provide recommendations. None of them replied to say: "but I was able to"; "the Panel asked me, and I answered". Two did respond, and each confirmed that they were unable to give their view on suitability for release. This corresponds to what the Parole Board told the Divisional Court (Bailey §96).

37. Sixthly, those responses which were received by Mr Martin reinforce the vital importance of a stated view on suitability for release. The POM and the PP both say that their own final position would have been materially informed by the – unknown – view on suitability for release of the COM. The POM (Ms Williams) says the recommendation would have been a joint one with the COM and that if the COM had wanted to request a period in open conditions to build up their further working relationship, then the POM would likely have supported this. The PP (Ms Owen) says the recommendation would have been very much dependent on discussions with the COM. This shows that not knowing the COM's view was significant to the POM and the PP.

38. Seventhly, the responses – subject to that qualification – are positive, in both cases. The POM replied:

> ***I would have recommended release on licence to an Approved Premises. This is because he had completed the one-to-one psychology intervention and received positive feedback from this. We know from his previous times on licence that reoffending is not imminent with him and he tends to do well gaining accommodation work. Regular checking of phone and Internet history could identify if he was accessing sex/dating related sites. I therefore feel a period in open conditions would not be necessary.***

The PP replied:

> ***I can offer that I would have recommended release on licence to an Approved Premises…***

39. Eighthly, this means there would have been material changes, unknown to the Panel. The adverse views on suitability for release from the September 2021 were known and on the record. The PP had stepped into the current picture in light of subsequent events. There was a continuity in the identity of the POM (Ms Williams), whose view on suitability for release had been negative in September 2021 but who, in the current circumstances would have been recommending release on licence to an approved premises. The Panel was not only deprived of the views on suitability for release, but was deprived of the changed position as to those views, in favour of release, subject to the third professional witness of whose view it and the other witnesses were also deprived.

40. Ninthly, the Panel recorded and placed significant weight on those views which the professional witnesses were able to present, but without appreciating the bottom line view on acceptability for release on which it would surely also have placed significant weight. The Panel recorded and discussed the evidence. It described that evidence as "comprehensive". It did what it described as "a robust and independent risk assessment". It said it "placed great weight" on what it had been told by the professional witnesses. This means the Panel was being guided by what it understood it was being told. But it did not have that "valuable part of the evidential matrix" (Bailey §30). It wanted that evidence and wanted to be able to place weight on it, because it had specifically directed it in Directed Reports and as part of why the three witnesses were to attend the oral hearing, in the May 2022 Directions.

41. Tenthly, this description of the oral hearing from a section headed "material facts" in the Claimant's pleaded Grounds for Judicial Review – incorporated into the Form N461 and accompanied by a statement of truth – has stood since 13.6.23 and not been contradicted either by the Justice Secretary or the Parole Board:

> ***each of the witnesses struggled to answer some direct questions because they felt legally prevented from doing so, and some declined to answer some questions from the panel or his legal representative concerning the Claimant's suitability for a progressive move or for release. The psychologist was repeatedly asked to answer questions but repeatedly declined.***

This corresponds to the evidence which the Parole Board gave the Divisional Court, as to the practical consequences of the Bailey Unlawfulness (Bailey §96):

> ***The Board's experience has been that witnesses understand the guidance to prevent them from providing evidence concerning their views or recommendations, and have refused to give that evidence even where panels have requested or directed that they do so…***

The Response Points

42. I turn, insofar as not covered already, to the key response points that were put forward by the Justice Secretary, and the reasons why I do not accept that they provide an answer. Here is why:

43. First, an Internal Memorandum relied on by the Justice Secretary did not stand as operative remediation. The Summary Grounds of Resistance were accompanied by a 350-page bundle of materials. Within them is a document which was supplied to the Divisional Court in Bailey on 28 February 2023, two days before the substantive hearing on 1 March 2023. I am told it was briefly referred to in the oral submissions, but is not referenced in the judgment and evidently provided no material comfort to the Divisional Court. It was described as an internal document of the Parole Board which, alongside other materials, had been released by the Parole Board in response to a freedom of information request, and was understood in consequence to have been in the public domain since at least 21 September 2022. The writer was intending to address panel members because it speaks about "you, as an independent panel". The writer expressed the view, contrary to what the Divisional Court subsequently decided, that (a) the new July 2022 rule operated in law to "negate" any direction that a Directed Report should include a recommendation; and (b) a panel should no longer indicate that Directed Reports provide a recommendation or view on suitability for release "as this would be contrary to the will of Parliament as is set out in the rules". The writer expressed the view that questions on suitability for release could be asked at an oral hearing, albeit that witnesses may decline to answer. It was not said that the witness had an obligation to answer and would be breaching that obligation if they withheld their opinion. I have no evidence about any promulgation of this memorandum or any impact. In my judgment, it cannot possibly stand as an implemented arrangement which served to remediate the position (§27 above).

44. Secondly, I cannot conclude that the Panel decided that it did not need or want professional witnesses' views on suitability for release. Ms Milligan submitted that an appropriate finding, by way of inference from the decision document and the evidence as a whole, is that the Panel was satisfied with the evidence that it had received and, having thought about it, was satisfied that it did not want or need and would not be assisted by any views on suitability for release. I can find no material in the case which can properly support that reconstruction. The May 2022 Directions embodied the position as to what the Panel wanted and needed. There is no evidence to support an inference that the Panel subsequently decided that views on suitability for release did not matter. The Panel got on with its own risk assessment in the absence of those views, the witnesses being known to have been prohibited – or inhibited – from giving their views.

45. Thirdly, I cannot conclude that – even if professional witnesses had given favourable views on suitability for release – the Panel would have declined to direct release. Ms Milligan submits that this can be inferred from the strength of the Panel's reasoning in its decision, its reference to comprehensive evidence and its own risk assessment. The Panel made its decision with what it had, doing its best to the best of its ability. To rely on this to say what would have happened is to start in the wrong place. The starting point would have been with the valuable evidence of views on suitability for release, required in the May 2022 directions in the two Directed Reports and as an agenda item for all three witnesses at the oral hearing. This evidence would have come in, while

thinking was at a formative stage. The hearing would have been different. The deliberation stage would have been different. The reasoning would have been different. Any "strong reliance" on the professional witness evidence would now have favoured release.

46. Fourthly, I cannot conclude – based on a submission made in closing – that views on suitability for release were in fact elicited by oral questions and answers at the hearing. Ms Milligan points to the written closing submission filed by the Claimant's representative immediately after the hearing. It said: "Professionals today agree that his risk is manageable in the community …" This was a submission, and it did not say that professional witnesses gave their views on suitability for release. The professional witnesses, when emailed by Mr Martin (§§36-38 above) did not say that they gave their views on suitability for release, and make the point that they did not know each other's views. The decision letter, which does not record agreement with the submission, does not record that the professional witnesses gave their views on suitability for release; nor that they agreed about it. This was a decision which "placed great weight on their evidence".

47. Fifthly, I do not accept that R (Faulkner) v Home Secretary [2006] EWHC 563 (Admin) assists the Justice Secretary's arguments. In. In that case, a Parole Board panel after an oral hearing had recommended transfer to open conditions, and the Justice Secretary's decision-making as to whether to accept that recommendation involved reliance on a psychologist's report which included recommendations (§23). The prisoner's claim was that it was procedurally unfair not to disclose this for representations to be made on it. Dismissing the claim for judicial review, the Court held that there was no unfairness to the prisoner, emphasising that "there was no new material in the report" (§38); it was analysis and an expert assessment which was "based entirely on the evidence which was before the Parole Board … on which the claimant had had an opportunity to make representations" (§39). Ms Milligan submits that there is an analogy, because what has primacy is the "material" and the "evidence", rather than a recommendation or view derived from that material and evidence. In my judgment, there is no safe analogy. The decision-maker was the Justice Secretary, who had the analysis and assessment and relied on it. The Justice Secretary was not a judicial body, receiving opinion evidence. What was "critical", as to why the report did not need to be disclosed, was that it was "an in-house assessment of evidential material on Carltona principles", which "falls clearly within the Carltona principle" (§§35 and 39). The report was not evidence, but part of internal decision-making for the Home Secretary. Here, we have evidence – valuable opinion evidence – directed by a judicial body, from one party's witnesses, to be provided transparently for and at an oral hearing at which the prisoner is present and participating; and all because the evidence, and due process in its reception, matters.

Remedy

48. A number of points were raised in relation to remedy. I will deal with the main issues here.

49. First, the Justice Secretary invokes the statutory overlay of s.31(2A) of the Senior Courts Act 1981. Parliament has told me that I "must refuse to grant relief" and "may not make an award" under s.31(4) for damages, if it appears to me "highly likely that the outcome for the applicant would not have been substantially different if the conduct

complained of had not occurred"; unless I consider it "appropriate" to disregard this requirement "for reasons of exceptional public interest" (s.31(2B)). The "relief" to which this refers is in s.31(1) and includes a "quashing order" and a "declaration". These provisions do not stand in the way of appropriate vindication by means of the judgment of the Court. They do not say that the Court cannot make a finding of unlawfulness. I have done that already.

50. The conduct complained of is the Bailey Unlawfulness. I have explained why this had a vitiating impact on the Panel's decision-making. Even if I take "outcome" as narrow – the Panel's decision as to directing release – it does not appear to me to be highly likely that the outcome would not have been substantially different. I cannot even say it is "likely", still less "highly" likely. Parliament has not required me to undertake an exercise in speculation, and the case-law explains why such an exercise is inappropriate. I reach the same conclusion even if the conduct complained of is the inhibition on the professional witnesses giving their views on suitability for release. There is no basis for refusing relief by reference to s.31(2A). I can leave aside the following: wider aspects of "outcome" in light of principle and practicality (§30 above); exceptional public interest; and the interface between s.31(2A)(2B) and the duties and remedies under the Human Rights Act 1998, including effective judicial protection and how the HRA reflects ECHR Article 13.

51. Secondly, the Justice Secretary raises three discretionary bars. First, that the Claimant had an adequate alternative remedy, namely asking the Parole Board to reconsider its decision in light of the impact of Bailey. Secondly, delay, because the claim was brought on 14 June 2023, 3 months after the impugned decision (13.3.23). Thirdly, that the claim is academic because the cycle of Parole Board reviews meant the next oral hearing was imminent (7.5.24).

52. I have not been persuaded by these arguments. We are not at the permission stage. Permission for judicial review was granted on 9 October 2023 and I do not accept that any permission-stage issue was overlooked. It is right that the Decision Document drew attention to the procedure (Parole Board Rules 2019 r.28) for "a party" to apply within 21 days – which could be extended in the interests of justice – for reconsideration on grounds that the decision was "procedurally unfair", "irrational" or that there had been an "error of law". I can see that such recourse might have provided a resolution, and that arrangements could have been made by the Justice Secretary in conjunction with the Parole Board to have post-Bailey cases speedily triaged. The Justice Secretary is a r.28 "party" too. This case has not been conceded, as – I am told – others were. It has become the forum for grappling with legal points. There has been procedural confusion: both the Parole Board and the Justice Secretary have taken the position that they should be an Interested Party only, and the other should be sole Defendant. No detriment to good administration has been identified, there was in any event no material lack of promptness, and the prejudice from any passage of time is to the Claimant. If ongoing cycles of parole review routinely made such claims academic, these claims could never get anywhere. None of these discretionary bar points, moreover, stand as a reason why the Court should not address the issues in a judgment, as I have.

53. Thirdly, there is the remaining question of general discretion and judgment. As to that, I am satisfied – having dealt with discretionary bars – that in the circumstances it is appropriate to grant, rather than refuse, a declaration recording that the impugned decision was contrary to law by reason of the Bailey Unlawfulness. No argument was

advanced as to why a quashing order would introduce any practical vacuum. The decision stands on the record, but it was rendered unlawful by the Bailey Unlawfulness and I am satisfied that there is good reason formally to quash it; rather than declining to do so. A robust approach is appropriate, including to vindicate Article 5(4) rights. The practical position will be overtaken by the latest parole review and no further order or direction is necessary or appropriate.

Just Satisfaction

54. Next, there is this agreed issue: "If the Court finds that the conduct of the parole proceedings involved a violation of Article 5(4) ECHR, what is the appropriate just satisfaction for the particular breach (and its consequences) in all the circumstances?" Just satisfaction under HRA s.8 (damages) was included in the Judicial Review Grounds. The skeleton argument on behalf of the Claimant included the submission that the Court should grant "Appropriate further relief pursuant to s.8 of the HRA, including damages for anxiety and frustration occasioned by the unlawful treatment." Included in the bundle of authorities was R (Sturnham) v Justice Secretary [2013] UKSC 23 [2013] 2 AC 254. Mr Rule KC accepts that he cannot establish that the detention has become arbitrary because "the system which the statutes have laid down breaks down entirely because the Parole Board is denied the information it needs for such a long period that continued detention has become arbitrary": R (James) v Justice Secretary [2009] UKHL 22 [2010] 1 AC 553 at §21. He accepts that he cannot mount an argument that, on the balance of probabilities, the breach of Article 5(4) has resulted in detention of the Claimant "beyond the date when he would otherwise have been released" (Sturnham §13(6)). He also accepts that he cannot establish that a modest award should be made because of "delay in violation of Article 5(4)" which "has caused the prisoner to suffer feelings of frustration and anxiety … sufficiently severe to warrant such an award" (Sturnham §13(12-(15)). The invitation made is to make a modest award, by reason of some "other procedural failure", it being recognised that "numerous cases … not concerned with delay" have involved "awards … made to applicants who had suffered feelings of frustration and anxiety caused by a violation of Article 5(4)" (Sturnham §§60-61).

55. It is for the Claimant's representatives to satisfy the Court that just satisfaction damages are appropriate. In the passage cited, there is a reference to "numerous cases" involving awards referable to applicants who had suffered feelings of frustration and anxiety caused by a violation of Article 5(4), but none of these were analysed in any written or oral submissions. It is eleven years since Sturnham and I was shown no subsequent case. The only cases I was shown describe bases for just satisfaction damages which I have listed and which are inapplicable. I do not have a single relevant 'working illustration'. If there were authority against the Justice Secretary, known to his lawyers, they would have needed to bring it to my attention. In the context of Article 5(4) there are many cases – for example, cases about being denied an oral hearing – which have been determined by the Courts. I raised this at the hearing. No case was drawn to my attention, but I have looked at Osborn at §§114-115 where the "numerous cases" from Sturnham were said not to be comparable and the finding of violation sufficed. The cupboard is also bare as to evidence. There was no evidence before me dealing with frustration and anxiety; nor as to its severity. Judicial review claimants know that their required documentation is a properly pleaded and particularised claim for HRA damages (Judicial Review Guide 2023 §7.3.1.3). In the present case, where this was an

agreed issue, a fairly and properly developed written submission with supporting materials was needed. That does not mean excessive citation of authority. It is 20 years ago that the Court of Appeal discussed proportionality and just satisfaction claims and commended: a summary approach; with the Judge reading the relevant evidence; with relatively brief oral submissions; and with the targeted citation of, say, a best three authorities. See Anufrijeva v Southwark LBC [2003] EWCA Civ 1406 [2004] QB 1124 at §81v. A balance is to be struck, but if the damages aspect of the case matters, the Court does need something concrete to go on.

56. In all the circumstances – in the present case – I decline the invitation to make such an award. I do not have the tools that I would need to be able to accept the Claimant's submission that a modest award of damages is appropriate. I agree with Ms Milligan that it is not appropriate to adjourn or defer this aspect. A fair opportunity was available to supply written materials and authorities, and to make written and oral submissions. But a point that was effectively only a footnote in the pleaded grounds and written submissions, is now effectively a footnote in this judgment. I am deciding the issue with what I have. I am satisfied that a robust approach to remedies (§53 above) provides a legally sufficient and appropriate vindication. The Court's Order and this judgment will stand as the satisfaction which is just.

Permission-Stage Candour

57. This was an issue raised by the Court, to which both parties responded, including in written observations after the hearing. The facts, as known to me, are these.

    i) The Justice Secretary resisted permission for judicial review, including on non-materiality grounds, in Summary Grounds of Resistance (14.7.23), with which 350 pages of materials were filed. GLD, who were handling these proceedings for the Justice Secretary, had asked Mr Martin to send his email (11.7.23) asking the report-writers what recommendation they would have provided had they been able to do so, seeking this information today or tomorrow. The POM responded (12.7.23), stating – contingently – that she would have recommended release. This response was not passed to GLD to be considered for disclosure. The PP then responded (18.7.23), stating – contingently – that she would have recommended release. This response too "was not passed to GLD to be considered for disclosure".

    ii) The Claimant made applications (20.7.23 and 25.7.23), because the POM had told him that she had been emailed asking what her recommendation would have been. He received responses from the POM (25.7.23) confirming that she could not disclose the recommendations and from the Psychology Department (27.7.23) recording that the PP had emailed "recommending release". Mr Bridger, the Claimant's solicitor, filed a witness statement (17.8.23) referring to this material; and emailed the POM (17.8.23). It was only after the Claimant indicated to the Justice Secretary's team that he was aware of the email question having been asked that the emails were passed to GLD to be considered for disclosure.

    iii) The POM replied to Mr Bridger (29.8.23) setting out the contents of her emailed response to Mr Martin (from 12.7.23). The same day, the Justice Secretary filed a response to Mr Bridger's witness statement (29.8.23) exhibiting the chain of emails between Mr Martin and the three witnesses (with redactions whose

unwitting effect was to emasculate the fact that the COM had also been asked). Mr Bridger filed another witness statement (30.8.23) and permission was considered on 7.9.23 and granted.

58. I am grateful to the parties' representatives for their assistance in establishing this factual picture. I accept what I have been told. The emails had been disclosed by the time permission was considered. They were disclosed promptly after GLD received them. The POM told the Claimant about the email. The POM and the PP responded to the Claimant's applications. Nothing was being covered up. It is important to record this.

59. But the problem is that the email chain was not passed to GLD, even though GLD had initiated the asking of the question and had asked for a prompt response, even when one response was very prompt and even when another followed. The Summary Grounds and materials were finalised and served, without disclosure of the asking of the question or the POM's answer which tended to undermine the defence and support the claim. Nor was the PP's response then provided, filed and served. It was because the Claimant made his applications – following information from the POM – that the emails emerged at the permission stage. The Justice Secretary had a choice. Permission for judicial review does not have to be resisted (Judicial Review Guide 2023 §8.3.5). But if the choice is taken to resist permission, it is necessary to ensure candour due diligence, not defer it. One way to test this is to suppose a Permission-Stage Assurance (R (Police Superintendents' Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin) [2024] 1 WLR 166 at §19). Further, candour is the institutional responsibility of the public authority and internal communication is key. I do not think the applicable duty of candour was discharged, as at the time of the filing of the summary grounds, nor as at 18.7.23. It is important to record this too.

Conclusion

60. In conclusion, the claim for judicial review succeeds. I will grant a declaration and a quashing order. I will refuse the claim for HRA damages. Having circulated this judgment as a confidential draft, I am able to deal here with consequential matters. The parties were agreed as to the appropriate Order, to give effect to the Judgment. There was no application to me for permission to appeal. My Order is: (1) The claim for judicial review succeeds. (2) It is declared that the decision of the Second Defendant dated 13 March 2023 was rendered unlawful for the reasons set out in the Judgment. (3) The decision of the Second Defendant dated 13 March 2023 is quashed. (4) The claim for damages is refused. (5) The First Defendant shall pay the Claimant's reasonable costs of the claim, to be subject to detailed assessment if not agreed.

Payment on Account of Costs

61. I will add this: (6) Pursuant to CPR r 44.2(8), the First Defendant shall make a payment on account of those costs, within 14 days of being served with a professionally drawn schedule of costs, in the sum of 60% of the schedule. This was contentious. The Claimant asked for this order, but at the level of 70% and without the words "professionally drawn". The Justice Secretary said there should be no r.44.2(8) order, because: (a) a requested indication of the costs bill had not been provided; (b) the Court needed to arrive at some estimation of the costs likely to be awarded; and (c) the order would be open-ended and undefined. I am satisfied, in all the circumstances, that

"60%" of a "professionally drawn" schedule is justified and appropriate. I refer to my discussion in R (LC) v SSHD [2023] EWHC (Admin) at §§6-7; and see too R (Sherratt) v Bolton Council [2024] EWHC 699 (Admin) at §§27-28.