Neutral Citation Number: [2013] EWCA Civ 182

Case No: C1/2012/0944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LORD JUSTICE STANLEY BURNTON &
MR JUSTICE KING
[2012] EWHC 882 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2013

Before :

LORD JUSTICE PILL
LORD JUSTICE TOULSON
and
LORD JUSTICE TOMLINSON

- -

Between :

The Queen (on the application of Gregory McGetrick)	**Appellant**
- and -	
(1) Parole Board (2) Secretary of State for Justice	**Respondents**

- -

Mr Sam Grodzinski QC (instructed by **Bhatt Murphy**) for the **Appellant**
Mr Ben Collins (instructed by **Treasury Solicitor**) for the **Respondents**

Hearing date : 29 January 2013

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Approved Judgment

Lord Justice Pill :

1. This is an appeal against a judgment of the Divisional Court (Stanley Burnton LJ and King J) dated 4 April 2012 whereby they dismissed a claim for judicial review made by Mr Gregory McGetrick ("the appellant") ([2012] EWHC 882 (Admin)). The appellant sought a declaration in relation to an application he had made to the Parole Board ("the Board"). The issue in the appeal is whether the Board has power to make an interlocutory direction requiring evidence submitted by the Secretary of State to the Board, in this case allegations and evidence of offences that were untried ("untried material"), to be excluded from the final dossier of material taken into account by the particular panel of the Board deciding on whether to release a prisoner on licence.

The facts

2. The Divisional Court related the basic facts:

> "2. On 6 May 2005, following guilty pleas, the Claimant was sentenced to seven years' imprisonment plus an extended licence period of three years, under section 85 of the Powers of Criminal Courts (Sentencing) Act 2000. The sentence was imposed in relation to two different sets of offences, the first concerning possession of firearms and ammunition; and the second concerning possession of a large number of indecent images of children on his computer.
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> 3. In sentencing him, the Judge at Northampton Crown Court stated:
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> > 'I bear in mind that it does not appear that you had those images other than for your own gratification in some form or another and therefore this is an important mitigating factor. I know not why you got involved in such offending, but that you undoubtedly did is all too apparent by the number of images the court has had to consider. Those are serious matters but they do lack, fortunately, some of the various factors such as distribution, production and matters of that sort, which would require the court to pass a severer sentence'.
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> After noting that the Claimant had no previous convictions, the Court imposed the sentence referred to above.
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> 4. On 4 February 2009, following an oral hearing the previous month, the Parole Board directed that the Claimant be released on licence, his risk being found sufficiently low to warrant such release. His licence included as condition 9 a condition "Not to own or use a computer... capable of accessing the internet... without the prior approval of your supervising officer" and as condition 11 a condition "Not to have unsupervised contact with children under the age of 16 without the prior approval of

> your supervising officer". He was released on 23 February 2009.
>
> 5. On 18 September 2009, the Secretary of State recalled the Claimant to prison. This followed an incident in which the Claimant was seen by a police officer to have spoken to two school girls aged around 9 years old in a public place "for a couple of seconds". The girls' evidence to the police officer was that the Claimant, who had had been walking with his mobile phone to his ear, had said "I'm fed up getting voicemail". This was considered by the probation service and the Secretary of State to be a breach of condition 11 of his licence. He was then seen to enter an internet cafe and to access a number of websites including Google, email sites, and a "dirty dating" website which contained images of partially clothed adult women. This was a breach of condition 9.
>
> 6. The Claimant's case was initially considered by the Board on the papers, and then at an oral hearing in August 2010. The Board's assessment was that "you currently pose a medium risk of serious harm to children and the public and a low risk of reconviction". However the Board considered that it had insufficient evidence to make a final decision about re-release, and directed the Claimant's Offender Manager, Ms Pauline Hughes, to arrange for the Claimant to be assessed for the Internet Sex Offenders Programme (ISOP)."

3. At a further hearing of the Board in November 2010, a series of further risk assessment reports was placed before the Board by the Secretary of State. The judgment continued:

> "7. The next hearing of the Board was on 3 November 2010. At that hearing, a series of further risk assessment reports were placed before it in an updated dossier prepared by the Secretary of State. The updated dossier included the untried material. That material consisted of a Case Summary that had been prepared by the CPS prior to the Claimant's Crown Court trial. In addition to referring to the allegations of possessing firearms and indecent images of children on which he had been convicted, the Summary included allegations that the operator of the Claimant's computer had, at some point before his arrest in September 2004, exchanged images with other internet users and had boasted in emails of raping two children and having a "very loving relationship" with his 9-year-old daughter. It referred to the fact that the Claimant had been subsequently arrested on suspicion of indecent assault on children unknown and charged with specimen offences including distributing an indecent photograph of a child and sending obscene and menacing messages via email. In addition, the untried material included prosecution witness statements from the police relating to these allegations. No indictment was ever pursued in

> relation to any of these matters, and the Claimant was not convicted of any offence in connection with them."

4. The appellant's Offender Manager in the probation service stated that the information supported his assessment that the appellant is at a risk of contact offences towards children. The Manager's report referred to the untried material in detail and spoke of a "heightened risk related to contact offences" arising from it.

5. The updated parole dossier also contained a detailed report from Ms Julia Long, a Chartered Forensic Psychologist. In her opinion, the recent reports "appear to have reverted to making assertions about risk that have no empirical basis and seem merely linked to an absence of understanding of Mr McGetrick's offending behaviour."

6. On behalf of the appellant, his solicitor made representations to the Board in relation to the untried material. He also referred to Prison Service Order ("PSO") 6000 which provides:

> "… pre-trial prosecution evidence, such as witness statements... must not be included in the dossier as they do not necessarily set out the circumstances of the offence as established in court: they are liable to challenge by the prisoner and could mislead the Parole Board..."

7. PSO 6000 deals with what ought not to be included in the dossier for the panel appointed to deal with the case but does not bear upon the power of the Board if material which is, or is alleged to be, misleading or inappropriate is included in the dossier. The Secretary of State's decision as to what to include in the dossier could be challenged by way of judicial review but that is submitted to be an inappropriate and insufficient remedy for a prisoner.

8. The Board's response to the solicitor was contained in a letter dated 8 November 2010 from the Chairman of the panel appointed to decide the case:

> "The Panel considered that this was a matter of importance to the Parole Board, which could not be interpreted by individual members. [Counsel for the Claimant] indicated that should we decide that the answer was as submitted by [the Secretary of State], he would then request an adjournment to argue his point on judicial review. The Panel therefore adjourned your hearing to a date to be fixed, once your solicitors, NOMS and the Parole Board have satisfactorily agreed this matter or the point has been decided by the Administrative Court. ..."

9. In a further letter dated 23 February 2011, the Board's Head of Casework wrote to the appellant's solicitor, communicating the decision of the Chairman of the Board:

> "Whether the Rules strictly apply or not, directions have so far been asked for and given as if they do, which seems eminently sensible. My conclusion is that the allegations, for good or ill, form part of the material before the Panel. It is therefore for the panel to decide whether it is relevant, and if it is, to come to a

conclusion as to the weight it should give to it. The Panel also has an obligation to act fairly. If it concludes that the allegations not relied on at the trial are relevant, but that it cannot fairly determine whether or not they have been made out, it would have to give them little or no weight, which would, in turn, affect its view of the reliance it could place on any reports which did rely on them."

The statute

10. Section 239 of the Criminal Justice Act 2003 ("the 2003 Act") provides:

"The Parole Board

(1) The Parole Board is to continue to be, by that name, a body corporate and as such is-

(a) to be constituted in accordance with this Chapter, and

(b) to have the functions conferred on it by this Chapter in respect of fixed-term prisoners and by Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c 43) (in this Chapter referred to as "the 1997 Act") in respect of life prisoners within the meaning of that Chapter.

(2) It is the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners.

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

(a) any documents given to it by the Secretary of State, and

(b) any other oral or written information obtained by it;

and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.

(4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it.

(5) Without prejudice to subsections (3) and (4), the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with

> by a prescribed number of its members or requiring cases to be dealt with at prescribed times.
>
> (6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the Secretary of State must have regard to--
>
> (a) the need to protect the public from serious harm from offenders, and
>
> (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.
>
> (7) Schedule 19 shall have effect with respect to the Board."

11. The Secretary of State recalled the appellant under powers conferred by section 254 of the 2003 Act. Under section 255D of the 2003 Act, the Secretary of State was obliged to refer to the Board the case of an extended sentence prisoner and the Secretary of State must give effect to a recommendation for immediate release on licence. Other issues were considered in the Divisional Court but the sole issue before this court is whether the Board has a power, at an interlocutory stage, to exclude the untried material.

12. The Parole Board Rules 2011 ("the 2011 Rules"), made under section 239(5) of the 2003 Act, did not come into force until after the decision challenged. They empower the Secretary of State to serve on the Board any information or reports which the Secretary of State considers relevant to the case (rule 7(2)). Rule 8 empowers the Secretary of State to withhold any information or report from the prisoner and their representative where the Secretary of State considers that its disclosure would adversely affect national security, the prevention of disorder or crime or the health or welfare of the prisoner or any other person. The Rules do not affect the construction of section 239(3).

Submissions

13. On behalf of the appellant it was submitted that the Board's power under section 239 must be read consistently with the statutory purpose but that does not involve depriving the Board of its power to manage its own procedures in a particular way, to ensure fairness. There is nothing in section 239 to prevent the Board from considering documents given to it by the Secretary of State at an interlocutory stage and deciding whether fairness requires that they be excluded from the final substantive stage, when a particular panel of the Board decides on the recommendation for release. If the Board concludes that fairness requires the exclusion of such evidence from consideration by the panel, a direction can be made that nobody who has seen the relevant evidence shall sit on the panel that determines the case.

14. It was submitted that a panel which considers the question of release may not include a judicial or even a legally qualified member. Before material is released to an

entirely lay panel, it should be considered at a interlocutory stage so that prejudicial material that should be given no weight is removed from the dossier.

15. Reliance is placed on the expression "dealing with cases" in section 239(3) of the 2003 Act. That permits the Board to "deal with" a case in stages, including an interlocutory stage to address the admissibility of evidence, it was submitted. The section does not require that all material given to the Board by the Secretary of State has to be considered at the final stage, provided it has been considered substantively at some stage. The consequence of the Board's argument would be that the Secretary of State has power to control what evidence is placed before the final panel of the Board, no matter how prejudicial that material is and even if that material has no evidential value. That would be to impinge on the Board's judicial independence.

16. Reliance was placed on the decision of this court in *R (Girling) v Parole Board* [2006] EWCA Civ 1779; 2007 2 All ER 688. This court considered the scope of the power conferred by section 32(6) of the Criminal Justice Act 1991 to give "directions" to the Board. It was accepted, on behalf of the Secretary of State, at paragraph 17, that if the Secretary of State were to make directions which encroached upon or interfered with the exercise by the Board of its judicial responsibilities when deciding whether or not to direct the release of a prisoner, the Secretary of State would be acting unlawfully. Sir Anthony Clarke MR added, at paragraph 19:

> "Like all English words used in a statute (or indeed elsewhere), the meaning of the word 'directions' depends upon its context. The conclusion reached by the judge would we think be correct if the power to give directions included a power to direct the Board how it was to decide a particular case or class of case, because that would be to impugn the independence of the Board and to interfere with its functions as a court. However, if the power to give directions is construed as including, and being limited to, a power to give general directions to the Board to assist it to exercise its powers within the law, we can see no objection in principle to such a power being conferred on the Secretary of State."

To construe section 239(3) as preventing the Board excluding, from consideration by the panel deciding the case, unfair and prejudicial material would interfere with the Board's functions as a court, it was submitted.

17. In the absence of any power in the Board to give interlocutory consideration to the material supplied by the Secretary of State, the panel in this case would have before it untried material in circumstances where the appellant's computer, which contained the database on which the allegations were made, had been destroyed. The Board is not deprived, by the wording of section 239, it was submitted, of its power to regulate its own procedure and follow a two stage process.

18. Mr Grodzinski QC, for the appellant, relied on the affirmation in *R (Brooke) v Parole Board* [2008] EWCA Civ 29 [2008] 1 WLR 1950 of the principle that the Board needed to be and to be seen to be free of influence from the Secretary of State in relation to the performance of its judicial functions (paragraphs 78 and 79). In common with all such tribunals, it has an inherent jurisdiction to control its own

procedure so as to ensure fairness, subject to any constraint clearly imposed by legislation, it was submitted. Legislation should be construed, if possible, consistently with the preservation of that inherent jurisdiction.

19. Cases may arise where the probative value of material supplied to the Board is so outweighed by its prejudicial effect that fairness requires its exclusion from consideration by the panel of the Board deciding the case. However scrupulous and well-intentioned such a panel is, it may have been supplied with information which renders a fair hearing of the case impossible, it was submitted. Information may also be submitted, such as a statement by the applicant to his solicitor, which the panel deciding the case ought not to see because it is covered by legal professional privilege. A power should be available to the Board to exclude such material from the dossier provided to the panel which is to decide the case. It is on the Board that section 239(3) imposes a duty and not a particular panel.

20. It was submitted that this court should hold that the Board has power to conduct an interlocutory hearing and remit the case to the Board for the Board to decide whether it should exercise its power to rule on the admissibility of the evidence at an interlocutory stage.

21. For the Board, Mr Collins submitted that section 239(3) requires the Board to consider documents given to it by the Secretary of State. It was submitted that "dealing with cases" in the sub-section must mean "deciding cases", that is to say making recommendations in the light of the material placed before the Board. The panel deciding the case must consider any document given to the Board by the Secretary of State.

22. The Board is an expert body and its members are well qualified to decide on the weight to be given to evidence submitted to its members. Given the duty of the Board to assess the risk a prisoner would present, it is essential that the panel should have before it all information that bears upon its consideration of the risk to the public of the prisoner committing further offences if he is released (*R (Roberts) v Parole Board* [2005] 2 AC 738). In *Harris, R (on the application of) v Parole Board* [1997] EWHC Admin 808, Scott Baker J stated that:

> "it is incumbent upon the Parole Board to have before it the widest possible information."

23. Mr Collins referred to the composition of the Board. Many of its members are either serving or retired judges and a substantial number of the others are experienced psychiatrists and psychologists. The lay members are appointed for their experience and expertise.

24. Secondly, the role of the Board must be kept in mind. It is not to decide guilt or innocence but whether a prisoner represents a risk to the public. The range of information which may be relevant to that assessment is a broad one, as Scott Baker J said in *Harris*. Mr Collins also relied on statements of Kennedy LJ and Keene LJ cited by the Divisional Court (below). Mr Collins submitted that it was difficult to envisage circumstances in which, because of material supplied to it, the panel could not perform its duty fairly.

25. It was submitted that the statutory language is clear. The panel appointed to decide the case must consider all documents given to it by the Secretary of State and may not make recommendations without considering these documents. For the panel to ignore them would offend against the clear wording of the statute. That does not impair the fairness of the proceedings, given the task to be performed and the people performing it.

26. As to the proposed interlocutory procedure, Mr Collins submitted that it is not only unnecessary and administratively cumbersome but it would impose a most difficult task on the interlocutor. There would be great difficulties in deciding, in advance of the hearing, that there was material which could not be relevant to the assessment of risk. Panel members, who are entitled to attach no weight to material they consider unfair or unhelpful, do not need the intervention of an interlocutor. Reference was made to the statement of Mummery LJ in *Beazer Homes Ltd v Stroude* [2005] EWCA Civ 265, at paragraph 9:

> "In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action, rather than at a separate preliminary hearing. The judge at a preliminary hearing on admissibility will usually be less well informed about the case. Preliminary hearings can also cause unnecessary costs and delays."

These remarks are pertinent in the present context, it was submitted.

Findings of Divisional Court

27. The findings of the Divisional Court were succinctly stated:

> "23. In essence, this is a question of statutory interpretation: what is meant by "dealing with cases" in section 239(3)? Clearly, in a sense, the Board is dealing with a case whenever it makes an interlocutory decision (e.g., whether to adjourn a substantive hearing) as well as when it makes a substantive recommendation.
>
> 24. In my judgment, the phrase 'dealing with cases' does include the consideration and the making by the Board of its substantive recommendation. It is dealing with a case when it makes an interlocutory decision; but it is still doing so when it makes its substantive decision, and section 239(3) requires it at the latter stage to consider all the documents given to it by the Secretary of State. That this is so is, I think, made clear by subsection (4). It makes no sense to interpret subsection (4) as satisfied by an interlocutory decision: it uses the words "must deal with cases" as meaning "must decide cases". Substantive decisions are made on consideration of evidence, interlocutory decisions may or may not be (as where a case is adjourned part heard through lack of time). The phrase must have the same meaning in subsection (3). This interpretation of the phrase

> "deal with cases" is also consistent with the power conferred on the Secretary of State by subsection (5). It authorises the Secretary of State to make rules as to the number of members of the Board who may comprise a panel to deal with, i.e., to decide, cases.
>
> 25. . . .
>
> 26. It follows that I would reject this ground. It does not follow, however, that the Board is bound to give weight to the evidence contained in any document given to it by the Secretary of State. The Board may decide that such evidence is of great, or little, or negligible, or even no evidential value. In making that appraisal, it is considering such documents as required by section 239. The section does not qualify the inherent power of the Board to decide what if any weight to be given to any evidence it considers."

28. At paragraph 25, the Divisional Court referred to the decision of Scott Baker J in *Harris*. When stressing the need for the applicant to have "a full and proper opportunity of answering to the Parole Board the detailed allegations made", Scott Baker J stated:

> "But it seems to me that it would be quite wrong that the Parole Board should be deprived of the opportunity of seeing material of this nature [post-trial report] and of hearing anything that a prisoner has to say about it. . . . it may well be that in a particular case they are of some significance in the context of the evidence as a whole."

Scott Baker J added that he was sure:

> "That the Parole Board panel is well able to evaluate the weight that ought to be given to unsubstantiated hearsay evidence."

29. The Divisional Court referred to judicial statements in other cases. In *R (Brooks) v The Parole Board* [2004] EWCA Civ 80, Kennedy LJ stated, at paragraph 28:

> "But in the final balance the Board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury."

In *R (Sim) v Parole Board* [2003] EWCA Civ 1845, Keene LJ, stated, at paragraph 42:

> ". . . the concept of a burden of proof is inappropriate where one is involved in risk evaluation."

30. The Divisional Court in the present case stated, at paragraph 33:

> ". . . For that purpose [assessment of risk], the Board must take into account hearsay and other evidence of misconduct or

> criminal offences on the part of the prisoner, whether that misconduct or offence took place before or after or at the same time as the offending for which he was sentenced. Similarly, the Board must take into account evidence as to the relevant good conduct of the prisoner, whenever it took place. The weight, if any, to be given to that evidence is a matter for the Board."

31. Permission to appeal to this court was granted by Toulson LJ on a consideration of the papers. He summarised the argument against the decision of the Divisional Court in this way. Decisions about a person's liberty should be made by a tribunal untainted by prejudice, that Parliament should not be taken to have intended to erode that principle and that it is a possible interpretation of section 239(3) that the Board will have considered the material by "dealing with" the case in such a way that the panel hearing the case has power to refer the case to another panel.

Discussion and conclusions

32. The expressions "interlocutory hearing" and "interlocutory direction" have been used in the course of argument but the object sought to be achieved is a limited one, namely a power to exclude from consideration by the panel of the Board, deciding whether to recommend release on licence, all documents given to the Board by the Secretary of State. The need to exercise that power, if it exists, would appear to me to be likely to arise only rarely. The Secretary of State is well aware of the task the Board has to perform and can be expected to take care when selecting and supplying documents which will, or may, assist the Board in performing its duty. Given the task to be performed, the range of such material is likely to be a broad one. It would be open to a prisoner to challenge the legitimacy of documents supplied for this purpose by the Secretary of State by way of protest and also by judicial review.

33. Judges in criminal courts frequently have to sentence defendants having seen documents and reports which may include or refer to untried material or extraneous matters. Judges may of course recuse themselves but rarely do so on that ground. In the present case, the trial judge will almost certainly have seen the case summary now complained of but it does not appear that he was invited to recuse himself from the duty of sentencing. While a majority of the members of the Board are not legally qualified, I would not expect members of the appointed panel often to have difficulty in considering the documents supplied and giving appropriate weight, which may in some cases be no weight at all, to the contents of a particular document or documents. The task members have to perform, the assessment of risk to the public, is a different one from the task of deciding upon the correct sentence.

34. That having been said, it is accepted that the Board has judicial responsibilities and the Executive must not be permitted to impugn its independence by interfering with its functions as a court. Section 239(3) should be read, if at all possible, so as not to infringe that principle.

35. I see no reason why section 239(3) must be read so as to prevent the Board having a power, in a rare case where it may be necessary, to make arrangements whereby a document or documents may be excluded from the dossier prepared for the panel making the recommendation to the Secretary of State, provided a member or panel of

the Board considers all documents given to the Board by the Secretary of State. A panel might legitimately take the view, having seen documents supplied by the Secretary of State, that it could not fairly and dispassionately decide whether a recommendation for release should or should not be made. I do not express a view as to whether this applies to the documents in issue in this case.

36. A panel could recuse itself and a different panel could start again but there could be cases in which the material is such that no panel could fairly come to a proper decision having seen it. I repeat that I would expect such cases to be extremely rare but I would uphold the power of the Board, acting judicially, to exclude a document or documents from consideration by the panel making the recommendation. I do not consider that would breach section 239(3). The duty in the section is imposed on the Board, a statutory body, and not on a particular panel of its membership. The duty in the subsection is performed, in my judgment, provided a member or members of the Board have considered all documents given by the Secretary of State, even if the panel making the recommendation has not. That reading of the subsection is possible and should be followed to uphold the judicial independence of the Board.

37. It will be for the Board to give effect to this statement of its powers. It will follow from the way I have approached the problem that I do not consider that the documents supplied by the Secretary of State should in every case be subject to analysis by a legally qualified member of the Board, or a panel of legally qualified members. That would be unnecessary as well as wasteful of time and resources. There may also be developments following a sift which would make documents, thought earlier to be irrelevant, relevant to the question of risk. To introduce such a procedure would appear to me to be overkill having regard to the very limited nature of any problem that may exist.

38. Given the experience and expertise of members of the Board, and the task they have to perform, which is in relation to risk, I would expect it usually to be possible to leave it to the panel appointed to deal with the case to express any concerns it has about material it has seen. A panel in that position could refer the papers to the Chairman, or his appointed delegate or panel, to decide what course is appropriate procedurally.

39. The panel in the present case has expressed unease about continuing its task having seen certain documents and it is, in my judgment, entitled to seek guidance as to how to proceed. I respectfully agree with the guidance given by the Chairman of the Board in the letter of 23 February 2011 save that there could be a case in which the panel is entitled to recuse itself if it concludes that, having seen the documents, it cannot properly continue with its task. Given the powers available to the panel, as advised by the Chairman, I would not assume that it was improper for the panel members to proceed in the present case but a ruling from this court on the point is neither necessary nor appropriate.

40. I would allow the appeal to the limited extent that section 239(3) of the 2003 Act does not require that the panel deciding the case must always consider all documents supplied to the Board by the Secretary of State. It is for the Board to decide what procedures are necessary to give effect to that ruling.

Lord Justice Toulson :

41. I agree that this appeal should be allowed for the reasons given by Pill LJ.

42. The case turns on the interpretation of the words in section 239(3) of the Criminal Justice Act 2003:

> "The Board must, in dealing with cases in which it makes recommendations…, consider any documents given to it by the Secretary of State…"

43. Although it may seem a narrow point of statutory construction, underlying it is a matter of constitutional significance. For that reason and because we are disagreeing with the conclusion of the court below, I add some words of my own.

44. In making recommendations for the release of prisoners, the Parole Board exercises a judicial function: *Brooke* [2008] 1WLR 1950 at [78].

45. As a matter of general principle, every judicial body has inherent jurisdiction to establish its own procedures for dealing with cases justly: see, for example, *Attorney General v Leveller Magazine Limited* [1979] AC 440 and *Taylor v Lawrence* [2003] 1 QB 528 at paragraph 17.

46. This general principle is part of the wider principle of judicial independence, which is an important aspect of the rule of law. The principle requires that judicial bodies should act without bias or reasonable perception of bias.

47. It has been recognised that a tribunal's ability to act without actual or apparent bias might in some circumstances be compromised by the introduction of inadmissible and prejudicial material into the mind of the decision maker. Judges are well used to considering, on a provisional basis ("de bene esse"), evidence which they may then decide should be excluded from their ultimate decision making, because of its legally inadmissible character or its potentially prejudicial effect and absence of probative value. To be able to do so is one of the objects of judicial training and discipline. However, there may be unusual cases where that would be an unrealistic expectation because of the particular circumstances and nature of the material. Lady Hale summarised the position in *Re A* [2012] UKSC 60, [2012] 3 WLR 1484, at [17]:

> "If the public interest against disclosure prevails, the decision-maker, whether judge or jury, is not entitled to take the information into account in deciding the result of the litigation. There is no hard and fast rule as to whether the same judge can continue to hear the case. It is well established that a judge may do so in a criminal case, but then the jury and not the judge are the finders of fact. It may also be possible to do so in a civil case: see *Berg v I M L London Limited* [2002] 1 WLR 3271. The well-established test of apparent bias will apply: see *Porter v Magill* [2002] 2 AC 357."

48. Only statute could compel a different approach.

49. Parliament may legislate to regulate the way in which judicial bodies conduct their proceedings, or authorise regulation by secondary legislation such as the Parole Board

rules. However, the principle that judicial decisions about a person's liberty, whether made by a sentencing court or by the Parole Board, should be made by a tribunal untainted by prejudice or the risk of prejudice is so fundamental that Parliament should not be taken to have intended to erode that principle unless primary legislation permits no other interpretation. This is an application of the principle of legality recognised, for example, in *Simms* [2000] 2 AC 115, 131.

50. In that context the question arises: does the Parole Board have power to establish a procedure for deciding whether documents given to it by the Secretary of State should be withheld from the panel which will make the ultimate decision on a prisoner's release, because of the risk of bias if the material were to go before the panel?

51. It is no answer to that question for the Secretary of State to argue, as Mr Collins did, that the Secretary of State can be trusted so that this will never happen. The good faith of the Secretary of State is not in issue, but in the day to day administration of human affairs there is no way of guaranteeing that no such risk could ever arise. We are concerned with a question of jurisdiction. Nor is it a satisfactory solution to suggest, as Mr Collins did, that the prisoner's remedy should be to apply for judicial review of the Secretary of State's decision to place material before the Parole Board. Judicial review should be a last resort, and the Parole Board should be able to conduct its proceedings in a way which enables justice to be done without the intervention of the court.

52. I agree with Pill LJ that section 239(3) of the 2003 Act is well capable of being interpreted consistently with the ability of the Parole Board, in an appropriate case, to decide that documents given to it by the Secretary of State should be withheld from the panel which will make the ultimate decision about a prisoner's release. The Parole Board would be considering the documents in dealing with the case, and section 239(3) should be so construed.

53. I am not troubled by the floodgates argument advanced by Mr Collins. For one thing, it would not be in the interests of a prisoner wanting release to delay matters by raising preliminary points unless he had a genuine expectation that it would help him. In any event, it would be for the Parole Board to decide how to deal with a request for a preliminary decision. Whether a preliminary decision was given on paper or at a preliminary hearing might depend on the apparent potential substance of the request, but whoever made that decision would no doubt give full weight to the normal expectation that panels should be able to sift the evidence and reach a fair determination. The applicant would have to show that without advance exclusion there would be a real likelihood of bias applying the *Porter v Magill* principle. Every case is fact specific, but the applicant would face a considerable hurdle. Unless there were truly a real risk of prejudice satisfying the *Porter v Magill* test, the question whether evidence should be admitted, or what weight could properly be attached to it, could and should be left to the panel making the ultimate decision.

Lord Justice Tomlinson :

54. I agree with both judgments.