proportionality analysis – its principal virtue for its defenders – does not analytically work. The Court of Appeal did not reason from this, as they might have, that proportionality *ought* therefore not to be available at common law. Rather, they went on to hold in clear, orthodox, terms that it was not available as a matter of precedent. In doing so, *Browne* has become a bad case, badly advanced, which risks setting back the cause of public law and obscuring its more interesting contribution of how not every type of public law challenge is readily amenable to proportionality review at common law.

C.J.S. KNIGHT

Address for Correspondence: 11 King's Bench Walk, Temple, London, EC4Y 7EQ, UK. Email: christopher.knight@11kbw.com

REVIEWING A PAROLE BOARD DECISION TO RELEASE

IN November 2017, the Parole Board wrote to John Worboys (now known as John Radford) recommending his release on licence from a sentence of Imprisonment for Public Protection (IPP). There was a legal duty to hear his application as he had served the tariff period (eight years) specified by the sentencing judge, minus the time he had spent on remand. The question for the Board was whether Radford's continued confinement was necessary to protect the public (Criminal Justice Act 2003, s. 239(1)(b)). Having considered an extensive dossier, the evidence of psychologists, and interviewed custody staff and Radford, the Board took the decision that the risk posed by Radford could be safely managed in the community, assuming stringent licence conditions were imposed. The decision generated public alarm when it was reported in early 2018. Radford had been convicted of one count of rape, four counts of sexual assault, one count of attempted sexual assault, one count of assault by penetration and 12 counts of administering a substance with intent. All 12 attacks had been on lone female passengers in his taxi. However, the Metropolitan Police believed that his offending had been far more prolific; in 2014, the High Court held that Radford had committed "in excess of 105 rapes and sexual assaults" (at [6]) and found fundamental failings in the police investigation (*DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), upheld by the Court of Appeal *The Commissioner of Police for the Metropolis v DSD and NBV, Alio Koraou v The Chief Constable of Greater Manchester Police* [2015] EWCA Civ 646, [2016] Q.B. 161, and by the Supreme Court *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11, [2018] 2 W.L.R. 895).

The legal significance of additional allegations was central to the judicial review of the decision to recommend the release of Radford on licence in

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R. (DSD and NBV & Ors) v The Parole Board of England and Wales & Ors and John Radford [2018] EWHC (Admin) 694, [2018] 3 W.L.R. 829. Whilst many cases have been brought by prisoners who have failed to convince the Parole Board that they have satisfied the test for release, this case was the first review of a release recommendation. The potential ramifications of this decision were not lost on the President of the Queen's Bench Division, Sir Brian Leveson, but the Court believed the case was so atypical that the ruling would not result in routine challenges being brought in the future.

The first determination that had to be made was whether the release decision was irrational; was it "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*CCSU v Minister for the Civil Service* [1985] A.C. 374, at 410). All parties accepted that this had to be evaluated with regard to the material that was before the Parole Board when the decision was taken. The jurisdiction of the High Court in such cases is well-established: "[it] is not for this court to substitute its own decision, however strong its view, for that of the Parole Board", it is for the Board, not the Court, to "weigh the various considerations it must take into account in deciding whether or not early release is appropriate" (*R. (Alvey) v Parole Board* [2008] EWHC (Admin) 311, at [26]).

Accordingly in *Radford*, it was not sufficient for the claimants' purposes that they had persuaded the Court that the decision was "surprising and concerning" (at [130]). There were psychological assessments recommending release. The panel would also have been aware that Radford might be "devious, calculating and an expert manipulator" (at [131]), and his evidence could not necessarily be taken at face value. The irrationality challenge was not upheld. By adopting a strict interpretation of the irrationality test and confirming that the High Court does not perform an appellate role with regards to decisions taken by the Parole Board, the likelihood of success in future challenges by victims is slim.

The second determination that had to be made was whether the Parole Board had failed to have regard to relevant considerations when it failed to consider the unproven allegations of similar offending referred to in the dossier. The Court drew an important distinction: "[It] is not the role of the Parole Board to *determine* whether a prisoner had committed other offences … [but it is not] precluded from *considering* evidence of wider offending when determining the issue of risk" (at [155], emphasis in original). An analogy was drawn with the Criminal Justice Act 2003, s. 229, which specifies the test for determining whether an offender is "dangerous" at the sentencing stage. This was the test applied in IPP cases. (The sentence was abolished in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, although the test remains applicable to some custodial sentences.) In the context of section 229, case law supports the argument

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that evidence of unproven offending can be considered as part of an overall risk assessment (*R. v Farrar* [2006] EWCA Crim 3261, [2007] 2 Cr.App.R. (S.) 35; *R. v Considine* [2007] EWCA Crim 1166, [2008] 1 W.L.R. 414).

At the same time, statute does not compel the Parole Board to consider evidence of wider offending in all cases. On the facts in *Radford*, further enquiries should have been made. What made the case distinctive? First, the scale of the alleged offending. Reference was made to "80+ potential victims" at several points in the dossier (at [159]). This cast doubt on Radford's description of events. Secondly, the allegations called into question his account of the incidents of which he had been convicted: the Court concluded that the evidence suggested he had minimised the severity of his conduct. The evidence should have alerted the Board that Radford's account needed to have been tested robustly as it had only changed after six years in custody, which suggested a "deftness in impression management" that should have "engendered a considerable degree of dubiety" (at [159]). Thirdly, Radford's openness and honesty were critical to calculating his risk. A more searching review of the evidence, including that in relation to incidents that did not result in prosecution or conviction, would have cast doubt on his evidence to the psychologists who assessed him and his testimony to the Board. Because the Court could not conclude that the additional material would have made no difference to the outcome, the release direction was quashed and Radford's case remitted to the Parole Board for rehearing before a different panel.

The Court's ruling is consistent with a broader trend to admit "non-conviction" misconduct evidence in criminal trials. In *R. v Mitchell* [2016] UKSC 55, [2017] A.C. 571, the Supreme Court held that juries could consider such evidence "in the round" to decide whether the evidence proves propensity to commit offences of the type charged to the criminal standard (at [43]). Vitally, the jury does not have to consider each alleged incident in a "hermetically sealed compartment" and find each to be true to the criminal standard before such a propensity can be found (at [49]).

The procedures governing the hearing were prescribed in the Parole Board Rules 2016. Rule 25(1) stipulated that information about proceedings must not be made public. The claimants challenged the vires of the Rule on the basis that it conflicted with the overarching principle of open justice which includes (but is not limited to) the obligation to hold hearings in open court (*Attorney-General v Leveller Magazine Ltd.* [1979] A.C. 440), placing judicial decisions into the public domain (*R. (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] Q.B. 218), and a presumption that evidence used in court is publicly available (*R. (Guardian News & Media) v City of Westminster Magistrates Court* [2012] EWCA Civ 420, [2013] Q.B. 618).

Precision is necessary as it would be easy to overstate the significance of the ruling on the vires of Rule 25. As then constituted, the Rule prohibited

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making public *any* information about proceedings. Instead, "the open justice principle may well require *some* information about proceedings which are quite properly taking place in private being put into the public domain" (at [175], emphasis added). The Court, therefore, upheld the challenge to the vires of Rule 25, commenting that it was for the Secretary of State to determine how the Rule should be reformulated.

Revised Rules came into force on 22 May 2018. Rule 25(1) now obliges the Board to provide summaries for victims of the reasons why a decision was taken. The Board Chair can only refuse in "exceptional circumstances". Rule 25(2) provides a broader duty to supply a summary to members of the public unless disclosure is not in the public interest. Naming panel members and expert witnesses has the potential to compromise their safety or to make them more risk-adverse. These fears are allayed by Rule 25(4), which prohibits the disclosure of the names of those involved unless they are parties to the proceedings. A broader consultation is currently taking place (Ministry of Justice, *Reconsideration of Parole Board Decisions: Creating a New and Open System*, Cm. 9612 (April 2018)).

The legacy of *Radford* will therefore be systemic. Parole decision-making has already become more transparent, and this is welcome. As 25,000 decisions are taken by the Board every year, this represents a major reform in criminal procedure. The then Chair of the Parole Board, Nick Hardwick, had long championed greater transparency but was forced to resign over the ruling following shameful political pressure. It is vital that the Board's independence is recognised and respected. The political aftermath of *Radford* does not inspire confidence. In future the Parole Board will face equally challenging decisions and must be able to release individuals who satisfy the legal test even if there is likely to be a public backlash. It was reported on 19 November 2018 that a new panel had determined that Radford was not suitable for release or for progression to an open prison.

GAVIN DINGWALL

Address for Correspondence: School of Law, De Montfort University, Leicester, LE1 9BH, UK. Email: gdingwall@dmu.ac.uk

WHEN WILL I GET OUT?

THE Supreme Court heard the arguments in *R. (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 W.L.R. 1831, on 18 January, but the judgments were not handed down until 28 November 2018. The justices clearly found it very difficult to answer what should be a simple question: is a prisoner serving an extended determinate sentence (EDS) unlawfully discriminated against on the basis that he or she faces less advantageous

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