Neutral Citation Number: [2022] EWHC 1026 (Admin)

Case No: CO/2050/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Wednesday 4th May 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of AUDI JOHNSON)	**Claimant**
- and -	
(1) PAROLE BOARD FOR ENGLAND AND WALES **(2) SECRETARY OF STATE FOR JUSTICE**	**Defendants**

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- -

Stuart Withers (instructed by Kesar and Co) for the **Claimant**
Fraser Campbell (instructed by GLD) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

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Hearing date: 24.3.22

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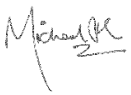
Approved Judgment

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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THE HON. MR JUSTICE FORDHAM

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on 4.5.22

MR JUSTICE FORDHAM:

Introduction

1. The issue of law which arises in this judicial review case is this. Does the Parole Board ("the Board") have the power to make a decision to "re-fix" the "date for a person's release on licence", in a case in which it has already dealt with a reference to it by making a decision to "fix a date for the person's release on licence" pursuant to section 256(1)(a) of the Criminal Justice Act 2003 ("the 2003 Act"). Answering that question involves a legal concept still known by the Latin phrase "functus officio", or simply "functus", which describes the situation when "a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it": see R (Dickins) v Parole Board [2021] EWHC 1166 (Admin) [2021] 1 WLR 4126 at §52. The central statutory provisions are section 256 of the 2003 Act and section 12 of the Interpretation Act 1978 ("the 1978 Act"). Here is section 256 of the 2003 Act (there is no subsection (3)):

> ***256. Review by the Board. (1) Where on a reference under section 255B(4) or 255C(4) in relation to any person, the Board does not direct his immediate release on licence under this Chapter, the Board must either – (a) fix a date for the person's release on licence, or (b) determine the reference by making no direction as to his release. (2) Any date fixed under subsection (1)(a) must not be later than the first anniversary of the date on which the decision is taken. (4) Where the Board has fixed a date under subsection (1)(a), it is the duty of the Secretary of State to release him on licence on that date.***

Here is section 12(1) of the 1978 Act:

> ***12. Continuity of powers and duties. (1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires…***

It is common ground that the Board's section 256 functions fall within the ambit of section 12(1) and that the crux is whether "the contrary intention appears".

2. A decision by the Board to fix a date for the person's release on licence (s.256(1)(a)) is a decision made "on a reference under section 255B(4) or 255C(4)". There is an alternative, namely to "determine the reference by making no direction as to his release" (s.256(1)(b)). It was common ground before me that, once the Board has made a decision which fixes a date for the person's release on licence (s.256(1)(a)), the Board would not then have the power to switch to the alternative, so as to reopen its decision and determine the reference by making no direction as to the person's release (s.256(1)(b)). The Board's position is that, having fixed a date for the person's release on licence (s.256(1)(a)), it can reopen the decision so as to 're-fix' the date for release. Whether that is correct is a question of law for the Court to resolve. It is agreed that, whatever the answer to that question is, it cuts both ways. That is to say, if the Board does not have the power to 're-fix' the date for release to put it back, neither would it have power to 're-fix' the date of release to bring it forward.

The factual context

3. It is common ground that answering the question of law which arises in this case is an exercise which does not depend on the facts. So I need do no more than give a brief factual outline. In July 2017 the Claimant was convicted of possession of Class A drugs

with intent to supply, for which he received a 4-year standard determinate sentence. On 20 December 2019 he was released on licence pursuant to section 244 of the 2003 Act – at 'half-time' – having served the requisite custodial period ("the RCP"). On 1 April 2020 he was returned to custody, his licence having been revoked on 27 March 2020. Having been assessed by the Second Defendant, the Secretary of State for Justice ("the SSJ"), as not being suitable for automatic release, his case was referred to the Board who considered it at oral hearings on 30 October 2020, 24 November 2020 and 18 February 2021. On 15 February 2021 the Claimant's Community Offender Manager ("the COM") provided a report for the Board which confirmed that a placement could be made available for the Claimant in approved premises in London, ideally premises at Streatham, which had adapted accommodation suitable for him. On 22 February 2021 the COM added a risk management plan to the Claimant's dossier. On 24 February 2021 the Board issued a decision fixing the Claimant's release date as 10 March 2021 and directing that the Claimant permanently reside at Streatham approved premises. The decision was sent to the Board's Case Manager ("the BCM"), but the BCM did not send it to the COM or to the parties. It had, however, been uploaded to the public protection database by 2 March 2021, on which date the Claimant's solicitor both accessed it and informed the Claimant what the decision was: he was to be released on 10 March 2021.

4. The circumstances in which the release date came to be 're-fixed', twice, were as follows. On 26 February 2021 the COM completed a Stakeholder Response Form ("the Form") which informed the Board as follows: that the adapted room at the Streatham approved premises was in use; that a former opposing gang member was present in the premises and due to leave on 7 April 2021; but that the room would be available as from 8 April 2021. That Form was sent to the Board's Panel Chair on 3 March 2021. On 10 March 2021 – the date previously fixed for the Claimant's release – the BCM sent the original decision dated 24 February 2021 to the parties and to the COM. The COM promptly emailed to complain about the delay in receiving the previous decision fixing the date. It became evident that, had the COM known about the fixed date, she could have pursued urgent steps to find a solution. In the circumstances as they by now were, the COM asked the prison to hold off on the Claimant's release until she found out whether the Streatham approved premises was ready to receive him. Later on 10 March 2021 the BCM emailed the parties and the COM with a fresh decision which 'amended' the date of the Claimant's release to 8 April 2021. That course of action led to an immediate complaint by the Claimant's solicitor. By 12 March 2021 the COM had identified a possible bed space at approved premises in Camden, available within 3 days (15 March 2021), the Claimant's solicitor had confirmed that the Claimant would take that room, and so the COM emailed the BCM to confirm that the Claimant had been accepted at the approved premises in Camden from 15 March 2021. On 15 March 2021 the Board issued further directions which 'amended' the Claimant's date of release to that day (15 March 2021) and the Claimant was released on that day to the approved premises in Camden, with a licence condition: "to permanently reside at an approved premises" which the Claimant was not to "leave to reside elsewhere, even for one night, without obtaining the prior approval of your supervising officer". It was out of these factual circumstances that the claim for judicial review arose.

A preliminary issue

5. The claim for judicial review raises – as a central issue – whether the Board had any power to 'refix' the release date of 10 March 2021 having made its decision on 24 February 2021. That is not the only issue in the case. In granting permission for judicial review on the papers on 7 October 2021 Heather Williams J directed a one-day hearing of the issue, with directions regarding determination of the secondary issues to be given following that hearing if the Claimant were successful. The hearing was in person. The Board adopts a 'neutral' position as to the particular decisions and decision-making in this case but has assisted the Court by taking a clear position on the point of law, maintaining that it has the power to 're-fix' the section 256(1)(a) date for release. The SSJ has adopted a neutral, non-participatory, position.

Features of the legal landscape

6. It is unnecessary, as well as unwise, to attempt a detailed and comprehensive exposition of the legal framework relating to questions of release and the interrelated functions of the SSJ and the Board. But it will I think be helpful to a relevant understanding of the overall setting in which the arguments in this case have arisen, to describe some key features.

The Board

7. A good place to start is Stacey J's explanation in Dickins at §14: that the Board was established by section 59 of the Criminal Justice Act 1967 and remains established as a body corporate pursuant to section 239(1) of the 2003 Act; and that, although it is recognised as a court when deciding whether to direct a prisoner's release and for the purposes of Article 5(4) ECHR, it is "entirely a creature of statute" and "has no inherent jurisdiction".

Release on licence

8. There are a number of different scenarios in which a person, on whom a custodial sentence has been imposed, may come to be released (or re-released after recall), on licence. These scenarios include: the case of a determinate sentence prisoner; the case of an indeterminate sentence prisoner (for example a life sentence prisoner); and the case of an extended sentence prisoner. Release "on licence" is important. It means there will be licence conditions with which the person who is released is required to comply. In the case of a life prisoner, provision for licence conditions is found in section 31 of the Crime (Sentences) Act 1997 ("the 1997 Act"). In the case of licences under chapter 6 of Part 12 of the 2003 Act, provision for licence conditions is found in section 250 of the 2003 Act. In the design and imposition of licence conditions there is a prescribed division of labour between the SSJ and the Board: see R (Latif) v Secretary of State for Justice [2021] EWHC 892 (Admin) [2021] 4 WLR 61. Licence conditions may be "standard conditions", or they may be 'bespoke' conditions, species of both of which are identified in the Criminal Justice (Sentencing) (Licence Conditions) Order 2015 (SI 2015 No. 337) ("the 2015 Order").

9. A primary example of a bespoke licence condition is a condition concerning "residence at a specified place": see Article 7(2)(a) of the 2015 Order. That means a bespoke licence condition can require residence in an approved premises ("a RAP Condition"). Such a condition was an integral part of the Board's decision-making in the present case. RAP Conditions were the subject of the Court of Appeal's judgment in R (Bowen)

v Secretary of State for Justice [2017] EWCA Civ 2181 [2018] 1 WLR 2170, a case in which – following oral hearings – the Board directed the relevant individuals' release from custody on the basis that a number of conditions would be imposed by the SSJ in their release licences, namely a period of residence at specified approved premises in Cardiff (see Bowen at §4). In that case there had been a risk management plan which had elicited that a bed was to be available from a known date (see §18). The Court discussed the statutory scheme and practical features relating to approved premises (at §§24-25).

10. Another particular species of electronically-monitored curfew licence condition ("an EMC Condition") arises in cases where a fixed-term prisoner is released on licence before 'half-time': in the period up to 135 days before the RCP, pursuant to the SSJ's statutory power in section 246(1)(a) of the 2003 Act. In that special situation the licence conditions for release are required by statute to include a section 253 EMC Condition: see sections 250(5) and 253. So, one scenario of release on licence arises where a fixed-term prisoner is released in the period up to 135 days prior to having served the RCP. In that scenario release on licence is pursuant to a discretionary power conferred on the SSJ (2003 Act s.246).

11. One scenario of release on licence arises in the case of a life prisoner to whom section 28 of the 1997 Act applies. There, Parliament has provided (in s.28(5)) that: "As soon as (a) a life prisoner to whom this section applies has served the relevant part of his sentence [and] (b) the Board has directed his release under this section, it shall be the duty of the [SSJ] to release him on licence". In Bowen the Court of Appeal concluded that the SSJ's section 28(5) duty is fulfilled, in a case where release is directed by the Board with a recommended RAP Condition, where within "a reasonable time" the RAP placement arrangements are made, and the prisoner released. What this means can be encapsulated as follows. Section 28(5) release, in accordance with a decision of the Board, is statutorily-mandated release on licence after a Board decision, but without any 'immediacy' obligation and without any fixed future date. I will call this "Section 28(5) Release".

12. Another scenario arises in the context of a fixed-term prisoner at half-time, having served the RCP pursuant to section 244 the 2003 Act. As to that scenario, Parliament has imposed a statutory duty on the SSJ to release the prisoner on licence once that point in time has been reached. Section 244(1) provides, leaving aside the specified exceptions: "As soon as a fixed-term prisoner … has served the requisite custodial period for the purposes of this section, it is the duty of the [SSJ] to release him on licence under this section". I will call this "Section 244(1) Release".

The position post-recall

13. Various scenarios arise after a revocation and recall, where these have been actioned by the SSJ pursuant to statutory powers conferred in sections 254 and 255 of the 2003 Act. Here are the basic features:

    i) If the recalled person is not an extended sentence prisoner, the SSJ will assess whether they are a person "suitable for automatic release" (s.255A(2)(4)).

    ii) If the recalled person is assessed by the SSJ as "suitable for automatic release", a statutorily-prescribed automatic release period ("ARP") applies. The ARP is

14 or 28 days (depending on whether or not their sentence was less than 12 months), calculated from the day on which they returned to custody (s.255A(9)). They must "at the end of" that ARP be released on licence (s.255B(1)(b)), unless one of the following specified situations arises. (a) The first specified situation is that the SSJ may exercise the discretionary power to release the prisoner before the ARP has ended (s.255B(2)). (b) The second specified situation is that, the case having been referred to the Board (s.255B(4)), the Board decides, before the ARP has ended, to direct the prisoner's "immediate" release on licence (to which, subject to a caveat to which I will return, the SSJ "must give effect") (s.255B(5)). (c) The third specified situation is that, the case having again been referred to the Board (s.255B(4)), the Board decides to fix a date for the person's release on licence (s.256(1)(a)). (d) The fourth specified situation is that release is delayed, in a case where the individual has not yet reached the date which would have been the RCP, because arrangements necessary for the operation of EMC Conditions are not yet in place (s.255B(6)(7)). That fourth specified situation also operates as the caveat to which I referred earlier: as a basis for delayed release where there is an "immediacy" direction from the Board (s.255B(5)(7)). (e) The fifth specified situation is that the SSJ reassesses the individual as not, after all, suitable for automatic release in the light of further "information about [the individual]" having been received (s.255B(8)(9)).

iii) If the recalled person is an extended sentence prisoner, or if they are not assessed by the SSJ as suitable for automatic release, they can be released on licence in any one of the following ways. (a) The first way is the SSJ exercising the discretionary power to release the prisoner (s.255C(2)). (b) The second way is, the case having been referred to the Board (s.255C(4)), the Board directing the prisoner's "immediate" release on licence (to which – subject to the same caveat as identified above (s.255C(6)(7) – the SSJ "must give effect") (s.255C(5)). (c) The third way is that, the case having been referred to the Board (s.255C(4)), the Board – as in the present case – decides to fix a date for the persons release on licence (s.256(1)(a)).

iv) In a situation where there has been a reference to the Board (s.255B(4) or s.255C(4)), and where the Board has not directed "immediate" release on licence, and did not "fix a date" for release on licence, the Board will "determine the reference by making no direction as to release" (s.256(1)(b)). In those circumstances, the case is re-referred – in accordance with the statutory scheme- to the Board within the next 12 months (s.256A(1)(2)). On the new reference, the same three responses are available as arose on the original reference, pursuant to section 256(4)(5)):

> ***(4) On a reference under subsection (1) or (2), the Board must determine the reference by – (a) directing the person's immediate release on licence under this Chapter, (b) fixing a date for his release on licence, or (c) making no direction as to his release.***
>
> ***(5) The Secretary of State – (a) where the Board makes a direction under subsection (4)(a) for the person's immediate release on licence, must give effect to the direction; and (b) where the Board fixes a release date under subsection (4)(b), must release the person on licence on that date.***

The Parole Board Rules

14. The Parole Board Rules 2019 ("the Rules") were made by the SSJ under powers contained in the 2003 Act. The Rules include provisions which are applicable in a situation where the individual's case has been referred (or re-referred) to the Board by the SSJ. The Board, acting through its appointed Panel, "to consider the release of a prisoner" by first deciding "on the papers" (Rule 19(1)) whether "(a) the prisoner is suitable for release; (b) the prisoner is unsuitable for release; or (c) the case should be directed to an oral hearing". The Panel's decision "must be recorded in writing with reasons… and the written record provided to the parties within 14 days" (Rule 19(8)). Where a Panel has "considered a prisoner's case at an oral hearing", it must then decide (Rule 25(1)) whether "(a) the prisoner is suitable for release, or (b) the prisoner is unsuitable for release". The Panel's decision must be recorded in writing with reasons and that record must be provided to the parties not more than 14 days after the end of the hearing (Rule 25(6)).

15. The Rules contain an express mechanism whereby decisions are "provisional" and "final". A decision by the Board's Panel, whether on the papers or after an oral hearing, that the prisoner is (a) suitable for release or (b) unsuitable for release is "eligible for reconsideration" in classes of case – specified in the Rules – which include cases involving a life (indeterminate) sentence and cases involving an extended sentence (Rule 28(2)). If "ineligible" for reconsideration, the decision is "final" (Rules 19(5), 25(3)). If "eligible" for reconsideration, the decision is "provisional", but if no application for reconsideration is received within the specified period, the decision becomes "final" (Rules 19(4), 25(2)). Reconsideration under the Rules is on the grounds that the decision is "irrational" or "procedurally unfair" (Rule 28(1)) and if the application for reconsideration is dismissed the decision becomes "final" (Rule 28(8)). One point decided in Dickins is that "mistake of law" is not a ground for reconsideration.

Changes in circumstances and new information

16. There are a number of different scenarios which may involve changes in circumstances including new information coming to light, which could warrant adjustment in actions being taken in relation to release on licence, or post-recall re-release on licence. (1) In R (SSJ) v Parole Board [2020] EWHC 3490 (Admin) [2021] ACD 28 the Board had dealt with a post-recall reference (s.255C(4)) and what later came to light was information relating to the nature of the original custodial sentence. (2) In Dickins the Board had dealt with the question of Section 28(5) Release of a lifer, and what later came to light was information about alleged conduct in prison. (3) As the SSJ's express power in section 255B(8) recognises, new information may come to be received "about" the prisoner. (4) As the same express power (s.255B(9)) also recognises, new information may also come to be received, not "about" the prisoner, but which is "other relevant information". (5) As the express 'caveat' provisions in sections 255B(6)(7) and 255C(6)(7) recognise, information may come to light which relates to whether licence conditions are in place so that the licence condition can be complied with. (6) As was discussed in Bowen, there in the context of a decision on Section 28(7) Release, information relating to the availability of a place for the purposes of an RAP Condition may change and if the expected availability date of the RAP place should change, for any reason, this could affect the timing of release including that "release would be brought forward" (Bowen §18).

Two cases considering functus

17. There are two recent cases of this Court which address issues as to functus in the context of the 2003 Act. They are SSJ and Dickins. An important note of caution is that, in each of those cases, it can convincingly be pointed out that the legal analysis of functus was 'obiter dictum' (not part of the decisive reasoning of the Court in deciding the case): see SSJ at §28 (the functus issue "did not arise"); Dickins at §51 (the functus issue was "academic"). Having said that, in each case the functus point was fully argued and the Court was specifically asked by the parties to deal with it. What is more, in the present case it is common ground between the parties that the reasoning as to functus in the two earlier cases was legally correct. I have heard no argument which contends that there is a basis for this Court to disagree with that analysis in those cases. The parties have proceeded on the basis that the two earlier cases were correct in their analysis of the functus issues. So do I.

The SSJ case: the Board's "immediacy" decisions

18. The SSJ case involved an extended sentence imposed in March 2012 from which the prisoner had been released, having served the RCP in June 2015. His licence had subsequently been revoked and he had been recalled to prison in March 2020. His case was referred to the Board (s.255C(4)) who considered it believing that the extension period associated with the extended sentence had in fact already expired. In those circumstances, the Board (on 17 June 2020) dealt with the purported reference by saying it had "no decision to make" and making clear that the prisoner should be "immediately released". The true position, in fact, was that the extension period associated with the extended sentence had not in fact expired but ran to 22 June 2023. That having come to light, the SSJ then purported to 're-refer' the case to the Board (on 17 July 2020). On the 're-reference', the Board concluded that it had no power to make a decision, being functus. The SSJ brought a judicial review claim, which was all about whether the Board should now reconsider the case on the correct factual basis. Three points were prominent. (1) The first point was the argument that the Board could not be functus since it had made "no decision". (2) The second point was that the 17 June 2020 decision, if it was a "decision", was unfair or irrational and should be quashed and the matter remitted. (3) The third point was that – based on the 1978 Act section 12(1) – the SSJ had a continuity of statutory power (s.255C(4)) to refer (ie. re-refer) a case to the Board, even if the Board had dealt with a referral by making a s.255C(5) direction for "immediate release on licence" to which the SSJ "must give effect".

19. The case came before William Davis J who granted the claim for judicial review. The consequence was that the Board would need to reconsider the question of the prisoner's release afresh, and on a correct appreciation of the nature of the extended sentence and extension. The claim succeeded for two reasons. The first reason was that the Board had made no decision (§§25, 38). The second reason was that, even if the Board were characterised as having made a decision directing immediate release on licence, that decision was unfair or unreasonable (irrational) given the misappreciation of the true nature of the sentence (§§26-27, 38). These two reasons – indeed, either one of them – were sufficient to dispose of the claim.

20. At the parties' invitation and encouragement, William Davis J went on specifically to consider the following question. Where the Board has made a decision on a section 255C(5) reference and directs the prisoner's "immediate" release on licence, is there

any statutory power for the Board to revisit its decision, including by virtue of any re-referral by the SSJ in the exercise of a 'continuity' of statutory function arising by virtue of section 12(1) of the 1978 Act. William Davis J's answer to that question was "no". He concluded that there was no statutory power for the Board to revisit such a decision, and there was no statutory power of re-referral to the Board by the SSJ (§§30-37, 39). Underpinning that conclusion where the observations: that "the [SSJ] must give effect to a direction by the Board for the immediate release of a prisoner on licence"; that when the Board "makes such a direction the [SSJ] must give effect to the direction"; and that this "is a duty not a power" (§33). Rejecting the argument that section 12(1) of the 1978 Act provided a basis for re-referral "from time to time as occasion requires", William Davis J said this: "Section 12 does not permit repeated exercise of a statutory duty where 'contrary intention appears'. Such contrary intention is apparent from the terms of section 255C(5). Once the Board has directed a prisoner's immediate release on licence, the SSJ is under a duty to give effect to that direction. That does not allow for any further exercise of the initial duty to refer the case to the Board. Section 12 of the 1978 Act does not assist the SSJ in relation to his duty under section 255C". In relation to the 'reconsideration' jurisdiction under Rule 28 of the Rules, William Davis J described that scheme as one which "avoids any issue of functus or finality because it creates the concept of a provisional decision" so that "the scheme provides the [SSJ] with the means to challenge a decision to release in appropriate cases".

21. Based on the SSJ case, it was common ground before me that any situation in which the 2003 Act describes the Board as making a decision "on a reference", which decision "directs" the prisoner's "immediate release on licence", such that the SSJ "must give effect to the direction", is a situation where the Board is functus once it has made such a decision. Irrespective of what new development takes place or what new information comes to light, including about the prisoner or about arrangements in conjunction with a licence condition, the Board has no statutory power to re-open and revisit that decision. The only mechanism for reconsideration by the Board of such a decision would be the situation where, in accordance the Rules, the decision is "eligible for consideration" and so is "provisional", not yet being a "final" decision. Even there, although not functus, the Board's function is circumscribed by the Rules: it can revisit the decision through reconsideration, but only in accordance with the narrow grounds of irrationality or procedural unfairness (Rule 28(1)).

The Dickins case: Section 28(5) Release

22. In Dickins the claimant was serving a life sentence with an 18-year minimum term which had expired on 27 September 2019. On 11 May 2020 the Board emailed a decision with reasons (the 'first decision') to the BCM, directing the SSJ to release the claimant from custody in accordance with the conditions set out in the decision. Later that same day, new information came before the Board about events two days earlier involving the alleged receipt by the claimant of contraband into prison. On 12 June 2020 the Board decided (the 'second decision') that it was functus and had no power to reopen the first decision and take the further information into account. On 18 June 2020 the first decision was sent to the parties by the BCM. On 9 July 2020 the SSJ applied for "reconsideration" of the 'second decision' under Rule 28. On 11 August 2020 the Board upheld the application for reconsideration on the grounds of error of law (the 'third decision'). The error of law, identified by the Board in the 'third decision', was that the 'second decision' had wrongly treated the Board as functus, the legally correct

position being that the Board had been able (in the 'second decision') to take account of the new information, since the 'first decision' had not (at the time of the 'second decision') yet been communicated to the parties. The claimant (the prisoner) sought judicial review of the 'third decision' on two grounds. The prisoner's first ground was that "error of law" is not a ground for reconsideration under Rule 28. The prisoner's second ground was that there had been no "error of law" in the 'second decision' – meaning the 'third decision' could not stand – since the Board had been functus when it sent its 'first decision' and reasons to the BCM on 11 May 2020.

23. Stacey J allowed the claim for judicial review. She found in favour of the claimant on the first ground for judicial review. The Rule 28 power of reconsideration did not extend to "error of law" and so the 'second decision' (and so the 'first decision') should have stood undisturbed by the 'third decision'. Although in those circumstances "academic", invited and encouraged by the parties, Stacey J went on to consider the second ground for judicial review.

24. In analysing the second ground for judicial review, Stacey J found "that the Board had performed its relevant function at 08.51 on 11 May 2020 when the Panel Chair sent the decision and reasons to the [BCM]" (§63). Pursuant to the Rules (Rules 19(8), 21(12) and 25(6)), "the point at which the written reasons [were] agreed by the Panel members" was the point at which "the decision is made" (§55). The separate and distinct functions with regard to the administrative task of communication of the decision did not alter the plain and ordinary meaning of the Rules as to when the Board had performed its function and reached its decision (§57). Stacey J went on to say that the fact that the decision was "provisional" under the Rules could not assist, given that the only grounds for "reconsideration" could not apply, and given that the decision was "still a decision" (§62). The Board had no power to reconsider its decision to direct Section 28(5) Release, including by reference to a "supervening material change of circumstance" (§64). The decision could be revisited only to the extent that it could be reconsidered as a "provisional" decision on the limited grounds in Rule 28, or a correction under the "slip rule" in Rule 30 (§67).

25. Based on the Dickins case, it was common ground that any decision with reasons sent to the BCM directing a Section 28(5) Release would involve the Board being functus including as to (a) the prisoner's suitability for release and (b) any relevant licence condition identified by the Board as suitable or necessary for that release. The Board would not have the statutory power to revisit those questions, in the light of further information or change of circumstances. Nor would section 12 of the 1978 Act justify the identification of such a power. The only revisions which the Board would have the power to make would be amendment under the "slip rule", to "correct an accidental slip or omission in a decision" (Rule 30), or reconsideration of the decision as a "provisional" one, within the prescribed time-frame and on the prescribed grounds that the decision was "irrational" or "procedurally unfair" (Rule 28(1)). The fact that the decision concerned an indeterminate sentence and was therefore "eligible for reconsideration" (Rule 28(2)), making it "provisional" and not becoming "final" until no application for reconsideration was received (Rule 25(2)) or until such an application had been dismissed (Rule 28(8)), did not affect this analysis. All of this, it was common ground before me, is what Dickins correctly decided.

The argument for a power to 're-fix' a future date of release

26. Mr Campbell for the Board advanced a clear and comprehensive argument in favour of the proposition that a decision pursuant to section 256(1)(a) of the 2003 Act, on a section 255B(4) or section 255C(4) reference, to "fix a date for the person's release on licence" is one which the Board has statutory power to revisit so as to amend that date and 're-fix' it, whether by substituting a later or an earlier fixed date. Mr Campbell submits that the Board has a 'continuity' of statutory power in this regard, which continues right up to the final moment of any fixed date which has been set. He submits that the Board may receive further information of any relevant kind in order to decide whether to 're-fix' a different date for release, or for that matter to decide to vary one of the licence conditions which it has identified as appropriate for the release. His argument in support of that proposition involved, as I saw it, the following key points:

    i) It is unnecessary positively to imply a 'continuity of power' – capable of being exercised "from time to time as occasion requires" – as arising from the language and structure of section 256(1)(a) of the 2003 Act in its statutory setting. Whether or not a 'continuity of power' of that kind could otherwise be implied in the light of that language and structure is not the point. The point is that Parliament, by virtue of an overarching statutory provision within whose ambit the Board's section 256(1)(a) power falls, has specifically mandated that as a general rule "it is implied… that the power may be exercised… from time to time as occasion requires". That rule applies, implied by virtue of section 12(1) of the 1978 Act, unless it is specifically displaced by the wording and structure of the 2003 Act on the basis that the "contrary intention appears". The question is therefore not whether there is something positive in the 2003 Act from which the implied power of continuity can be derived. Rather, the question is whether there is something apparent in the 2003 Act constituting a "contrary intention".

    ii) An authoritative and illuminating example of a 'continuity of power', derived from section 12(1) of the 1978 Act, can be found in the case of In re Wilson [1985] 1 AC 750. In that case primary legislation conferred on the magistrates' court a power (the 'principal power'), when fixing a term of imprisonment, to "postpone the issue of the warrant until such time and on such conditions, if any, as the court thinks just" (see 758C). The magistrates had postponed the issue of the warrants, on condition that the fines be paid at the rate of £3 per week. The magistrates' clerk had concluded that the magistrates had no power subsequently to revise that condition (see 754F). Overturning a previous line of authority, Lord Roskill applied section 12(1) of the 1978 Act, observing that he could "see no reason why the powers given by Parliament should not be exercised from time to time and indeed as often as justices are concerned that the occasion requires" (see 759C). Lord Bridge agreed, explaining that the correctness of that analysis was not undermined by the fact that in one respect – enforcement of a maintenance order – a provision in a related statute had included "elaborate express provisions giving power to a magistrates' court enforcing a maintenance order to vary the terms of a previous order postponing the issue of a warrant of commitment pursuant to the provisions" governing the 'principal power'. Those other, elaborate provisions were revealed – on an interpretation of the 'principal power', in the light of section 12(1) of the 1978 Act – to have "always been inherent in the subsection itself" (see 761A). Wilson helpfully illustrates the straightforward application of section 12(1): in the

context of a power including the identification of a future time; in the context of a court; and in the context where related provisions made elaborate provision which might have been regarded as clear contraindication. This Court should adopt an equivalent approach.

iii) It is accepted that there is no 'continuity of power', and section 12(1) of the 1978 Act is displaced because "the contrary intention appears", in a number of scenarios relating to release on licence. But these are all for distinct, identifiable reasons. Those reasons do not apply to the issue in the present case. One scenario is an 'immediacy' release on licence, where the Board has directed the prisoner's "immediate" release on licence, such that under the express terms of the 2003 Act the SSJ "must give effect to the direction". In that scenario, the "contrary intention appears", because an express and extant statutory duty of executive implementation of the Board's decision has been triggered and falls on the SSJ. It is because the Board's decision is one which, pursuant to the statute, has triggered an express statutory duty of "immediate" implementation that the 'continuity of power' which section 12(1) of the 1978 Act would imply is displaced. That is the reasoning of the SSJ case.

iv) Another scenario relates to Section 28(5) Release. In that context, where the Board has directed the prisoner's release on licence, such that "it shall be the duty of the [SSJ] to release him on licence", the "contrary intention appears" for the purposes of section 12(1) of the 1978 Act. That is not because the SSJ has an 'immediacy' duty (see Bowen). Instead, it is because the Board has 'discharged its duty and function', so that the 'duty has passed' to the SSJ and the Board has 'done all that it needs to do'. That is the Dickins case.

v) In situations where the Board has made a decision which is "provisional" – including an 'immediacy' decision concerning an extended sentence prisoner and including a decision directing a Section 28(5) Release – the Board has still 'discharged its duty and function', except insofar as the "provisional" decision can be the subject of "reconsideration" under the express terms of the Rules. The Board does have a narrow power under the Rules to reconsider. There is no wider statutory power to revisit the decision, in the light of a change of circumstances or new information. In relation to a Section 28(5) Release direction that, again, is the Dickins case.

vi) When the Board makes a section 256(1)(a) decision to "fix a date" for the person's release on licence, there are three key, linked components in the Board's reasoned decision exercising that power. A first component is the Board's assessment of whether the prisoner is "suitable for release", applying the test identified in R (King) v Parole Board [2016] EWCA Civ 51 [2016] 1 WLR 1947 at §23. A second component is the Board's assessment of what licence conditions would be appropriate or necessary to direct in relation to such a release. A third component is the assessment of the appropriate future date to fix for such a release.

vii) So far as the first component is concerned, once this has been the subject of a first reasoned decision under section 256(1)(a), it is accepted that the Board would not have the statutory power – including as a 'continuity of power' implied by virtue of section 12(1) of the 1978 Act – to reopen the assessment of

whether the prisoner is "suitable for release". This reflects the position in the Rules. Under the express terms of the Rules the Board must decide that the prisoner is "suitable for release" (Rule 25(1)(a)) or "unsuitable for release" (Rule 25(1)(b)). Unless "eligible for reconsideration" – in which case there is the prescribed period for "reconsideration" on the prescribed grounds (Rule 28) – this suitability decision is "final" (Rule 25(3)). On "suitability" or "unsuitability" for release, once decided under section 256(1)(a) the Board has discharged its function and no change of circumstances or new information would suffice. Both SSJ and Dickins were cases about reopening suitability for release.

viii) The same is not true for the second component (licence conditions) or the third component (fixed date). No provision of the Rules deals with these components of the decision. They are not covered by the language which makes "final" a decision by the Board "that (a) the prisoner is suitable for release, or (b) the prisoner is unsuitable for release" (Rule 25(1)(a) and (b)). These components are 'at large'. The conclusion on "suitability" or "unsuitability" for release excludes the 'continuity of statutory power' – otherwise implied by virtue of section 12(1) the 1978 Act – because the Rules attribute 'finality' (Rule 25(2)(3)) to that decision. But there is nothing which similarly constitutes the "contrary intention", so far as concerns the Board's assessment of appropriate licence conditions, nor its assessment of the appropriate future date.

ix) Nor is there any contrary intention in the terms of the 2003 Act itself. Indeed, if anything, there are textual indicators which support the conclusion that a 'continuity of power' arises, in which the Board can 're-fix' a section 256(1)(a) future date for the prisoner's release. One textual indicator is the phrase "has fixed a date" in section 256(4), another is the phrase "any date fixed" in section 256(2), it being striking that Parliament did not use the phrase "has fixed the date". Another textual indicator is that Parliament used the phrase "determine the reference" – language which is admittedly "conclusory" – but it did so only in section 256(1)(b) ("determine the reference by making no direction as to his release"). It did not speak of fixing a date for the person's release on licence as involving "determining the reference", in section 256(1)(a). The fact that "determine the reference" is used in that way in section 256A(4)(b) only serves to emphasise that it is not used in that way in the preceding section 256(1)(a). But in any event, this textual feature is only one part of the legal analysis.

x) Unlike those situations where the Board makes a direction for "immediate" release on licence, those where the Board makes a direction for Section 28(5) Release, and those when the Board determines for the purposes of section 256(1) whether the prisoner is "suitable" or "unsuitable" for release, the section 256(1)(a) fixing of a future date itself and the identification of appropriate licence conditions involve no contraindication of the section 12(1) 1978 Act implied 'continuity of power'.

xi) Turning to the purpose of the statutory provisions, there is nothing in the statutory purpose which supports a contrary intention. Indeed, the implication of a 'continuity of power', enabling the Board to revisit and 're-fix' a section 256(1)(a) future date for the individual's release strongly promotes the statutory purpose, with its public protection imperative. Key to the statutory purpose, so

far as concerns release on licence and the function of the Board, is the "need to protect the public from serious harm from offenders and the desirability of preventing the commission of further offences and securing … rehabilitation" (see 2003 Act s.239(6)). The function which the Board discharges revolves around achieving what is necessary for the protection of the public: see King. For the Board to have the power to revisit, revise and 're-fix' a future release date, as well as to revisit and revise the contents of any licence condition, strongly promotes the statutory purpose of public protection. It does so, moreover, in a context in which the prisoner – necessarily – does not fall yet to be released. This is not an 'immediacy' situation. For the Board to be able to take into account further information relating to the precise design of licence conditions, or relating to the question of adjustment of the fixed release date, is to enable the Board to promote and secure public protection, prevent further offending and secure rehabilitation. It ensures, just as the statutory interpretation in Bowen did, that there is flexibility in the application of the statutory scheme in order to ensure that arrangements are in place.

xii) This interpretation has other linked virtues. It avoids 'defensive practices', whereby the Board might be tempted to set later fixed release dates as a precaution, through concern as to a rigid inability to have subsequent regard to the emerging picture on the ground. It avoids situations where a prisoner would be released pursuant to a licence condition which stands immediately to be breached: for example, a RAP Condition which cannot be complied with because the placement is known at the time of release to no longer be available. That, moreover, could be a release into homelessness. It could make recall inevitable, with the referral process having to start all over again, when even a short delay could have resolved the problem. It promotes justice and fairness. It is even-handed. Importantly, it would allow for a fixed date to be 're-fixed' and brought forward, where suitable arrangements have been found, just as in allowing a fixed date to be 're-fixed' and deferred where there is a difficulty or development impeding suitable arrangements being found. Far from there being a "contrary intention", these points indicate that the implied 'continuity of power' promotes the statutory purpose rather than conflicting with it.

Discussion

27. The Board's argument, whose essence I have endeavoured to encapsulate, is clear, comprehensive and sustained. But I cannot accept that it is correct. In my judgment, Mr Withers is correct when he submits that, on the correct legal analysis, when the Board has made a reasoned decision which fixes a release date for the purposes of section 256(1)(a), it does not then have a 'continuity of power' to "re-fix" a different date for the person's release on licence. I will explain why.

28. It is a clear feature of the 2003 Act that there are situations in which Parliament recognised the importance and appropriateness of a certain, defined future date for release, notwithstanding that release would be on licence.

i) One example concerns Section 244(1) Release, when the 'half-time' RCP has been served. That is a situation in which the clear statutory intent is that the "fixed"-term prisoner to whom the statutory provision applies will know in advance, as will all of those who are to be involved in implementing release,

that there is a definitive "fixed" date on which they will be released. That statutory entitlement to release is then "as soon as" the relevant prisoner "has served the requisite custodial period". Since that release is on licence, it follows that there will be appropriate licence conditions. It follows that appropriate arrangements will need to be taken in order for those licence conditions to be effective. It is always possible that any licence condition could come to be undermined by some development in the run up to the release date. But the statutory scheme has identified a future fixed date and the prisoner is entitled to be released on it.

ii) Another example concerns the ARP. As has been seen, this is the 14- or 21-day period arising in the context of a person assessed as "suitable for automatic release". Again, since this is by nature release on licence, there will need to be appropriate conditions and arrangements. In this context, Parliament made express provision: in section 255B(6)(7) for a delayed release date because suitable arrangements for an EMC Condition are not yet in place; and in section 255B(8)(9) for a delayed release date because of further information which has come to light regarding the prisoner. These express powers are not, in my judgment, comparable to the express provisions to which Lord Bridge referred in Wilson, where a general power was identified to have been "always inherent" notwithstanding a partial detailed overlay. In my judgment, it is clear that there is no general, implied power in section 255B for the SSJ to defer the immediate release directed by the Board or to delay the release on the expiry of the ARP. Take this example. Information has come to light, but it is not information "about" the prisoner, and it is not about arrangements for an EMC Condition. Rather, it is information about arrangements for an RAP Condition. It is clear that the SSJ would not have any equivalent, implied, power to delay release.

iii) These examples are important because they show that, consistently with the statutory purpose of protection of the public – and notwithstanding that things may happen or come to light in relation to the prisoner or arrangements relating to licence conditions – there are situations in which there is a statutorily-recognised value in having a definitive, clear, fixed release date to which everyone has to work.

29. Turning to the key provisions which are in issue, Parliament has required the Board to 'deal' – I will use a neutral word for now – with a "reference" made to it under section 255B(4) or 255C(4). There are three specified ways of 'dealing' with the reference, which need to be examined.

i) A first way in which the Board can 'deal' with such a reference is to direct the prisoner's "immediate" release on licence (ss.255B(5), 255C(5)). When the Board makes a decision of that kind, it is common ground that the Board is functus. That is so, even if something immediately comes to light on the day of release about the prisoner or about the arrangements for licence conditions. It is common ground that the Board has 'discharged its function', and has no general or implied statutory power to reopen, revisit or retake that decision. The only powers which the Board has to revisit its conclusions are these. First, under the slip rule. Secondly, where the decision is – under the Rules – only a "provisional" decision, such that "reconsideration" can occur, within a prescribed time-frame, restricted to certain classes of case and narrow grounds.

ii) A second way in which the Board can 'deal' with such a reference is to "fix a date" for the prisoner's release on licence (s.256(1)(a)). This is where the controversy lies.

iii) The third way in which the Board can 'deal' with the reference is by acting to "determine the reference by making no direction as to [the prisoner's] release" (s.256(1)(b)). In that third situation the Board has clearly discharged its function. The case comes back to it by means of a further reference (s.256(1)-(3)).

This means that, in relation to the first and third ways of 'dealing' with the reference, it is accepted that these are situations which involve 'discharging the Board's statutory function', once it has made a decision, subject only to the narrow residual function and basis for reconsideration under the Rules. And this is the position notwithstanding that information could come to light, whether in an 'immediacy' case, or in a case where the Board has determined the reference by making no direction as to release.

30. The phrase "determine the reference" (used by Parliament in s.256(1)(b)) is "conclusory language". That is how it was described in Mr Campbell's skeleton argument. I think he was right. It is true, as he points out, that the phrase "determine the reference" is used in section 256 in the context of making no direction (s.256(1)(b)), and that Parliament did not use that phrase in section 256(1)(a). It did not there say that acting to "fix a date for the person's release on licence" was also action to "determine the reference". But, in my judgment, it is plain that fixing a date is equally action to "determine the reference". In my judgment, there are the three alternative ways in which the Board acts to "determine the reference". This is put beyond any doubt by considering section 256A(4). There, Parliament speaks perfectly naturally of the Board being under a duty to "determine the reference by" and then each of three modes determining the reference. As was seen earlier, on a further reference, section 256(4)(5) provide as follows:

> ***(4) On a reference under subsection (1) or (2), the Board must determine the reference by – (a) directing the person's immediate release on licence under this Chapter, (b) fixing a date for his release on licence, or (c) making no direction as to his release.***
>
> ***(5) The Secretary of State – (a) where the Board makes a direction under subsection (4)(a) for the person's immediate release on licence, must give effect to the direction; and (b) where the Board fixes a release date under subsection (4)(b), must release the person on licence on that date.***

There is no sensible reason why the very same three ways of 'dealing' with a further reference should all be of the "conclusory" quality, but not in the case of the original reference. It would be bizarre if the Board were in a different position – as to being functus – when fixing a date for release on licence, depending on whether it was the first (s.256) or a subsequent (s.256A) post-recall reference. And viewed in context, the most natural connotation of "determination" is "conclusory": that the decision, whichever of the three outcomes is chosen by the Board, stands as the 'determinative' outcome on the reference.

31. The point is further reinforced, in context, by the fact that the language used for identifying a date for the release on licence is "fixing". The natural and ordinary meaning of that word means a definitive, clear, fixed release date to which everyone has to work. The Board is acting to "determining the reference" by identifying "a date"

which is then "fixed". The fixed date enables everybody including the prisoner to know exactly where they stand. It enables everybody, including those who need to make suitable arrangements, to know what date has been fixed. Once the Board has made its decision and has acted to "determine the reference" by making the decision – once it has "fixed a date" – it is then straightforwardly the duty of the SSJ to release the prisoner "on that date" (s.256(4)).

32. Then there are the Rules, and the provision for 'finality' and "reconsideration". It is revealing that – ultimately – Mr Campbell's analysis turned on the interpretation of Rule 25(1)-(3) and the scope of decisions which are "final". As to this:

i) I accept that the Rules can control the point at which the Board becomes functus, by controlling the point at which the Board's "decision" has been made. If, for example, the Rules made provision for a "minded-to" decision, which were then subsequently confirmed as a "decision", the Board would not be functus when it made the "minded-to" decision.

ii) Mr Campbell's argument accepts that if and insofar as there is 'finality' under the Rules, the Board is 'functus'. This is how he supports his concession that – when the Board fixes a date for release under section 256(1)(a) – that part of the decision which he carves out as concerning whether the prisoner is "suitable" or "unsuitable" for release is an aspect in relation to which the Board is indeed functus.

iii) The Board's argument and logic is this. When the Board fixes a date for release on licence, those aspects of the Board's decision-making which involve identifying appropriate licence conditions, and which involve identifying the appropriate fixed future date for release, are aspects which fall within section 256(1)(a) but which do not fall within the description "decide that (a) the prisoner is suitable for release" in Rule 25(1)(a). On that basis, they are not aspects which would ever be or become "final" (Rule 25(2)(3)). Ultimately, this is the bedrock on which the Board's argument is based.

iv) I cannot accept this submission. It would mean that the necessary and appropriate licence condition, and the appropriate fixed date for the release, would not fall within the Board acting to "decide … that … the prisoner is suitable for release". These would be aspects that would not, ever, become "final" (Rule 25(2)(3)). They would also be aspects of the decision which are not required by the Rules to be "recorded in writing" with "reasons" (Rule 25(6)). They would not be part of a "record" which must be provided to the parties "within 14 days" (Rule 25(6)). It would also follow that, however irrational or procedurally unfair, in a case involving an indeterminate sentence or an extended sentence, these aspects could attract no Rule 28 "reconsideration" of the conclusions at which the Board has arrived.

v) In my judgment, when the Board makes a decision – in acting to "determine a reference" – to direct immediate release on licence, on identified conditions, in my judgment the 'immediacy' and the condition are 'part and parcel' of the Board's decision that the prisoner is suitable for release. In other words, what the Board is actually deciding is that the prisoner is "suitable" for "release" which is "immediate" and on identified "conditions". All of those elements fall

within that decision. They would all become final, if not eligible for reconsideration, or if reconsideration is not sought, or they are undisturbed after reconsideration. They would all be capable of reconsideration, if eligible (because the class of case attracts the reconsideration mechanism) and if an application in time is made, on the grounds specified in the rules.

vi) In my judgment, in the same way, where the Board determines a reference by fixing a date for a future release on licence rather than ordering immediate release the Board is deciding that the prisoner is suitable for release on a fixed future date on conditions. Again, all three features form part of that decision. They are 'part and parcel' of it. These features would all need to be part of the decision recorded in writing with reasons, and all provided to the parties. They would all be final, except in a class of case eligible for consideration. But in such a class of case, they would all be aspects falling to be reconsidered on the Rule 28 grounds.

vii) I am fortified in this analysis by Bowen. There, in the context of Section 28(7) Release, McCombe LJ (for the Court of Appeal) at §§43, 47 and 48 explained that, when the Board has decided suitability for release (i) provided certain licence conditions are in place (ii) which could include a direction that release would occur on a defined date (when premises needed for an RAP Condition were identified as available), these matters were "part and parcel" of and "integral" to the decision to direct release:

> ***43. In my judgment, it is clear from section 28(6) that the Board cannot give a direction for release under section 28(5) unless it is satisfied that it is no longer necessary to confine the prisoner for the protection of the public. While there is no express provision empowering the Board to compel particular licence conditions, it is clear from section 31(3) that the scheme envisages that the Board will in fact make recommendations as to the conditions that are desirable in order to achieve the protection of the public and it would be entitled to determine that it is not "safe" to release the prisoner without such conditions being in place.***
>
> …
>
> ***47. If, as I see it, the claimants would not have been released at all if Approved Premises could not be made available, they can hardly complain if they are released in accordance with a direction that release will occur on a defined date when the premises are known to be available…***
>
> ***48. In my judgment, each of these Parole Board decisions are properly to be read as directing release subject to the risk management plan, including residence at the Approved Premises. As Whipple J said [2016] EWHC 2057 at §§37, 40 the conditions imposed are "part and parcel of" and "integral to" the decision to direct release.***

In my judgment, those elements of a section 256(1)(a) decision to fix a date for release on licence which involve (i) the fixed release date and (ii) the necessary licence conditions are, in the same way, elements which are "part and parcel of" and "integral" to the decision that the prisoner is suitable for release. And, if that is right, the distinction on which Mr Campbell's argument ultimately rests is an unsustainable one.

33. Next, it is significant that the Board can be functus – having 'discharged its function' – even though the release is not 'immediate' and there is no 'immediacy' duty.

i) One such situation, which Mr Campbell accepts, is an aspect of the decision where the Board has fixed a date for release on licence (s.256(1)(a)). He accepts that, insofar as it is the Board's decision on suitability for release (Rule 25(1)(a)), the Board has 'discharged its function' and cannot revisit that question, except in a class of case covered by – and on the restricted grounds applicable to – a "reconsideration". That would mean that, if new information or new material came to light, later on the same day as the decision, or during the period to the fixed date, or (in a class of case eligible for reconsideration) during a period while "reconsideration" were awaited, the Board could not revisit its decision as to suitability for release. It means that, in a case in which the Board fixes a date for a determinate sentence prisoner's release on licence, and the very next day become seized of new information indicating that the prisoner may pose a threat to the public, the Board accepts that it would have no power to revisit the question of what it characterises as "suitability" for release, on the basis of that fresh information.

ii) Another such situation arises in conjunction with Section 28(5) Release. It was common ground between Mr Campbell and Mr Withers that what Bowen decided is this: that the SSJ's duty of Section 28(5) Release, on its legally correct interpretation, is a duty to release upon fulfilment of the licence conditions identified as necessary by the Board (or when any delay has become unreasonable). That means, in Section 28(5) Release scenarios – like Bowen and Dickins – there is a period of time before the SSJ's duty to release has crystallised. During that period, there could be a further development or new information. But there, the Board accepts, it has no 'continuing function' of the Board, except the narrow function under the Rules: "reconsideration", if sought within the prescribed period, enabling the "provisional" decision to be reconsidered on narrow prescribed grounds.

iii) Both Counsel also accepted that it would, in principle, be possible for the Board to have made a section 28(5)(b) direction for release prior to, and in anticipation of, the lifer minimum term date being served. If that were the position, the Board would have discharged its function, except the narrow function under the Rules: "reconsideration", if sought within the prescribed period, enabling the "provisional" decision to be reconsidered on narrow prescribed grounds.

iv) These examples show that even though there is no 'extant immediate duty' on the SSJ to effect release, that does not of itself support a 'continuity of function' on the part of the Board. This further undermines the arguments made about how the 'continuity of power' which is contended for promotes the underlying statutory purpose of public protection. Nothing would promote the underlying statutory purpose of public protection more than being able to have further regard to information, subsequently available, relating to what the Board characterises as "suitability for release". Yet the Board accepts that the decision on suitability for release could only be revisited in a class of case eligible for "reconsideration", if an application for reconsideration is made within the appropriate time, and on one of the two narrow grounds on which reconsideration applications can be granted, where 'fresh evidence' is not one of them.

v) Indeed, even if one takes the 'immediacy' scenario, Mr Campbell's argument entails that the SSJ is not obliged to have discharged the duty to release the prisoner until the end of the day in question. Yet he accepts that the Board would not have the function of being able to reconsider its decision further, in the light of new information as to a further development occurring on the day itself.

34. So far as concerns the various arguments about the statutory purpose and public protection, and the arguments about the fact that the consequences of the Board lacking the power to reopen a decision 'cut both ways', those arguments lose much of their potency when it is recognised that there are many scenarios relating to release on licence in which the Board has no continuity of function, albeit that further information can come to light or difficulties can (foreseeably or unforeseeably) arise. In my judgment, when Parliament conferred the function on the Board of determining a reference by fixing a future date for release on licence, Parliament was giving primacy to the prisoner – and everybody else – knowing where they stood, by reference to a definitive, clear, fixed release date to which everyone has to work. That clarity and certainty, meaning that the date cannot then be deferred or delayed, is a virtue whose potency is not in my judgment materially undermined by the fact that nor can the date be brought forward.

Conclusion

35. In my judgment, in the light of the points I have made about the statutory scheme, "the contrary intention appears" for the purposes of section 12(1) of the 1978 Act. The Board has no continuity of power to re-fix a date for a person's release on licence, in a case in which it has already dealt with a reference to it by making a decision to "fix a date for the person's release on licence" pursuant to section 256(1)(a) of the 2003 Act. In the case of an extended sentence prisoner, the Board's decision may be provisional and subject to reconsideration under the Rules, within the prescribed time and on the prescribed grounds. But, unless and to the extent "provisional" and subject to "reconsideration" under the Rules, the decision discharges the Board's function, and the Board is functus.

End-notes

36. Finally, I mention two sources to which my attention was invited. First, Mr Withers referred to the passage in Wade & Forsyth, Administrative Law which was cited in Dickins at §30 (and in R (Demetrio) v IPPC [2015] EWHC 593 (Admin) at §38), which says of section 12(1) of the 1978 Act:

> ***this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.***

My analysis in the present case has focused on section 12(1) of the 1978 Act, as seen in action in Wilson, viewed in the context of the special features of the statutory context and setting, in relation to the Board's functions.

37. Secondly, Mr Campbell referred to the Explanatory Notes to the Police Crime Sentencing and Courts Bill. The Bill, as it currently stands (at the time of the hearing

before me) would amend the 2003 Act, removing the distinction between directions for immediate release and directions for future release, revoking section 256 of the 2003 Act, and replacing current powers with a general provision that a direction for release by the Board must be implemented by the SSJ "as soon as is reasonably practicable in all the circumstances". The Explanatory Notes describe this as desirable because the Board's directions for release on future specified dates create "an expectation of release on that date, which may not be possible if other conditions of release also need to be fulfilled", in which circumstances "applications are required to the Parole Board to change the timing of its release direction". That observation was relied on as supportive of the Board's understanding of what the current law permits. I cannot accept that this is an aid to construction. Rather, the answer to that is the same one as William Davis J gave in the SSJ case at §39: it may be that there is a "supposed power", which has been exercised and accepted, but if that is so it is nevertheless with "no basis in law".