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Case No: CO/3618/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before :

MR JUSTICE WILLIAM DAVIS

- -

Between :

THE QUEEN **(on the application of THE SECRETARY OF STATE FOR JUSTICE)**	**Claimant**
- and -	
THE PAROLE BOARD	**Defendant**
- and -	
JAMES WALKER	**Interested Party**

- -
- -

Sir James Eadie QC and Jason Pobjoy and Isabel Buchanan (instructed by **Government Legal Department**) for the **Claimant**
Brendan McGurk (instructed by **Government Legal Department**) for the **Defendant**
Michael Lennon (instructed by GT Stewart Solicitors) for the **Interested Party**

Hearing date: 3rd December 2020

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Approved Judgment

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MR JUSTICE WILLIAM DAVIS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on the 16th December 2020.

Mr Justice William Davis:

Introduction

1. James Walker is currently serving a determinate sentence of 15 months' imprisonment imposed on 6 May 2020 at Sheffield Crown Court for offences of theft, affray and assault. The circumstances of those offences are of no relevance to these proceedings save that the events which gave rise to the offences led to Mr Walker's recall to prison in relation to an extended sentence imposed in March 2012. The Secretary of State for Justice believed that Mr Walker remained subject to an unexpired period of licence. The licence was revoked on 3 March 2020.

2. In accordance with his statutory obligation under Section 255C(4) of the Criminal Justice Act 2003 ("the 2003 Act") the Secretary of State on 31 March 2020 referred Mr Walker's case to the Parole Board ("the Board"). A single member panel of the Board considered the case on 15 April 2020. The case was adjourned in order for further information to be obtained. One issue of concern was the expiry date of the sentence imposed in March 2012. The documentation provided to the Board was not consistent on that issue. On 17 June 2020 the single member concluded that the sentence imposed in March 2012 had expired in March 2020. That meant that there was no decision for the Board to take. However, the written reasons for the decision stated that, because the sentence had expired, there would be an order for immediate release from that sentence.

3. The written reasons were provided to HMP Doncaster. The prison authorities immediately sent to the Board the Crown Court order in relation to the sentence imposed in March 2012. This order (which had been amended in April 2012) showed that the licence period of the extended sentence was not due to expire until June 2023. Therefore, Mr Walker was still subject to extended licence.

4. On 17 July 2020 the Secretary of State re-referred Mr Walker's case to the Board. It was said that the decision of 17 June 2020 was fundamentally flawed. The Board should have made a decision as to whether the protection of the public required his continued detention. The Board refused to accept the re-referral. Their refusal was on the basis that a final decision had been made which rendered the Board functus. It only could be reviewed via the reconsideration mechanism in the Parole Board Rules 2019 or via judicial review.

5. The Secretary of State challenged the Board's refusal to accept his re-referral on two broad grounds. First, he argued that the refusal decision was wrong in law. The Board was not functus because it had made no valid decision. Even if the Board were functus, it had the power to re-open a final decision in exceptional circumstances. Such circumstances existed in this case. Second, and in the alternative, the decision in June 2020 was procedurally unfair and/or irrational. No decision maker in the position of the Board could properly have reached that decision.

6. Skeleton arguments were submitted by all parties in relation to the first ground. The Board remained neutral on the second ground as did Mr Walker so I only had written submissions on that ground from the Secretary of State. Oral submissions at the hearing on 3 December 2020 followed the same pattern. At the end of the hearing I announced that I was satisfied that no decision had been taken by the Board on 17 June 2020. I also announced that the grounds on which the purported decision of the

Board of 17 June 2020 were challenged by judicial review were made out. In consequence I ordered the Board to make a fresh or actual decision pursuant to the Secretary of State's referral on 31 March 2020. I said that I would give my full reasons in writing which I now do.

Factual background

7. On 9 March 2012 Mr Walker appeared for sentence at the Crown Court in Sheffield. He had been convicted after a trial of an offence of manslaughter. He earlier had pleaded guilty to an offence of inflicting grievous bodily harm on a different occasion. Those offences put him in breach of suspended sentences of imprisonment totalling 51 weeks imposed in relation to offences of affray and possession of bladed articles. He was sentenced by the trial judge, Mr Justice Openshaw (as he then was). The judge concluded that the proper sentences were as follows: manslaughter - 4 ½ years' imprisonment; inflicting grievous bodily harm – 3 years' imprisonment; activation of the suspended sentences – term reduced to six months' imprisonment. He determined that the totality of Mr Walker's offending required to be reflected by a sentence consisting of the aggregate of those terms. The judge also decided that Mr Walker was dangerous within the meaning of Section 227(1)(b) of the 2003 Act and that an extended sentence was necessary. It should be noted that this was an extended sentence imposed prior to the legislative changes introduced by the Legal Aid, Sentencing and Prosecution of Offences Act 2012. Thus, Mr Walker was entitled to early release at the half way point of his custodial term. In line with good sentencing practice the judge imposed a custodial term representing the aggregate sentence – 8 years' imprisonment – on the lead offence, in this case the offence of manslaughter. Concurrent terms were imposed in relation to the other matters. The extension period was set at 4 years. Mr Walker had spent a considerable time in custody prior to his trial. The judge directed (as he then was required to do) that the 262 days spent on remand were to count towards the custodial term. Therefore, the half way point of the custodial term was in June 2015.

8. I have not seen the order as it was originally drawn up by the Crown Court. Counsel who represented Mr Walker on 6 May 2020 in due course informed the Board that he had seen the original order. Counsel said that the original order indicated that the extended sentence consisted of a custodial term of 4 years and an extension period of 4 years. Whether that is correct matters not. The effective order of the Crown Court was the order held by HMP Doncaster. That order was said to be an amended order. It was dated 4 April 2012.

9. Mr Walker was duly released in June 2015. This was the half way point of a custodial sentence of 8 years taking into account that he had been remanded in custody from June 2011. He was not at liberty for long because he was recalled in August 2015. He was released again on licence on 20 April 2017. His licence stated unequivocally that his sentence expired on 22 June 2023. As might be expected, Mr Walker signed the licence on his release.

10. Notwithstanding the clear position as it appeared from the court order, the police national computer record showed that Mr Walker's extended sentence in respect of the offence of manslaughter consisted of a custodial term of 4 years and an extension period of 4 years. This same error was repeated in the March 2020 recall report sent by the relevant probation officer based in South Yorkshire to the Public Protection

Casework Section ("PPCS") albeit that the recall report also identified the sentence expiry date as 22 June 2023. The Secretary of State's recall document as sent to the Board by the PPCS simply said that the total sentence was 12 years with an expiry date of 22 June 2023.

11. When he came to consider the case on 15 April 2020 the single member of the Board had the documents from the PPCS and the PNC record. He did not have a copy of the court order. He did not have a copy of the sentencing remarks. Unsurprisingly he was confused by the contradictory information in relation to the sentence imposed. He ordered a copy of the sentencing remarks to be obtained as well as making requests for information about Mr Walker's progress.

12. By 17 June 2020 the single member had a copy of the sentencing remarks. I have already outlined the way in which Mr Justice Openshaw approached the sentencing exercise. Having indicated the sentence appropriate for each offence or set of offences, he identified that they should run consecutively and that no reduction was appropriate to reflect totality. He then said this:

> *In order to reflect the total notional determinate term of eight years, and in order to avoid technical complications which can arise from consecutive extended sentences, it is necessary to apply the whole of the custodial term onto the manslaughter, otherwise he would go unpunished for the second indictment and indeed implementing the suspended sentence would be of no effect.*

That made it quite clear that the custodial term to be served in relation to the offence of manslaughter was to be 8 years. Unfortunately, the judge then said that the law required him to express the custodial term at one half of the notional determinate sentence. This appears to have been a reference to the approach required when imposing an indeterminate sentence. The judge went on to say that the custodial term would be four years. This was inconsistent with the passage I have quoted. In reality the judge was referring to the time Mr Walker would spend in custody before being entitled to release on licence. This was made clear by the exchange the judge had with prosecution counsel at the end of the sentencing exercise. She established that the judge intended to pass a sentence of imprisonment totalling 8 years' custody of which he would serve 4 years before being released on licence.

13. However, the single member also had representations from GT Stewart Solicitors made on behalf of Mr Walker. So far as I know the solicitors had not represented Mr Walker in 2012. They put the position on the basis of the instructions they had from Mr Walker and on their interpretation of the documentary material. Mr Walker himself must have known the true position for any number of reasons. He was the person serving the sentence. Yet his solicitors said that it was clear from the sentencing remarks that Mr Walker had been sentenced to an extended sentence consisting of 4 years' custody and 4 years' extended licence. They said this about Mr Walker's concerns:

> *However he does remain concerned that he could be detained unlawfully should the issue with the index offence not be resolved at this juncture.*

The Board did not have any representations made directly by Mr Walker. His concern as expressed to his solicitors is difficult to understand. He cannot have believed that his licence period would have changed from the document he signed in April 2017.

14. The solicitors also provided the Board with a copy of an advice from counsel, Mr Edward Moss, who represented Mr Walker at the sentencing hearing in May 2020. Whether Mr Walker was still subject to an extended licence was of some consequence at that hearing though it could not have directly affected the sentence imposed. For instance, it would not have been open to the sentencing judge to order the sentence he imposed to run consecutively to any period that Mr Walker would spend in custody by reference to the extended sentence. Counsel advised that the sentence imposed by Mr Justice Openshaw in March 2012 was an extended sentence consisting of a custodial term of 4 years and an extension period of 4 years. He so advised on the basis of the police national computer record, the original court order (to which I referred above) and the solicitors' note of the proceedings in March 2012. The advice was entirely reasonable on the material counsel had. Sadly he did not have the sentencing remarks or the amended order.

15. The written reasons dated 17 June 2020 bore a heading as follows:

> *DECISION: Immediate release*

The introductory paragraph set out the history of the Board's consideration of the Secretary of State's referral and concluded with this:

> *...it has been established that your original sentence was of 4 years' custody with an extended licence period of 4 years, and that this expired in March 2020. The sentence for which the Secretary of State referred your case to the Parole Board for review is therefore no longer in force, and this panel has no decision to take.*

Notwithstanding the acknowledgment that the Board had no role to play in the issue of whether Mr Walker should be released at any particular point, the written reasons went on to analyse his criminal history, the nature of the offences for which he received an extended sentence and the most recent offending. It was noted that multiple risk factors remained and that the Probation Service considered that the risks could not be managed in the community. The conclusion was that there was a high risk that, if released, Mr Walker would commit offences of violence with serious injury to others being the result. The concluding paragraph of the written reasons was as follows:

> *Mr Walker, this is an unusual case, due to apparent errors in calculating your sentence expiry date. If you were still serving the sentence for which the Secretary of State referred your case to the Parole Board for review, this panel would not have directed your release. The panel would have considered it remains necessary for the protection of the public that you be confined, because you have recently committed further violent offences which parallel your index offences; your risk does not seem to have reduced effectively. The panel did not consider that your risks could be effectively managed on licence*

again, until you have completed further offence-focused work (whether in group or 1:1) in custody on your decision-making, attitudes to violence, and substance misuse relapse prevention skills. However, you are not in fact serving that original sentence. It has expired 3 months ago. You are serving a further determinate sentence and are not eligible for release for another 6 months; but the Parole Board and this panel are not asked to comment on that.
The panel (though it does not need to) directs your immediate release from the original sentence. No licence conditions can be made.

16. As I have already indicated, the provision of the written reasons to HMP Doncaster led to the disclosure by the prison of the amended court order and to the re-referral of Mr Walker's case to the Board by the Secretary of State.

Legal framework

17. Mr Walker was sentenced to an extended sentence pursuant to Section 227 of the 2003 Act as it applied prior to the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Having been released at the half way point of the custodial term as then required by Section 247 of the 2003 Act, he was on licence for the remaining half of the custodial term and for the whole of the extension period.

18. The powers and duties of the Secretary of State in relation to the licence of a person in Mr Walker's position are contained in Section 255C of the 2003 Act, the relevant parts of which are as follows:

> *(1) This section applies to a prisoner ("P") who—*
> *(a) is an extended sentence prisoner, or*
> *(b) is not considered to be suitable for automatic release.*
>
> *(2) The Secretary of State may, at any time after P is returned to prison, release P again on licence under this Chapter.*
>
> *(3) The Secretary of State must not release P under subsection (2) unless the Secretary of State is satisfied that it is not necessary for the protection of the public that P should remain in prison.*
>
> *(4) The Secretary of State must refer P's case to the Board—*
> *(a) if P makes representations under section 254(2) before the end of the period of 28 days beginning with the date on which P returns to custody, on the making of those representations, or*
> *(b) if, at the end of that period, P has not been released under subsection (2) and has not made such representations, at that time.*
>
> *(5) Where on a reference under subsection (4) the Board directs P's immediate release on licence under this Chapter, the Secretary of State must give effect to the direction.*

In the case of Mr Walker the Secretary of State could not release him on licence unless he was satisfied that it was not necessary for the protection of the public that

Mr Walker should remain in prison. Whether the protection of the public required Mr Walker's continued detention was a matter for the Board. The Secretary of State was obliged to refer Mr Walker's case to the Board in the way that he did. The scheme of the 2003 Act is that, where the Board directs immediate release on licence (because it is safe to release the prisoner), the Secretary of State must give effect to that direction.

19. Section 12 of the Interpretation Act 1978 provides as follows:

> *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.*
>
> *(2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office.*

The functions exercised by the Secretary of State under Section 255C of the 2003 Act fall within the ambit of Section 12.

20. In 2019 the Secretary of State made the Parole Board Rules 2019 ("the 2019 Rules") in the wake of the litigation surrounding the direction for release of the prisoner commonly known John Worboys which resulted in the Board's direction in that case being quashed. Rule 19 of the Rules deals with a case where the Board considers the referral by the Secretary of State on the papers which is what happened in this case. The relevant paragraphs are as follows:

> *19.—(1) Where a panel is appointed under rule 5(1) to consider the release of a prisoner, the panel must decide on the papers either that—*
> *(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.*
> *……..*
> *(4) Any decision made under paragraph (1)(a) which is eligible for reconsideration under rule 28 is provisional, and becomes final if no application for reconsideration is received within the period specified by that rule.*
>
> *(5) Any decision made under paragraph (1)(a) which is not eligible for reconsideration under rule 28 is final.*
>
> *(6) Any decision made under paragraph (1)(b) is provisional.*
> *……..*
> *(8) The decision or advice of the panel must be recorded in writing with reasons for that decision or advice, and the written record provided to the parties within 14 days of that decision or advice.*

Rule 28 sets out the reconsideration procedure. The relevant paragraphs are as follows:

28.—(1) Subject to paragraph (2), where a decision has been made under rule 19(1)(a) or (b), 21(7) or 25(1), a party may apply to the Board for the case to be reconsidered on the grounds that the decision is—
(a)irrational, or
(b)procedurally unfair.

(2) Decisions are eligible for reconsideration only where the prisoner is serving—
…….
(b)an extended sentence;

(3) An application for a provisional decision to be reconsidered under paragraph (1) must be made and served on the other party no later than 21 days after the written decision recorded under rules 19(8), 21(12) or 25(6) is provided to the parties.

(4) Where a party makes an application under paragraph (3), the other party may make representations, and those representations must be provided to the Board and the party who made the application within 7 days of service of the application.

(5) Where an application made under paragraph (3) is received by the Board, the application must be considered on the papers by an assessment panel.

(6) After assessing the application under paragraph (5), the assessment panel must—
(a)direct that the provisional decision should be reconsidered, or
(b)dismiss the application.

(7) The assessment panel may direct that the provisional decision should be reconsidered under paragraph (6)(a) only if it has identified a ground for reconsideration under paragraph (1).

(8) Where the assessment panel dismiss the application under paragraph (6)(b), the provisional decision becomes final.

(9) Where the assessment panel directs that the provisional decision should be reconsidered under paragraph (6)(a), the assessment panel must direct that the case should be—
(a)reconsidered on the papers by the previous panel or a new panel appointed under rule 5(1), or
(b)reconsidered at an oral hearing by the previous panel or a new panel appointed under rule 5(2).

(10) The decision of the assessment panel must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the decision.

The basis (and the only basis) for reconsideration is where the decision (whether to release or not to release) is irrational or procedurally unfair. This mirrors the grounds on which judicial review will be ordered of a decision of the Parole Board. The reconsideration process is easier and quicker than applying for judicial review. Rules 29 and 30 deal with errors of procedure and correction of accidental slips or omissions. These rules add to the ways in which a Board decision may be reviewed but they are of no relevance to the issues in this case.

21. As already noted the Board can be subject to judicial review. The Secretary of State argued that the decision of the Divisional Court in *R (ex parte Robinson) v The Parole Board* [1999] Prison LR 118 was relevant to the circumstances in this case. Robinson was subject to a discretionary life sentence imposed for an offence of manslaughter. He had spent many years in custody when, in 1998, a panel of the Parole Board considered his case and concluded that such risk as he presented would be manageable within the community. This conclusion was reached even though the probation service had argued against this conclusion. The probation service believed that the protection of the public required Robinson's continued detention. The panel was minded to order his release but did not so because there was no release plan in place. Therefore, the panel adjourned final consideration of the case whilst a release plan was prepared. By the time of the adjourned hearing the original chairman had retired. A new chairman took his place. The probation service had made known their disquiet at the conclusion of the original panel. At the adjourned hearing the issue of risk was re-assessed with further evidence being called. The panel as then constituted decided that it would not be safe to release Robinson. He applied for judicial review of that decision on the basis that the original panel had decided the issue of risk. The Divisional Court found that the decision of the original panel in relation to risk was final and conclusive. The Board was functus officio in relation to that issue. The court rejected the argument that Section 12(1) of the Interpretation Act 1978 entitled the Secretary of State to invite the Board to reconsider its decision when the opportunity arose as it did by reason of the adjourned hearing. The court said this:

> *Justice to discretionary life prisoners in the post-tariff period in my judgment requires that once a prisoner succeeds in the face of opposition in satisfying a panel that he can safely be released, that decision must be regarded as final and conclusive, subject only to the Secretary of State demonstrating that it was fundamentally flawed or pointing to a supervening material change of circumstances.*

The Secretary of State relied on this passage to support the argument that he is entitled to re-refer a case when the Board's decision was "fundamentally flawed" or there has been "a supervening material change of circumstances".

The competing submissions

22. On behalf of the Secretary of State Sir James Eadie QC put the case as set out in summary at paragraph 5 above. He said that the Board in reality had made no decision at all. If the Board had made a decision, it was to the effect that it had no jurisdiction. This was a fundamental error and amounted to the Board denying itself access to the only jurisdiction it had, namely to decide what was required to protect the public. A decision of that kind was no decision at all. In the alternative, if the Board had made an effective and final decision, the ratio in *Robinson* entitled the

Secretary of State to challenge the decision where the criteria set out in the passage cited above applied. This impliedly gave the Secretary of State the power to re-refer since that would be the effective means of demonstrating the fundamental flaw or material change of circumstances. Sir James went on to argue that the decision of the Board (if it was a true decision) was open to judicial review on conventional grounds. Procedural unfairness arose because the Board did not have the amended court order when it made the decision. The decision was irrational because it ignored the available material tending to show that Mr Walker remained on licence.

23. Mr Brendan McGurk on behalf of the Board made submissions only in relation to the first ground of appeal. He did not address the second ground of appeal. The Board conventionally remains neutral when one of its decisions is challenged as being irrational or procedurally unfair. It did so on this occasion. Mr McGurk argued that the Secretary of State has no power to re-refer a prisoner's case to the Board when the Board has made a final decision on release. Were such a power to exist it would involve the Board re-visiting its decision. Yet Section 255C(5) requires the Secretary of State to give effect to a direction for immediate release. In those circumstances the Secretary of State cannot have the power for which he argues when the Board has ordered release. Mr McGurk submitted that a final decision had been made in the case of Mr Walker. The only routes whereby that decision could be overturned would be via an application for a reconsideration pursuant to Rule 28 of the 2019 Rules or on an application for judicial review. Mr McGurk argued that the 2019 Rules read together with Section 225C provide an exhaustive code for any review of a decision to release. Judicial review remains open to the Secretary of State as a remedy in the appropriate case but otherwise the Rules have abrogated any common law principle. He noted that *Robinson* pre-dated both the 2003 Act and the 2019 Rules. He said that, in any event, what was said in *Robinson* in relation to fundamental flaws and change of circumstances did not form part of the ratio of the case.

24. Mr Michael Lennon appeared at the hearing on behalf of Mr Walker. He adopted the submissions made by Mr McGurk in relation to the first ground. He made no submissions on the second ground. In the Defence filed on Mr Walker's behalf it is argued that there was no procedural unfairness on which the Secretary of State can rely. In relation to irrationality it is said that the Secretary of State contributed to the errors made in the course of the Board's consideration of Mr Walker's case. That means that the Secretary of State cannot rely on the mistake of fact which led to the Board's decision.

Discussion

25. I have no doubt that the Board in fact made no decision in this case. The document setting out the written reasons dated 17 June 2020 was headed DECISION with the decision being identified as immediate release. That heading has to be read in conjunction with the text of the written reasons. In the opening paragraph of those reasons it was said that the Board "had no decision to take". On the analysis of the facts carried out by the Board, Mr Walker was not subject to any sentence in respect of which the Board had any jurisdiction. Thus, the only sensible reading of the written reasons is that the Board made no decision. In the final sentence of the written reasons the Board said that it directed Mr Walker's immediate release from the original sentence. On its own analysis that was a nonsense. It could not possibly release a prisoner from a non-existent sentence. When it was said that the Board "did

not need to" make the direction, that was also a nonsense. On the facts as the Board took them to be, the Board could not make the direction. I am satisfied that those passages in the written reasons are meaningless. The position as the Board saw it was that it had no decision to take. As a result it took no decision. In truth it should have made a decision. For those reasons I ordered the Board to make a decision on the referral made in March 2020. The question of re-referral did not arise.

26. In the alternative the decision (if such it was) of the Board was procedurally unfair and irrational and fell to be quashed. The unfairness arose as a result of the critical error of fact which led to the decision being made. The Board did not have a crucial piece of material before it i.e. the amended court order. This led to the Board proceeding on an erroneous basis. The Board was not at fault in a true sense in relation to the missing court order. The same was true of the Secretary of State. Whilst HMP Doncaster had the relevant order, the PPCS was unaware of it. If uncorrected, the procedural unfairness will cause objective unfairness to the public who have an interest in being protected from the unjustified release of dangerous prisoners. In the context of procedural unfairness I am satisfied that it is of relevance that the prisoner in this case must have been aware of the error of fact being made by the Board.

27. The irrationality of the Board's so-called decision arises from the fact that, notwithstanding the absence of the court record sheet, it should have been clear that the true sentence was as is now acknowledged i.e. a custodial term of 8 years with an extension period of 4 years. The Board failed to take proper account of the sentencing remarks in their totality and of Mr Walker's initial release date which was 4 years after the effective start date of the sentence. The latter fact can only have been consistent with a custodial term of 8 years, Mr Walker being a prisoner entitled to automatic release at the half way point of his sentence.

28. These conclusions are sufficient to dispose of the claim. On the facts as I have found them to be, the issue of re-referral does not arise. There will be cases in which there is some room for debate about the factual findings in which event a decision of the court will be in the alternative i.e. catering for each competing version of the facts. I cannot in all conscience say that there is legitimate debate about the facts in this instance. In the ordinary course that would mean that I would go no further in my consideration of the case. However, whether it is within the power of the Board to accept a re-referral of a case where there has been a decision to release is a question of keen interest to both the Secretary of State and the Board. What I say on the topic cannot be part of the ratio of my decision. Even so, both parties are anxious for a judicial view on the issue and, since it was fully argued, I am willing to give it.

29. The first observation that I make about Mr Walker's case is that the circumstances are very unusual and are unlikely to recur – at least I hope that is so. When Mr Justice Openshaw imposed the sentences he did, there was no easy way by which errors of the kind that were made in the original order could be detected. The judge would not see the court order. How the amendment came to be made in this case is not known. If the same situation were to happen again today, the error would be identified within a very short time of the sentence being imposed. Any custodial sentence must be recorded in full by the court clerk on the Digital Case System in use in all Crown Courts. The record must be made at the time of or immediately after the imposition of the sentence. That is required so that the sentencing judge can confirm on the

system that the sentence has been recorded accurately, the judge being required to provide such confirmation as soon as possible and in any event before the preparation of the court order. I set that out in case it might be thought that it is commonplace for sentences to be mis-recorded. I suspect that it was rare in 2012. Such mis-recording ought to be avoided altogether now. The facts of this case show the wisdom of the current system. I set out those matters in order to demonstrate that the facts here of themselves ought not to cause some wider concern about the inadequacy of the powers of the Secretary of State.

30. Sir James's argument on the question of re-referral was based on what was said in *Robinson*. He said that the relevant passage was part of the ratio by which I am bound. Although the statutory and regulatory landscape is now very different to that which applied in 1999, the concept of a fundamental flaw in the decision or a later change of circumstances affecting the decision remains valid. In the hearing I asked Sir James if "fundamentally flawed" in this context was a term of art. He said that it was not. However, he drew a comparison with the approach required in relation to judicial review of decisions of the Upper Tribunal (of whichever Chamber) refusing permission to appeal from the First Tier Tribunal of that Chamber. *Cart v Upper Tribunal* [2012] 1 AC 663 adapted the second appeal test. The extent of the judicial review jurisdiction in such cases is now set out in CPR Part 54.7A(7)(b). I am not persuaded that I obtain much assistance from this comparison. It is the second limb of the jurisdiction – "some other compelling reason" – which is most apposite. It is with respect no more specific than "fundamentally flawed".

31. In *Robinson* the court did not provide any assistance as to the circumstances in which a fundamental flaw or a change in circumstance might arise. Nor did the court explain the mechanism by which the Secretary of State was to demonstrate either factor. Nothing was said about whether the Secretary of State had to act within a particular time and, if not, why not given the doctrine of finality in any judicial or quasi-judicial decision. In my view the reason for this is that *Robinson* was very unusual on its facts. The Board was not functus in relation to its final decision because the original panel had adjourned final consideration of release pending further enquiries. The decision on which the prisoner relied and which the Secretary of State sought to challenge was one made part way through the process. The question of re-referral did not arise. When the court in *Robinson* spoke of the Secretary of State demonstrating a fundamental flaw or a material change in circumstances, that was in the context of a continuing process. In *Robinson*, the court said that, had the Secretary of State been in a position to show to the panel at the adjourned hearing that the earlier panel's decision had been fundamentally flawed or that there had been a material change of circumstance in the interim, that would have enabled the panel at the adjourned hearing to re-visit what had been decided by the earlier panel. The court did not further explain the mechanism or provide any time constraints because it was unnecessary in the context of the case under consideration. I am satisfied that *Robinson* is not authority for the proposition that the Secretary of State has the power to re-refer the case of a prisoner to the Board when the Board has made a final decision to release.

32. *Robinson* has been cited in later authority on which Sir James relied. I do not consider that, in any case cited to me, it can be said that *Robinson* supports the proposition that the Secretary of State has the power to re-refer a final decision of the

Board. Sir James relied on three authorities. In *Francis v Secretary of State for Home Department* [2005] 1 WLR 186 the issue was whether a prisoner was restricted to making one set of representations to the Secretary of State in relation to his recall. The duty to refer pursuant to Section 255C did not arise, not least because the prisoner in *Francis* was subject to a quite different statutory regime as existed prior to the 2003 Act. *Lowe v Governor HMP Liverpool* [2008] EWHC 2167 (Admin) involved the quashing of a decision by a prison governor to recategorise a prisoner on the basis that the decision was not in accordance with the relevant Prison Service Order and was irrational being based on erroneous or irrelevant material. The relevance of *Robinson* was marginal and the context of the litigation was wholly different to referral of a case by the Secretary of State to the Board. *Boparan v Governor of HMP Stoke Heath* [2019] EWHC 2352 (Admin) also concerned the decision of a prison governor. This decision related to Home Detention Curfew. The prisoner had been granted HDC by one prison governor but this decision had been reversed by the governor of a different establishment to which the prisoner subsequently was transferred. The complaint of the prisoner was that the later decision was irrational because nothing had changed since the first decision. The only relevance of *Robinson* was that it was relied on to establish that exceptional circumstances would be required for the first decision to be reversed. The context was very far removed from this case and the duty of the Secretary of State to refer a case to the Board.

33. There has been a significant change in the statutory position since 1999. In the 2003 Act, not in force when *Robinson* was decided, the Secretary of State must give effect to a direction by the Board for the immediate release of a prisoner on licence. This provision has applied since 2008. It must be remembered that in this case no such direction was made for the reasons already given. No question of re-referral arises because there was no decision at all. Moreover, where such a decision is made, it will not be in the context of a person serving another sentence. Such a person could not be released immediately on licence. Again the issue of re-referral will not arise. The only context in which the Board can direct the prisoner's immediate release on licence is when the only sentence the prisoner is serving is one in respect of which the Board has jurisdiction. When the Board makes such a direction the Secretary of State must give effect to the direction. This is a duty not a power. If the Secretary of State is under a duty, he cannot fail to comply with that duty unless there is a clear basis for him to do so. For the reasons I have given, *Robinson* does not provide that basis.

34. The 2019 Rules only serve to emphasise this conclusion. The scheme in Rule 28 provides for reconsideration of a decision to release. It is relatively narrow in its scope but the same applies to the supposed jurisdiction of re-referral. It sets a time within which the application for a reconsideration must be made. The scheme avoids any issue of functus or finality because it creates the concept of a provisional decision. Any decision to release will always be provisional if it relates to a sentence which in the first instance involved a finding of dangerousness or to a determinate sentence subject to initial release by the Board. There may be sentences in relation to which the Board have jurisdiction which do not fall within these categories of sentence. Having made enquiry in the course of the hearing of what those sentences might be, I am satisfied that the reality is that the reconsideration scheme applies to all sentences where there is any prospect of significant risk. It follows that the scheme provides the Secretary of State with the means to challenge a decision to release in appropriate cases. Even if a common law jurisdiction of re-referral of final decisions

did exist prior to the 2019 Rules, I do not consider that it survived the implementation of the Rules.

35. Sir James has pointed to Section 12 of the Interpretation Act 1978 as providing a basis for re-referral. Section 12 provides for an exercise of a statutory duty "from time to time as occasion requires". That must include the duty of the Secretary of State under Section 255C of the 2003 Act. I disagree. Section 12 does not permit repeated exercise of a statutory duty where "the 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 Secretary of State 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 Interpretation Act 1978 does not assist the Secretary of State in relation to his duty under Section 255(C).

36. I understand that the Secretary of State has concerns about the narrow interpretation given to the terms "irrational or procedurally unfair" by the Board. He considers that the narrow interpretation has led the Board to refuse to reconsider cases which required reconsideration. If those concerns were to have real validity in a particular case, this would be something which could be the subject of judicial review. It is not for me to offer a view as to how the Board should interpret its power under Rule 28 or whether the Board's interpretation has been too narrow. It is not an issue in this case. I have heard no argument and received very limited evidence on the point. Whatever the position as to the way in which Rule 28 operates in practice cannot be of any relevance to the existence of a power to re-refer.

37. Following the hearing Sir James provided a note on the question of supervening and material change of circumstances. This is a factor referred to in *Robinson* as justifying a challenge to what would otherwise be a final decision. Sir James argued in the note that neither judicial review nor reconsideration under Rule 28 would cater for this. He offered the example of a prisoner whom the Board decided was suitable for release but whose release was not immediate for the usual administrative reasons. Were the notional prisoner violently to attack someone (whether another prisoner or a member of prison staff) between the decision being made and his release, there would be nothing that the Secretary of State or the Board could do to affect his release. Those circumstances would not render the decision to release irrational or procedurally unfair. Thus, the reconsideration procedure would not apply. Sir James said that this would be extraordinary and wrong as a matter of principle and public policy. In my view this submission ignores reality. This violent prisoner could and inevitably would be arrested for the violent assault. It is difficult to imagine the circumstances in which the prisoner would be granted his liberty pending his trial. Whether the prisoner then is convicted of the offence will depend on the circumstances. In any event it is of note that Sir James's note says this about recall: "recall is generally based on behaviour whilst on licence; accordingly, behaviour whilst in prison (prior to release on licence) would not generally give rise to a recall". This is how he dealt with the proposition (apparently suggested by the Board in other cases) that the Secretary of State in his hypothetical example could recall the prisoner and thereby start the whole process afresh. I had no evidence about or argument on the circumstances in which the Secretary of State can order recall so I am unable to comment on the proposition or Sir James's answer to it. However, I am bound to note that he used the word "generally" in his note which on the face of it suggests that

there may be circumstances in which the general practice does not apply. If that is the case, his hypothetical violent prisoner would seem to be a good case to disapply the general practice.

Conclusion

38. On the facts of this case no point of general principle arises. The Board did not make a decision when it should have done so. The referral made by the Secretary of State in March 2020 remains live and will now be considered by the Board. In the alternative, such decision as the Board did make was irrational and procedurally unfair. That decision has been quashed so as to require the Board to consider Mr Walker's position afresh. On whatever basis the Board now makes its decision, it will do so on a proper assessment of the position in relation to Mr Walker as it now is.

39. Although the issue of re-referral did not strictly arise on the facts of the case, the point was fully argued before me. I am satisfied that there is no power of re-referral as posited on behalf of the Secretary of State. It may have been a supposed power exercised hitherto and accepted by the Board. It has had no basis in law at least since the introduction of the 2019 Rules and probably since the implementation of Section 255(C) of the 2003 Act.