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Case No: CO-4108-2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2021

Before :

THE HONOURABLE MRS JUSTICE STACEY

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Between :

Wesley Dickins	**Claimant**
- and -	
The Parole Board for England and Wales	**Defendant**
-and-	
The Secretary of State for Justice	**Interested Party**

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Mr Jude Bunting (instructed by **Swain & Co Solicitors**) for the **Claimant**
Mr Nicholas Chapman (instructed by **The Government Legal Department**) for the **Defendant**
No appearance or representation by the Interested Party.

Hearing date: 15 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 6th May 2021 at 10.30am.

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MRS JUSTICE STACEY

The Honourable Mrs Justice Stacey:

1. The claimant, Wesley Dickins, is a post tariff life sentence prisoner who seeks to challenge the Parole Board's decision made by HHJ Topolski QC of 11 August 2020 ("the Decision") which directed a reconsideration of its earlier provisional decision of 11 May 2020 that had directed the Secretary of State for Justice to release the claimant. The Parole Board for England and Wales ("the Board") is the defendant to the proceedings and the Secretary of State for Justice is the interested party. Two grounds, both of which the parties agree raise important issues, are relied on: (1) the scope of the reconsideration procedure in Board cases, specifically whether reconsideration on the basis of a "mistake of law" is ultra vires the Board's statutory power when the rules refer only to irrationality and procedural unfairness as grounds for reconsideration applications; and (2) whether the Decision was based on the legally erroneous conclusion that the Board was not *functus officio*.

2. Mr Justice Saini granted permission on both grounds observing that the claim raised an important issue of principle which has wide implications beyond the present case and that both grounds were clearly arguable. He ordered an expedited hearing. Indeed the Board had invited the Court to grant permission so that guidance upon the two procedural issues raised in the claim could be given. The defendant does not actively defend the Decision but adopts a neutral stance to assist the Court. Let me record at the outset my thanks to the very great assistance that has been provided to the Court by both counsel, including their joint agreed note on statutory construction and agreed summary of issues. Thanks too are due to all those who have worked, at speed, behind the scenes.

Background facts

3. On 31 July 2002 the claimant was sentenced to a term of life imprisonment for murder with a minimum term of 18 years which expired on 27 September 2019. He was transferred to an open prison on 20 December 2017. An oral hearing under rule 25 of the Board's rules of procedure (The Parole Board Rules, statutory instrument No.1038 ("the Rules")) was conducted (over the telephone due to the pandemic) on 26 March 2020 for an assessment by a panel of the Board of the suitability of the claimant's release on license. The panel was tending towards directing Mr Dickins' release and adjourned the hearing for a period of six weeks to allow the Probation Service time to complete a risk management plan, anticipating a decision could then be made by the panel on the papers. On 5 May 2020 the risk management plan was considered by the panel. At 8:51 on 11 May 2020 the panel chair emailed the case manager with the panel's reasoned decision directing the Secretary of State to release the claimant from custody in accordance with the conditions set out in its decision.

4. The usual procedure after an oral hearing and receipt of any further submissions or documents requested, will be for a panel to hold a discussion to consider and formulate its decision. After the discussion, the panel chair will draft the decision which they then circulate in draft to the other panel members. Once the panel has agreed the final wording the panel chair sends it to the case manager for sending to the parties in accordance with the Rules.

5. At 10:24 on 11 May 2020, just an hour and a half after the case manager had received the panel's decision and reasons, the Board was informed that Mr Dickins had been

returned to closed conditions. This followed an allegation that in the early evening of Saturday 9 May 2020 a prison officer had witnessed a white Range Rover pull into the chapel car park within the grounds of the open prison, HMP Hollesley Bay, and saw a large black plastic bag passed to the claimant through the car window. A search of the bag found it to contain what was believed to be alcohol and steroid tablets. Mr Dickins denies the allegation. No findings have yet been made and he has not been charged with a criminal offence nor made subject to prison discipline rules in respect of the incident.

6. On receipt of the new information on 12 May 2020 the panel chair decided to adjourn the case in order to receive further reports before the referral could be concluded on the papers as intended. He made a number of directions for a full report on the circumstances giving rise to Mr Dickins' return to closed conditions to be obtained, an updated risk assessment and up to date recommendation on his suitability for a return to open conditions and for release. However the directions were not actioned since Mr Michael Atkins, legal director at the Board, reviewed the matter and on 12 June 2020 concluded that the panel was *functus officio* and had no power to reopen the 11 May 2020 decision or take any further information into account. On 18 June 2020, the 11 May 2020 decision was issued to the parties.

7. On 9 July 2020 the interested party applied for a reconsideration of the 11 May 2020 release decision on two grounds, the first, a challenge to the make up of the panel[1] is no longer relevant, but the second, that the decision was irrational and/or procedurally unfair because the panel failed to consider the incident of 9 May 2020 when reaching its decision, is at the heart of this case.

8. The reconsideration application was considered by HHJ Topolski QC on the papers. He observed that the events of 9 May 2020 "could not be regarded as an insignificant piece of adverse intelligence" and "were potentially highly relevant to at least some of his [Mr Dickins'] risk factors." The evidence before the panel of the prison psychologist had highlighted the need for professionals to be attentive to the smallest item of information which might give rise to concerns about Mr Dickins' openness and motivation.

9. HHJ Topolski QC found as follows:

> "26. It is clear that fairness demands that the alleged conduct of the Respondent on 9 May 2020 required an explanation from him and, if he was prepared to give it, for that explanation to be properly tested and assessed by the Panel. Otherwise there would have been no real purpose behind the directions given by the Panel on 12 May 2020.
>
> 27. I had found it difficult to understand how the events of 9 May 2020 could have been overlooked. However, following the making of enquiries, I understand (as I have already mentioned), it was decided that the Panel's decision of 11 May 2020 was treated as final, and the Panel was obliged to regard itself as *functus officio* (that is, having performed its office) and therefore

[1] That the make up of the panel with 2, rather than 3, members was procedurally unfair. It was not a point that had been raised earlier.

had no power to make any further substantive decisions on this case.

28. There can be no doubt that in discharging my independent judicial function in deciding this application I must apply what I regard to be correct principles of law. In so doing I have concluded that it is essential that I should consider the question "*when should a panel of the Board regard itself as being functus officio*"? In my judgment, a panel of the Board should not be regarded as being *functus officio* until its decision has been reduced into writing and communicated to the parties.

29. In an Annex to this decision, I have attempted to set out my view of the law in order that it can be understood.

30. Returning to the application for reconsideration itself, had the events of 9 May 2020 been placed before the Panel so that they could be properly examined and addressed, they would have at least been capable of altering their decision, or prompted to take other steps such as putting the case off for a further oral hearing where the new information and its effect on any risk assessment could be fully and fairly examined.

31. If a panel does not take into account facts which are potentially relevant to its decision, then the obligation upon them is to explain to the parties why they did not do so. The Panel in this case did not do that. In my view the interests of public protection are paramount and the events of 9 May 2020 required careful examination by a panel of the Parole Board.

Decision

32. I have therefore reached a conclusion that the Panel should have taken into account the events of 9 May 2020. The fact they did not was, in my judgment, the result of a mistake of law which renders the decision to release irrational. The application for reconsideration is therefore granted."

10. Directions were made for an expedited rehearing and he directed the panel's adjournment directions of 12 May 2020 to be reissued. In his Annex, referred to at para 29 of the Decision, HHJ Topolski QC reviewed a number of cases in other domestic jurisdictions to explain his conclusion that whether it be a Court, a tribunal, an adjudicator, or an expert, it is only when a decision is communicated, or promulgated, that the proper application of the principle of *functus officio* is triggered. Without any disrespect to HHJ Topolski QC both parties agreed that it is not necessary to set out the reasoning contained in the detailed Annex.

11. Thereafter Mr Atkins issued a new legal update mirroring that of the Decision on 4 September 2020.

12. Following a pre-action protocol letter of 5 October 2020, judicial review proceedings were commenced on 10 November 2020. The Secretary of State for Justice remains neutral and has neither lodged an acknowledgement of service nor made any submissions on the pleaded grounds and taken no part in the proceedings. The Board provided summary grounds on 30 November 2020 followed by detailed grounds on 2 March 2021 following the order of Saini J granting permission.

13. Since the issues in the case are of principle and not fact specific it is unnecessary to rehearse the particular circumstances of Mr Dickins' original conviction, offending record and the implications of the alleged drug drop-off on 9 May 2020 in the prison grounds beyond noting, in complete agreement with HHJ Topolski QC in the Decision, and as accepted by the claimant, that the information would indeed have been highly material and highly relevant to the issue of whether it was necessary for the protection of the public that Mr Dickins should be confined. I would go further, if the Board had had the power or discretion to consider the new information, it would have been wrong not to have considered it.

Legislative framework and the Rules

14. The Board was established by s.59 Criminal Justice Act 1967 and remains established as a body corporate (s.239(1) Criminal Justice Act 2003 (CJA 2003)). 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.

15. A prisoner, such as Mr Dickins, who has been sentenced to life imprisonment is entitled to require the Secretary of State for Justice to refer his or her case to the Board at any time after they have served their minimum term and for further biennial reviews thereafter. If "the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined" (s.28(6)(b) Crime (Sentences) Act 1997) it shall direct the prisoner's release. When the Board directs a prisoner's release the Secretary of State must release him or her and their release can only be delayed for a reasonable time to put in place any necessary licence conditions (*R (Bowen and Stanton) v Secretary of State for Justice* [2018] 1 WLR 2170).

16. The Secretary of State for Justice is empowered to make rules with respect to proceedings of the Board by statutory instrument under the negative resolution procedure by s.239(5) and s.330(2)-(4) CJA 2003. The current Rules came into force on 22 July 2019. The Rules apply to all cases and applications before the Board (r.3(1)). The text of the relevant rules for the purposes of the issues in this case are set out in annex to the judgment. In summary, once the Board receives a referral, it convenes a panel which will decide on the papers if the prisoner is suitable or unsuitable for release or if the case should be directed to an oral hearing (r.19(1)). A decision by the panel on the papers that the prisoner is suitable for release is provisional if the decision is eligible for reconsideration under r.28. But the decision will be final if it is not eligible for reconsideration under r.28 or if no application for reconsideration is received within the specified time. Rule 19(8) requires a decision of the panel under r.19 to be recorded in writing with reasons and the written record provided to the parties within 14 days of the decision.

17. A prisoner may apply for an oral hearing after a provisional paper decision that he or she is unsuitable for release by serving an application on the Board and the Secretary of State within 28 days of the provision of the written record of the provisional paper decision under r.19(8). Rule 21 sets out the procedure to be followed where further evidence is received after a panel has directed that a case should be determined at an oral hearing (whether under r.19(1)(c) or r.20) and before the oral hearing.

18. After an oral hearing the panel must decide whether the prisoner is either suitable or unsuitable for release (r.25). If the decision is eligible for reconsideration under r.28, it is a provisional decision and becomes final if no application for reconsideration is made within the specified time limit. Any decision made by the panel that is not eligible for reconsideration is final. The decision must be recorded in writing with reasons and the record provided to the parties not more than 14 days after the end of the hearing.

19. The reconsideration scheme set out in r.28 provides that some decisions of the Board - including a decision that a prisoner on an indeterminate sentence such as Mr Dickins is or is not suitable for release after a hearing convened under r.25(1) - are eligible for reconsideration. The panel's provisional decision of 11 May 2020 was thus such a decision. The grounds on which a party may apply to the Board for an eligible decision to be reconsidered are that it is irrational or procedurally unfair. Time for making a reconsideration application runs from 21 days after the written decision recorded under the Rules is provided to the parties. The assessment panel (which conducts the reconsideration) must record its decision in writing with reasons and the record be provided to the parties not more than 14 days after the decision.

20. The Rules also contain a slip rule (r.30) in standard format and r.29 provides that procedural errors will not invalidate any steps taken in the proceedings unless directed otherwise by a panel chair or duty member.

21. As an aid to construction, Mr Chapman referred to the Ministry of Justice's consultation document of April 2018 and government response of February 2019 that preceded the introduction of r.28 which followed a review into the law, policy and procedures relating to Board decisions process after the case of *R (DSD) v Parole Board* [2019] QB 285 concerning the serial rapist John Worboys. The consultation document proposed the introduction of a mechanism within the rules to enable a decision to be reconsidered in some cases to avoid the need for judicial review proceedings. On the question of the basis on which a decision should be reconsidered, having noted the classic three general grounds for judicial review of illegality, irrationality (unreasonableness) and procedural unfairness, the Ministry of Justice proposed as follows:

> "49. We are therefore minded to adopt a reconsideration mechanism internal to the Parole Board which has a threshold akin to that of judicial review but with broadened parameters. We believe that using the criteria of a legal framework which is widely accepted and understood would mean that applicants will be able to engage more easily in the process." (Reconsideration of Parole Board decisions: creating a new and open system (CM 9612), April 2018)

22. It went on to propose some flexibility for broader requests for reconsideration to be considered as follows:

> "52. We are minded to use grounds that are comparable to those used to appeal a decision of the First-tier Tribunal to the Upper Tribunal. The grounds are that there must be a point of law arising from the decision.
>
> 53. Examples that have been established as points of law are listed below:
>
> a. made irrational findings on matters that were material to the outcome
>
> b. failed to give reasons for findings on material matters
>
> c. failed to resolve conflicts of fact or opinion on material matters
>
> d. gave weight to immaterial matters or failed to take account of relevant considerations
>
> e. made a material misdirection of law on any material matter
>
> f. committed a procedural irregularity capable of making a difference to the outcome or fairness of the proceedings
>
> g. made a mistake about a material fact which could be established by objective and uncontentious evidence, where the appellant was not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.
>
> 54. We believe these grounds provide a manageable and sufficiently broad basis for the reconsideration mechanism and appropriately balance the need to challenge with the need to allow the Parole Board to continue with their core business. (para 52, 53 & 54)."

23. The Board response to the consultation suggested that reconsideration should be available in cases of "illegality, irrationality or procedural unfairness", or arguments that new evidence has come to light since the original hearing or demonstrates that an administrative error or mistake has occurred.

24. The government's response to the public consultation explained that the purpose of the creation of the reconsideration mechanism was to provide a more accessible way to review parole decisions in those rare cases where decisions may be flawed. As to the criteria for reconsideration it stated as follows:

> "17. There will be a high threshold for reconsideration applications to be accepted, along the lines of the **judicial review grounds** (illegality, irrationality and procedural unfairness).
>
> 18. Parole decisions are based on an assessment of evidence and the professional judgement of individual panel members. Decisions should not be vulnerable to challenge simply because a party disagrees with the result. To meet the threshold for reconsideration, the decision will need to be legally flawed in some way." (Reconsideration of Parole Board decisions: creating a new and open system – Government response to the public consultation (CP 30), February 2019)

Competing submissions

25. On ground 1, Mr Bunting submitted that the Rules do not permit for a decision to be reconsidered on any grounds other than irrationality or procedural unfairness. Even though illegality and error of law were discussed as possibilities in the consultation documents, they did not find their way into the Rules as adopted by Parliament, whatever the subjective intention. Nor can illegality be seen as a subset of irrationality.

26. On ground 2, Mr Bunting submitted that the functions to be performed by the defendant were firstly to make a decision whether Mr Dickins was suitable for release under r.25(1), secondly to provide reasons for its decision and thirdly, the communication of the decision to the parties. The date the parties are provided with the decision is separate and quite distinct from the making of the decision itself. The panel had made a decision and formulated their reasons for it in the email of 8:51 on 11 May 2020 and it was *functus* when the email was sent to the case manager as that is what is provided for in the Rules. None of the authorities relied on by either HHJ Topolski QC in his detailed and careful Annex to the Decision, nor those in the defendant's submissions shed any light on the matter since question has to be assessed by reference to the Rules of the Board as a body corporate, not the Civil Procedure Rules or Tribunals, Courts and Enforcement Act 2007 or rules of procedure made thereunder.

27. On ground 1, Mr Chapman noted the conclusion of HHJ Topolski QC that the material was potentially highly relevant and the panel's decision not to consider it was irrational, even if the irrationality arose from the error of law in the Board's conclusion that the panel was *functus*. He also asked the Court to consider if an error of law could be interpreted as a form of irrationality and referred to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, specifically Lord Greene MR's example at 229: "For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law… If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"."

28. He also suggested the Court may wish to consider not only the ordinary meaning of the text of r.28 in its proper context but also the legislative intent and purpose of the rule as set out in the consultation documents cited above. But he acknowledged that the Board's powers are conferred and limited by legislation and if the legislation does not provide for reconsideration of the provisional decision on the basis that it was infected by legal error, then no such power exists.

29. On ground 2, although Mr Chapman stated that the Board's understanding is that it has no jurisdiction to modify or revoke a provisional decision after it has been communicated to the parties in accordance with the Rules, the Board sought guidance on whether it was *functus* prior to communication of its decision.

30. The Board had had some difficulty grappling with this question as demonstrated by its change of position a number of times starting with the panel chair's view on 12 May 2020 that it could take on board the new information and revisit the 11 May 2020 decision. That view was superseded by the Board's legal director Mr Atkins' initial opinion that the panel was *functus*, which was then followed by the Board's opposite conclusion and adoption of the reasoning in the Decision that it was not *functus*. The Board's current view is that it was not *functus* but for different reasons to those set out in the Decision. As Mr Chapman explained to the Court, the fundamental and difficult question is whether each of the three steps under the rules – decide, record and inform – are properly regarded as separate and distinct functions of the Board or aspects of a single function, or process, which it would be wrong to "salami slice" (*R (Demetrio) v IPCC* [2016] PTSR 891). He considered that useful guidance was provided by the discussion in *In re L and another (Children)* [2013] 1 WLR 634 per Baroness Hale at paras 16 – 19 and *AIC Ltd v FAAN* [2020] EWCA Civ 1585 in the context of the courts. He also drew the Court's attention to *Patel v SSHD* [2015] EWCA Civ 1175 in the context of the Tribunals, Courts and Enforcement Act 2007 and the Tribunal Procedure (Upper Tribunal) Rules 2008. Specifically in the context of the defendant he referred the Court to *R(Gourlay) v Parole Board* [2017] 1 WLR 4107, and the observation of Hickinbottom LJ at para 50 that "the Board has a power, not an obligation, to review any decision it makes."

31. The Court would also need to consider two relevant judgments of the High Court concerning the Board's powers. The *obiter dictum* in *R v Parole Board ex p Robinson* [1999] Prison LR 118 that suggested the Secretary of State could revisit a decision that was "fundamentally flawed," if there had been a "supervening material change of circumstances" or "fresh evidence" (paragraphs 28 and 32) and *R(Secretary of State for Justice) v Parole Board* [2020] EWHC 3490 (Admin) which, albeit on different facts, considered the power of the Secretary of State to re-refer the case of a prisoner to the Board and considered the Rules in their current form.

32. The Court was invited by Mr Chapman to keep in mind the Board's statutory function to keep the public safe through its assessment of whether a prisoner would pose a significant risk of causing serious harm to the public if released and consider if it should be entitled to modify or revoke a decision on adequate grounds up to the point at which it is communicated to the parties. Is it equivalent to the sealing of an order in the civil field as was the case in *AIC*?

33. The Court was also invited to consider whether there are good public policy reasons why the Board should not be required to stick with a decision made on false, incomplete or out of date information before that decision has been communicated to the parties. It would, thankfully, be a rare occurrence and not what Mr Chapman described as a "floodgates situation". The Court was invited to consider whether the principles of finality and certainty in decision-making would be undermined by the reconsideration of a decision prior to communication of the decision, especially since r.25(6) stipulates the reasons to be communicated within 14 days of the hearing.

34. Mr Chapman accepted that if the Court was to rule in favour of the claimant on ground 1, ground 2 must also fail. However in order to assist the Board in future the Court was invited to give guidance on ground 2, regardless of the outcome on ground 1.

Analysis and conclusions

Ground 1: Scope of the reconsideration procedure

35. The first question is whether the ground for reconsideration identified in HHJ Topolski QC's Decision is an error of law, irrationality or perhaps something else? Error of law, or illegality, means

> "that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it," (*Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 per Lord Diplock at 410F).

Irrationality (or *Wednesbury* unreasonableness)

> "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*CCSU* per Lord Diplock 410G).

It has two limbs.

> "The first limb focuses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focuses on its outcome – whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former." (*Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 para 24 per Lady Hale).

36. In considering irrationality in the context of decisions of the Board, due deference must be had to the expertise of the Board in making decisions relating to parole (*R (DSD and others* [2019] QB 285*) v Parole Board* [2018] EWHC 694 (Admin)).

37. HHJ Topolski QC's concluded that the panel should have taken into account the events of 9 May 2020. Their failure to do so was the error of law in deciding that it was *functus* which rendered the decision to release irrational and could therefore be reconsidered under the r.28 procedure.

38. But in HHJ Topolski QC's judgment, all the problems stemmed from the panel's conclusion that it was *functus* which, on his analysis would be an error of law. The reason why the new material was not taken into account flowed directly as a consequence of what was said to be the error of law. It was inextricably bound up with, part and parcel if you like, of the *functus* decision. Whilst failure to take into account relevant material can be a classic ground of irrationality, where, as here, it was a direct

consequence, the *sine qua non*, of a decision that the panel had no legal power to take the material into consideration, it would fall into the category of an error of law and is not an irrational decision. Even though the consequence of the *functus* decision is that relevant material has not been taken into account. I therefore find that the ground for reconsideration was an "error of law" and not either irrationality, or some other, as yet unidentified, category.

39. The next issue therefore is the meaning of r.28 which breaks down into three sub-questions: is "error of law" a subset of "irrationality"; is the meaning of "irrationality" clear and settled as a legal term of art; and, thirdly do the consultation documents assist in clarifying the meaning of r.28?

40. Both parties, supported by the case law (*O'Reilly v Mackman* [1983] 2 AC 237 at 278), agreed that taxonomy of public law principles will often be inappropriate – an arid Casaubon type exercise – as little usually turns on which category of public law a claim succeeds: the effect of an unlawful decision will be the same whichever is applied. But in this case it is crucial as we are considering the words of the Rules that, ostensibly at least, adopt the wording of only two of the three established categories of grounds of public law challenge.

41. Irrationality and illegality bear different meanings and address different mischiefs: one is about understanding the law that regulates the decision maker's power, the other is about behaving irrationally. It is illustrated by the facts of this case. There was nothing irrational in the carefully reasoned and meticulous approach of both Mr Atkins in his initial advice that the panel was *functus* and the Decision which reached the opposite result, even though they could not both be right. Neither decision defied logic or was in any sense outrageous. Detailed consideration by sensible minds had carefully considered the issue.

42. If illegality was a subset of irrationality surely it would have been expressly articulated as such in one or more authorities in the last 70 odd years? I do not read the example of Lord Greene MR in *Wednesbury* at 229: "for instance, a person entrusted with a discretion must, so to speak, direct himself properly in law […] If he does not obey those rules he may truly be said, and often is said, to be acting "unreasonably"", as meaning that an error of law is a form of irrationality. It is a reference to the exercise of a discretion within the bounds of reason and that a failure to do so may render it subject to challenge in law. As was made clear in the final paragraph of *Wednesbury* at 233 – 234, the focus is on the irrationality of or reasonableness of its decision "a conclusion so unreasonable that no reasonable authority could ever have come to it". See also *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374, per Lord Diplock at p.410 and *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 para 24. The issue of *functus* however is purely binary and a question of law: the act has either been performed or it has not. I therefore conclude that irrationality and illegality are separate and distinct concepts and neither is a subset of the other.

43. In construing a statute or statutory instrument, such as the Rules, the task is to ascertain the intention of Parliament. The phrase is a shorthand reference to the intention which the Court imputes to Parliament in respect of the language used. It is not the subjective intention of the Minister or other person or persons who promoted the legislation.

44. Where the language of the legislation is clear and unambiguous and gives rise to no serious controversy as to its meaning, this can and should be achieved by a simple application of the normal and natural meaning of the words used. The fundamental principle of parliamentary sovereignty is that clear and unambiguous words must be given their clear and unambiguous meaning. Where a word or phrase has a technical meaning in a certain branch of the law, and is used in a context dealing with that branch, it is to be given that meaning unless the contrary intention appears (see for example *Bennion, Bailey and Norbury on Statutory Interpretation,* s.22.5 and *R (Sisangia) v Director of Legal Aid Casework* [2016] 1 WLR 1373 at paras 11 – 17).

45. The Court should therefore first look for a clear meaning of the words used. But in doing so the Court may wish to consider the enactment's purpose or object in which case it may look at the context in which the legislation was passed and at other material extraneous to the legislation itself (depending on the circumstances). It may include consultation papers and related materials (see *Craies on Legislation* 12th edition, chapter 18 1.1 – 6 and 27.1.11).

46. Not only is the meaning of "irrationality" clear and reasonably settled as a legal term of art as discussed above, but on the face of it, r.28(1) is clear and unambiguous that reconsideration may only be applied for on the ground of either irrationality or procedural unfairness and none other. In order to respect the fundamental principle of Parliamentary sovereignty the words must be given their natural meaning.

47. That is probably a complete answer to the question as there is little doubt of the plain and technical meaning, but I have also considered the consultation papers set out above to see if useful insight can be gleaned about the purpose or object of r.28 and the context in which the legislation was passed.

48. If one considers the wider context and the purpose of the Board only to recommend a prisoner's release when it is satisfied that it is no longer necessary for the protection of the public that he or she should be confined (s28(6) Crime (Sentences) Act 1997), one can see the policy arguments for enabling the Board to correct an error of law if it risked the protection of the public. As Mr Chapman said it is most perplexing why reconsideration on the ground of an error of law did not make it into the Rules when it had been canvassed and trailed in the consultation papers so extensively and the indications were that the intention was to adopt similar grounds, if not wider, to those in judicial review claims. Illegality was specifically mentioned as were "legally flawed" decisions. Yet those ideas and proposals did not make it into the Rules as approved by Parliament. Since they were expressly canvassed, the inference is that the decision was deliberate. Perhaps it was to do with the importance of finality of litigation and to deter unmeritorious reconsideration applications from clogging up the system, perhaps there was some other reason: but it is mere speculation and it is not about the subjective intention of the Minister or other proposer of the legislation.

49. It would be tempting to find that the reconsideration procedure should incorporate an error of law, particularly on the facts of this case and one can see why HHJ Topolski QC was straining to do so. But for whatever reason the Rules do not provide for it and it would involve reading words into the Rules that simply are not there which cannot be done under the first principles of construction. I am forced to conclude that the legislation does not provide for reconsideration of a decision on the basis that it was infected by legal error and accordingly, no such power exists.

50. It follows that the Decision cannot stand.

Ground 2: the meaning of *functus officio*

51. Although it is therefore academic to consider ground 2, at the request of the parties, I shall still consider it.

52. The concept of *functus officio* arises when:

> "a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it"

(*R (Commissioner of Police of the Metropolis) v IPCC* [2015] EWCA Civ 1248 ("Demetrio")) at para 42, per Vos LJ giving his approval of the Divisional Court's definition.

53. In order to determine whether the panel was *functus* when it received the new information about Mr Dickins' alleged involvement in bringing contraband into the prison, it is first necessary to decide if it had "performed" its relevant "function". The panel had made its decision, it had recorded its reasons for it, but the parties had not yet been informed of it. Since the Board is a creature of statute with no inherent jurisdiction, the starting point at which it becomes *functus* must be the statutory scheme.

54. Both s.28(6) Crime (Sentences) Act 1997 and r.25(1) require the Board to "decide" whether a prisoner is suitable for release. A plain reading of r.25(6) suggests that the communication of a decision is a separate act to the act of making the decision and indeed the act of recording the decision with reasons. The subsequent communication of reasons to the parties would seem to be administrative.

55. Mr Chapman suggested that the function could be said to comprise two aspects both of which needed to have been completed in order for the function to have been performed: firstly for the Board or panel to satisfy itself that the confinement of the prisoner was no longer necessary for the protection of the public (s.28(6)); and, secondly, if so satisfied, to direct his or her release (s.28(5)). The difficulty with this argument however is that the wording of the Rules provide that the decision is made at the point at which the written reasons are agreed by the panel members and no later see r.19(8), 21(12) and 25(6). HHJ Topolski QC acknowledged this in paragraph 4 of the Annex to the Decision.

> "As I understand it, the Board's approach is that a panel is *functus officio* once it has made its decision, even if that decision has not been communicated to the parties. Again, as I understand it, that approach is taken because as a creature of statute the Board regards itself as being reliant upon its Rules for the manner in which it carries out its functions. So, for example, when Rules 19(8), 21(12) and 25(6) provide that, and I paraphrase:

> "*the decision… must be recorded in writing with reasons for that decision… and the written record provided to the parties within 14 days of the decision*"
>
> That, in the context of the Rules is I understand interpreted to mean that the decision is made and is final at the point at which the written reasons are agreed by the panel members and no later."

56. It is hard to fault the logic of the Board's reasoning at that point as summarised in that paragraph.

57. Mr Chapman was right to remind the Court of the important purpose to protect the public and that in exercising this function "the Board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury" (*R v Parole Board ex p Watson* [1996] 1WLR 906 per Sir Thomas Bingham MR at 916 – 917), but where, as here the plain and ordinary meaning of the Rules is that it has performed its function when it has reached its decision, the underlying purpose of the provision does not assist. The steps of deciding and recording the decision are properly regarded as separate and distinct functions of the Board to the administrative task of communication.

58. Can assistance be gleaned from the wider authorities or parallels with the CPR or the rules of other statutory bodies or tribunals? *In re L and another (Children)* [2013] 1 WLR 634 Baroness Hale at paragraphs 16 – 19 held that in the civil jurisdiction a judge was entitled on adequate grounds to reverse his or her decision at any time up to the point at which an order is drawn up and perfected (meaning sealed by the Court under the CPR). In a family case the judge gave an oral outline judgment announced to the parties at the end of a fact-finding hearing that the father was the perpetrator of non-accidental injuries sustained by a child. But after further consideration of the evidence and before the order was drawn up, the judge changed her mind decided that she was unable to find which of the parents had injured the child and set out her reasons in a "perfected judgment". In order to determine whether the Court could alter the outcome of the fact-finding hearing in such a way Lady Hale analysed the history of the courts beginning with the Judicature Acts 1873. She continued through the case law and statutory developments up to the current CPR to conclude that the judge did have the power to change her mind and that it had long been the law that a judge is entitled to reverse their decision at any time before their order is drawn up and perfected.

59. Mr Chapman also drew the Court's attention to *Patel v SSHD* [2015] EWCA Civ 1175 which considered the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Tribunals, Courts and Enforcement Act 2007. The Court of Appeal held that an "excluded decision" of the Upper Tribunal took effect, and was irrevocable, from the moment it was uttered. It noted that by s.10 of the 2007 Act the jurisdiction of the Upper Tribunal to review its own decisions is expressly excluded and for that reason the decision was irrevocable.

60. The central difficulty however is that the case of *In re L* was specific to the civil courts by reference to their history and the authorities specific to the civil courts' jurisdiction and CPR which are not the same as the Rules, statutes and case law that the Board is required to follow as a creature of statute without any inherent jurisdiction. By the same

token *AIC Ltd v FAAN* [2020] EWCA Civ 1585 is of no assistance to the interpretation of the Rules and statutory powers of the Board to revisit its decisions as it also concerns the rules of the Court. It has no application to an analysis of the Rules.

61. Similarly *Patel* is concerned specifically with the Upper Tribunal rules and the 2007 Act both of which are differently worded and contain different provisions to those which govern the Board. I find that *Patel* has no wider application beyond the 2007 Act and Upper Tribunal rules and is therefore of no assistance to the interpretation of the Board Rules and Crime (Sentences) Act 1997. An understanding of the scope of the powers set out in particular rules is specific to the wording of those rules and the statutory framework under which the public body operates and will depend upon what its rules provide.

62. Nor is any assistance provided by the provisional nature of some of the Board's decisions. Firstly, a provisional decision is still a decision, even if, following a successful reconsideration it is not the final decision. Secondly, not all decisions are provisional. Any decision made by a panel under either r.25(1) or r.19(1) which is not eligible for reconsideration under r.28 is not provisional but is final. Since I have found that the grounds for reconsideration do not include illegality, the Decision was not eligible for reconsideration and was thus final. It follows that the description of a decision being provisional in certain circumstances under r. 25(1) and 19(1) does not mean that the panel had not performed its function when it made its 11 May 2020 decision.

63. I therefore conclude that the Board had performed its relevant function at 8:51 on 11 May 2020 when the panel chair sent the decision and reasons to the case manager. The next question is whether the Board was entitled to modify or revoke its decision before communicating it to the parties. Both sides agreed that apart from r.28 and the slip rule in r.30, there is nothing in the text of the Rules that provides for modification or revocation of a decision once taken. I am referred to *Robinson*, a case before the Divisional Court on different facts concerning the 1997 rules of the Board. In that case a panel of the Board had made a decision that there was "no evidence of significant risk to life or limb" and that the prisoner could be safely released. The panel adjourned the hearing for the detailed arrangements to be put in place in a release plan. As the panel chair had retired after the hearing, the release plan came before a differently constituted panel for approval. The second panel did not agree with the first panel's assessment of risk. Notwithstanding the completion of the release plan, the second panel refused to direct the Secretary of State to release Mr Robinson. The Court had no difficulty in concluding that the first panel's decision was final and conclusive and it was impermissible for the second panel to change its mind. The Court held:

> "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"

64. It was common ground that the ultimate clause in the sentence is strictly *obiter* since there was neither a fundamental flaw nor a supervening material change of

circumstance in the *Robinson* case. In that case the Board accepted that there was no new material before the Board and the case could not be put on the basis of a change of circumstances or fresh evidence. Both parties also consider that the proposition is no longer good law. Mr Justice William Davis has recently considered *Robinson* in *SSJ*. In that case the Board ordered the immediate release of a prisoner (Mr Walker) as it had wrongly been informed that his sentence had expired when it had not. When the Secretary of State informed the Board that Mr Walker's sentence did not expire until June 2023 and referred the matter back for reconsideration, the Board refused as it considered itself *functus*. The Secretary of State challenged the Board's decision by way of judicial review. William Davis J upheld the review application. He concluded that the Board was not *functus* since it had not taken a decision, it had merely observed that there was no decision for it to take as the sentence had expired. In discussing *Robinson* the Judge noted that the Court had not provided any assistance as to the circumstances in which a fundamental flaw or a change in circumstances might arise, nor the mechanism by which the Secretary of State was to demonstrate either factor. He considered that *Robinson* was very unusual on its facts and concluded:

> "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." Para 31

65. William Davis J also noted that there has been a significant change in the statutory position since *Robinson,* which was decided four years before the Criminal Justice Act 2003, and which was based on rules which have since been superseded.

> "… The scheme [rule 28] 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." (Para 34)

66. I agree with William Davis J. The introduction of the Rules has addressed what was previously a lacuna in the 1997 rules and has placed reconsideration on a statutory basis. *Robinson* is no longer good law as the statutory framework has changed. There is thus no risk of straying into the doctrine of *stare decisis.* But if it could be said that *Robinson* and *SSJ* are two previous inconsistent decisions from Judges of co-ordinate jurisdiction that have decided the same point differently, then I follow *SSJ* as the second of those decisions as I am directed to do in accordance with *Willers v Joyce and Another (No. 2)* [2018] AC 843 and *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59.

67. It follows that William Davis J's finding in *SSJ* about the Secretary of State's reconsideration powers post the introduction of the Rules must also apply to a prisoner: both are defined as "parties" under the Rules without discrimination (r.2). Accordingly, outside r.28 and the r.30 slip rule, the Board cannot reconsider a decision on application or request by either the Secretary of State or a prisoner once it has been decided.

68. The final point to be considered is whether the observation of Hickinbottom LJ in *Gourlay* (para 50) that "the Board has a power, not an obligation, to review any decision it makes" is authority for the Board having a general power of review. It can be dealt with swiftly. When read in the context of the paragraph and the case, it is a reference only to the Board's ability to compromise or concede judicial review proceedings. The paragraph in full is as follows:

> "However, it is clear that a party does not in fact actively contest a claim simply because he does not concede it. In relation to the distinct issue of whether such a party should be treated as actively contesting a claim in the circumstances of this case, the Board has a power, not an obligation to review any decision it makes."

69. *Gourlay* cannot be read as authority for conferring a wider power on the Board to revisit its decisions, outside its own Rules and regulations.

70. Hard cases make bad law and this is a hard case. Highly relevant material that could well have had a bearing on its assessment of the risk Mr Dickins posed to the public if he were to be released came to light after the panel had made its decision on 11 May 2020. But the Board was *functus* when it made its Decision and Parliament has not given the Board the power to reconsider its decision in such circumstances. It is not for the Court to intervene and re-write the Rules. The Decision must be quashed. It is very much to be hoped that any concerns as to Mr Dickins' risk can be met by his licence conditions.

Annex

Relevant Extracts from the Parole Board Rules 2019/1038

19. Consideration on the papers

"— (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.

(2) Where a panel has received a request for advice from the Secretary of State concerning whether a prisoner should move to open conditions, the panel must recommend whether—

(a) the prisoner is suitable for a move to open conditions, or

(b) the prisoner is not suitable for a move to open conditions.

(3) Where a panel makes a decision that the case should be directed to an oral hearing under this rule, the panel may at the same time make any directions relating to the 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.

(7) Where the Board receives a request for advice with respect to any matter referred to it by the Secretary of State, the Board may advise or make a recommendation to the Secretary of State without an oral hearing.

(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."

20. Procedure after a provisional decision on the papers

"—(1) Where a panel appointed under rule 5(1) has made a decision that a prisoner is unsuitable for release under rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing to determine the case.

(2) A prisoner who makes an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of the provision of the written record under rule 19(8).

(3) If no application has been served by the prisoner under paragraph (2) after the expiry of the period specified by that paragraph, a provisional decision made under rule 19(1)(b)—

(a)remains provisional if it is eligible for reconsideration under rule 28, and becomes final if no application for reconsideration is received within the period specified by that rule, or

(b)becomes final if it is not eligible for reconsideration under rule 28.

(4) Where no application is served by a prisoner under paragraph (2), the decision must be provided to the parties by the Board within 35 days of the written record under rule 19(8).

(5) If an application is served in accordance with paragraph (2), the decision about whether the case should be determined at an oral hearing must be taken by a member of the Board who—

(a)is a duty member, and

(b)was not part of the constituted panel appointed under rule 5(1) who made the provisional decision.

(6) If the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, a provisional decision under rule 19(1)(b)—

(a)remains provisional if it is eligible for reconsideration under rule 28 and becomes final if no application for reconsideration is received within the period specified by that rule, or

(b)becomes final if it is not eligible for reconsideration under rule 28.

(7) Where the decision taken under paragraph (5) is that the case should not be determined at an oral hearing, that decision must be provided to the parties by the Board within 35 days of the written record under rule 19(8).

(8) A decision under paragraph (5) cannot be deferred or adjourned by a panel chair or duty member under rule 6 and the time limit in paragraph (7) cannot be extended under rule 9."

25. Decision by a panel at an oral hearing

"—(1) Where a panel has considered a prisoner's case at an oral hearing, the panel must decide either that—

(a) the prisoner is suitable for release, or

(b) the prisoner is unsuitable for release.

(2) Any decision made by the panel under paragraph (1) 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.

(3) Any decision made by the panel under paragraph (1) which is not eligible for reconsideration under rule 28 is final.

….

(6) The decision under paragraph (1) and/or recommendation under paragraph (4) 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.

(7) The recorded decision and/or recommendation must refer only to the matter which the Secretary of State referred to the Board."

28. Reconsideration of decisions

"—(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—

(a) an indeterminate sentence;

(b) an extended sentence;

(c) a determinate sentence subject to initial release by the Board under Chapter 6 of Part 12 of the 2003 Act.

(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."

29. Error of Procedure

"Where there has been an error of procedure by either party or by the Board, including a failure to comply with a rule—

(a)the error does not invalidate any step taken in the proceedings unless the member appointed by the Board for this purpose, being either a panel chair or duty member, directs otherwise, either on the application of a party or in the course of conducting the proceedings, and

(b)the panel chair or duty member may make a direction or take any other step that it considers appropriate."

30. Slip Rule

"—(1) The Board may at any time correct an accidental slip or omission in a decision.

(2) A party may apply for a correction without notice."