Neutral Citation Number: [2023] EWHC 821 (Admin)

Case No: CO/2724/2022
and CO/3259/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2023

Before:
LADY JUSTICE MACUR
and
MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING **on application of** **(1) ADRIAN JOHN BAILEY** **(2) PERRY MATTHEW MORRIS**	**Claimants**
-and-	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
-and-	
PAROLE BOARD FOR ENGLAND AND WALES	**Interested Party**

- -

Philip Rule KC and Michael Bimmler (instructed by **Instalaw Solicitors**) for the **Claimants**
James Strachan KC, Scarlett Milligan and Myles Grandison (instructed by the **Government Legal Department**) for the **Defendant**
Ben Collins KC, Nicholas Chapman and Michael Rhimes (instructed by the **Parole Board**) for the **Interested Party**

Hearing date: 4 April 2023

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE MACUR AND MR JUSTICE CHAMBERLAIN

Lady Justice Macur and Mr Justice Chamberlain:

Introduction and summary

1 In a judgment handed down on 15 March 2023 (neutral citation [2023] EWHC 555 (Admin): "the first judgment"), we gave our reasons for concluding the Secretary of State for Justice had acted unlawfully in making rule 2(22) of the Parole Board Amendment Rules (SI 2022/717: "the 2022 Amendment Rules) and in promulgating two sets of guidance about the effect that rule ("the July Guidance" and "the October Guidance"). The guidance was addressed to staff employed or engaged by HM Prison and Probation Service ("HMPPS staff") who give written and oral evidence to the Parole Board ("the Board"). It instructed HMPPS staff not to express a view on the question whether a prisoner is suitable for release or transfer to open conditions ("the ultimate issue").

2 We left four issues for determination at a subsequent hearing, which was fixed for 4 April 2023:

(a) relief;

(b) costs;

(c) permission to appeal; and

(d) the issues identified at [161]-[165] of our first judgment relating to the application of the law of contempt of court.

Developments since the first judgment

3 In the period between the handing down of our judgment and the subsequent hearing, the Secretary of State has taken steps to inform HMPPS staff that the July and October Guidance has been withdrawn. On 15 March 2023, the day we handed down judgment, an email was sent to Regional Probation Directors, containing information which was then "cascaded" to their staff. It contained this:

> "We are considering the Court's judgment and next steps carefully and will issue guidance in due course. In the meantime, we wanted to update colleagues urgently today on what the judgment means in practice now. The Parole Board will update its members on the judgment today too. What this judgment means for report writers attending Parole Hearings or submitting reports over the next few days is:
>
> - All previous guidance (in whatever form) on giving recommendations is, as of today, revoked and should not be followed.
>
> - Reports prepared for the dossier should not contain any recommendations on suitability for release, in accordance with the Parole Board Rules 2019 as amended by the 2022 Amendment Rules. This does not apply to any reports written to comply with a direction of by the Parole Board. This means that whilst we should not include recommendations in the dossier, as a matter of course, if

> the Parole Board directs such a report, that direction must be complied with.
>
> - Report writers and witnesses should answer any questions asked by the Board that they feel able to answer, having regard to all the circumstances of the case, including their knowledge of the case and area of expertise. This includes questions that the Parole Board may ask on whether or not the witness recommends release, or whether someone can be safely managed in the community, if the witness feels able to answer those questions."

4 On 17 March 2023, an email was sent to Prison Group Directors, Heads of Community Integration, Governors and Directors of Private Prisons and copied to Senior Civil Servants and Heads of Group. These staff were asked to "cascade as quickly as possible to staff writing reports for the Parole Board". The email said that the relevant templates had been updated to provide a box for practitioners to complete a recommendation, but "only where a recommendation is directed by the Parole Board. In all other circumstances, the box should remain blank" (emphasis in original). The email went on as follows:

> "It is important to remember that:
>
> - **Reports prepared for the dossier should not contain any recommendations on the prisoner's suitability for release, in accordance with the Parole Board Rules 2019** as amended by the 2022 Amendment Rules. This does not apply to any reports written to comply with a direction of the Parole Board. This means that whilst we should not include recommendations in the dossier as a matter of course, if the Parole Board directs such a report, that direction must be complied with.
>
> - Report writers and witnesses should answer any questions asked by the Parole Board that they feel able to answer, having regard to all the circumstances of the case, including their knowledge of the case and area of expertise. This includes questions that the Parole Board may ask on whether or not the witness recommends release, or whether someone can be safely managed in the community, if the witness feels able to answer those questions." (Emphasis in original.)

5 These emails were forwarded to us on 28 March 2023.

6 Then, on 30 March 2023, the Secretary of State made and laid before Parliament the Parole Board (Amendment) Rules 2023 (SI 2023/397: "the 2023 Amendment Rules"), which came into force on 3 April 2023. The Explanatory Note accompanying these Rules makes clear that they were made "to take account of a court judgment". They amend the Parole Board Rules 2019 to omit paragraph 1Z of the Schedule and replace it with a new Part A1 (headed "Secretary of State view on suitability for release") as follows:

> "1. Reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs of Part B of this Schedule. Report writers' may include in the report their professional opinion on whether the prisoner is safe to be managed in the community, or moved to open prison conditions, provided that they feel able to give such an opinion. Any such opinion should be made by reference to their particular area of competence, as well as to their specific interactions with the prisoner.
>
> 2. Where considered appropriate, the Secretary of State, as a party to the proceedings, will present an overarching view on the prisoner's suitability for release in accordance with the statutory release test."

7 Various other consequential amendments were also made.

8 As can be seen, the prohibition on report writers giving their view on the "ultimate issue" has now gone, even as respects the reports forming part of the initial dossier; and the Secretary of State's view is now described as an "overarching view" given "as a party to proceedings", rather than a "single Secretary of State view".

9 The 2023 Amendment Rules were drawn to our attention by the claimants' solicitors on 31 March 2023. On 3 April 2023, we were shown a new guidance document ("the March 2023 Guidance") dated 31 March 2023, which makes clear that all previous guidance has been "found unlawful, revoked and must not be followed" and which gives further guidance about how HMPPS staff should write reports and about oral hearings before the Board. We have annexed that document to this judgment.

(a) Relief

10 Before the 2023 Amendment Rules were made, there was a dispute about the appropriate form of relief. The Secretary of State had submitted that we should exercise the power in s. 29A of the Senior Courts Act 1981 to grant a suspended quashing order without retrospective effect. But rule 2(22) of the 2022 Amendment Rules has now been superseded. The result is that there is nothing left to be quashed. This means that an order under s. 29A is not available. It follows that the only form of relief we can now grant in relation to rule 2(22) is a declaration that the decision to make that rule was unlawful.

11 Both the July and the October Guidance have now been withdrawn. Accordingly, the only relief necessary or appropriate is a declaration that the decisions to promulgate these documents were unlawful in the respects set out in our first judgment.

12 There is no power to deprive a declaration of any retrospective effect. That is a consequence of the way s. 29A was drafted.

13 From the publication of the 2023 Amendment Rules until the morning of the hearing on 3 April 2023, it appeared that there was agreement about the appropriate form of relief, namely, declarations that the decisions to make rule 2(22) of the 2022 Amendment Rules, and the July and October Guidance were unlawful.

14 Mr Philip Rule KC, who appears with Mr Michael Bimmler for the claimants, submitted that the March 2023 Guidance is still problematic in several respects. We do not set these out here, because we do not consider that the lawfulness of the March 2023 is an issue for us to decide in this claim. The decisions originally challenged in this claim were the decisions to make rule 2(22) and to make and promulgate the July Guidance. Permission was granted to amend the claim to challenge the October Guidance, because that challenge could be heard on the timetable which had been fixed without unfairness to the Secretary of State, and there were public interest reasons to allow the amendment. To allow the claimants a further amendment to challenge the March 2023 Guidance would be unfair to the defendant and would permit a form of "rolling judicial review", which the Court of Appeal has deprecated: see e.g. *R (Dolan) v Secretary of State for Health* [2020] EWCA Civ 1605, [2021] 1 WLR 2326, [118]. If there is a legitimate complaint about the March 2023 Guidance, it will have to be ventilated by a fresh claim for judicial review. We say nothing about the prospects of such a claim.

(b) Costs

15 The parties now agree that the Secretary of State should pay the claimants' costs. We shall accordingly make an order to that effect.

(c) Permission to appeal

16 Mr James Strachan KC, who leads Ms Scarlett Milligan and Mr Myles Grandison for the Secretary of State, had no application to make to this Court for permission to appeal, though he indicated that the Secretary of State would consider whether to make such an application directly to the Court of Appeal pursuant to CPR 52A PD, para. 4.1(b).

(d) Contempt of court

How the issue arose

17 We concluded that the promulgation of the July and October Guidance was unlawful because:

(a) as the Secretary of State accepted (see [34]-[35] of the first judgment), where a witness has a view on the ultimate issue, and the Board directs the witness to express that view in writing or asks them to do so at an oral hearing, the witness is legally obliged to comply with the direction or answer the question (save where the witness can rely on a privilege against answering); and

(b) both the July and the October Guidance induced HMPPS staff to breach those legal obligations by refusing to comply with directions from the Board and/or by refusing to answer questions put to them at oral hearings.

18 In advance of the hearing, we asked whether a failure to answer a question in these circumstances would amount to contempt of court and, if so, by what procedure such a contempt could be dealt with. The parties each filed notes addressing these issues. The Board submitted that a failure to answer would amount to a contempt of court, which could be addressed by proceedings under CPR Part 81, which could be brought at the instance of a party or the law officers. The Claimant agreed that the failure would amount to a contempt of court but submitted that the Board itself had power to punish it. The Secretary of State submitted that a failure to answer would not amount to a contempt of

court, because the Board is not a court for the purposes of the law of contempt; and that in any event the Board had no power to punish the contempt.

19 As we explained at [34]-[35] of the first judgment, it was not necessary for us to determine this dispute in order to conclude that the July and October Guidance were unlawful. However, it was also not satisfactory to leave these important issues unresolved: see the postscript to our judgment at [161]-[165]. We accordingly gave directions for a further hearing. We have since received further written submissions and full oral argument at the hearing on 3 April 2023.

Can failure to answer an oral question amount to a contempt?

20 In a court or tribunal to which the law of contempt applies, refusal to answer a relevant and necessary question put by the tribunal constitutes a contempt in the face of the court, unless the answer attracts a legally recognised form of privilege: see *Arlidge, Eady and Smith on Contempt* (5th ed), para. 10-167; *Attorney General v Mulholland* [1963] 2 QB 477. A question is relevant and necessary if the answer to it would serve a useful purpose in the proceedings in hand: ibid., 492 (Donovan LJ). See also *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347 (Lord Diplock): "…a refusal to answer the question if ordered to by the judge to do so would constitute a contempt committed in the face of the court and thus a criminal contempt".

21 Whether a refusal to answer a question puts a witness in contempt of court will depend on the view of the court considering the contempt about the relevance and necessity of the question. This may be context-specific: see e.g. *Attorney General v Lundin* (1982) 75 Cr App R 90. However, we can envisage cases in which a witness's view on the "ultimate issue" might be both relevant and necessary to the Board's task of determining the statutory question before it. We note here the passage from Wigmore, *Evidence in Trials at Common Law* (3d ed., 1983), cited with approval by the Court of Appeal in *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195 and set out at [32] of our first judgment, that a rule excluding "ultimate issue" evidence, if carried out strictly and invariably, "would exclude the most necessary testimony".

Rule 24(7) of the Board's Rules

22 At the hearing, Mr Strachan suggested that an HMPPS witness could not be compelled to give his view on the "ultimate issue" because of rule 24(7) of the Board's Rules, which provides as follows:

> "No person is compelled to give any evidence or produce any document which they could not be compelled to give or produce on the trial on an action."

23 Mr Strachan reminded us of our observation at [99] of the first judgment that HMPPS witnesses would not be permitted to give opinion evidence in civil proceedings to which the MOJ was a party because they are employed or engaged by an entity for which the MOJ is responsible. He went on to submit that, accordingly, "ultimate issue" evidence given by HMPPS witnesses attracts the protection of rule 24(7). We reject that submission.

24 Rule 24(7) must in our view be read with rule 24(6), which allows a panel to receive in evidence any document or information whether or not it would be admissible in a court

of law. Reading these rules together, the clear intention is to make clear that (i) the strict rules of evidence (including the rule that requires an expert witness to be independent of the parties) do not apply; and (ii) the ordinary privileges and immunities which apply in civil proceedings (e.g. legal professional privilege, the privilege against self-incrimination and public interest immunity) do apply in proceedings before the Board.

25 If rule 24(7) were read in the way suggested by Mr Strachan, it would cover all opinion evidence given by any HMPPS witness (including evidence on matters such as the risk posed by the prisoner), but not opinion evidence given by witnesses called on behalf of the prisoner. It would also cover any other evidence which (under the strict rules of evidence) would be inadmissible in civil proceedings but (under rule 24(6)) would be admissible before the Board. We do not think that this is what rule 24(7) means, when that rule is read objectively and in context.

26 As we made clear in our first judgment, at [101], a witness cannot be required to express a view on an issue if they do not have one. But a witness who does have a view and refuses to give it in circumstances where no privilege applies could, in our judgment, be in contempt of court, if law of contempt applies to proceedings before the Board.

Does the law of contempt apply to proceedings before the Board?

The law

27 RSC O. 52, r. 1 empowered the Divisional Court to punish contempt committed in connection with proceedings in "an inferior court". The question for the House of Lords in *Attorney General v BBC* [1981] AC 303 was whether a local valuation court was an inferior court for these purposes. Viscount Dilhorne drew a distinction between "courts which discharge judicial functions and those which discharge administrative ones, between courts of law which form part of the judicial system of the country on the one hand and courts which are constituted to resolve problems which arise in the course of the administration of the government of this country": 339-340. The High Court's contempt jurisdiction extended only to the former. The local valuation court, which performed functions previously discharged by assessment committees, fell within the latter category. Whilst it had to act judicially (i.e. impartially and fairly), its functions were administrative, not judicial.

28 Lord Edmund-Davies noted that a local valuation court was not bound by the rules of evidence and had no power to summon witnesses or order the production or inspection of documents and its members could rely on their own knowledge as well as on the evidence and argument before them: 351. He also said at 352 that it should not be left to judges to widen the scope of the contempt jurisdiction.

29 Lord Scarman noted that the label "court" did not determine the matter, one way or the other: 358. At 359-360, he said this:

> "I would identify a court in (or 'of') law, i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or

> administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law."

30 The definition of "court" in s. 19 of the Contempt of Court Act 1981 ("the 1981 Act") drew on this passage. "Court" was defined as including "any tribunal or body exercising the judicial power of the State".

31 In *Attorney-General v Associated Newspaper Group plc* [1989] 1 WLR 322, the Divisional Court had held that the Mental Health Review Tribunal was not a court for the purposes of s. 19. In *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, that was overruled. In the Court of Appeal, Lord Donaldson MR said this at 380-1:

> "Prior to the passing of the Mental Health Act 1983, mental health review tribunals quite clearly did not exercise the judicial power of the state in relation to patients subject to restriction orders. Their function was to make recommendations which the executive branch of government was free to accept or reject. They had to act judicially, but that is nothing to the point since, as we pointed out in *Attorney-General v. British Broadcasting Corporation* [1981] AC 303, many administrative functions import a duty to act judicially. However, under the Mental Health Act 1983 these tribunals were given the power and the duty of applying statutory criteria and, on the basis of their findings, ordering or refusing to order the release of restricted patients from detention to which they had been subjected by order of bodies which were, without doubt, courts. The change was necessitated by a ruling of the European Court of Human Rights: *X v. United Kingdom* (1981) 4 EHRR 188 which called upon the United Kingdom to honour article 5(4) of the [ECHR]… Furthermore, the tribunals were given power to summon witnesses by subpoena: see rule 14(1) of the Mental Health Review Tribunal Rules 1983.
>
> If such a tribunal is not a 'court' for all purposes, the Human Rights Convention is not being complied with, since there is no indication that 'court' in the Convention has any different meaning from that which it bears in English law. However, I have no doubt that in law a mental health review tribunal is a court. Contrary to what is stated in *Attorney-General v. Associated Newspaper Group Plc.* [1989] 1 WLR 322 it did not inherit an executive function. It was given a new and quite different function. I would only add that I can see no reason why, as the Divisional Court appears to have held, the touchstone for determining whether a body is a court should be its ability

> to deprive a citizen of his liberty. One of the oldest and most important duties of the High Court is to restore liberty to a citizen by means of a writ or order of habeas corpus. Nor do I appreciate the relevance of the fact that the patient has a right to renew his application every year in deciding whether or not such a tribunal is a court. In my judgment, in so far as *Attorney-General v. Associated Newspaper Group Plc.* [1989] 1 WLR 322 decided that a mental health review tribunal was not a court, it was wrongly decided and should not be followed."

32 Lord Donaldson continued at 381:

> "Contempt of court is an unfortunate term which conveys to some the concept that the court and the judges are concerned for their personal dignity. Of course they are not. Their concern, and that of the law, is that the authority, impartiality and independence of the courts shall be upheld, which is quite different. Accordingly, the principal types of contempt are (a) conduct which impedes or prejudices the course of justice and (b) disobedience of orders made by the court."

33 In the House of Lords, Lord Bridge (with whom the other members of the Appellate Committee agreed) placed reliance on the reference to the MHRT in the provisions of the Administration of Justice Act 1960, but made clear that he also agreed that the MHRT exercised the judicial power of the state: He said this at 389:

> "I entirely agree with Lord Donaldson of Lymington MR that a mental health review tribunal is a court, and thus that persons may be guilty of contempt of such a tribunal. Since the Mental Health (Amendment) Act 1982 the functions of a mental health review tribunal have clearly been those of 'any tribunal… exercising the judicial power of the state…' within the definition in section 19 of the Contempt of Court Act 1981."

34 This passage makes clear that Lord Bridge (and the House of Lords) regarded Lord Donaldson's analysis as a separate and freestanding basis for concluding that the MHRT was a court for the purposes of s. 19.

35 In *Peach Grey & Co. v Sommers* [1995] ICR 549, the Divisional Court held that an Industrial Tribunal was a court for the purposes of s. 19 of the 1981 Act. At 557, Rose LJ (with whom Tuckey J agreed) gave three reasons for this conclusion. The first focused on its powers; the second was that it discharged judicial rather than administrative functions (applying the test in *Attorney General v BBC*); the third was that it exercised the judicial power of the state in the same way as the Mental Health Review Tribunal: 557-8.

36 In *General Medical Council v BBC* [1998] 1 WLR 1573, the Court of Appeal held that the Professional Conduct Committee of the General Medical Council was not a court for these purposes. The Court accepted at 1580 that the committee was exercising "a function which is a recognisably judicial function", but nevertheless, was "not part of the judicial system of the state". Rather, it was "exercising (albeit with statutory sanction) the self-

regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct".

37 Since then, it has been held that some tribunals are courts for these and similar purposes: see *Attorney General v Singer* [2012] EWHC 32 (Admin), where Cranston J (with whom Toulson LJ agreed) held that the Leasehold Valuation Tribunal (now part of the First-tier Tribunal) exercised judicial rather than administrative functions and so was an "inferior court" for the purposes of s. 42 of the Senior Courts Act 1981; and *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), where Upper Tribunal Judge Mark West held at [144] that the First-tier Tribunal (Special Educational Needs and Disability Chamber) was a court for the purposes of s. 19 of the 1981 Act.

38 Finally, in *R (DSD) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285, the Divisional Court (Sir Brian Leveson P, Jay and Garnham JJ) had to consider whether the open justice principle applied to proceedings before the Parole Board. Since that principle did not apply to tribunals which were not courts, the Court had to consider whether the Parole Board was a court. The Divisional Court said this at [171]:

> "the critical question is whether the body at issue exercises the judicial power of the state: see *[Pickering] v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 417G, and *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618, para 46 approved in Kennedy's case [2015] AC 455, para 115. In the case of the Parole Board, that question must be answered affirmatively: see *R (Giles) v Parole Board* [2004] 1 AC 1, para 10, and *R (Brooke) v Parole Board* [2007] HRLR 46, paras 2, 14, 17 (Divisional Court); [2008] 1 WLR 1950, para 53 (Court of Appeal). The judicial function of the Parole Board is to determine whether a prisoner should remain confined after the expiry of his minimum term. Adjudications upon matters of individual liberty are paradigm examples of the exercise of a judicial function."

39 Thus, although the question was a different one (whether the open justice principle applied), the Court considered that the answer turned on the same issue as the question whether the law of contempt applies, namely, whether the Parole Board exercises the judicial power of the state. The answer was "Yes".

Submissions

40 Mr Ben Collins KC, Mr Nicholas Chapman and Mr Michael Rhimes for the Board submitted that the Board discharges independent judicial functions. Applying *Attorney General v BBC, Pickering* and *Peach Grey,* the Board can be seen to be exercising the judicial power of the state. He also placed reliance on *R (Gourlay) v Parole Board* [2017] EWCA Civ 1003, [2017] 1 WLR 4107, where at [20] Hickinbottom LJ said that the Strasbourg Court had identified three characteristics of a court for the purposes of Article 5(4) ECHR: (i) independence form the executive, (ii) appropriately guaranteed judicial procedures and (iii) a decision-making, as opposed to merely advisory, function. At [22] he said that the case law established that the Board was a "court" for the purposes of Article 5(4).

41 Mr Rule for the claimants adopted these submissions and added that the Board is under a duty to keep a record of its proceedings: see *McIntyre v Parole Board* [2013] EWHC 1969 (Admin), [19]-[22]. He emphasises in particular the passage from Lord Donaldson MR's judgment in *Pickering,* which we have set out at [31] above.

42 Mr Strachan for the Secretary of State submitted that, although the Board exercises a judicial function in determining whether the statutory release test is met, and undoubtedly has court-like attributes, it is not a court of law. The criminal courts of England and Wales exercise the judicial power of the state in sentencing prisoners to a term of imprisonment. The Board exercises an administrative function in assessing whether detention remains necessary for the protection of the public. The Board does not set precedent, is not bound by the rules of evidence, has no power to summon witnesses, nor compel the production of evidence. It differs from the mental health review tribunal ("MHRT") in that (i) the latter does have power to summon witnesses or compel the production of evidence and (ii) statute (the Administration of Justice Act 1960) recognises the application of the law of contempt to it.

43 Mr Strachan placed reliance on the decision of the House of Lords in *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, as showing that the Board was not a court of law, but an administrative body. This, he submitted, was part of its reasoning explaining why the Board could properly admit evidence not shown to one of the parties, even though a court (properly so-called) could not.

44 Strasbourg authority recognises that bodies which are not courts "of the classic kind integrated within the standard judicial machinery of the country" may qualify as independent and impartial for the purposes of Article 5(4) ECHR: *Weeks v United Kingdom* (1988) 10 EHRR 293, [61]. In *R (Brooke) v Parole Board* [2008] EWCA Civ 29, [2008] 1 WLR 1950, the Court of Appeal referred to the Board as a "court", using inverted commas, and said that it "had the essential attributes of a court", not that it was in fact a court.

45 The Secretary of State accepted that the power of a county court or the High Court under CPR 34.4 to issue a witness summons "in aid of an inferior court or tribunal" would extend to issuing such a summons in aid of the Board (as the Court of Appeal held in *Brooke*, at [36] and [53] and in *R v Vowles* [2015] EWCA Crim 45, [2015] 1 WLR 5131, [42]). An application for such a summons could be made by the Board itself. But this does not mean that the Board is a court of law for the purposes of the law of contempt, because "inferior court" is defined in CPR 34.4 as "any court or tribunal that does not have power to issue a witness summons in relation to proceedings before it", a formula which is apt to include bodies other than courts of law.

46 Furthermore, Mr Strachan observed that there was no authority recognising a body as a court for the purposes of the law of contempt of court where the body did not itself have power to compel the attendance of witnesses. It could not be a contempt to refuse to answer a question from a body with no power to compel attendance in the first place.

Discussion: does the Board exercise the judicial power of the state?

47 We start by asking the question posed by Lord Scarman in *Attorney General v BBC* and by Lord Bridge in the passage in *Pickering* cited at [33] above*:* does the Board exercise the judicial power of the state?

48 The suggestion that, in this field, only criminal courts exercise the judicial power of the state is both wrong in principle and contrary to authority. In the passage we have quoted at [31] above from his judgment in *Pickering*, Lord Donaldson expressly rejected the Divisional Court's view that "the touchstone for determining whether a body is a court should be its ability to deprive a citizen of his liberty". As he pointed out, ordering a person's release from detention is also, paradigmatically, an exercise of the judicial power of the state.

49 There are, in our view, strong parallels between the Board and the MHRT, whose functions are now discharged by the First-tier Tribunal (Mental Health). Like the MHRT, the Board:

(a) previously had advisory functions only;

(b) acquired the function of deciding (not merely advising) whether a detained person should be released because the Strasbourg Court held that Article 5(4) ECHR required that question to be decided by an independent and impartial tribunal;

(c) applies a statutory test to determine whether a detained person should be released;

(d) is not bound by the strict rules of evidence; and

(e) has judicial and non-judicial members.

50 Thus, even if there were no authority on the point, we would have said that the Board satisfies the test enunciated by Lord Scarman in *Attorney General v BBC* and Lord Bridge in *Pickering*. The question whether a court or tribunal exercises the judicial power of the state is liable to generate marginal cases, but a body which decides whether a subject should remain detained in prison, or be released into the community, is not one of them. The point is not, of course, free from authority. *DSD* strongly bolsters our view. Although the question arose in a different context, the Divisional Court in the passage set out at [38] above held in terms that the Board does exercise the judicial power of the state, applying the test enunciated in *Pickering*.

51 The fact that the Board is a "court" for the purposes of Article 5(4) ECHR does not, in and of itself, mean that it is a court for the purposes of the law of contempt. However, the reason why it is required to be a court for the purposes of Article 5(4) is that is functions include deciding whether detention is lawful. To the extent that the distinction drawn by Viscount Dilhorne and Lord Scarman in *Attorney General v BBC* remains relevant, the authorities show beyond doubt that the Board's function of deciding whether to direct a prisoner's release must be, and is, a judicial, not an administrative one: see e.g. *R (McGetrick) v Parole Board* [2013] EWCA Civ 182, [2013] 1 WLR 2064, [44] (Toulson LJ), cited in our first judgment at [21]; *Vowles,* [41]. The most recent encapsulation of this view can be seen in a judgment handed down by the Supreme Court this morning, to which our attention was helpfully drawn by Mr Grandison for the Secretary of State. In *R (Pearce) v Parole Board* [2023] UKSC 13, at [5], Lord Hodge and Lord Hughes (with whom the other members of the Court agreed), said this at [5]:

> "The Board is a statutory body, in being since 1967 and presently established under section 239 of the Criminal Justice Act 2003 ("CJA 2003"). Although in the past its functions were to advise the Home Secretary on the exercise of the Royal prerogative

> power to release prisoners before the end of their sentence, it now has statutory responsibilities for itself making the decision about early release, that is to say release on licence sooner than the end of the court's sentence. The Secretary of State (now of Justice) is obliged to follow any directions for release which it may give. In so doing, the Board acts judicially and as a body independent of the executive. It is properly treated as a court for the purposes of the European Convention on Human Rights. In *Weeks v United Kingdom* (A/11) (1987) 10 EHRR 293 the Strasbourg Court explained that the relevant attributes of a court are that it is independent and impartial and that its procedures are fair, which includes the requirement that the prisoner is able properly to participate in the proceedings of the Board: paras 61-65." (Emphasis added.)

52 Nothing in the speeches in *Roberts* affects this conclusion. The question there was whether the Board could properly take into account closed evidence (i.e. evidence not shown to one of the parties). There is a wealth of case law on that question as it applies in different fora. It is true that Lord Woolf referred to the Board as exercising an administrative function and appears to have regarded that characterisation as relevant to the decision whether closed evidence could be admitted. But this does not help in answering the quite separate question whether the Board is exercising the judicial power of the state for the purposes of the law of contempt. In any event, the characterisation of the Board's functions as administrative has been authoritatively superseded in the nearly 18 years since *Roberts* was handed down.

Discussion: does it matter that the Board has no power to compel the attendance of witnesses or the production of documents?

53 At the hearing, Mr Strachan placed significant reliance on the Board's lack of power to issue a witness summons to compel the attendance of a witness or the production of documents. The absence of such a power has been often remarked upon by the courts (see e.g. *R (Vowles) v Parole Board* [2015] EWCA Civ 56, [2015] 1 WLR 5131, at [42], cited by the Supreme Court in *Pearce*, at [13]) and in various of the reviews to which we referred at [39]-[41] of our first judgment. This was said to be relevant in two ways. First, Mr Strachan pointed out that the MHRT did have a power to summon witnesses and that this was a feature remarked upon by Lord Donaldson as part of his reasons for concluding that the law of contempt applied to its proceedings. Second, he submitted that it was conceptually impossible for a failure to answer questions put by a body with no power to compel the attendance of witnesses to constitute a contempt of court.

54 We take these points in turn. As to the first, it is true that Lord Donaldson in *Pickering* observed that the MHRT had been given power to summon witnesses. But there is no indication in that case, or any other, that the power to issue a witness summons is a condition *sine qua non* for the applicability of the law of contempt. All the authorities show that deciding whether a tribunal exercises the judicial power of the state requires a holistic assessment of the function and powers of the body in question. The focus of the analysis in the *Pickering* case was on the functions of the MHRT, as they had developed through progressive statutory amendments under the influence of the Strasbourg Court. Seen against this background, the absence of a power to summon witnesses does not affect our judgment that the functions the Board now exercises fall squarely within the judicial power of the state.

55 As to Mr Strachan's second point, we do not consider that a witness's refusal to answer a question cannot constitute contempt unless the tribunal posing the question has a power to summon witnesses. Consider the position of a court to which the law of contempt unquestionably applies (e.g. the Crown Court). In such a court, the obligation on a witness to attend judicial proceedings is quite separate from the obligation, once present, not to commit any contempt in the face of the court (including by refusing to answer relevant and necessary questions). Statute now provides that a person who disobeys a witness summons requiring him to attend before any court is guilty of contempt of that court and may be punished summarily as if his contempt had been committed in the face of the court: see s. 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965. As the Law Commission pointed out, however, "the penalty is considerably higher (two years' imprisonment) for the witness who attends but then refuses to answer questions than for the witness who disobeys a summons and does not attend": Law Com 209 (2012), para. 5.16.

56 Given that the obligations (i) to attend and (ii) having attended to answer relevant and necessary questions are distinct, we can see no reason why the latter obligation should not apply simply the tribunal has no power itself to compel attendance. Indeed, even where obligation (i) does not apply, there is, in our view, a strong public interest in protecting the integrity of judicial proceedings from contempt in the face of the court, of which refusal by a witness to answer a relevant and necessary question is one example.

57 It follows that the absence of a power in the Board to summon witnesses does not affect our conclusion that the Board exercises the judicial power of the state in the sense in which that phrase has been used in the authorities to which we have referred. Accordingly, a failure to answer a relevant and necessary question posed by the Board could constitute a contempt of court.

Does the Board have the power to punish contempt itself and, if not, how is it to be addressed?

58 A superior court of record has power to sentence a contemnor of its own motion: *Surratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55, [2008] 1 AC 655. Inferior courts of record have power to deal with contempt in the face of the court (which could include deliberate failure to answer a question posed by the court): see e.g. *Arlidge, Eady and Smith on Contempt,* para. 13-7.

59 All parties before us agree that the Board is not a superior court of record. The question whether the Board has power to deal with contempt itself – i.e. without recourse to the High Court – depends on whether it is an inferior court of record. Unhelpfully, *Halsbury's Laws of England* (vol. 24A, para. 18) tells us that "the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences". The footnote contains examples of inferior common law courts recognised in authorities from the sixteenth, seventeenth and eighteenth centuries as having powers to fine or imprison.

60 In our view, a court which is a creature of statute has only those powers given to it by Parliament, whether expressly or impliedly. Neither its governing statute nor its Rules give the Board any express power to punish contempt. Parliament did not provide that it was to have the powers of a court of record. The power to punish for contempt is not one which is necessary to enable the Board to do justice, since any contempt can be dealt

with by the High Court: see by analogy the reasoning of the Court of Appeal in *C7 v Secretary of State for the Home Department* [2023] EWCA Civ 265, [80]-[81].

61 It follows, in our view, that the only way a contempt of the Board can be addressed is by proceedings in the High Court under CPR 81. Such proceedings could be brought by a party to the proceedings or by a law officer by application pursuant to CPR 81.3(3). They would require the permission of the High Court under CPR 81.3(5)(a). However, the Board could also refer a case of alleged contempt to the High Court, which could then consider the matter on its own initiative under CPR 81.6. Even if such a case is not referred, the High Court is obliged by CPR 81.6, in any case where it considers that a contempt may have been committed, to consider on its own initiative whether to initiate contempt proceedings.

The application of CPR 81.6 in this case

62 We concluded in our first judgment that guidance issued under the authority of the Secretary of State instructed HMPPS witnesses to refuse to comply with the Board's directions and to refuse to answer its oral questions in circumstances where the refusal could amount to a breach of the witness's legal obligation. The consequence of the conclusions we have reached in this judgment is that a refusal to answer an oral question could also amount to a contempt of court, provided that the question was relevant and necessary, the witness had a view to give, and the witness could not assert a legally recognised privilege against answering: see [20]-[21] above. If such a contempt were committed, the person giving the instruction not to comply or not to answer could also be guilty of contempt of court: see e.g. *Arlidge, Eady and Smith on Contempt* (5th ed.), para. 3-130.

63 As we have said, the obligation in CPR 81.6 to consider whether to initiate proceedings for contempt of court arises whenever the court considers that a contempt of court "may have been committed". The fact that the contempt may have been committed by Ministers or officials does not attenuate the obligation: *R (Mohammad) v Secretary of State for the Home Department* [2021] EWHC 240 (Admin), [26], and the authorities referred to there. However, the Court is not required to initiate proceedings for contempt where a formal explanation of the breach, supported by witness statements, has been given and where it concludes that the breach was not intentional and that measures have been put in place to avoid any recurrence: see *ibid.*, [27].

64 As we noted in our first judgment at [62], "[t]he evidence does not explain by what process, or by whom, the July Guidance was drafted or whether it was approved by the Secretary of State". That remains the position. There is no better information about the process which led to the amendment of the July Guidance and the promulgation of the October Guidance. We also have no witness statement explaining what has been done since our judgment, though we have seen certain communications informally exhibited to emails sent to the court.

65 In our view, the Secretary of State should be given a further opportunity to file further evidence on these matters. We shall decide, pursuant to CPR 81.6 and in the light of any such evidence, whether we should initiate contempt proceedings against any person or persons and/or give further directions as necessary.