Neutral Citation Number: [2020] EWHC 3184 (Admin)

Case No: CO/1705/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2020

Before:

KATE GRANGE QC (sitting as a Deputy Judge of the High Court)

- -

Between:

The Queen on the application of SAM DEXTER **Claimant**

- and –

SECRETARY OF STATE FOR JUSTICE **Defendant**

-and-

THE PAROLE BOARD OF ENGLAND AND WALES
Interested Party

- -
- -

Philip Rule (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
Julian Blake (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 21 October 2020

- -

FINAL JUDGMENT

Kate Grange QC (sitting as a Deputy Judge of the High Court):

INTRODUCTION

1. The Claimant, Mr Dexter, was convicted of serious violent and sexual offences and given an indeterminate sentence for public protection ("an IPP") with a minimum custodial term of 6 years, less time on remand. Having served the term specified, his case was reviewed by the Parole Board. After he had spent a period of time in open prison conditions pursuant to their recommendation, the Parole Board concluded that detention was no longer necessary for the protection of the public and directed him to be released, subject to additional licence conditions, including a period of residence at Norfolk Park Approved Premises ("AP") in Sheffield. The Claimant had to wait just over 2 ½ months (81 days) for a bed at Norfolk Park AP before he was released. His claim relates to that period of detention which he challenges as unlawful detention.

2. His claim is advanced under three main headings, which reflect the pleaded grounds for judicial review, as follows:

   i) Ground 1: failure to effect the Claimant's release within a reasonable time. The delay is said to be in breach of public law duties and/or in breach of section 28(5) of the Crime (Sentences) Act 1997.

   ii) Ground 2: "negligent detention".

   iii) Ground 3: Unlawful detention contrary to Article 5 ECHR.

PROCEDURAL HISTORY

3. On 11 May 2020 the Claimant filed an application for judicial review accompanied by an application for expedition as he remained in prison at that time. On 12 May 2020

Johnson J ordered that the application for permission for judicial review and (if granted) the substantive judicial review should be heard at a rolled up hearing on 22 May 2020. The Claimant was released to Norfolk Park AP on 21 May 2020 and the hearing was subsequently adjourned and re-listed by an order of Knowles J dated 16 June 2020. An application by the Defendant for the matter to proceed to a written permission decision was refused by Goose J on 13 July 2020. The rolled up hearing came before me on 21 October 2020.

4. Mr Dexter has provided a witness statement dated 19 May 2020 and he also relies on a statement from his solicitor, Ms Sangeetha Vairavamoorthy, dated 21 August 2020. The Secretary of State relies on two witness statements, the first from Mr Ian York, Head of the Public Protection Casework Section in the Public Protection Group at Her Majesty's Prison and Probation Service, dated 19 May 2020 and the second from Ms Joanne Oliver, Head of Operations for Residential and Accommodation Support Services at Her Majesty's Prison and Probation Service (HMPPS), dated 12 October 2020.

RELEVANT FACTS

5. Mr Dexter was born on 19 November 1992 and is now aged 28. In October 2012 when aged 19 he was sentenced to an IPP for offences of burglary with intent, grievous bodily harm (x 2) and indecent assault. Mr Dexter had entered the home of an elderly couple and after punching the male householder several times, he sexually assaulted the female resident and seriously injured her. Both victims required treatment in hospital and suffered lasting trauma. The female victim sustained a broken hip. The tariff or minimum term was set at 6 years, less time served on remand. That period expired on 12 April 2018. On 21 August 2018 the panel of the Parole Board recommended that he

should be moved to open conditions and a review period of 15 months was set to allow for that transfer and to permit further assessment of the risks he posed on release. He moved to open conditions on 22 November 2018. As part of the next review, the Parole Board convened an oral hearing which took place on 23 January 2020.

6. On 23 June 2019, in advance of the Parole Board hearing, his Offender Manager, Ms Judith Spence, provided an assessment report and current risk management plan. At that time Mr Dexter had been accepted by Norfolk Park AP for "ROTL" (release on temporary licence) purposes, but the Offender Manager had not been advised whether a bed space would be available for him if released. It was noted at that time that, should the Parole Board decide to release Mr Dexter, the probation service would require at least 6 weeks in order to secure accommodation for him.

7. On 17 January 2020 the Offender Manager provided an addendum report for the Parole Board. In that report she recommended that Mr Dexter was suitable for release from custody, provided that the risk management plan was implemented which would ensure his risk could be safely managed in the community. That risk management plan provided for Mr Dexter to be accommodated for a period of time in Approved Premises on release, following which he would go to live with his mother in Barnsley. The Offender Manager indicated that she was "*awaiting the outcome of the referral*" which was a referral to Norfolk Park AP. She reported that Mr Dexter had been on day releases and was now on his fourth ROTL in Norfolk Park AP for periods of three or more days. She explained that: "*There have been no issues at the hostel, he has engaged with staff and complied with the rules. He has also had contact with probation on all his release to the hostel.*" She indicated that, should a bed not become available at Norfolk Park

AP, Mr Dexter had provided an alternative address in Sheffield which was still to be assessed.

8. In the witness statement of Ian York he explains that this alternative accommodation was ultimately considered by the Probation Service not to be appropriate for Mr Dexter's initial release, albeit it would be suitable once Mr Dexter had spent a period of time at an AP.

9. At the Parole Board hearing on 23 January 2020 the Panel considered the dossier consisting of 245 pages which included the 17 January 2020 update from the Offender Manager. The Panel also heard oral evidence from the Offender Manager and from Mr Dexter's Offender Supervisor, Ms Sarah Edmondson. By its written decision dated 9 February 2020, 17 days later, the Parole Board directed release subject to additional licence conditions. In its written decision the Panel Chair apologised for the delay in issuing the Parole Board's decision letter; the Chair indicated that "*some personal matters*" had led to an unexpected delay. The Panel went on in its decision to evaluate the risk management plan put forward by the Offender Manager which included the immediate management and reduction of risks through confirmed employment and residence initially at Norfolk Park AP. It was noted that the regime at Norfolk Park AP would include a curfew, a key worker and structured activities and supervision. The Parole Board's conclusion was as follows:

> "The Panel concluded that it is no longer necessary for the protection of the public that you remain confined in custody. The panel assessed that your risk of causing serious harm in the community could now be managed **and therefore directs your release**. As an indeterminate sentence prisoner, you will appreciate that the date for this will be determined by the Secretary of State. You will also appreciate that the panel's decision remains a provisional one, subject to the 'reconsideration mechanism' (which is explained at the foot of this letter)…" (emphasis in original)

10. The 'reconsideration mechanism' referred to at the end of the Panel's conclusions was a reference to the fact that the Parole Board decision was "provisional" for 21 days from the date it was issued to the parties. That was also made expressly clear at the very end of the decision letter where it was explained that, within that time, relevant parties might apply for the decision to be reconsidered on the basis that it was either 'irrational' or 'procedurally unfair' or both. If no such applications were received then the decision would become final after 21 days. These were new procedures introduced in the Parole Board Rules 2019 (which came into force on 22 July 2019) following the decision of the Divisional Court in *R (on the application of DSD and NBV) v (1) Parole Board of England and Wales and (2) Secretary of State for Justice* [2019] QB 285 which concerned the high-profile challenge to Parole Board procedures in the John Worboys case.

11. The Panel's main conclusion was reiterated in the Introduction to the decision letter which stated:

> "The Panel has **decided to direct your release**. Subject to there being no adverse developments, you will be released, at a date determined by the SofS, once all necessary arrangements have been made…" (emphasis in original)

The panel considered that a number of additional licence conditions were "*necessary and proportionate*" to manage Mr Dexter's risks in the community. The first of those was to reside at Norfolk Park AP as directed. The panel made clear that Mr Dexter must not leave to reside elsewhere, even for one night, without obtaining the prior approval of his supervisor and thereafter must reside as directed by his supervising officer.

12. As explained in Mr York's witness statement, a placement at Norfolk Park AP was secured on 23 January 2020 (i.e. the same day that the oral parole board hearing took

place) to begin on 3 February 2020. That date was fixed in anticipation of a Parole Board direction. However the Parole Board made clear that it would not issue its decision by that date. As a result the placement had to be released to other offenders. On 27 January 2020 the Central Referral Unit with responsibility for managing referrals to APs was informed that Mr Dexter should be kept on a 'pending list' for accommodation at Norfolk Park AP (a pending list is a list of offenders who are likely to be released soon, but where there is no definitive date fixed).

13. On 10 February 2020 the Parole Board decision was received by the Probation Service. Subsequently, on 26 February 2020, the Central Referral Unit confirmed to the Offender Manager by e-mail that a placement at Norfolk Park was available for a clear three month period from 17 June 2020 with a departure date of 17 September 2020. That was said to be the first available date at any of the North East APs (i.e. the region which included Norfolk Park AP). Mr York explained in his statement that there were "improvement works" that were being undertaken in Norfolk Park AP, meaning that 12 of the beds (out of 44) were decommissioned but would become available when the works were completed and that work had inevitably been delayed by the COVID-19 pandemic. In oral submission Mr Blake for the Secretary of State elaborated on the reason for the improvement works which had been due to an outbreak of legionella at Norfolk Park AP.

14. On 2 March 2020 the Parole Board decision became final following the expiry of the 21 day period for reconsideration. On that same day Mr Dexter was informed (initially by his brother following a conversation between his brother and his Offender Supervisor) that he would not be released to Norfolk Park until 17 June 2020. In the event a place was available sooner than that and Mr Dexter was released on licence to

Norfolk Park AP on 21 May 2020. This was a period of 81 days (2 months 20 days) after the final date of the Parole Board decision on 2 March 2020.

LEGISLATION

The Convention

15. Article 5 of the European Convention on Human Rights (ECHR) provides, so far as material to these proceedings, as follows:

> "1. Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

Domestic legislation

Crime (Sentences) Act 1997

16. Chapter II of the Crime (Sentences) Act 1997 ("the 1997 Act") is headed "Life sentences". By s.34 of the 1997 Act, a "life prisoner" includes any person serving a sentence of imprisonment for public protection under s. 225 of the Criminal Justice Act 2003. Section 28 of the 1997 Act, as amended, provides as follows (in its material parts):

> "28.— Duty to release certain life prisoners.

> (1A) This section applies to a life prisoner in respect of whom a minimum term order has been made; and any reference in this section to the relevant part of such a prisoner's sentence is a reference to the part of the sentence specified in the order.
>
> …
>
> (5) As soon as (a) a life prisoner to whom this section applies has served the relevant part of his sentence, (b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.
>
> (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless— (a) the Secretary of State has referred the prisoner's case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.
>
> …
>
> (8A) In this section *"minimum term order"* means an order under— (a) subsection (2) of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (determination of minimum term in respect of life sentence that is not fixed by law), or (b) subsection (2) of section 269 of the Criminal Justice Act 2003 (determination of minimum term in respect of mandatory life sentence)."

17. Section 31 of the 1997 Act, as amended, provides as follows:

> "Duration and conditions of licences
>
> "(3) The Secretary of State must not include a condition in a life prisoner's licence on release, insert a condition in such a licence or vary or cancel a condition of such a licence except— (a) in accordance with recommendations of the Parole Board, or (b) where required to do so by an order under section 62A of the Criminal Justice and Court Services Act 2000 (compulsory electronic monitoring conditions)."

Offender Management Act 2007

18. Accommodation in "Approved Premises" is one of a number of "probation purposes" specified by the Offender Management Act 2007 (the "2007 Act"). Section 1, as amended provides (as far as material):

> "Meaning of 'the probation purposes'
>
> "(1) In this Part *'the probation purposes'* means the purposes of providing for— (a) courts to be given assistance in determining the appropriate sentences to pass, and making other decisions, in respect of persons charged with or convicted of offences; (b) the giving of assistance to persons determining whether conditional cautions should be given and which conditions to attach to conditional cautions; (c) the supervision and rehabilitation of persons charged with or convicted of offences; (d) the giving of assistance to persons remanded on bail; (e) the supervision and rehabilitation of persons to whom conditional cautions are given; (f) the giving of information to victims of persons charged with or convicted of offences.
>
> "(2) The purpose set out in subsection (1)(c) includes (in particular)— (a) giving effect to community orders and suspended sentence orders (or, in the case of persons mentioned in subsection (3), any corresponding sentence which is to be carried out in England and Wales); (b) assisting in the rehabilitation of offenders who are being held in prison; (c) supervising persons released from prison on licence; (d) providing accommodation in approved premises …"

19. Section 2 of the same Act provides as follows:

> "Responsibility for ensuring the provision of probation services
>
> "(1) It is the function of the Secretary of State to ensure that sufficient provision is made throughout England and Wales — (a) for the probation purposes; (b) for enabling functions conferred by any enactment (whenever passed or made) on providers of probation services, or on officers of a provider of probation services, to be performed; and (c) for the performance of any function of the Secretary of State under any enactment (whenever passed or made) which is expressed to be a function to which this paragraph applies; and any provision which the Secretary of State considers should be made for a purpose mentioned above is referred to in this Part as *'probation provision'* .
>
> "(2) The Secretary of State shall discharge his function under subsection (1) in relation to any probation provision by making and carrying out arrangements under section 3.
>
> "(3) The Secretary of State must have regard to the aims mentioned in subsection (4) in the exercise of his functions under subsections (1) and (2) (so far as they may be exercised for any of the probation purposes).

> "(4) Those aims are— (a) the protection of the public; (b) the reduction of re-offending; (c) the proper punishment of offenders; (d) ensuring offenders' awareness of the effects of crime on the victims of crimes and the public; and (e) the rehabilitation of offenders.
>
> "(5) The Secretary of State is not required by subsections (1) and (2) to take any action in relation to the making of provision for a purpose mentioned in subsection (1) if it appears to him that appropriate provision is being or will be made by any person acting otherwise than in pursuance of arrangements under section 3 …"

APPROVED PREMISES

20. A very useful summary explanation of "Approved Premises" appears in *R* (*Bowen & Stanton) v Secretary of State for Justice* [2016] EWHC 2057 (Admin) at [19] where Whipple J stated:

> "The 2007 Act refers to "Approved Premises". These used to be known as probation or bail hostels. The power to approve a premises is conferred on the Secretary of State by s 13 of the 2007 Act. APs offer residential provision to selected offenders and some bailees in order to provide enhanced levels of protection to the public and reduce the likelihood of further offending. They are principally reserved for prisoners released on licence who pose a high or very high risk of harm in the community. APs are resource intensive, with 24 hour staffing and enhanced supervision of residents, often in the context of delivering specific interventions for individual prisoners. Residence at an AP is only ever temporary, usually in the region of three months, as an intended transition to living in the community. If the resident re-offends or breaches any licence conditions during that period, the Secretary of State can recall that individual to prison."

21. The following passages from Probation Instruction 32/2014 on Approved Premises, Annex B are also instructive on the nature and purpose of APs:

> "<u>Risk of serious harm threshold</u>
>
> 2. APs are a public protection measure. An offender will be required to reside in one because:
>
> - He presents a high or very high risk of serious harm;

- this risk cannot be safely managed in a less restrictive community setting; and

- residence in an AP is critical to his overall risk management and the protection of past or future victims.

The role of APs in protecting the public

3. APs have extensive security equipment, including cameras and physical measures, and have to have at least two staff on duty at all times. Residents are subject to an overnight curfew and can be under additional curfew or reporting conditions that are personal to them.

The role of APs in preventing re-offending

4. APs do not just conduct monitoring and surveillance. They are also obliged to provide key workers who form an integral part of the offender management process, and each resident will have a programme of purposeful activity that is intended to help with reducing re-offending and reintegration into society. Purposeful activity ranges from programmes and offending behaviour work to life skills and seeking employment."

GROUND 1: FAILURE TO RELEASE WITHIN A REASONABLE TIME

The Arguments

22. Mr Dexter's first ground of challenge is that there was a failure to take reasonable steps to ensure that the Parole Board's specified conditions were met within a reasonable time after the Parole Board directed release. Reliance is placed on the Court of Appeal decision in *R (Bowen & Stanton) v Secretary of State for Justice* [2018] 1 WLR 2170, which I will discuss in more detail below. In that case a public law duty not to delay release beyond a reasonable time was identified in precisely this context i.e. where there is delay in securing accommodation in an AP after the Parole Board has directed release.

23. In support of the contention that there was an unreasonable delay, Mr Dexter's Counsel, Mr Rule, advances a number of arguments specific to the facts of Mr Dexter's case which I have summarised below. I should make it clear that Mr Rule makes very detailed arguments on behalf of Mr Dexter in his Grounds and skeleton, then supplemented and adapted in oral argument, all of which I have considered carefully. I have attempted to set out - albeit in summary form - the various propositions he advances, without reproducing in full the entirety of the written and oral argument.

24. In particular Mr Rule submits as follows:

i) The particular period of delay in this case was not known to, determined by or sanctioned by the Parole Board, in contrast to the position in *R (Bowen & Stanton) v Secretary of State for Justice* [2018] 1 WLR 2170. That resulted in uncertainty for the claimant with consequent anxiety, distress and frustration as explained by him in his witness statement. Even after the Parole Board decision was made final on 2 March 2020, Mr Dexter first learned of the expected date of 17 June 2020 through discussions with his brother and there was no "official", judicial determination indicating the date.

ii) The period of detention after the Parole Board's direction involves a greater restriction on freedom and movement than before that direction. Unlike in the earlier period Mr Dexter was not able to access temporary releases (ROTLs), including day and overnight releases from prison (e.g. for the purpose of visiting relatives).

iii) Mr Dexter's continued detention in prison during the period after the Parole Board decision coincided with the COVID-19 coronavirus pandemic and increased restrictions in prison as a result of that event. That meant that Mr Dexter could not have family visits in prison and could not go out to work in the coffee shop at the prison. In this regard Mr Rule places reliance on the Court of Appeal decision in *R v Jones* [2020] EWCA Crim 764 in which an 8 month criminal sentence was reduced to 6 months, in part, because of the impact which Covid-19 was having on the prisoner's conditions of detention.

iv) Due to the delay in release from the start of March 2020 Mr Dexter was unable to take up employment as a labourer with a wall and floor tiling company which had been arranged before his release (although Mr Rule did make clear in oral submissions that alternative employment had later been secured after release).

v) Mr Dexter was imprisoned at a young age (i.e. age 19) and was relatively young when he offended. He was initially sentenced to detention in a young offender institution for public protection given that he was under 21 (by virtue of Article 3(4)(b) of the Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005). Mr Rule submits that frequently it is recognised that it is important to allow those who offended as youths an enhanced opportunity to rehabilitate and regain liberty as reformed individuals.

vi) The need for Mr Dexter to be accommodated in an AP if released was known for a long time in advance of the Parole Board hearing and was

not an unexpected development. As set out in the Secretary of State's published policies governing the planning and provision of APs (including the Probation Service Manual at [31.15] and [31.17] and Probation Instruction 32/2014 on Approved Premises (Annex B at [65]), it was the responsibility of officers to plan in advance of the Parole Board to enable the swift release of the Claimant.

vii) The Parole Board hearing was delayed in convening and ought to have been held in November 2019.

viii) The Secretary of State did not propose or explore any alternative accommodation once it was apparent that Norfolk Park AP was not available until June 2020. Mr Rule submits that no delay can properly be advanced as within a reasonable timeframe without all reasonable steps to find alternative accommodation having been taken.

25. In support of the contention that the delay was unreasonable, Mr Rule places reliance on The Parole Board Rules 2019 (S.I. 2019/1038) which recognise the need for a speedy decision on every Parole Board review. Rule 25(6) requires the decision to be provided to the parties not more than 14 days after the hearing and Parliament has decided that as part of the new 'reconsideration mechanism' it is only permissible to hold release in abeyance for up to 21 days (in accordance with Rule 28) for any challenge to be made to the release. He contends that this is a deliberately short period and was required to be given effect on 2 March 2020.

26. In oral submissions Mr Rule also relies on the decision in *R (Huxtable) v Secretary of State for Justice* [2020] EWHC 2494 (Admin) which he says

emphasises the significance of much shorter periods of delay than occurred in this case. He notes that at [42] in that case a period of 21 days was said to be comparable with current timescales for making practical arrangements for release (as set out in the Impact Assessment for the 2019 Rules). He also submits that the ability of the Parole Board to shorten the 21 day reconsideration period was "crucial" to the defence of the lawfulness of that period of detention in *Huxtable* (when Fraser J considered the lawfulness of the detention under Articles 5(1) and (4) of the ECHR) as made clear at [101] of that decision.

27. Mr Rule also advances a number of arguments under this ground of challenge to the effect that the language of s.28 of the 1997 Act requires release "without delay" given the finality of the "conclusive direction" made by the Parole Board (in paragraphs [33]-[38] of his skeleton and his Grounds at [55]-[70]). Mr Rule also submits that cases such as *R (Robinson) v Parole Board* [1999] Prison LR 118 and *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254 emphasise the need for the Parole Board to maintain control at all times of the process and that, if necessary, the Defendant should have brought the case back to the Parole Board to seek further directions if it was clear (as he says it was) that there would be excessive delay waiting for a place at Norfolk Park AP.

28. Finally, Mr Rule submits that there was a "widespread" "systemic deficiency" in the provision of APs and a failure to discharge the duty of sufficiency of provision in the necessary system, contrary to the duties identified in *Bowen & Stanton*. I have addressed those arguments separately at [68ff] below.

29. Overall Mr Rule submits that the period of detention in this case was too long to be reasonable and is excessive.

30. For the Secretary of State, Mr Blake submits that there was no failure to comply with the reasonable timeframe requirement in this case. In summary his submissions were as follows:

i) He contends that the starting point is the judgments in *Bowen & Stanton* which make clear that continued detention in order to put in place the conditions which were imposed as part of the risk management plan was entirely lawful. He submits that Mr Dexter was subject to an indeterminate sentence and that he had no right to release at any date following conviction. His only expectation could have been that he would be released if he could demonstrate that his continued detention was no longer necessary for public protection, and he knew (or should have known) that any direction for release would be subject to a residence condition.

ii) Mr Blake argues that the period of delay of 2 months and 20 days is not unreasonable when viewed in the context of an indeterminate sentence where the Claimant had been lawfully detained for almost 8 years.

iii) He also submits that there was no failure of advance planning in this case given that a placement at Norfolk Park AP had been secured on 23 January 2020 (the date that the Parole Board met) to begin on 3 February 2020, but that this had to be released because the Parole Board had not issued its decision by that time.

iv) Mr Blake submits that there was a temporary, local explanation for the unavailability of a place at Norfolk Park AP, namely the outbreak of legionella which reduced the number of beds available at that AP. He

also contends that Norfolk Park AP was clearly the most suitable AP for Mr Dexter given that he had spent all of his periods of release on temporary licence (ROTL) at that AP and it was close to his support network.

v) Although he accepts that no attempts were made to identify any other alternative AP, he submits that there is no evidence that any other AP was suitable for Mr Dexter. There was no AP in Barnsley where Mr Dexter's mother lived and this was not a case where there had been a general direction of release to an AP and no AP could be found; in reality Norfolk Park AP was the only viable AP in his case. In support of his submissions Mr Blake relied upon the evidence of Ms Joanne Oliver, including at [20] of her statement where she explained that, in her experience, there is always a bed that can be made available at an AP, but it would have to be approved by the Offender Manager as suitable for a particular release plan and no such request for an alternative AP was made in this particular case. Mr Blake submitted that any consideration of an alternative in this case would inevitably have involved a reconsideration of the risks posed by Mr Dexter at an alternative AP with a consequent reassessment by the Parole Board if an alternative was identified. He made the point that it was far from certain that this could be done before the place at Norfolk Park AP came up in any event and it was doubtful that the Parole Board would have sanctioned release to a different AP in the circumstances of this case.

vi) In response to the contention that this case can be distinguished from *Bowen & Stanton* on the basis that the Parole Board had not specifically endorsed the period of delay in this case, Mr Blake highlights the lack of any anticipated delay in the availability of an AP at the time of the Parole Board hearing. He also draws attention to the language used by the Court of Appeal in *Bowen & Stanton* which did not suggest that the Parole Board's awareness of the dates of availability of APs in those cases was a significant part of its analysis.

vii) He also identifies a number of other cases including *Taylor* and *Huxtable* (in particular the example at [28]) where the absence of a specified date at the time of the Parole Board hearing was not identified as a concern. He submits that any date of availability identified to the Parole Board at the time of its consideration is always provisional and might be subject to change. The Parole Board would be aware of the duty on the Secretary of State to ensure that the Parole Board's specified conditions were met within a reasonable timeframe.

viii) In his written argument Mr Blake also draws attention to the lack of any identification by Mr Dexter or his advisors before release of any alternative AP which would be suitable.

31. Finally, Mr Blake rejects the contention that there was any systemic deficiency in this case which had contributed to the delay in Mr Dexter's case. I have addressed those detailed arguments separately at [68ff] below.

32. Overall Mr Blake accepts that the period of delay is "regrettable and unusual" and that the case "could have been administered better" but he submits that it was not unlawful.

Bowen & Stanton v Secretary of State for Justice

33. Before I consider the parties submissions under Ground 1, it is important to examine the Court of Appeal decision in *Bowen & Stanton* and Whipple J's first instance decision in that case, which was entirely upheld by the Court of Appeal. Both parties rely on aspects of that case in these proceedings. It is a decision which is binding on this court and provides important guidance on the lawfulness of detention in this specific context.

34. In *Bowen & Stanton* both claimants were convicted of serious offences and indeterminate sentences were imposed. After their minimum terms had expired their cases were reviewed by the Parole Board which directed their release subject to conditions. One of those conditions in each case was residence for a period at a named AP. Following the Parole Board direction, there was a delay before a place became available at the AP; in Mr Bowen's case that delay was 69 days and in Mr Stanton's case it was 118 days.

i) Section 28 - Construction

35. On behalf of Mr Stanton and Mr Bowen it was submitted that on a proper construction of s.28 of the 1997 Act the Secretary of State was obliged to release the claimants within a very short time of the Parole Board decision and that their release should not have been delayed for anything like the time periods that followed the decisions in their cases.

36. The Court of Appeal (McCombe LJ giving the main judgment, with which Sir Terence Etherton MR and Ryder LJ agreed) rejected the contention that the statutory scheme required prompt release within a few days of the Parole Board decision and regardless of the practicalities of putting the necessary conditions for release in place. It concluded that under s. 28(6) of the 1997 Act the Parole Board cannot give a direction for release under s.28(5) unless it is satisfied that it is no longer necessary to confine the prisoner for the protection of the public. While there is no express provision empowering the Board to compel particular licence conditions, it was clear from s.31(3) that the scheme envisages that the Board will in fact make recommendations as to the conditions that are desirable to achieve the protection of the public and it would be entitled to determine that it was not "safe" to release the prisoner without such conditions in place (McCombe LJ at [43] and see also Whipple J at [35]-[36]).

37. It therefore followed that each of the Parole Board decisions was properly to be read as directing release subject to the risk management plan, including residence at an AP. The conditions imposed were "*part and parcel of*" and "*integral to*" the decision to direct release. It was implicit that the Board's direction was subject to conditions (McCombe LJ at [48] and [54] and Whipple J at [37] and [40]).

38. In reaching its conclusions the Court of Appeal relied on and approved a decision of Langstaff J in *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 (Admin). Although that was a decision refusing permission for judicial review, it was adopted and relied upon by Whipple J as part of her own reasoning. McCombe LJ stated:

"[51] The passage from Langstaff J's judgment in *Elson's* case was this:

> " section 28 of the 1997 Act cannot sensibly be interpreted to provide that as soon as a Parole Board takes a decision in which it directs release, albeit under conditions or at some future time, the Secretary of State is under a duty there and then and thereby to ensure that that release takes place forthwith. That would give no effect to the provisions of section 31; it would not recognise the difference in language between section 28 and section 32; it would in my view simply have been beyond the contemplation of Parliament that the alternative, which would need to have been in place immediate release to be effected, would operate in an impractical way—as Ms Davies points out, if it were to be the case that it was anticipated that a Parole Board might make a direction which was conditional as to time or circumstance, that (so far as a circumstance such as accommodation in a hostel was concerned) the hostel would have to be held available just in case the Board at its hearing might decide that particular prisoner under review was to be released, even though it equally might not. Supervision arrangements would have to be made in anticipation of a possible outcome; appointments with psychiatrists and the like would have to be in place—all of which would be on a provisional basis which, given that the decision lies in the power of the Parole Board which has not yet considered it, might or might not be given effect to. I cannot sensibly construe section 28 in such a way that it would have that effect."

[52] I agree with Langstaff J and the judge that Parliament cannot have intended the section to work in a way that would have the impracticable results that flow from the construction which Mr Rule would have us adopt. Of course, prior planning is made by the offender manager to see when a place at Approved Premises would be available, as happened here. It enables the panel to know that, if it directs release to Approved Premises, the release can be safely achieved with the relevant risk management precautions in place. However, to my mind, an intention to require immediate release at a time before such precautions are known to be available is not something that one should readily attribute to Parliament. As Langstaff J also pointed out, if a prisoner is released on condition of residence at a place which is not available to him it would have the result that he would have to be brought back to prison immediately the condition was broken on the first day out of custody. Such a result can hardly have been intended."

39. The Court of Appeal also held, when refusing permission to appeal on separate grounds of appeal under Article 5 ECHR, that an individual who is detained under an IPP is detained under his original sentence. At [100] it concluded:

> "The Parole Board decided judicially the conditions upon which it would be safe to release the claimants. Without the conditions, there would be no release. Until those conditions could be achieved, therefore, (provided that that was within a reasonable timeframe) there could be no breach in the relevant chain of causation."

ii) Reasonable time to provide Approved Premises

40. Although the Court of Appeal rejected the contention that the 1997 Act required the immediate release of a prisoner if necessary conditions could not be put in place, it noted that it was "common ground" that the Secretary of State was under a public law duty not to delay a prisoner's release beyond "a reasonable timeframe" (McCombe LJ at [49] and [57]). As to that, the legal test to be applied was set out at [41]-[42] of Whipple J's judgment:

> "[41] … The Secretary of State plainly is under an obligation to take reasonable steps to ensure that the Parole Board's specified conditions are met within a reasonable time after the Parole Board has directed release. That obligation does not come from s 28 read with s 31 of the 1997 Act, nor does it come from s 2 of the 2007 Act, which I will address in greater detail below as part of Issue 3. It comes from domestic public law, which requires the Secretary of State, as a public body, to operate a proper system, to act reasonably and to apply its own published policy to those within the contemplation of that policy, see *R (Kaiyam) v Justice Secretary* [2015] AC 1344 at [41] (Lord Mance and Lord Hughes JJSC) where the Court identified the following "ordinary" public law duties owed by the Justice Secretary: "… As a matter of domestic public law, complaint may be made in respect of any systemic failure, any failure to make reasonable provision for an individual prisoner so egregious as to satisfy the *Wednesbury* standard of unreasonableness [see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223] or any failure to apply established policy."

> [42] These duties provide the safeguard for any life prisoner who believes that his continued detention, pending a placement at an AP, is excessive or unreasonable."

41. It was accepted by the Secretary of State before the Court of Appeal that one of the factors that has to be taken into account in deciding whether a reasonable timeframe for release had been exceeded, along with matters relating to an individual prisoner's case, is to look at whether the overall provision of APs "*has been so insufficient as to have given rise to the delay in the offering of a place to the individual concerned*" (McCombe LJ [59]).

42. In the case of Mr Bowen, Whipple J noted that he had not advanced any case of unreasonableness; a position which she found "unsurprising" given that his wait for a place was around two months in the context of a life sentence with a minimum term of 14 years. Attempts had also been made in his case to find alternative Approved Premises and, in any event, only some of those other APs were acceptable to Mr Bowen. In those circumstances the delay in his case of around 2 months was not excessive or unreasonable (Whipple J [43], McCombe LJ at [75]).

43. In Mr Stanton's case the Court of Appeal held that the Judge had reached the "correct" conclusion when she decided that the delay of four months in his case was reasonable (McCombe LJ at [76]-[83]). Whipple J's conclusion was as follows:

> "[46] The real point for Mr Stanton is the four-month delay: was it excessive? In answer, I note two things. First, as a matter of context, Mr Stanton was subject to an "indeterminate" sentence for public protection. He had no right to release at any date certain following conviction. His only expectation was that he would be released if he could demonstrate that his continued detention was no longer necessary for public protection. He knew (or should have known) that any direction for release might

> be subject to a residence condition, fulfilment of which would depend on a suitable placement being found. That is what happened; that was in line with his reasonable expectations. Secondly, on the facts, his release could only have been secured earlier by sending him to a different AP, because Mandeville House was full. But Mr Stanton wanted to be in the Cardiff area, which was undoubtedly the best place for him given his family and community ties, and that was what the Parole Board had specified, even knowing there would be a delay of around 4 months. Overall, and if this matter is part of Mr Stanton's case, I conclude that his detention until 23 July 2015 was reasonable, while accepting that this case falls closer to the line."

44. At [81]-[83] of McCombe LJ's judgment he emphasised that a focus directed simply at the bare number of days for which each claimant had to wait for a place was not the right approach. Instead the "overall context" of the cases was important. This context included that it was in the nature of the sentences imposed on the claimants that they were indeterminate and that release would only be achieved upon the Parole Board being satisfied that release could be managed within the community, with suitable risk strategies in place. Residence conditions were only to be expected in such cases. Accordingly, the decision whether any particular period prior to release of a life/IPP prisoner with a residence condition is unreasonable or not, will depend entirely on the facts of the particular case, save only where it appears that the national availability of APs has had a "*genuinely adverse effect on an individual prisoner*" ([83]).

45. On the facts of both cases, the Court of Appeal found nothing in the material presented to it (which had also been relied upon as part of a separate ground of challenge alleging systemic failure) to show that a national shortage of Approved Premises had any real effect upon the period for which they had been waiting prior to release ([86]).

iii) Alleged breach of "James" public law duty in Bowen & Stanton

46. A separate ground of challenge in *Bowen & Stanton* was an alleged breach of the "*James* public law duty". Although that ground of challenge is not pursued separately as one of the three main grounds in these proceedings, it is nevertheless important to note the conclusions that were reached in *Bowen & Stanton* on that issue, since Mr Dexter seeks to rely on a "widespread" "systemic deficiency" in the provision of APs as part of his case as to why his continued detention was unreasonable and in breach of domestic public law. He also raises similar points under Article 5(1) ECHR.

47. Before Whipple J the Claimants in *Bowen & Stanton* maintained that the Secretary of State was under a public law duty to "enable reasonable opportunity of release from an indeterminate sentence". In support of that contention the claimants relied upon *James v United Kingdom* (2013) 56 EHRR 12 and other similar cases, as summarised by the Judge at [63]-[65] of her judgment. That duty was said to arise by reference to those cases which examined the Secretary of State's failure to provide courses to assist offenders towards rehabilitation and/or excessive delay in moving prisoners to open conditions; in both cases frustrating a prisoner's ability to demonstrate to the Parole Board that detention was no longer necessary for public protection. Those cases attest the "*James* public law duty" which is a duty to make reasonable provision, which requires sufficient resources to be made available for the fulfilment of that duty.

48. Whipple J rejected the contention that any "*James*" public law duty arose in the present context, for two key reasons. First, cases involving the availability of

resources to meet the Parole Board's directions for release subject to particular specified conditions, are very different from the situation in *James* (and other similar cases) where the problem arose at an earlier stage in the sequence, before the Parole Board had made any direction for release. The claimants' arguments therefore sought to extend the *James* public law duty far beyond the factual context in which it had been recognised. Secondly, in *James* and other similar cases the public law duty was *implied* because the Criminal Justice Act 2003 was silent on the provisions which were necessary to allow prisoners a reasonable opportunity to demonstrate to the Parole Board that they should be released. In contrast, a solid statutory foundation exists for the provision of Approved Premises. That statutory foundation is to be found in ss.1-2 of the 2007 Act. Section 2 provides that it is the "function" of the Secretary of State to ensure that "sufficient provision" is made for probation purposes, which expressly includes the provision of APs.

49. Consequently, Whipple J was not persuaded that there was any space for the imposition of a *James* public law duty in the current context. In reaching that conclusion she relied on the following passage from the judgment of Leggatt J (as he then was) in *Taylor v Secretary of State for Justice* [2015] EWHC 3245 (Admin) on the scope of the duty in s.2 of the 2007 Act:

> "[25] …section 2 does not create a duty to provide any particular assistance to any individual. The section is framed in general terms. It refers to the "function" of the Secretary of State, which is a word that connotes a general responsibility rather than any specific duty. It is, moreover, clear from its wording that the section is dealing with the overall sufficiency of the provision made for the probation purposes in England and Wales and not with whether or what specific provision should be made in any particular case for the benefit of any particular individual.

> [27] …under the 2007 Act the question whether "sufficient" provision has been made throughout England and Wales for the probation purposes is a matter for the Secretary of State to determine, subject only to ordinary principles of judicial review. Under the 2007 Act it is for the Secretary of State to decide what provision ought to be made for any of the probation purposes (as expressly reflected in the definition of "probation provision" in section 2(1) and in the wording of section 3(1) of the Act). It must by the same token be for the Secretary of State to decide what provision is sufficient. That question necessarily involves judgments about how the various probation purposes can most effectively be furthered using the resources available. It is neither within the expertise nor part of the constitutional function of courts to make judgments of that nature. They are for the executive branch of government to make."

50. Whipple J agreed with Leggatt J that resources must be taken into account, given the nature of the duty identified; namely a high level duty on the executive to make sufficient provision, rather than a specific duty conferring rights on any individual. She distinguished the current context from cases like *James* (including *R (Fletcher) v Governor of HMP Whatton* [2014] EWHC 3586 (Admin)) where the public law duty by its very nature confers individual rights and in relation to which resources cannot be a valid excuse for non-compliance. Overall she was not persuaded that a *James* public law duty existed. Instead there was a duty on the executive to make "sufficient provision" as contained in s.2 of the 2007 Act and resources were a relevant consideration when assessing compliance with it.

51. Separately Whipple J also considered whether, on the evidence before her, there was any breach of duty as alleged. At [73]-[75] she summarised the evidence available which the claimants contended was sufficient to support their case that the provision of APs was "wholly inadequate". However the Judge accepted evidence submitted by the Secretary of State to the effect that the provision of

APs was sufficient and she rejected the contention that there was any systemic insufficiency or consequential breach of duty. She concluded as follows:

> "[77] … There may be strains on the system, and in some cases there may be delays in finding a suitable placement (as suggested by the witness evidence by the various solicitors), but I am not persuaded that those problems represent any form of systemic failure.
>
> [78] That is the answer however the duty is put. Certainly, there is no demonstrated breach of the high level s 2 duty. But even if a wider *James* public law duty to make such provision did exist, there is still no compelling evidence of breach: the evidence relating to the availability of APs is a world away from the evidence about the deficiencies in the provision of courses and other services examined in *James* and related cases.
>
> [79] There is no insufficiency in the provision of APs such as to amount to a breach of duty, however that duty is framed. I am willing to accept that there are shortcomings at an individual level within the system. That much is plain… But that does not reveal any breach of duty under s 2 of the 2007 or even on the assumption that a *James* duty does apply."

52. In the Court of Appeal permission to appeal was refused both on the question whether a *James* public law duty existed and on the question whether there was any breach of that duty [89]-[96]. At [93] McCombe LJ concluded that the alleged breach of the *James* public law duty added nothing of substance to the decision on whether a reasonable time had been taken to secure the accommodation in Approved Premises. The Court's conclusion on the reasonable time issue did not suggest to him that the question of national resources had any impact on the particular circumstances of the claimants.

Discussion: reasonable time

i) The specifics of Mr Dexter's case

53. Applying the Court of Appeal's reasoning in *Bowen & Stanton*, in my judgment the following features of this case are particularly important when considering whether the delay was reasonable.

54. First, Mr Dexter was subject to an indeterminate sentence for public protection. His only expectation could have been that he would be released if he could demonstrate that his continued detention was no longer necessary for the protection of the public. It follows that Mr Dexter had no right to release at any particular date following conviction and residence conditions were entirely to be expected in his case. In this case the Parole Board made expressly clear that his release could only occur once all the necessary arrangements had been put in place to give effect to the release management plan. It also stated in terms that his release would be on a date to be determined by the Secretary of State.

55. Secondly, the delay in this case is for a period of 2 months and 20 days in the context of an indeterminate sentence where almost 8 years imprisonment had been served, a minimum custodial term of 6 years having been set at the outset. Viewed in the proper context of that lengthy period of imprisonment, the delay is not disproportionate.

56. Thirdly, inquiries about the availability of Norfolk Park AP were made in good time in this case. In her report dated 17 January 2020 the Offender Manager reported that she was awaiting the outcome of a referral to Norfolk Park AP and by the time the Parole Board met on 23 January 2020 there was a place available at Norfolk Park AP to commence on 3 February 2020. Accordingly, this is not a case where there was a failure of proper planning in advance of the Parole Board hearing in breach of the Secretary of State's published policies.

57. Fourthly, it is clear that a number of unforeseen events occurred after the Parole Board hearing on 23 January 2020. The Parole Board itself did not issue its written decision within the normal 14 day period (in fact doing so 17 days later) (it is relevant to note that Rule 9 Parole Board Rules 2019 gives a discretion to the panel chair to alter any of the time periods where necessary to do so). That was why the Parole Board apologised in its written decision, explaining that "some personal matters" had led to an unexpected delay. In addition, and more pertinently, as explained in Mr York's statement and as I have set out above, around a quarter of the beds in Norfolk Park AP became unavailable due to the need to carry out works following an outbreak of legionella. By the time the Parole Board decision became final on 2 March 2020, a place was not available at Norfolk Park AP until June 2020 (although in the event that place was able to be secured on 21 May 2020). In my judgment these unforeseen events explain the delay in this case. There is for this reason no basis for the suggestion that the delay resulted from a breach of public law duty to take reasonable steps to ensure that the Parole Board's conditions were met.

58. Fifthly, it is clear on the specific facts of this case that Norfolk Park AP was the AP which was obviously most suitable for Mr Dexter. He was convicted of very serious offences. It is apparent from the Parole Board decision and from the material before it that he had been able to demonstrate his suitability for release, in large part because of his "proven and tested" resettlement plan which included accommodation at Norfolk Park AP on release. It was in that AP that Mr Dexter had spent all of his periods of release on temporary licence, including a number of overnight stays. It was specifically stated by his Offender Manager that he had "engaged with staff and complied with the rules" at that specific AP.

That AP was also close to Mr Dexter's mother in Barnsley (there being no AP in Barnsley itself). In those circumstances there were important reasons why Norfolk Park AP had been selected as his AP on release (with no alternatives having been identified) and I accept Mr Blake's submission that it is far from clear whether the Parole Board would have ordered release had they known that Norfolk Park AP would not be available (or at least not available for some time).

59. To my mind Mr Rule's best point is that no attempts were made to identify any other alternative APs which might have been suitable for Mr Dexter once it became clear on 26 February 2020 that a place was not available for a 3 month stay until 17 June 2020. Ideally there would have been some consideration of alternatives at that point. But given that Norfolk Park AP had been at the centre of Mr Dexter's release plan and integral to his risk reduction work while on temporary licence, I do not consider that it was unreasonable for those involved with Mr Dexter's case to wait for that place to become available. I also accept that any attempt to identify alternative APs and carry out the appropriate risk assessment, including bringing the matter back before the Parole Board, would have taken time and may not necessarily have been much quicker than waiting for the place which did in fact materialise at Norfolk Park AP on 21 May 2020.

60. Mr Rule understandably draws attention to a number of important effects which the delay had upon Mr Dexter, including his inability to access ROTL between March and May 2020, his inability to take up a firm employment offer and the coinciding of his continued detention with the COVID-19 pandemic which further limited his freedom within the prison at that time. He has also highlighted Mr Dexter's relative youth when offending. While I accept that, in

principle, the effects of delay on an individual's circumstances might be sufficient to render any delay unreasonable, I do not consider that the impact on Mr Dexter was so severe that it affected the reasonableness of the delay in this case. Putting it another way, even if they are relevant factors, they do not come close to outweighing the powerful factors I have identified at [54]-[58] above.

61. I can fully understand that the delay must have been frustrating and upsetting for Mr Dexter as he has explained in his witness statement. But I am not persuaded that the effects on him were such that it was unreasonable to wait for the place at Norfolk Park AP to become available. I also bear in mind that the effects of the COVID-19 pandemic were likely to mean that, in any event, and whether residing in Norfolk Park AP or in open prison, Mr Dexter would have been subject to restrictions of movement and an inability to see family and friends, in common with everyone else in the UK at that time.

62. Mr Rule also advances a number of arguments under this ground of challenge to the effect that the language of s.28 of the 1997 Act requires release "without delay" given the finality of the "conclusive direction" made by the Parole Board. However these arguments all run contrary to the Court of Appeal's decision in *Bowen & Stanton* which is binding on me.

63. While I accept that the tenor of the decision in *Huxtable* reinforces the need for there to be proper justification for *any* period of imprisonment, particularly beyond a Parole Board direction for release, I do not consider that it supports the contention that there was unreasonable delay on the facts of this specific case. I note, in particular, that Fraser J in *Huxtable* cites *Bowen & Stanton* as one of a number of decisions which support the proposition that the legislation

cannot be construed as the Parole Board requiring "immediate release" following a direction for release (see [59]-[66]).

64. What of Mr Rule's contention that this case can be distinguished from *Bowen & Stanton* on the basis that the Parole Board in those cases was aware of and sanctioned the period of delay which subsequently occurred? Does that make a difference to the reasonable timeframe analysis? In my judgment it does not. I accept that one factor which was relied on by Whipple J (as upheld by the Court of Appeal) in assessing the reasonableness of the delay in Mr Stanton's case (Mr Bowen not having pursued that in his grounds of challenge), was the fact that the Parole Board itself was aware of and could be taken to have sanctioned the delay of around 4 months in his case. But it does not follow that the absence of that feature in this case renders the decision unlawful. On the facts of this case there was no expected delay at the time the Parole Board hearing took place. At that time a place had been secured at Norfolk Park AP to start on 3 February. So at that time there was no delay to inform the Parole Board about, let alone for it to sanction. That delay only became apparent subsequently.

65. I also note that in *Bowen & Stanton* it is recorded at paragraph 5 of McCombe LJ's decision that "*the approximate date of availability was known to the Board at the time of each of their decisions*" (my emphasis) and that is consistent with the Defendant's published policy which provides that the "*estimated*" date when an AP place will become available should be written into the release plan before the Parole Board hearing (see [31.16] of the Approved Premises Manual April 2013). Nowhere within the Court of Appeal (or first instance) decision in

Bowen & Stanton is it suggested that the Parole Board's endorsement of the delay is critical to its reasonableness.

66. I will return to this topic in the context of Article 5 ECHR below because Mr Rule has argued that the absence of a date of availability for the AP in the Parole Board decision renders the decision unlawful under Article 5(1). At this point however it suffices to say that I do not regard the failure of the Parole Board to endorse the delay as fatal to the reasonableness of the delay in this case. After it became apparent in late January that a place could no longer be held at Norfolk Park AP and once the Parole Board directed release with conditions, the Secretary of State had a reasonable time in which to effect the Parole Board's decision. For the reasons already discussed above I do not consider it unreasonable not to have gone back to the Parole Board and explored an alternative AP when it became apparent that there would be a period of delay.

67. Finally, in terms of what occurred on the specific facts of this case I have not placed any reliance on Mr Dexter's own failure to identify alternative APs. While I accept that in some cases the prisoner himself may suggest an alternative AP, I agree with Mr Rule that in this case that was a matter for the Secretary of State's officials to initiate and it is not relevant to my analysis of the reasonableness of the delay that Mr Dexter himself did not suggest any alternatives. Mr Blake sensibly did not press this point in oral argument.

ii) Did the national availability of AP places have any adverse impact in this case?

68. As I have noted earlier in this judgment, Mr Rule submits that a further relevant factor to be taken into account, in deciding whether a reasonable timeframe has been exceeded, is whether the overall provision of APs is so insufficient as to

have given rise to the delay in the offering of a place to Mr Dexter. It is part of his case that there was a widespread systemic failure to discharge the duty of sufficiency of provision of APs which impacted on Mr Dexter's case.

69. In *Bowen & Stanton* McCombe LJ held that the question whether any particular period prior to release of an IPP prisoner with a residence condition is unreasonable or not will depend entirely on the facts of the particular case, "*unless it appears that national unavailability of Approved Premises placements has had a genuinely adverse effect on an individual prisoner*" ([83] my emphasis).

70. In Mr Dexter's case I do not consider that the national availability of AP placements has had a genuinely adverse effect on him for the following reasons:

i) The evidence shows that there was a place available for Mr Dexter at Norfolk Park AP at the time of the Parole Board hearing 23 January 2020, but unfortunately that place could not be held available beyond 27 January.

ii) The evidence also strongly suggests that it was the unavailability of beds at Norfolk Park AP due to the outbreak of legionella (and the consequent decommissioning of around a quarter of its beds) which affected the ability of Mr Dexter to secure a place after 2 March 2020 and before 21 May 2020.

iii) Mr Rule places reliance on the e-mail from the North East Central Referral unit dated 26 February 2020 in which they indicated that a stay at Norfolk Park AP between June and Sept 2020 was "*the first available*

date at any of the North East APs". He submits that this demonstrates that there was a systemic shortage of AP places within the North East region at this time which impacted on Mr Dexter's position. But that ignores the important point at (ii) above about the specific local factors which affected Norfolk Park AP at that time. The e-mail he relies on also goes no further than to provide a snapshot as to the position in the NE region on that date where a placement was sought for 3 months. That evidence is not sufficient to support the contention that it was a national or regional unavailability of places which made the difference in his case.

iv) Allied to point (iii) above, I also accept the evidence of Ms Oliver at [16]-[20] of her statement. She is the Head of Operations for Residential and Accommodation Support Services at HMPPS. She has worked at HMPPS for 6 years. It is her evidence that the waiting time in Mr Dexter's case was not the result of any general lengthy waiting period which follows a Parole Board decision. In her experience there is always a bed that can be made available, but it has to be approved by the Offender Manager and acceptable to the particular offender.

71. It is for those reasons specific to Mr Dexter's individual circumstances that I have concluded that the national (and regional) picture in terms of the overall sufficiency of provision of APs did not have a genuinely adverse effect on his situation.

iii) Is there evidence of a widespread systemic deficiency in the provision of APs?

72. Nevertheless, and despite that conclusion, I set out below the respective arguments of the parties on the evidence before me about the national situation, since Mr Rule invites me to conclude that there was a "widespread" systemic deficiency in the provision of APs in this case. I then explain my conclusion, including why I do not consider that this demonstrates any breach of the high level duty or general responsibility to make sufficient provision of APs.

73. Mr Rule relies on the following evidence (in outline):

i) The witness statement of his solicitor Ms Sangeetha Vairavamoorthy dated 21 August 2020 which highlights a number of analyses and statistics relevant to the demand for AP places. In particular she exhibits to her statement a September 2016 "*NPS Approved Premises Demand Analysis and Future Capacity Report*" ("the September 2016 Report"), and she also refers to a 2017 Annual Report by HM Inspectorate of Probation ("the 2017 Annual Report") and a July 2017 report "*Probation Hostels' (Approved Premises) Contribution to Public Protection, Rehabilitation and Resettlement*" ("the July 2017 Report").

ii) As to the September 2016 report, Mr Rule draws attention to the identification of a need at that time for a minimum of an additional 10 APs, assuming that efficiencies in the use of APs were maximised. Overall the report concluded that the estate would need to provide between 230 and 1020 more beds (between 10 and 47 more APs) if refusals were to continue at their current rate (and there was no sign they would return to earlier levels). He highlights the section of the report dealing with "Refused referrals" (section 4.4) which states that refusals

due to a lack of space accounted for 65% of all refusals and that refusal rates had increased by more than 60% in the last 18 months.

iii) As to the 2017 Annual Report, Mr Rule draws particular attention to the statement that in July 2017 hostels were oversubscribed and an extra 400-500 beds were needed to meet demand.

iv) Mr Rule highlights the conclusion in the July 2017 Report that probation hostels have high occupancy rates and are oversubscribed. As recorded in that report, at that time there were 2200 beds available. While the estate was described as "*substantial*", the report stated that, based on interviews with NPS managers, there was "*not enough capacity, with an estimated shortfall of 25%*".

v) Mr Rule then contrasts the 2016-2017 position with what can be seen in the 31 January 2020 "*Analysis of current and future demand for Approved Premises beds*" ("the January 2020 Report") which was disclosed by the Defendant. He noted that although there had been a commitment in early 2019 to increase the AP estate by over 200 beds (with half those beds to be delivered by the end of 2020), the analysis showed that there was a significant "unmet referral demand". It indicated that, assuming current occupancy rates of around 73%, there could be unmet demand of around 580 beds (albeit if occupancy was higher this would reduce, possibly to 50 beds assuming 90% occupancy). Further analysis showed that some areas were under more pressure than others with London and the Midlands carrying the highest deficit. Based on one methodology (which was not the preferred approach, as

explained in the report) refusal rates for non-ROTL and ROTL were estimated to be 11% and 2% respectively. (Mr Rule specifically noted that unmet demand in this context relied on counts of refusals that were not followed by another referral or residency within 90 days.) Overall that suggested unmet demand of around 100 referrals per month but using a preferred and possibly more accurate method of analysis (based on 'NOMIS/OASys' data), that could be as high as 160-170 unmet referrals per month. The analysis also suggested that unmet bed demand may have risen from 577 in 2016/2017 to as much as 1593 in 2018/2019, albeit direct comparison with earlier figures was difficult.

74. Overall Mr Rule submits that the picture painted by these reports is that there are insufficient AP beds to meet demand and that this was known about in 2016 and yet has not been fully addressed since that time, despite increasing demand for AP beds.

75. In contrast Mr Blake urges caution when interpreting these reports and drawing conclusions from them. He accepts that more places are needed to satisfy the demand imposed by a growing prison population, but he relies on the witness statement of Mr York and Ms Oliver to make the following specific points:

i) The number of AP bed spaces in 2016 (at the time of Whipple J's judgment) was 2,203 and that increased to 2,220 in 2019 and to 2,260 by the time the Parole Board directed the Claimant's release in February 2020 i.e. there has been an increase of 40 AP places between 2019 and 2020 and an increase of 57 places since 2016.

ii) As explained in Ms Oliver's statement the number of beds is a measure of capacity and not occupancy and it is unlikely there will ever be 100% occupancy around the country.

iii) The analysis of bed occupancy for April 2019 to March 2020 shows an overall occupancy rate for beds of 74% in the North East APs (the reasons why those beds are not used being various). The national occupancy rate has also decreased – in 2017 it was 92% (according to the July 2017 Report) but is now down to 77% (as shown in Exhibit JO1 to Ms Oliver's witness statement).

iv) The premise of the January 2020 Report is that it is a business case for expansion of the AP estate. Essentially it asks the question: if every request for a specific AP was to be met, how many would be needed? It is important to read the report in that specific context.

v) In the January 2020 report the analysis of unmet demand using the preferred method of calculation was based on an estimation of demand by counting the number of individuals with relevant characteristics irrespective of whether they were actually referred. Therefore it was a theoretical estimate of untapped demand based on individuals who may be suitable for referral based on their characteristics but who, for whatever reason, are not referred.

vi) An advanced booking system is operated which attempts to address excess demand by allocating places well in advance and giving Offender Managers a choice of up to 10 APs they can put forward. Offender managers will generally reserve a place at an AP several months prior to

release and the guidance to Offender Managers in the North East is to reserve places 6 months in advance wherever possible.

76. Overall Mr Blake submits that the available evidence is very far away from showing any systemic problem or failure to operate a proper system.

77. In approaching the question of the national availability of APs, in my judgment, the starting point is the nature and scope of the duty which arises under s.2 of the 2007 Act as analysed by Whipple J in *Bowen & Stanton*. As she (and Leggatt J in *Taylor*) concluded, it is not a duty to provide any particular assistance to any individual; it is a high level duty to make sufficient provision, which duty does not confer rights on any individual.

78. Having considered the parties' submissions carefully, including the detailed statistical reports on which reliance is placed, I do not accept that the evidence demonstrates a widespread systemic failure in relation to the provision of APs as alleged by Mr Rule in this case.

79. In approaching this issue I accept the points made by Mr Blake about the need to exercise considerable care when considering the available statistics. As stated in the January 2020 Report the data about APs is complex and not widely used and there are considerable uncertainties in any analysis of the situation which demands a degree of caution. For the reasons explained in the statement of Ms Oliver and as also explained in some of the available reports, an analysis of the adequacy of the provision of AP spaces cannot be conducted on a simple supply/demand basis. There are a wide range of factors which will influence the extent to which there is demand on the system at any one time and the extent to which there is capacity to meet that demand at any particular time. The

available reports also recognise that available spaces can be increased if there are increased efficiencies in the way that APs are used; increasing the available bed spaces relies on a combination of using the current estate as efficiently as possible while also increasing the number of places to meet growing demand.

80. When Whipple J considered the position in 2016 she concluded that the evidence relating to the availability of APs was a "*world away*" from the evidence about the deficiencies (including in some cases a complete absence) in the provision of courses and other services examined in *James* and related cases. While I accept that the up to date statistics suggest a worsening picture nationally in terms of unmet demand for AP places, the overall picture is a mixed one. I note that there has been an increase of 40 bed spaces between 2019 and 2020 with further increases planned. I accept the evidence of Ms Oliver that national occupancy levels have fallen and that in the North East (the area most relevant to Mr Dexter) the occupancy rate is 74%. I also accept her evidence, based on her extensive experience, that there is not in general a lengthy waiting period for APs which follows a Parole Board decision. While the strains and pressures on the system do not appear to have abated and may have become more acute, I am not persuaded that the evidence supports the conclusion that there is a widespread systemic deficiency as alleged on behalf of Mr Dexter. The available evidence is still a very long way away from the systemic failings identified in *James* and other similar cases and does not support the conclusion that there has been a failure to satisfy the duty under s.2 of the 2007 Act to make sufficient provision.

Conclusions on Ground 1

81. The delay in moving Mr Dexter to an AP following the Parole Board's direction in his case did not exceed what was reasonable, particularly when taking into account the overall context in this case. Further I do not consider that the national (or local) availability of AP placements had any adverse effect in his case. In any event, the evidence before me does not suggest that there is any systemic deficiency (whether at local or national level) as alleged.

82. I do consider that Mr Dexter's reasonable time ground is arguable particularly given the failure to consider any alternatives (which I have discussed at [59]-[61] above) and I therefore grant permission on this Ground 1 of his claim. However his claim on this ground ultimately fails for the detailed reasons set out above.

83. Finally I note that this ground of challenge is framed in the Grounds and in Mr Rule's skeleton argument as a failure to effect release within a reasonable time "*and/or a breach of the statutory duty to release the applicant pursuant to section 28(5) of the [1997 Act]".* But any alleged breach of s.28(5) is entirely answered by the Court of Appeal decision in *Bowen & Stanton*. Further, the Court of Appeal endorsed Whipple J's conclusion that the duty to effect release within a reasonable time does <u>not</u> come from s.28 of the 1997 Act, but arises from domestic public law. In those circumstances any separate claim for judicial review arising from s.28(5) of the 1997 Act must also fail.

GROUND 2: NEGLIGENT DETENTION

84. In the alternative Mr Rule also advances a claim for the tort of negligence on Mr Dexter's behalf. Relying on just one authority in support of such a claim,

he asserts that there is "negligent detention" in consequence of "the absence of reasonable care being taken by D with reasonable steps adopted to avoid unnecessary detention" (at [81] of the Grounds and [49] of his skeleton). He argues that the case of *McCreaner v MOJ* [2015] 1 WLR 354 supports the proposition that a duty of care can arise in the present context where the case concerns the handling of a prisoner's release. My understanding is that if this duty is made out, he claims breach of it by reason of the entirety of the delay alleged.

85. In response Mr Blake submits that the *McCreaner* case was a civil claim for damages in the Queen's Bench Division rather than a claim for judicial review. He therefore argues that permission for judicial review to bring a claim for "negligent detention" should be refused. Further, he points out that the law only imposes liability for administrative failure on a very narrow basis, as made clear in the long line of authorities set out in *Jama v Ministry of Justice* [2012] EWHC 533 (QB) at [62]-[66]. Finally, he submits that, in any event, the arrangements which were made in Mr Dexter's case were reasonable in the circumstances and the law cannot impose a burden on the Defendant to do more than is reasonable to release the Claimant to an AP.

86. In my judgment this aspect of Mr Dexter's claim faces a number of insuperable hurdles. First, I am wholly unpersuaded that any duty of care could arise in tort in the circumstances of this case. On the facts of this case I fail to see how there was any assumption of responsibility to secure Mr Dexter's release or a relationship of such proximity that it would be appropriate to impose a duty of care. In the *McCreaner* case there was a specific assurance given to the prisoner

that he was eligible for HDC (home detention curfew) subject to basic checks on his home address being completed (see Cranston J at [44]). At no stage in this case was Mr Dexter given any assurance about his release date; on the contrary it was clear at all times that the Parole Board had directed release but subject to necessary conditions being in place before that could occur. The relationship which existed between Mr Dexter and the Defendant was one created by statute and through public law duties and policy alone.

87. Furthermore, in relation to this, a number of important public policy considerations would arise if a duty of care was imposed in this situation as identified in *Jama's* case by Kenneth Parker J at [62]-[66], all of which apply with equal force here. As discussed above, the statutory duty under s.2 of the 2007 Act is not a duty owed to a particular individual, it is a general duty to make sufficient provision. In addition, a public law duty arises to effect release within a reasonable time. I cannot see how those statutory and public law duties leave any room for the imposition of a duty of care in negligence.

88. Secondly, even if a duty of care did arise on the specific facts of this case, for the reasons I have explained in detail in my conclusions on Ground 1 above, no claim for breach of duty could succeed in this case. I have concluded that the Defendant's actions did not breach the public law duty to give effect to the Parole Board's recommendations within a reasonable time and there could be no breach of any duty at common law in those circumstances either.

89. Finally, Mr Blake is right in my judgment to highlight the very real difficulties with attempting to bring this particular claim in the Administrative Court. Any such claim ought to be properly pleaded in terms of the elements of the cause

of action in negligence (duty, breach, damage etc.) and how they are said to arise on the specific facts of this case.

90. For all of those reasons I conclude that this Ground of challenge is lacking in merit and is not arguable and I refuse permission for judicial review having heard full argument on the point.

GROUND 3: ARTICLE 5

91. The Claimant argues that his detention after the date of the Parole Board hearing was contrary to Art. 5 ECHR on a number of different bases.

Article 5(1)

(i) Article 5(1): Executive control over length of preventative detention

92. By his first argument the Claimant contends that because there was no endorsement by the Parole Board of the period of delay after its direction, there was not the requisite "judicial control" over the duration of the detention and therefore the detention became arbitrary and in breach of Art. 5(1). Mr Rule again seeks to distinguish the position in *Bowen & Stanton*, contending that the Court of Appeal was explicit about the need for this feature within the Parole Board decision at [44]–[45] of its judgment. To the same effect Mr Rule places reliance on the notification by the ECtHR of the applications of Mr Bowen and Mr Stanton published on 28 September 2020 and the short description given of the subject matter of that case, which expressly includes the fact that the Parole Board was aware of the anticipated delays in their cases in securing accommodation in APs at the time it directed release. Mr Rule also relies on a line of Art. 5 cases beginning with *Weeks v United Kingdom* (1987) 10 EHRR

293 emphasising that delays must be kept to a minimum. He submits that the requirements of Art. 5 are undermined if the Secretary of State can delay release on the basis that a condition cannot be met.

93. In his written submissions Mr Rule also relies on s.256 of the CJA 2003 which makes clear that where the Parole Board is expressly empowered by Statute to make a future release, it must specify a fixed date. But that provision relates to determinate sentence prisoners and I do not understand how it has any relevance to his arguments under Art. 5(1) in Mr Dexter's case.

94. In response, Mr Blake points out that the Court of Appeal in *Bowen & Stanton* expressly rejected the argument that the length of the detention was wrongly being determined by the executive in this specific context. At [101] it stated:

> "it was not the executive determining when detention should end in these cases. The detention would end when, in accordance with the Board's judicial decision, the claimants could be released consistently with the protection of the public."

95. I agree with Mr Blake's submission that it is nothing to the point that the Parole Board did not itself endorse the delay in this case. As I have explained under Ground 1 above, there was no anticipated delay at the time of the Parole Board hearing on 23 January. In addition, the Parole Board would be aware that the Secretary of State was permitted a reasonable period in which to secure an AP. As I have already noted earlier in this judgment, nowhere within the Court of Appeal (or first instance) decision in *Bowen & Stanton* is it suggested that the Parole Board's endorsement of the time period is critical to its lawfulness. That is particularly clear from [100] of its judgment where the Court of Appeal stated (when refusing permission to appeal under Art. 5 ECHR):

> "Looking at ground (2), the claimants were being detained under the original sentences. The Board decided judicially the conditions upon which it would be safe to release the claimants. Without the conditions, there would have been no release. **Until those conditions could be achieved, therefore, (provided that that was within a reasonable timeframe) there could be no breach in the relevant "chain of causation"**." (emphasis added)

96. I also cannot place any reliance on the ECtHR's recent notification of the subject matter of Messrs Bowen and Stanton's applications to that Court. The Court has merely summarised the background facts in their cases, including that the Parole Board was aware of the delay at the time it directed release. That is an accurate statement of fact but cannot be given any further significance, particularly given the broader conclusions of the Court of Appeal in that case.

97. Mr Rule accepts that the logic of his argument is that a breach of Art. 5(1) would occur whenever there was any delay (no matter how short) to the anticipated dates of availability of the AP which had been provided to the Parole Board. He seeks to minimise the consequences of that by contending that this might be a technical breach only with no substantive remedy. But if he was right and a breach of Art. 5(1) would occur (no matter how technical), that would have entirely impractical consequences, given that the reality is that any date or timeframe which is provided to the Parole Board must necessarily be provisional and might be subject to change. The following obvious examples are sufficient to make that point:

i) Unforeseen events could occur after the Parole Board hearing in respect of any particular AP e.g. fire, flood etc. (as was the case with Norfolk House AP where beds became temporarily unavailable due to a

legionella outbreak), thereby causing delay and/or necessitating alternative arrangements which may take time to implement.

ii) Following the introduction of the 'reconsideration mechanism' all Parole Board decisions will necessarily be provisional both because of the initial period (usually 21 days) for the raising of concerns and pending the undertaking and determination of any review which may occur pursuant to that mechanism. As is apparent from the example given at [28] of *Huxtable* in Mr Pusey's case (which did not attract any expressions of concern from the court) the operation of the reconsideration mechanism can mean that individuals lose their AP place with a consequent delay to release. It follows that any estimate which is provided to the Parole Board about the availability of an AP may have to be revisited depending on the outcome of the reconsideration mechanism if triggered.

98. It follows from the above that although it is an important part of the process (and indeed is part of the Secretary of State's published policies) for AP places to be secured in good time before Parole Board hearings and for the estimated date to be included in the release plan which is put before the Parole Board hearing, not least so that the Parole Board is aware of any anticipated delays at that stage, it cannot be right that any change to those estimated or approximate dates (no matter how reasonable) automatically breaches Art. 5(1).

99. As Mr Blake has emphasised, the Art. 5 ECHR case law sets a high threshold for any violation to occur and cases in which a violation will be found will be rare. This was emphasised by Lord Reed in *Brown v Parole Board* [2018] AC

1 where he analysed *James* and the subsequent line of cases involving prisoners serving IPP sentences. At [28]-[29] and [45] he stated:

> "[28] It is essential to bear in mind the realism and flexibility of the European court's approach. As Lord Mance and Lord Hughes JJSC noted [in *Kaiyam*], failings in the prison system which arise due to a lack of resources and facilities cannot always be redressed at the drop of a hat, whatever order a court may make… the court said in terms in the *James* case that it would be unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant treatment or facilities were made available immediately...
>
> [29] The high threshold for establishing a violation of article 5 on this basis was also emphasised by Lord Mance and Lord Hughes JJSC. As they observed at para 60, article 5 does not create an obligation to maximise the coursework or other provision made to the prisoner, nor does it entitle the court to substitute, with hindsight, its own view of the quality of the management of a prisoner and to characterise as arbitrary detention any case which it concludes might have been better managed. …
>
> … [45] Emphasis should…be placed on the high threshold which has to be surmounted in order to establish a violation of the obligation. As the European court stated in *Kaiyam v United Kingdom* 62 EHRR SE13, at para 70, cases in which a violation is found will be rare… That is consistent with the statement in *R (Sturnham) v Parole Board* [2013] 2 AC 254, para 13, that "a violation of article 5.1 of the Convention … would require exceptional circumstances warranting the conclusion that the prisoner's continued detention had become arbitrary". The guidance given by the European court, for example in *Kaiyam v United Kingdom* 62 EHRR SE13, paras 69-70, as well as that given in the present judgment, should be borne in mind."

100. Bearing in mind this high threshold for establishing a violation of Art. 5, I do not consider that the absence of endorsement by the Parole Board of the delay means that there was a lack of the requisite judicial control in this case for Art. 5(1) purposes. The Parole Board remained in control of whether the Claimant could be safely released and the Secretary of State was obliged to implement its direction within a reasonable time. Given the realism and flexibility which has been demonstrated in the European Court's approach in the *James* line of cases,

I am not persuaded that there was a breach of Art. 5(1) for the reasons advanced by the Claimant in this case. To conclude otherwise would involve wholly impractical consequences given the realities of the situation facing the Parole Board and the Secretary of State.

101. I should also make clear that Mr Rule's oral submissions on this point appeared to extend as far as saying that the Parole Board itself was in breach of both s.28 of the 1997 Act and Art. 5(1) ECHR for failing to specify a timeframe within its decision for release to the AP. However, as noted by Mr Blake in his oral submissions, this claim for judicial review has been brought against the Secretary of State as sole Defendant and the Parole Board are only an Interested Party. I agree that it is not open for Mr Rule to make those submissions when no claim for judicial review has been brought against the Parole Board.

(ii) Article 5(1): Lack of lawful justification/not in accordance with the law

102. Mr Rule also submits that there has been a breach of Art. 5(1) in this case because resource provision cannot be a justification for delaying release. He contends that, on the evidence available, Mr Dexter's detention became arbitrary and in breach of Art. 5(1). He also argues that it is open to the Court to find a *James* breach on the basis of a general lack of sufficient AP places to meet the levels of need now anticipated for many years.

103. In making that submission he relies in particular on the ECtHR decision in *Erkalo v Netherlands* (1999) 28 EHRR 509, including the statement at [52] of that decision that conformity with national law is not the only consideration in assessing whether there has been a deprivation of liberty, given that any such deprivation must also prevent persons from being detained arbitrarily. I note

that similar statements have been made in other cases, including in *James v United Kingdom* (2013) 56 EHRR 12 at [191].

104. As set out under Ground 1 above, I have carefully considered the available evidence and I have concluded that there is no evidence of a systemic failing in the general provision of AP places. I have also concluded that there was no relevant causal connection on the facts of this specific case between the delay suffered by Mr Dexter and the national (or regional) availability of AP places. Accordingly, on the specific facts of this case, the contention that Mr Dexter's detention became arbitrary due to failings at a systemic or individual level must fail and that is a complete answer to this ground.

105. I do however consider that I ought to address briefly the legal arguments on this topic, which took up some time before me. As to that there are real difficulties with the Claimant's arguments, given what amounts to arbitrary detention for the purposes of Art. 5(1). As Whipple J concluded in *Bowen & Stanton*, and as has become even more evident from the case law since that time (including *Brown v Parole Board*), arbitrariness in the present context has a "very narrow compass" and something "extreme and exceptional" would need to be shown about the relevant systems in place for a breach to occur. In *James v United Kingdom* the ECtHR set out some key principles to seek to explain that concept. Importantly the Court recognised that a balance must be struck between competing interests and that some "friction" between available and required facilities is inevitable and acceptable. At [194] it stated:

> "… in assessing whether the place and conditions of detention are appropriate, it would be unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant

> treatment or facilities be available immediately: for reasons linked to the efficient management of public funds, a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable. Accordingly, a reasonable balance must be struck between the competing interests involved. In striking this balance, particular weight should be given to the applicant's right to liberty, bearing in mind that a significant delay in access to treatment is likely to result in a prolongation of the detention. In the *Brand* case itself, the Court found that even a delay of six months in the admission of the applicant to a custodial clinic could not be regarded as acceptable in the absence of evidence of an exceptional and unforeseen situation on the part of the authorities."

106. The case of *Brand v Netherlands* (49902/99) 11 May 2004, 17 BHRC 398 referred to in that passage is relied upon by Mr Blake as an important example of the approach of the ECtHR in a situation which is much more analogous to the present context than the *James* line of cases. In *Brand* the applicant was convicted of robbery with violence. A regional court imposed a custodial sentence and having been found to be suffering from a mental disorder further confinement in a custodial clinic was ordered. But, having served the custodial sentence, no places were available at a custodial clinic and the applicant remained in detention in the ordinary remand centre. A delay of 6 months in the admission of the applicant to a custodial clinic was held to be unacceptable and in violation of Art. 5(1). The following passages in the Court's decision are particularly pertinent to Mr Dexter's case:

> "[62] …the Court, in the circumstances of the present case, cannot accept the applicant's argument that the failure to admit him to a custodial clinic on 10 October 1994 rendered his detention after that date automatically unlawful under Article 5 § 1 of the Convention.
>
> [63] In this connection, the Court considers in the first place that – given the difference between a prison sentence, which has a punitive character, and a TBS order, which is of a non-punitive nature – it cannot, as such, be regarded as contrary to Article 5 § 1 of the Convention to commence the procedure for selecting the

> most appropriate custodial clinic (see paragraphs 26 and 27 above) only after the TBS order has taken effect."
>
> [64] The Court further considers that, once this selection procedure has been completed, it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It agrees with the domestic courts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable."

107. Although the 6 month delay in Mr Brand's case breached Art. 5(1) the approach of the Court sheds important light on what would be considered acceptable in the present context and when the circumstances become so extreme as to tip over into arbitrariness.

108. Taking into account that Art. 5 case law and bearing in mind the high threshold which is applied, it is very difficult to see how Mr Dexter's case comes anywhere close to being arbitrary. At a systemic level the evidence about the availability of APs still falls a very long way short of the situation in *James*. In *James* there was a comprehensive and complete failure to resource the system to provide for IPP prisoners and their rehabilitation and progression (see e.g. the summary of the position in the House of Lords decision in *James* [2010] 1 AC 553 at [118], [121]-[123]) and there is nothing remotely approaching that in the evidence before me. I also accept that the approach of the ECtHR, as exemplified in *Brand*, is to recognise that there will be an inevitable tension between demand and available resources, with no expectation that release will be achievable immediately in all cases. Applying that to the specific facts of Mr Dexter's case where the delay (of a much shorter period than in *Brand*) can be explained due to unforeseen circumstances, it is difficult to see how his detention could be rendered unlawful under Art. 5(1).

109. In conclusion, there is no arbitrariness and no breach of Art. 5(1) at a systemic or individual level in this case.

(iii) Article 5(1): Break of the causal link between sentence and detention

110. Finally under Art. 5(1) the Claimant submits that there is a break in the chain of causation and that the necessary connection between the original sentence and the ongoing detention after the Parole Board direction has been lost. In support of that contention Mr Rule relies on the House of Lords decision in *James* (and other similar cases including *Faulkner* and *Kaiyam*) and asserts that the Court of Appeal in *Stanton & Bowen* did not deal with this causal connection point.

111. This argument is identical to that which was raised before Whipple J in *Bowen & Stanton* and which was swiftly rejected by her at [49] of her decision where she stated:

> "By their first argument, the Claimants contend that the Parole Board's direction breaks the chain of causation between the conviction and the continued detention, because continued detention ceased to be necessary once the Parole Board had directed release, and at that moment the causal connection between the conviction and detention was broken. This argument is closely linked to the construction of s 28 which I have already dealt with. I have concluded that s 28 envisages detention continuing up to the point that an AP becomes available. That puts paid to the Claimants' first argument. There is no break in the chain of causation if detention is continued while waiting for a place at an AP."

112. The Court of Appeal also concluded at [100]:

> "The Board decided judicially the conditions upon which it would be safe to release the claimants. Without the conditions, there would have been no release. Until those conditions could be achieved, therefore, (provided that that was within a reasonable timeframe) there could be no breach in the relevant "chain of causation"."

113. Mr Rule's reliance on the *James* line of cases in support of a break in the chain is entirely misplaced. In *James* itself the detention became disconnected from the original sentence and became arbitrary once the tariff expired and lengthy periods of delay (of around 2 ½ years) occurred during which offenders were left in prisons with no access to offending behaviour programmes to demonstrate a reduction or elimination of their risk (see [220] of the ECtHR decision).

114. As Mr Blake submits it naturally flows from the Court of Appeal's substantive decision in respect of the proper construction of s.28 of the 1997 Act that there is no break in the chain of causation – the Claimant's release has always been subject to conditions without which he would not be released.

115. I therefore conclude that there is no breach of Art. 5(1) on the basis of a break in the causal link with the original sentence.

Article 5(4) breach

116. Finally, the Claimant contends that the delay in his case led to a breach of Art. 5(4) because there was no "speediness of effect" following the Parole Board decision to release. Mr Rule asserts (by reference to cases including *R* (*Noorkoiv v Home Secretary and Parole Board* [2002] 1 WLR 3284 and *Faulkner*) that delays of less than 2 months in the convening of Parole Board hearings have been held to violate Art. 5(4). He also contends that the availability of judicial review proceedings in the Administrative Court is insufficient to render the process compatible with Art. 5(4).

117. Mr Blake submits that the Art. 5(4) guarantees were met when the Parole Board heard the Claimant's case and made a determination. Furthermore, the Claimant has access to the Administrative Court to seek to challenge the lawfulness of any ongoing detention.

118. In my judgment there has been no breach of Art. 5(4) in this case. As highlighted by Lord Reed in *Brown* at [25], even in *James v United Kingdom* (at [231]) the ECtHR concluded that there was no violation of Art. 5(4) on the facts of that case, given (1) the availability of judicial review proceedings to challenge the failure to provide relevant courses and (2) the ability of the Parole Board to order release under the statutory provisions once satisfied that the individual was no longer dangerous. It must follow that in this case the combination of the Parole Board's direction for release, together with the availability of judicial review, is sufficient for Art. 5(4) purposes.

119. Mr Rule also appeared to suggest in oral submissions that the lack of control by the Parole Board over the precise date of release to an AP breached Art. 5(4) as well as Art. 5(1). He also submitted that even the shortest period of delay beyond any anticipated or expected date needed to be sanctioned by the Parole Board otherwise the protections in Art. 5(4) would be rendered ineffective. I do not follow that argument. I cannot see how there is any breach of Art. 5(4) where the Parole Board directs release in circumstances where the Secretary of State has a public law duty to implement that decision within a reasonable timeframe. For the reasons set out earlier in this judgment this alternative way of putting the case under Art. 5(4) must fail.

Conclusions on Ground 3

120. The Claimant's Article 5 ECHR arguments are without merit and I refuse permission for judicial review on this Ground, having heard full argument on the points.

CONCLUSIONS

121. I grant permission to apply for judicial review on Ground 1, but for the reasons set out above and having heard full argument, I dismiss the substantive application for judicial review on that ground.

122. I refuse permission for judicial review on Grounds 2 and 3.