Neutral Citation Number: [2023] EWHC 3303 (Admin)

Case No: AC-2023-MAN-000042

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

Thursday, 21st December 2023

Before:
FORDHAM J

- -

Between:

THE KING (on the application of ROBERT SNEDDON)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Michael Bimmler (instructed by Bhatia Best Solicitors) for the **Claimant**
Myles Grandison (instructed by GLD) for the **Defendant**

- -

Hearing date: 7.12.23
Draft judgment: 13.12.23

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

FORDHAM J

FORDHAM J:

Introduction

1. This is a case about when in law the Secretary of State for Justice ("SSJ") can reject a Parole Board recommendation to transfer an indeterminate sentence prisoner to open conditions. The case features a policy which refers to rejection because "there is not a wholly persuasive case" (§6 below). It also features an earlier High Court judgment which spoke of "very limited parameters", where a recommendation can be rejected if it appears "for good reason" to be "unjustified or inadequately reasoned" (§21 below).

2. The Claimant is aged 70. He has been in prison for 41 years. In July 1982, at the age of 29, he was sentenced to life imprisonment, with a minimum term of 10 years. That was a sentence relating to two offences of rape in 1980 and 1981. He was also sentenced in respect of 5 offences of indecent assault. The victims of the rapes and indecent assaults were aged between 10 and 16. The Claimant was 27. In 1982 the Claimant was also interviewed by the police in relation to two further rapes which had taken place in July and December 1979. The victims were aged 14 and 15. The Claimant did not admit to being the rapist. But by 2014 a 'cold case review' and DNA analysis exposed the truth. He pleaded guilty and in June 2015 was sentenced to two concurrent further life sentences, with a minimum term of 8 years. The judge described the protracted campaign of violent rapes which it was now known that the Claimant had perpetrated.

3. Following the February 1992 expiry of the 10 year tariff under the July 1982 life sentence, the Claimant was eventually assessed as suitable for transfer to open conditions. There followed four periods in open conditions. The position, as the Parole Board recorded, was as follows. First, there was a period of 2 years 10 months between April 2006 (aged 53) and February 2009. That period ended when the Claimant was reported to be in breach of his licence, during release on temporary licence, having been observed in areas where young people could congregate. Secondly, there was a period of 3 years 4 months between March 2009 (aged 56) and July 2012. That period ended when the Claimant was seen purchasing, consuming and concealing alcohol. Thirdly, there was a period of 8 months between January 2013 (aged 59) and September 2013. That period ended when the Claimant was alleged to have been involved in the drug culture at the open prison. It was subsequently acknowledged that no adverse adjudication had followed, and that the Claimant had produced a negative drug test. Fourthly, there was a period of 6 months between March 2014 (aged 61) and September 2014. That period ended because the Claimant was by now under investigation following the 'cold case review' and there was a concern about a risk of absconding rather than any failure in open conditions.

4. The 8 year tariff under the June 2015 life sentences expired on 26 June 2023. The Claimant's 'post-tariff' review is underway with a Parole Board hearing expected to take place sometime in 2024 but not yet scheduled. These proceedings arise out of the decision-making following a 'pre-tariff' referral. The SSJ referred the Claimant's case to the Parole Board on 24 March 2020. The Parole Board Panel was comprised of two independent members and a psychologist member. An oral hearing commenced on 22 September 2021 and was adjourned. It resumed on 3 February 2022. There was a 604 page dossier of relevant documents. There were reports and updating reports by the Prison Offender Manager (Stephen Gaughan), the Community Offender Manager (Justine Martinus) and the Prison Psychologist (Ffion Burke). All 3 of those professionals

also gave oral evidence. The Claimant gave oral evidence and was questioned by the Panel members, who also questioned the professionals, including as to the implications of the Claimant's oral evidence. By a 14-page determination dated 15 February 2022, the Parole Board set out its reasoned recommendation that the Claimant be transferred to open conditions. By a decision letter dated 22 December 2022, the SSJ rejected that Parole Board recommendation.

5. What had happened between 15 February 2022 and 22 December 2022 was this. The first person to consider the Parole Board recommendation was the case manager (Bukie Awomolo), who recommended on 9 May 2022 that it be accepted. On 23 June 2022 the team leader (Conroy Barrett) recommended rejection. A negative decision letter was issued on 19 July 2022. In judicial review proceedings CO/3838/2022 that decision was withdrawn by way of a consent order. On 28 November 2022, the head of casework (Leah Goodrham) recommended rejection. The pro forma containing the May, June and November 2022 assessments was sent to the head of electronic monitoring operations (Ken Everett) on 6 December 2022. The covering email from Ms Goodrham provided the Parole Board's decision document and relevant reports. It informed Mr Everett of the test which he "should be applying", quoting from §§5.8.2 and 5.8.3 of the policy framework (§6 below). Mr Everett's assessment as decision-maker, rejecting the Parole Board's recommendation, was added to the pro forma on 13 December 2022 and the fresh adverse decision letter was sent (under the name of Bukie Awomolo) on 22 December 2022. The claim for judicial review was then commenced in March 2023. I granted permission for judicial review on the papers on 17 July 2023. It is not unfamiliar for the permission-stage judge to deal with the substantive hearing. This can promote the efficient use of judicial resources, case-management and expedition, consistently with the overriding objective.

The 2021 GPP Policy Framework

6. I will start with a description of policies and directions. I was told that these have subsequently changed, but no submissions were made, or needed to be made, about later or current instruments. The SSJ's Generic Parole Process Policy Framework (30 August 2021) was applicable in this case. It describes (at §3.8.18) the Public Protection Casework Section ("PPCS") as being responsible for deciding whether to accept or reject the Parole Board's recommendation for an indeterminate sentence prisoner to move to open conditions, taking into account the SSJ's Directions to the Parole Board (§11-12 below). The reference to rejection because "there is not a wholly persuasive case" is the third of three grounds set out in §§5.8.2 and 5.8.3 (the square-bracketed numbers here and in §§7-8 below are my insertions):

> ***5.8.2 PPCS may consider rejecting the Parole Board's recommendation if the following criteria are met: [i] The panel's recommendation goes against the clear recommendation of report writers without providing a sufficient explanation as to why; [ii] Or, the panel's recommendation is based on inaccurate information.***
>
> ***5.8.3 The Secretary of State may also reject a Parole Board recommendation if [iii] it is considered that there is not a wholly persuasive case for transferring the prisoner to open conditions at this time.***

Predecessor Policies

7. In 2012, the SSJ had issued Prison Service Instruction 36/2012 (Generic Parole Process). This was the policy which featured in R (Gilbert) v SSJ [2015] EWCA Civ 802 (see §§10-11). PSI 36/2012 said this at §6.5:

> ***6.5 … The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are: [i] the panel's decision is inaccurate; [ii] the panel have acted irrationally, for example by recommending transfer to open conditions when most of the reports and especially the offender manager's report and psychologist report favour retention in closed conditions.***

8. In 2015, the SSJ issued Prison Service Instruction 22/2015 (Generic Parole Process). PSI 22/2015 was the policy which featured in R (Kumar) v SSJ [2019] EWHC 444 (Admin) [2019] 4 WLR 47 (see §14). PSI 22/2015 said this at §6.4:

> ***6.4 The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are that the panel's recommendation: [i] either goes against the clear recommendations of report writers without providing a sufficient explanation as to why; [ii] or is based on inaccurate information. The Secretary of State may also reject a Parole Board Recommendation where [iii] he does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at this time.***

This 2015 policy provision did three things. First, it repeated the first sentence (about "very limited parameters") from PSI 36/2012 §6.5. Secondly, it rewrote the two criteria from PSI 36/2012 §6.5. Thirdly, it added a "third ground" (see Kumar at §53: §21 below). These criteria and this third ground became [i], [ii] and [iii] in the 2021 GPP Policy Framework §§5.8.2 and 5.8.3.

9. In 2020, the SSJ issued the Generic Parole Process Policy Framework (27 January 2020), §§5.8.1 and 5.8.2 of which contained the same text as §§5.8.2 and 5.8.3 of the 2021 GPP Policy Framework. This 2020 Framework was the policy which featured in R (John) v SSJ [2021] EWHC 1606 (Admin) (see §34); R (Stephens) v SSJ [2021] EWHC 3257 (Admin) (see §18); and R (Oakley) v SSJ [2022] EWHC 2602 (Admin) (see §22). It made a change. It deleted the sentence, found in both PSI 36/2012 §6.5 and PSI 22/2015 §6.4, about "very limited parameters". This deletion was noted in Oakley at §24; and first discussed in R (Wynne) v SSJ [2023] EWHC 1111 (Admin) at §46. It has been recognised not to have changed the legal position.

A Line of Ten Cases

10. The parties made reference to these ten cases. (1) In R (Banfield) v SSJ [2007] EWHC 2605 (Admin) (10.10.07, Jackson J) the SSJ acted lawfully in rejecting the Parole Board's recommendation for transfer to open conditions, reasonably finding the risk not to be "acceptable" absent a "full functional analysis" and "work to achieve frankness". (2) In R (Hindawi) v SSJ [2011] EWHC 830 (Admin) (1.4.11, DC), the SSJ acted unlawfully in rejecting a Parole Board's release-recommendation, departing without reasonable basis from the Panel's findings on "credibility". (3) In R (Adetoro) v SSJ [2012] EWHC 2576 (Admin) (26.9.12, HHJ Gilbart QC) the SSJ acted unlawfully in rejecting the Parole Board's recommendation for transfer to open conditions, giving legally inadequate reasons why there were supposedly serious and important "omissions" in the Panel's reasons. (4) In Gilbert (23.7.15, CA) the SSJ acted lawfully in rejecting the Parole Board's recommendation for transfer to open conditions, it being reasonable to reject an assessment made "without reference" to the absconder policy criteria. (5) In Kumar (28.2.19, Andrews J) the SSJ acted lawfully in introducing PSI 22/2015 §6.4 (§8 above).

(6) In John (14.6.21, Heather Williams QC) the SSJ acted lawfully in rejecting the Parole Board's recommendation for transfer to open conditions, it being reasonable to conclude that the Panel had "not fully grappled" with the prisoner's assessed high risk of violence in open conditions. (7) In Stephens (2.12.21, Whipple J) the SSJ acted lawfully in rejecting the Parole Board's recommendation for transfer to open conditions, it being reasonable to reject an assessment which "failed to follow" the Directions on prisoners facing deportation, and so had not "applied the correct test". (8) In Oakley (17.10.22, Chamberlain J) the SSJ acted unlawfully in rejecting the Parole Board's recommendation for transfer to open conditions, giving legally inadequate reasons for disagreeing with a "conclusion of fact" (that necessary work could not be undertaken in closed conditions). (9) In Wynne (11.5.23, Steyn J) the SSJ acted unlawfully in rejecting the Parole Board's recommendation for transfer to open conditions, unreasonably finding levels of risk, untrustworthiness and self-justificatory tendency which departed without good reason from the Panel's clear in-depth analysis and professional consensus. (10) In R (Green) v SSJ [2023] EWHC 1211 (Admin) (22.5.23, Sir Ross Cranston), the SSJ acted unlawfully in rejecting the Parole Board's recommendation for transfer to open conditions, preferring the adverse view of the prison psychologist but disregarding a relevant consideration, namely an updated risk-assessment capable of undermining that view.

The Statutory Directions

11. By s.239(2) of the Criminal Justice Act 2003, it is the duty of the Parole Board to advise the SSJ with respect to any matter referred to the Board by the SSJ which is to do with the early release or recall of prisoners. By s.239(6), the SSJ may give "directions" to the Board as to the matters to be taken into account by it in discharging any of its functions. The relevant Directions in this case were issued in April 2015, entitled "Transfer of Indeterminate Sentence Prisoners [ISPs] to Open Conditions". An important focus of transfer to open conditions is identified in the Directions at §3: whereas the "main facilities, interventions, and resources for addressing and reducing core risk factors exist principally in the closed prison estate", the "focus in open conditions is to test the efficacy of such core risk reduction work and to address, where possible, any residual aspects of risk".

12. The Parole Board's recommendation for transfer to open conditions should be "based on a balanced assessment of risk and benefits" (§5). The "main factors" to be taken into account by the Panel – described as "four tests" (Stephens §6) – are: "the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release" (§7(a)); the extent to which the prisoner is likely to comply with any form of temporary release (§7(b)); the extent to which the prisoner is considered trustworthy enough not to abscond (§7(c)); and the extent to which the prisoner is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at this stage (§7(d))." The first of these includes not only questions about evaluation of risk and its manageability, but also a question "balancing the interests of the prisoner against those of the public" (Oakley §50).

The Panel's Decision

13. The Panel's balanced assessment of risks and benefits led to the recommendation of transfer to open conditions. The conclusions section emphasised the following. In relation to the extent to which the Claimant had made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm on temporary release, the position recorded by the Panel was as follows. The Claimant had completed all relevant and essential risk reduction work. There had been considerable impression management during the course of his evidence to the Panel. He was minimising several key risk factors including a preoccupation with sex, his sexual interest in female children and the fact that his sexual violence was a response to maladaptive coping. He had sought to persuade the Panel that the overriding triggers to his offending were as a result of his own experiences of sexual abuse and his perception that he lacked power and control in intimate and non-intimate relationships. This was something that would need intense monitoring in open conditions and it was encouraging the professionals had a good understanding of his risk areas to be able to act with speed if risk were deemed to be escalating. In relation to likely compliance with temporary release, the Claimant had previously failed in open conditions for reasons that the Panel had set out (§3 above). In the past he had pushed boundaries and engaged in risk-taking behaviour but there was little evidence before the Panel to suggest that this remained a current concern. In relation to the risk of absconding, there was no evidence to suggest that the Claimant posed anything other than a low risk of absconding. In relation to the benefits of testing areas of concern in open conditions, the benefits of a period in open conditions to test the Claimant's learning and coping, his resolve in relation to his risk factors and substance misuse and the opportunity for him to develop his resettlement plans considerably outweighed the risks to the public.

14. The main body of the Panel's reasoned determination amplified all of this. In relation to the considerable impression management, the minimising of several key risk factors and the attempt to persuade the Panel as to overriding triggers for the offending, the Panel recorded various things which the Claimant had said at the hearing when questioned by the Panel members. In relation to identified risk factors the Panel listed these as being a sexual preference for young children, grievance thinking, blaming others, lack of emotionally intimate relationships, impulsivity, poor problem-solving, poor emotional control, failure to take responsibility for his actions, lack of consequential thinking and a willingness to engage in risk-taking behaviour. To these it added sexual preoccupation, feeling entitled to sex, rumination, rigid thinking, the need to exert power and control, using sex to feel better about oneself, feelings of isolation, low self-esteem and not talking to others about problems. The Panel recorded the following: that the Claimant had completed all required programmes; that he had joined the PIPE (Psychologically Informed Planned Environment) in 2020, to consolidate the learning from previous programmes; that he maintained an enhanced IEP (incentives and earned privileges) status; and that he was attending structured group sessions.

15. The reports and oral evidence of the three professionals was described in detail by the Panel in its determination. This is the summary of that description which appeared in the pro forma entry (9 May 2022). First, as to the Prison Offender Manager:

> ***The Prison Offender Manager said that he assessed Mr Sneddon to have good insight into his offending behaviour. His concerns relate to Mr Sneddon's presentation and behaviour when in less secure conditions. He said that the previous occasions in open conditions show that Mr Sneddon engages in risk-taking behaviours, will push the boundaries and take limited responsibility for his actions. The Prison Offender Manager is satisfied that Mr Sneddon has***

> ***completed extensive work in custody and has consolidated his learning via the PIPE. The Prison Offender Manager recommended that Mr Sneddon be progressed to open conditions and does so in the context of Mr Sneddon having spent four decades in custody and the need for him to test his learning and consolidation before his tariff expires. The Prison Offender Manager notes that Mr Sneddon's risk has been managed in open conditions on four previous occasions without any incidents of serious harm or reoffending. The POM said that taking into account Mr Sneddon's age and various physical health conditions, his capacity to engage in generalised violence has lessened. However, he said that if Mr Sneddon was to feel strongly aggrieved about something then there is the capacity for fire setting. Following the initial hearing in September 2021, at the Panel's request, the Prison Offender Manager and Community Offender Manager filed a consolidated report commenting on custodial behaviour and security intelligence. At the reconvened hearing, the Prison Offender Manager confirmed that the last proven adjudication was in March 2012 and there was nothing in the additional material that raised any risk related concerns. The Prison Offender Manager reconfirmed that he supported a transfer to open conditions.***

Secondly, as to the Prison Psychologist:

> ***According to the psychologist, the most recent conviction fits within the same pattern of offending as his previous convictions and the function of the offending was the same. Her assessment is that Mr Sneddon has made significant progress in understanding and addressing risk factors relevant to his offending including developing his insight into how his childhood experiences affected him, addressing his offence supportive attitudes and developing skills to manage his emotions. She noted the previous failures in open conditions but believes that Mr Sneddon has addressed these concerns via one-to-one work with a psychologist. Further, she assessed Mr Sneddon to have shown good insight into his previous attitudes in, and problems within, intimate relationships. She opines that he has shown an increased understanding of what constitutes a healthy relationship. She is also … satisfied that based on his current presentation and custodial behaviour; all core risk reduction work has been completed and recommends that Mr Sneddon is progressed to open conditions so that he can be monitored over a substantive period of time.***

Thirdly, as to the Community Offender Manager:

> ***The Community Offender Manager was allocated to Mr Sneddon's case in April 2020. She has not yet had a face-to-face meeting with him but has had approximately seven or eight telephone conversations with him. The COM emphasised that prior to Mr Sneddon being sentenced for the most recent conviction, he was residing in open prison conditions. She stated that there have been no recent adjudications, that Mr Sneddon has been engaging with staff at the PIPE and has been open about discussing his offending. She said that his thinking and behaviour have changed. She was satisfied that all treatment work has been completed and recommends that he be transferred to open conditions. She highlighted the benefits of a move to open conditions [which] will enable a sufficient period of testing in less controlled conditions and periods in the community given the length of time that Mr Sneddon has been in custody.***

16. So far as concerns the tools for the assessment of risk, the Panel set out the position as follows:

> ***OGRS3 scores are recorded which indicate that Mr Sneddon belongs to that group of offenders who present with a low likelihood of general offending within two years. The OASys assessment shows a low risk of general (OGP) and violent (OVP) offending. The OASys Sexual [proven] reoffending Predictor (OSP) is a new actuarial assessment tool for adult men. OSP predicts the likelihood of proven reoffending fora sexual offence, distinguishing between likely reoffending for a contact sexual offence (OSP/C) or a non-contact sexual offence (OSP/I) relating to indecent images of children. The OSP/ C score is medium and the OSP/I score is low. A low risk of serious recidivism (RSR) is recorded. Mr Sneddon is assessed as presenting a high risk of serious harm to the public and children and a low risk to a known adult. Ms Burke assesses Mr Sneddon's risk of further offending to lack imminence. The Panel's assessment is that the likelihood of generalised violent offending by Mr Sneddon is low given his age and physical health conditions. It assesses the likelihood of sexual violence / sexual offending to be low to medium while in open***

> ***conditions. The Panel agrees with the dynamic risk of serious harm scores. Further, the Panel is confident that warning signs would become apparent to indicate an escalation in risk.***

17. The Panel emphasised that there was "complete support among the professional witnesses" for the Claimant to progress to open prison conditions. It explained that the Claimant's partner was not assessed to be a protective factor in his case and the psychologist was not convinced that the partner would recognise or report any risk related concerns; nor did the community offender manager consider the partner to be a protective factor. The Panel agreed that the partner could not be regarded as protective but recorded that she had been a constant and consistent source of support to the Claimant over 4 decades. The Panel also recorded Ms Burke's position: that it was "difficult to assess" the Claimant's "openness and honesty", adding that he had been open about his past thinking and that his most recent behaviour in the PIPE demonstrated openness.

The SSJ's Decision

18. The SSJ's 3-page decision letter dated 22 December 2022 contains several introductory paragraphs and sets out the 2021 GPP Policy §§5.8.2 and 5.8.3 (§6 above). There then follows this passage (I have inserted square-brackets to reflect bullet points here and the five points at §19 below):

> ***The Secretary of State, when reaching this decision, did acknowledge the recent positive progress you have made and took into account matters including the following: [a] Although it is noted that you have spent a considerable part of your life in custody and in closed conditions, it is clear that you have taken the opportunity to acquire a number of educational qualifications and have worked while in prison. [b] You have completed numerous interventions including the Core Sex Offender Treatment Programme twice, the Extended Sex Offender Treatment Programme twice, Healthy Sexual Functioning Programme, the Better Lives Booster, the Enhanced Thinking Skills Programme and one to one work with a psychologist focussing on emotional management and developing relationships. [c] Report writers assess that all treatment work has now been completed and all recommended a transfer to open conditions. [d] Whilst not without incident, it is noted that your behaviour in custody has been largely positive. You also engage well with staff at the PIPE unit.***

19. The decision letter continues with a passage containing the following five points from which the conclusion was drawn that it "could not follow" that there was "a persuasive case" to transfer the Claimant to open conditions at this time:

> ***[1] It is noted that you are able to display a degree of self-control when in closed conditions but that you are open to more risk-taking behaviour when restrictions are more relaxed. Although the Parole Board have considered this and still recommended a transfer to open conditions, the Secretary of State has serious concerns about the potential risk to the public that such behaviour could cause if you had access to the community, given that risk-taking behaviour and poor consequential thinking is an identified risk factor.***
>
> ***[2] The Parole Board found it difficult to assess your openness and honesty, and considered that there was considerable evidence of impression management. In addition you were deemed to be minimising several key risk factors. Whilst this did not deter the Panel from making a recommendation for open conditions, the Secretary of State has placed more weight on this given that it will be essential for you to be open and transparent if you are to be placed in a setting of lower security. Given that rigid thinking and failure to take responsibility for your actions are identified risk factors, there is serious concern that your risks will not be able to be appropriately managed if you are not being open and honest at all times.***
>
> ***[3] The Parole Board concluded that you would need intense monitoring in open conditions and professionals would need to act with speed if your risk is deemed to be escalating. The Secretary***

> ***of State is unconvinced that open conditions would provide a suitable environment for such intense monitoring.***
>
> ***[4] While the Parole Board review panel was confident that warnings would become apparent to indicate further escalation of risk, it is noted that the Community Offender Manager clearly records that she is not convinced your partner would either recognise nor report any risk related concerns. The panel agreed that your partner cannot be viewed as a protective factor.***
>
> ***[5] Your lack of a wide support network places more importance on the relationship with your partner and increases responsibility on her to report any escalation in risk. Given that it is recognised that your risk would be exacerbated by the breakdown of supportive relationships, this does feel a delicate and unsustainable position to put you and your partner in and presents significant risk that any escalation would not necessarily be identified and/or reported.***

Key Disagreements

20. It is necessary, as Chamberlain J observed in Oakley at §51, to identify "with precision" the conclusions or propositions of the Parole Board with which the SSJ disagrees. At the hearing before me, Mr Bimmler for the Claimant pinned down the following questions of key disagreement on the part of the SSJ: (1) whether the Claimant's openness to "risk taking behaviour" is a present concern (see §19[1] above); (2) whether "openness and honesty", "impression management" and "minimising key risk factors" are appropriately manageable in open conditions (see §19[2] above); (3) whether the "intense monitoring" needed is achievable in open conditions (see §19[3] above); and (4) whether "warnings would become apparent" to indicate risk-escalation, given that the partner could not be relied on as a protective factor (see §§19[4] and [5] above).

Kumar-53: The Argument

21. In Kumar, the Court decided that PSI 22/2015 §6.4 (§8 above) was a lawful policy. Andrews J (as she then was) said this at §53:

> ***The current Policy has added a third ground, namely, that the Secretary of State does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at the relevant time. This was the target for much of [Counsel]'s criticism. Bearing in mind that this follows an express acknowledgment of the "very limited parameters" for departure from the recommendation of the Board, it is clear that the purpose of that ground is not to widen those parameters, but to preserve the ability of the Secretary of State (or the person to whom he has delegated the power to make the decision on his behalf) to exercise his discretion to reject a recommendation which does not strictly fall within either of the preceding grounds, but which appears to him (for good reason) to be unjustified or inadequately reasoned.***

22. I am going to call this passage "Kumar-53". One of the issues in this case is whether Kumar-53 articulates a legal test for the SSJ to apply under §5.8.3 of the 2021 GPP Policy Framework (§6 above). Mr Bimmler says it does. His argument – in essence as I saw it – is as follows:

23. In considering whether to accept a Parole Board recommendation to transfer a prisoner to open conditions, the SSJ can rely on §5.8.3 ("there is not a wholly persuasive case") only if the Kumar-53 test is satisfied: the recommendation appears to the SSJ, for good reason, to be unjustified or inadequately reasoned. The §5.8.3 ground ("there is not a wholly persuasive case") is a policy provision whose objectively legally correct interpretation is a matter for the judicial review court to identify. Kumar-53 was the judicial review court identifying that objectively legally correct interpretation. It is supported by Kumar §59, where Andrews J spoke of the "third basis" as the SSJ's

"discretion to reject advice which appears to him to be inadequately reasoned, or to provide insufficient justification for the recommendation, or to fly in the face of the evidence or the assessment of the nature of the risks found by the panel". It is supported by the permissible 'exploration' identified at Kumar §55 where Andrews J spoke of the SSJ as able "to explore the question whether the Board's recommendation was reached after a proper evaluation of the evidence and application of the [SSJ]'s Directions"; and "to explore [the] justification and to form a view as to whether it, and the reasoning behind it, is cogent". It fits with the "very limited parameters" (Kumar §53) and with the important observation that this is "not a Policy which enables the substitution of the views of a civil servant for the views of an expert body without justification" (Kumar §57).

24. This legally authoritative interpretation is something new. It departs from those general observations from the previous cases, which preceded the new third ground ("not a wholly persuasive case") in and after 2015. So, Andrews J was departing from the position in "cases such as Banfield" which she said had made it "plain that the Secretary of State may lawfully disagree with the Parole Board's view that the time has arrived to transfer a prisoner to open conditions, and that he may ascribe different weight to material factors in the risk/benefit balancing exercise" (Kumar §54). She was departing from the observation in Adetoro that the SSJ could disagree with a conclusion reached by the Parole Board from the factual material, provided that the SSJ gives "adequate reasons" (Kumar §9). The authoritative interpretation in Kumar-53, and the new test which it provides, has been emphasised in subsequent cases: see John §34; Stephens §§23, 38; Oakley §24; Wynne §§44-45; and Green §§37-38.

25. What follows from this analysis is this. Unless the SSJ's decision asks and answers the Kumar-53 question, the SSJ will have misunderstood the policy criterion in §5.8.3 ("not a wholly persuasive case"). That is a textbook public law error: a failure to understand the policy and ask the correct question. The SSJ's decision must provide reasoning which reflects the Kumar-53 test. Otherwise, the decision is unlawful. In the present case, the Kumar-53 question was nowhere stated for, or by, the decision-maker. The reasoning does not reflect the test. The claim, without more, must succeed.

Kumar-53: Discussion

26. I cannot accept this argument. The following points, emphasised by Mr Grandison, are immediately revealing. (1) Andrews J did not say in Kumar that she was identifying the authoritative and objectively correct interpretation of the third ground in PSI 22/2015. (2) Andrews J did not say in Kumar that she was departing from the previous case-law. (3) That would have been very odd because it would have meant that by *adding* the new third ground in PSI 22/2015 there was a new *narrowing* in the SSJ's power of rejection, by contrast with what had been recognised in conjunction with the previous two criteria in PSI 36/2012, considered in Gilbert (§7 above). (4) It would also have been very odd because the previous case-law was discussed without criticism (Kumar §§6-9, 54). (5) If Kumar-53 were intended to be the authoritative and objectively correct interpretation of the third ground, it is also odd that a few paragraphs later (at Kumar §59) Andrews J was adding an expansion ("or to fly in the face of the evidence or the assessment of the nature of the risks found by the panel"). (6) It is striking that none of the subsequent cases (John, Stephens, Oakley, Wynne or Green) say that Kumar-53 was the authoritative and objectively correct interpretation of the third ground in PSI 22/2015. (7) Nor do those cases say that failing to ask and answer the Kumar-53 question is a textbook public law error of failing to ask the legally correct question.

27. In my judgment, so far as Kumar-53 is concerned, the correct analysis is as follows. The issue in Kumar was whether PSI 22/2015, including the "third ground" ("wholly persuasive case"), was an unlawful policy. The key points advanced in that challenge, so far as the "third ground" was concerned, were the claim that it "failed to accord sufficient respect to the benefits and expertise of the panel" (Kumar §50(i), answered at §53); and the claim that it unfairly failed to allow effective participation by the prisoner (Kumar §50(iii), answered at §54). The point about weight attributed to material factors (§54) was a procedural point: there was no unfairness to the prisoner if the SSJ was considering the same material and features. The points about "very limited parameters", and "for good reason" and "unjustified or inadequately reasoned" were referable to purpose (§53), and the points about 'exploration' were relevant to the enquiry (§55). This was not an "unlawful or unfair" policy, since it did not enable "the substitution of the views of a civil servant for the views of an expert body without justification" (§57). All of this was a description of a policy which was consistent with the SSJ applying the lawful 'middle way' between (a) treating the Parole Board recommendation as binding (which it is not) and (b) treating the SSJ as entitled to reject a recommendation on the basis of substitutionary disagreement (which the SSJ cannot). That was what was needed, to answer the questions raised in Kumar. What is that lawful 'middle way'? This sort of question is familiar from other contextual settings (see John at §§68, 82). In the present contextual setting, the answer is provided by the authorities as a whole (§10 above). It is entirely consistent with Kumar and Kumar-53. There are key principles, to which I will now turn. They show that the answers to questions of the lawfulness of a decision to reject the evaluative conclusion of the Parole Board are provided by conventional, contextual public law standards.

The Key Principles

28. In my judgment the key principles identifiable from the case-law are as follows:

    (1) Decision-Maker. The primary decision-maker is the SSJ (Hindawi §63; Stephens §22; Prison Act 1952 s.12(2)). The Parole Board, in recommending transfer to open conditions, is giving advice (2003 Act s.239(2)).

    (2) Legally Significant Advantage. The Parole Board, in giving advice to the SSJ, has legally significant institutional and due process advantages over the SSJ. These include expertise in assessing the risk posed by individual prisoners (Banfield §28(1); Kumar §6; Stephens §20); and the due process of an expert assessment, immunised from external pressures, operating like a court, sifting and analysing the evidence, with an oral hearing to make relevant findings (Hindawi §50; Green §32). These advantages can make it difficult for the SSJ to show that it is reasonable to take a different view (Gilbert §92).

    (3) Required Weight. The SSJ is required to accord weight to the recommendation of the Parole Board and the weight required to be accorded depends on the matters in issue, the type of hearing before the Panel, the Panel's findings and the nature of the Panel's assessment (Hindawi §52; Kumar §7; Green §42i).

    (4) Reasonable Basis. Common law reasonableness is the controlling legal standard for deciding – in the context and circumstances of the case – whether the SSJ has accorded the required weight to the Panel's recommendation and assessment, by reference to the matters in issue, the type of hearing before the Panel, the Panel's

findings and the nature of the Panel's assessment. The SSJ may reject the Parole Board's reasoned recommendation, provided only that doing so has a reasonable basis ("a rational basis") (Hindawi §§51-52, 73, 81; Gilbert §92; Kumar §7). There can be no substitution of the views of a civil servant for the views of the Parole Board without reasonable "justification" (Kumar §57).

(5) Deficiency. The reasonable basis for rejection may lie in something having 'gone wrong' or 'come to light' which undermines the Panel's reasoned assessment. This idea of deficiency is not limited to a public law error (Kumar §54); nor to errors of law or fact or additional evidence having come to light (Hindawi §§49, 51; John 76). Examples of deficiencies would be a Panel assessment: (a) running counter to professional views without a sufficient explanation (Kumar §56; Stephens §24; 2021 GPP Policy Framework §5.8.2[i]: §6 above); (b) based on demonstrably inaccurate information (GPP Policy Framework §5.8.2[ii]: §6 above); (c) failing to apply the correct test or address the correct criteria (Gilbert §§73-74; Stephens §§29, 32-36; Oakley §25); or (d) appearing to fly in the face of the evidence or the nature of the risks found by the Panel (Kumar §59).

(6) Questions of Significant Advantage. The reasonable basis for rejection will require "very good reason" (Oakley §49, 52) – or "clear, cogent and convincing reasons" (Green §42ii) – in respect of evaluative conclusions on questions where the Panel has a significant advantage over the SSJ. Examples of questions of significant advantage are a Panel assessment: (a) of credibility after oral evidence at a hearing (Hindawi §§96, 111; Oakley §47); (b) of any question of fact from evidence at a hearing (Oakley §52); or (c) of questions of expert evaluation of risk, such as professional diagnosis or professional prediction (Oakley §§48-49). There is no bright-line distinction excluding questions of evaluative assessment, about the nature and level of the risk and its manageability from falling within this category (see Oakley §§48-49, revisiting the discussion in John at §47).

(7) Other Questions. For questions other than those of significant advantage, the reasonable basis for rejection will still always require "good reason", because the SSJ must always afford to the Parole Board's evaluative assessments "appropriate respect" (Hindawi §60; Oakley §50; Green §42iii). An example is the ultimate evaluative judgment, "undertaken against the background of the facts as found and the predictions as made by the Parole Board", which balances the interests of the prisoner against those of the public (Oakley §§49-50), as part of the question in Direction §7(a) (§12 above).

29. When all of this is understood, it can readily be seen why it is right, in principle, to speak of "very limited parameters" for rejection (Kumar §53). Moreover, since the key principles derive from contextually applicable public law standards, it can readily be seen why it does not matter whether the SSJ's present policy includes (§§7-8, 21 above) – or has deleted (§§9 and 6 above) – a sentence referring to "very limited parameters". The question is always whether the SSJ can "reasonably" reject the recommendation. In the language of §5.8.3, the question is whether the SSJ can "reasonably" treat the Panel's recommendation as being other than a "wholly persuasive case". All of this engages the key principles which I have listed. The policy ("wholly persuasive case") is consistent with the absence of substitution of the views of a civil servant for the views of the Parole Board without justification (Kumar §57). It is consistent with the legally significant

advantages which can make it "difficult" for the SSJ to show that it is reasonable to take a different view from that of the Parole Board (Gilbert §92).

Reasoned Disagreement

30. Mr Grandison says the SSJ is, in principle, entitled to disagree with the Parole Board substituting the SSJ's own and different evaluation of risk, provided that legally adequate reasons are given. The SSJ can therefore consider the balance of risk "differently", but needs to "explain why he reached his decision" leaving no "genuine doubt as to what he has decided and why" (Green §§49-50). The SSJ can reach a decision which "disagrees with a conclusion reached by" the Panel, giving "adequate reasons" (Adetoro §§55-56). That includes a decision, adequately explained, to "ascribe different weight to material factors in the risk/ benefit balancing exercise" (Kumar §54).

31. I cannot accept that analysis. It is materially incomplete. It does not go far enough in recognising the way in which the standard of reasonableness and legally adequate reasons apply. Whether disagreement is "reasonable", whether there is a reasonable basis to reject a Parole Board recommendation, and what constitutes the sort of good or very good reason which can justify rejection, is a context-specific question to which the key principles (§28 above) apply.

Self-Direction

32. I have rejected Mr Bimmler's submission that Kumar-53 identifies a question which the SSJ must ask and answer before rejecting a Parole Board recommendation of transfer to open conditions, absent which the SSJ commits the textbook public law error of failing to understand the policy and ask the correct question. So far as 'self-direction' is concerned, the position in my judgment is as follows.

33. There is no public law duty on the SSJ to identify the key principles (§28 above). The SSJ's public law duties are to make a reasonable decision and to give legally adequate reasons. The ultimate question is whether the SSJ's reasons – viewed as a matter of substance – meet the standards which govern rejection of a Parole Board recommendation; not whether the reasons articulate those standards along the way. Where the reasoned decision does not meet the law's standards, the conclusion may be that the decision is unreasonable (Wynne §86) or that there are inadequate reasons (Oakley §§57, 60). Take a straightforward illustration. Suppose the SSJ were to reject a Parole Board finding of fact. We know the principle, that "where there ha[s] been an oral hearing, very good reason [is] needed to depart from the findings of fact made by the panel that has seen the witnesses, particularly the [prisoner]": Hindawi §61. The failure to record that principle does not vitiate the decision for misdirection in law. The question is whether, in substance, there is "very good reason". An example would be if new and convincing evidence has come to light.

34. However, there is a further point. If the SSJ's decision does accurately reflect the key principles which govern rejection of a finding or recommendation by the Parole Board, that is likely to be a considerable virtue. The finding of fact illustration readily shows this. The virtue is likely to be reassuring to, and assist, the judicial review court. If the decision contains no reflection of the relevant principles, the court is deprived of any such reassurance. The court is likely to look more closely. It may in practice be harder to accept that there was the necessary reasonable basis for the rejection. To see this, take

another illustration. Suppose the SSJ were to reject a Parole Board finding on a contested question of diagnosis. We know the principle, that on such questions the Parole Board has a significant advantage over the SSJ, with a process well-suited to resolving them, so the SSJ will need a very good reason for taking a different view (Oakley §§47-49). The act of the SSJ recording in the decision that principle – or its substance – is a virtue, which is likely to provide the judicial review court with assistance. But what matters ultimately is still whether the decision identifies a very good reason. The self-direction is not a prerequisite, and its presence or absence is never determinative, but it may be illuminating, when the decision is read as a whole.

The Language of Love

35. In order to test the arguments, I asked Counsel this question: in principle, could the SSJ reject a Parole Board recommendation for transfer to open conditions "because the overall evaluation was wrong", on the basis that "crucial factors should have been weighed so significantly differently"? I had borrowed this language from a very different kind of case, namely where a High Court judge is overturning a District Judge's proportionality evaluation in an Article 8 ECHR extradition case: see Love v USA [2018] EWHC 172 (Admin) [2018] 1 WLR 2889. There is no read across to the present context. The Love formulation certainly illustrated the differences between the parties. Mr Grandison's answer to my question was: 'yes, but the SSJ does not need to meet so high a threshold'. Mr Bimmler's answer was: 'no, and the SSJ has to meet a higher threshold'. In my judgment, the answer will always depend on the nature of the question – or the relevant factor – on which the SSJ is disagreeing. So, taking a different view on a question of significant advantage (§28(6) above) will always require a very good reason. For the SSJ to say 'I have weighed this factor significantly differently' raises context-specific questions: about the nature of the factor; about the nature of the disagreement; about what it means to 'weigh it differently' and 'significantly differently'; and about the reasons for doing so. Both Counsel, for different reasons, said it was best to put the language of Love-26 to one side for present purposes. For the reasons just given, I agree with them.

The Lawfulness of the Decision

36. I can turn then to the decision in the present case. I have discussed the Panel's decision (§§13-17 above), the SSJ's decision (§18-19 above), four key disagreements (§20) and the key principles (§28 above). I turn to the remaining issue in the case. Does the SSJ's reasoned decision withstand scrutiny? Mr Bimmler says no; Mr Grandison says yes. I have reached the conclusion that Mr Bimmler is right: the decision to reject the Panel's reasoned recommendation does not have a reasonable basis. Here are my reasons:

37. By way of a preamble, there is this. The SSJ's reasoned decision does not have the virtue (§34 above) of recognising the key principles. The decision records that the SSJ "has found that there is not a wholly persuasive case". That reflects the criterion in the policy. But, standing alone, it is language which could reflect a mere substitution of judgment, which is impermissible (Kumar §57). It could suggest that the Parole Board's reasoned recommendation has to meet a high standard of persuasive proof or make a contrary position wholly unsustainable. That would be inconsistent with the bedrock principles of common law reasonableness (§28 above). The SSJ has disclosed an email instruction to decision-makers dated 4 May 2023. I can find within it no content reflecting the key principles. Indeed, one of the points made is that decision-makers should work to the current policy ("wholly persuasive case"), "but with a more precautionary approach".

None of this indicates that the decision is unlawful. None of it changes the key principles. But it does remove a virtuous feature from which the Court could draw reassurance (§34 above) and it does bring the lawfulness of the decision into sharp focus.

38. I start with the disagreement about "risk-taking behaviour". The SSJ describes "serious concerns" about the potential risk to the public that risk-taking behaviour "could" cause. The SSJ also says risk-taking behaviour "is an identified risk factor". The Parole Board recognised that. But the Parole Board's assessment was that, whereas the Claimant "has in the past" engaged in risk-taking behaviour, there was "little evidence before the Panel to suggest that this remains a current concern". This point is nowhere recorded by the SSJ. It is a conspicuous omission. The SSJ later records that the Parole Board found "considerable evidence" of impression management, but nowhere records that the Panel found "little evidence" to suggest that past risk-taking behaviour remains a current concern. Mr Grandison says the SSJ was placing greater weight than the Parole Board, for the future, on the materiality of the Claimant's past behaviour. He submits that the programmes completed by the Claimant (all prior to 2006) did not save the Claimant from risk-taking behaviour during previous periods in open conditions. He says, given that the Claimant was last in open conditions 13 years ago (in 2014), and is able to display a degree of self-control in closed conditions, it does not assist that there is "little evidence" of anything "current", for there could not be. But the Panel was able to probe the evidence of the prison psychologist about concerns addressed via one-to-one work. And there are two further powerful points. They concern the periods in open conditions (§3 above). First, although there was risk-taking behaviour which led to the return to closed conditions in February 2009 and July 2012, there was no adverse evidenced assessment of risk-taking behaviour in September 2013. Secondly, anything that did or may have arisen from the third period in open conditions (2013) was soon followed by a positive decision assessing that the Claimant could be returned to open conditions in March 2014, where he remained for 6 months without any failure. This means there was a body of evidence, from periods in open conditions. As the Prison Offender Manager stated the last proven adjudication was in March 2012. There had been 8 month and 6 month periods in open conditions in 2013 and 2014 which did not produce evidenced risk-taking behaviour. All of this was appreciated and referenced by the Parole Board, but these points are not addressed in the SSJ's decision letter. In my judgment, this aspect of the case engages questions in relation to which the Parole Board panel had an advantage over the SSJ. The assessment is cogent and coherent. No good reason, still less very good reason, is identified for rejecting it. The SSJ has, in my judgment, rejected the Panel's assessment in relation to risk-taking behaviour without paying it appropriate respect.

39. I turn to the other three disagreements: about the manageability of openness and honesty concerns; about the achievability of intense monitoring; and about warning signs becoming apparent. What emerged from the oral submissions at the hearing before me was the interrelationship between these three points of disagreement, all in the context of the Claimant's wife as not being a protective factor.

40. Here is what the SSJ is saying on these linked topics. The Claimant's openness and honesty are difficult to assess. Linked to this is the considerable evidence of impression management, and the minimising of several risk factors. It is a "serious" concern that, "if" the Claimant is not being open and honest at all times, then risks "will not be able to be appropriately managed". But why is that? It is because these concerns "need intense

monitoring", where "professionals would need to act with speed", based on "warnings [which] would become apparent". But this, says the SSJ, is not satisfactorily achievable in open conditions. Why not? It is because the SSJ is not "convinced" that open conditions are "a suitable environment" for "such intense monitoring". And specifically, when the Claimant is with his partner, it is because of a "delicate and unsustainable position" where an "escalation" would "not necessarily be identified and/or reported". And that is because the Claimant's partner cannot be relied on as a "protective factor" who would "recognise" and "report" any "risk related concerns". This protective gap "presents" significant risk of the escalation not being identified or reported. This, says Mr Grandison, is really about staff ratios in open conditions and about the position while in the community during release on temporary licence. The wife's position is highly relevant when the Claimant is "in the community, unsupervised, under licensed temporary release" (Directions §7(a): §12 above). The SSJ and the officials are well-placed to understand what is achievable in open conditions, for which the SSJ has direct responsibility, and relevant expertise. This is how the points fit together. And this is the SSJ's reasoned assessment.

41. Mr Bimmler argues that this reasoning cannot withstand scrutiny. That is essentially because, he says, it misappreciates what the Parole Board's reasoned assessment was actually saying to the SSJ, on questions which commanded unanimity between the professionals whose evidence was probed and assessed by the Panel. I accept that submission. I will explain why.

42. It is right that the Claimant's openness and honesty were difficult to assess, in the view of the prison psychologist, which the Panel recorded and emphasised. It is right that there was considerable impression management. That was observed by the Panel during the Claimant's own evidence at the hearing, as the Panel recorded. It is right that there was minimisation by the Claimant of several key risk factors. And it is right that these gave rise to present concerns. The Panel understood all of this and emphasised all of this. This was why there was the "need" for "intense monitoring". All of this is what the Panel was telling the SSJ. So far, there is no basis for disagreement. The nature of the risk was fully understood. The question was really about the manageability of the risk.

43. It is right, and it is significant, that the Panel identified the "need" for "intense monitoring in open conditions". But this was plainly not about the "position" in which the partner was being placed. The Claimant's partner was not going to be a protective factor. That, again, is what the Panel was telling the SSJ. The Panel recorded and emphasised that the prison psychologist did not assess the partner to be a protective factor, not being convinced that the partner would recognise or report risk related concerns. If the Panel had been assessing, as needed, monitoring which in any way depended on the partner's recognition or reporting, then the SSJ's reasoning about "a delicate and unsustainable position" would have been unimpeachably a good reason and reasonable basis for rejecting the recommendation. But that was not what was the Panel was saying to the SSJ.

44. When the Panel described "intense monitoring" as needed it was, very clearly, identifying intense monitoring of a kind deliverable by professionals within open conditions. The Panel gave a clear and cogent description of what it was saying. First, the Panel said intense monitoring would be needed "in open conditions". Secondly, the Panel said that it was "confident that warning signs would become apparent to indicate an escalation of risk". Thirdly, that was plainly nothing to do with the partner, who was not a protective

factor and could not be relied on. Fourthly, in explaining why it was "confident" – and in the very same sentence – the Panel explained that it was "encouraging that professionals have a good understanding of his risk areas to be able to act with speed if his risk is deemed to be escalating". Fifthly, this was linked to the evidence of the professionals about monitoring and testing. The Prison Offender Manager and Community Offender Manager referred to testing in open conditions; the Prison Psychologist referred to monitoring in open conditions. This was testing, and monitoring, by professionals. So, there was this assessed confidence as to what would happen, this assessed good understanding by professionals, this assessed ability of professionals to act, with speed, this assessed testing and monitoring by professionals. And these were all key positive findings which explained what the Panel meant by intense monitoring and why the Panel it would work.

45. The professional witnesses – whose evidence was probed and tested by the Panel including in light of the Claimant's oral evidence – were unanimous, as to manageability and achievability of the type of monitoring that was needed, and about the confidence as to warning signs being picked up by professionals able to act. This evidence, and its unanimity, were key to why "the risks to the public" were assessed by the Panel as "considerably outweigh[ed]" by the "benefits of a period in open conditions". Those benefits were to achieve the very purpose described in the Directions at §3 (§11 above). The professionals were well-placed to make their assessment of these questions of risk and its manageability. The Panel was in an advantageous position, in probing the views of the professionals, at the hearing. The Panel's assessment, adopted having fully tested the professionals' unanimous assessment, was cogent and coherent.

46. The SSJ built an adverse conclusion on the Panel's assessed need for intense monitoring in open conditions, in the context of the Panel's assessed concerns arising from openness and honesty, impression management and minimisation, and in the context of the Panel's assessment of the partner not being a protective factor. But the SSJ's adverse conclusion is built on sand, because it involves a misappreciation of what the Panel, clearly, meant by intense monitoring, and because it involves a failure to recognise the Panel's positive findings which explained what it meant and why it would work. It follows that no good reason, still less very good reason, is identified in the SSJ's decision letter for rejecting the Panel's assessment; and that the SSJ has rejected the Panel's assessment without paying it appropriate respect.

Conclusion

47. In these circumstances, and for these reasons, the claim for judicial review succeeds. I propose to grant the key remedy sought in the claim: to quash the impugned decision and remit the matter to the SSJ for reconsideration afresh. Having circulated this judgment in draft, I am able to deal here with any consequential matter. Counsel were agreed that the terms of the Order, in light of this judgment, should be as follows. (1) The Claimant's application for judicial review is allowed. (2) The SSJ's decision of 22 December 2022 not to transfer the Claimant to open conditions is quashed. (3) The question of the Claimant's transfer to open conditions is remitted to the SSJ for a fresh decision within 28 days of the date of this Order. (4) The SSJ shall pay the Claimant's reasonable costs of the judicial review on the standard basis, to be assessed if not agreed. (5) The Claimant's publicly funded costs shall be the subject of detailed assessment in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18. I made an Order in those terms.

Redactions and Junior Civil Servants

48. Having received this judgment in draft the SSJ invited me to redact the names of "junior civil servants" named at §5 above, on the following basis. Names were originally redacted on grounds of "relevance", when documents were served in April 2023. That was prior to Swift J's guidance in R (FMA) v SSHD [2023] EWHC 1579 (Admin) at §48 (27.6.23). Unredacted documents were provided at the hearing, at the Court's request, but it was not envisaged that names would be included in a judgment. The "longstanding practice" that names of "junior civil servants" are "generally redacted" reflects relevance, well-being and that they work on an understanding and expectation that names will not enter the public domain unnecessarily. Although this has not found favour with Swift J in R (IAB) v SSHD [2023] EWHC 2390 (Admin) §§26-30 (17.11.23), and a stay has been refused in that case, an expedited appeal is due to be heard imminently by the Court of Appeal (24.1.24). The individuals did not make decisions but merely provided recommendations and it is enough for the Court to have had the names and be able to identify when writers and recipients of communications were the same person.

49. Mr Grandison rightly recognises that this could have been handled differently. The SSJ did not make any application after FMA §48. I raised the point the afternoon before the hearing. My clerk's email said: "[t]he Judge would like to know why names … of those involved in the decision-making have been redacted and whether they should be unredacted". Unredacted documents were produced. Names were used in open court. There were no submissions for exclusion. There has been no evidence. The draft judgment was circulated (13.12.23) and the point was raised as an email request (19.12.23). I am not prepared to defer the hand-down of judgment for further submissions or for the resolution of IAB on appeal. I have to think about the position of those individuals concerned, and about open justice.

50. I was unpersuaded that there is a legitimate reason to replace names with pretend names, job descriptions or letters "A", "B", "C" in §5. I can see an evidenced: see Oakley §14 ("a team member" and "the writer"); and Wynne §22 ("a Case Manager"). I have seen no reasoned consideration of its legitimacy. Well-being matters, for everyone in every decision-making. I have no evidence of what engendered an understanding and expectation; nor why civil servants are so different from others (in this case, prison psychiatrist and offender managers). I wrote my judgment giving a natural narrative. Naming people who are part of the story is benign. Open justice is promoted. There is no special treatment. Judges should not write a judgment asking: 'is there a necessity for giving this name?' The question has to be whether there is a necessity for protecting someone's identity. Everyone was doing their job, to the best of their ability. Nobody is imperilled. I cannot see why anyone would be inhibited from doing their job, to the best of their ability, another time. I cannot see that naming people and how they did their jobs is contrary to any legitimate interest. I see no awkwardness as to what any well-informed person would think. Nor do I see support for a blanket or class-based protection, or a case-specific risk. I have to decide what to do now, on the eve of a hand-down. I completely agree with Swift J in IAB at §§26-30. I decline the invitation.