

Neutral Citation Number: [2024] EWHC 1534 (Admin)

Case No: AC-2023-BHM-000238

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

Birmingham Civil Justice Centre

Date: 20 June 2024

Before :

Her Honour Judge Carmel Wall sitting as a Judge of the High Court

Between :

THE KING

Claimant

on the application of **REUBEN VALENTINE**

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

Ms O. Beach (instructed by **Bhatia Best**) for the claimant
Mr R. Howell (instructed by **Government Legal Department**) for the defendant

Hearing date: 30 April 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 on 20 June 2024 by circulation to the parties or their representatives by email and by release to The National Archives.”

Her Honour Judge Carmel Wall:

Introduction

1. Reuben Valentine (“the claimant”) is a serving prisoner. He challenges the decision of the Secretary of State for Justice (“the defendant”) made on 2 August and notified to the claimant by letter dated 10 August 2023, that, contrary to the recommendation of the Parole Board, he should not be transferred from closed to open prison conditions.
2. Permission to apply for judicial review of the defendant’s decision was granted by HHJ Rawlings (sitting as a Judge of the High Court) on 16 January 2024, following consideration of the papers.
3. I have had the benefit of hearing submissions from Ms Beach, representing the claimant and Mr Howell, representing the defendant. I am grateful to each of them for their helpful and focussed submissions.

Factual background

4. The claimant was born on 9 December 1989.
5. His antecedent criminal history began at the age of 10 when he received a reprimand for an offence of violence. He had taken the victim to an alleyway, punched him and caused punctures to the victim’s ear and throat with a ball point pen.
6. He committed three offences of robbery, with others, when aged 11. When aged 12, again with others, he committed an offence of violence which included kicking the victim.
7. The index offence was committed on 6 March 2007 when the claimant was aged 17. He met with the victim and others near their home address. A playfight ensued in which the claimant’s coat was accidentally damaged. The claimant demanded money to replace the coat. He punched the victim in the face and was hit back. The claimant then produced a knife and fatally stabbed the victim. Eight stab wounds were inflicted, two of which penetrated the victim’s heart.
8. The claimant fled to the home of his aunt and went into hiding. She alleged that on 24 March 2007 he had telephoned and threatened to kill her.
9. The claimant entered a plea of guilty to the crime of murder on the third day of trial. On 11 October 2007 he was sentenced to detention at HM Prison with a minimum term of 16 years, less time on remand. The sentencing judge, the then Recorder of Nottingham, found that the claimant had intended to kill the victim; had shown no remorse; and had entered his guilty plea only after his “hopeless

defence was shot to pieces”. In his sentencing remarks, he described the claimant as “a particularly dangerous individual who is totally out of control and who will present and continue to present a significant risk of offending for the foreseeable future.”

10. The offence of intimidation in relation to his aunt was ordered to lie on the file on the usual terms.
11. The claimant’s application for leave to appeal against sentence was refused in January 2008.
12. By December 2009, the date of his last proven adjudication, the claimant had received seventeen proven adjudications of which eight related to assaultive behaviour or fighting with other prisoners.
13. Between 11 November 2010 and 5 May 2011 the claimant was detained in Arnold Lodge medium secure psychiatric unit and was diagnosed with paranoid schizophrenia. He was re-admitted to Arnold Lodge from prison on 27 April 2012 and remained as an inpatient until May 2014 following concerns about his compliance with medication and a deterioration in his mental health. He was subsequently treated as an inpatient in Llanarth Court Hospital between 30 November 2016 and 7 March 2019. In total he has spent about five years of his sentence in secure hospital settings.
14. It is not suggested that at the time of the index offence the claimant was experiencing any symptoms of mental illness that led to its commission. However, while incarcerated, deteriorations in his mental health have coincided with deteriorations in his positive engagement and behaviour. Since 2019 his mental health has been stable and he has been compliant with treatment.
15. Since August 2015 the claimant has been classified as a category C prisoner.
16. He applied to have his minimum term reduced but this was refused in February 2016.
17. Since April 2019 the claimant has had Enhanced Status on the Incentives and Earned Privileges Scheme (“IEPS”). He has received a large number of positive entries, and also some negative ones. Immediately prior to the Parole Board hearing were four positive entries received since September 2022 (for good behaviour and the completion of a barbering course) and negative entries in February 2023 (for lateness and swearing at staff).
18. He was transferred to HMP Ranby on 10 June 2019. During 2020 he was accepted for the progressive regime at HMP Warren Hill but the claimant withdrew from the process during the psychological risk assessment on the grounds he believed it would hinder his move to open conditions or release.

19. A prison staff member alleged witnessing the claimant committing an assault against another prisoner on 23 March 2020 which had resulted in the latter being left with a pen refill in his eye. After the incident, the claimant had been captured on CCTV removing and washing his clothing. The allegation of assault was denied by the claimant. When first asked about it, he offered no explanation for washing his clothing. At the Parole Board hearing he said this had been done out of caution in the early stages of the pandemic. The adjudication governor decided not to pursue this matter to adjudication because her view was “there is enough evidence on the balance of probabilities when taking into account supporting information but this does not meet the adjudication threshold.”
20. On 22 July 2022 the defendant made a reference of the claimant’s case to the Parole Board to consider whether to direct release on licence or in default to advise on whether the claimant should be transferred to open prison conditions. There was a considerable delay in the hearing taking place, due to several factors, none of which was the fault of the claimant.
21. The Parole Board considered a dossier of written evidence and on 17 March 2023 heard oral evidence from the claimant, Ms J. Elsmore (Community Offender Manager), Ms L. Carter (Prison Psychologist) and Ms L. Burns (Prison Offender Manager). After adjourning until 3 April 2023 the Parole Board issued its decision that the claimant should not be released on licence but recommended that he be transferred to an open prison.
22. On 21 April 2023 the minimum term of the claimant’s sentence expired.
23. On 3 May 2023 one of the defendant’s caseworkers completed the first part of a standard form proforma setting out, very briefly and in short summary terms, parts of the evidence and conclusions of the Parole Board. The case was then referred to Ms P. Churcher, Head of Reconsideration and Specialist Casework, on 25 July 2023 to decide on behalf of the defendant, whether to accept or reject the Parole Board’s recommendation. Ms Churcher had access to the full dossier of evidence as well as the Parole Board’s decision. She completed the remainder of the proforma setting out her reasons for rejecting the recommendation. On 2 August 2023 this was emailed to Ms J. Whyte, Head of Parole-Eligible Casework within the Public Protection Group of HM Prisons and Probation Service.
24. On 10 August 2023 the decision was notified to the claimant. The letter of notification was not drafted or approved by Ms Churcher but was instead written by a Case Manager based on the proforma completed by Ms Churcher. The letter but not the decision was reviewed by the Deputy Head of Parole-Eligible Casework before being sent to the claimant on 10 August 2023.

25. The claim was filed on 8 November 2023. HHJ Rawlings allowed the claim to proceed despite apparent delay but asked for an explanation for the timing of the application. This was provided. The defendant now takes no point on the timing of the claim. I have considered the claim on its substantive merits without reference to issues of lateness.
26. On 27 March 2024 the claimant was transferred to a Progression Regime at HMP Erlestoke.

The ground of challenge

27. The claimant relies on a single ground of challenge, namely that the defendant's decision was irrational in unreasonably departing from the Parole Board's recommendation. Ms Beach helpfully distilled this further at the hearing from the written grounds and skeleton argument.
28. She did not suggest that the defendant's decision had departed from any finding of fact made by the Parole Board. Rather, the challenge was that the defendant's evaluative process, in reaching a different conclusion from that of the Parole Board, was not sufficiently reasoned to justify departure from its recommendation.
29. The key issue on which the defendant differed from the Parole Board was whether the level of risk in transferring the claimant into open conditions was currently at an acceptable level. The defendant did not disagree that progression would be beneficial for the claimant; but concluded that a move to open conditions was currently premature, on grounds of risk; and other routes for progression were available and should be explored.

The evidence before the Parole Board, its decision and recommendation

30. There was a comprehensive dossier of written evidence before the Parole Board. It heard oral evidence from the professional witnesses set out above and also from the claimant who was represented. Many of the written reports had updating addenda due to the lapse in time between the defendant's referral and the hearing.
31. A significant issue in these proceedings when considering the rationality of the defendant's departure from the Parole Board recommendation is the degree of consensus between the professional witnesses about the most appropriate next step for the claimant. I have therefore given this aspect of the evidence particular consideration.
32. Heather Green, Offender Supervisor, provided a first written report to the Parole Board in July 2020. Her recommendation was in these terms:

Mr Valentine has completed all offence focussed work as outlined in his sentence plan. I did consider Mr Valentine's application to HMP Warren Hill's progressive regime as a positive step. At the same time however I am also supportive of his aim to progress to open conditions. I do believe that open conditions will prove to be a test for Mr Valentine. I do not assess him as being a risk of abscond, despite his flight to Bristol. Mr Valentine is now fully aware of what he needs to do to ensure he can progress through his sentence. It is my belief that Mr Valentine believes that he is now ready for progression and I am prepared to support his wish for a move to a less restricted regime.

33. She was supportive of a transfer to open conditions but did not go so far as to say that this was the best or only way forward for the claimant.
34. She wrote a first addendum report dated 29 December 2020 in which she expressed the view that “a move to open conditions may be too big a leap at this stage”. Her recommendation then was, “Ideally I would like Mr Valentine to consider a move to a Progressive regime. In the long term it may give him the opportunity to evidence some of the skills learnt from Kaizen in a supportive and non-threatening environment. This could help him transfer successfully to open conditions.”
35. Her second addendum report is dated 18 August 2022. By way of an update, she recorded that the claimant had a negative entry in February 2022 relating to threats to intimidate wing staff; but also had a positive report from July 2022 about his effort and attitude. She was unable to make any further recommendation to the Parole Board at that time because a change in internal rules prevented her from doing so.
36. Ms Burns provided both written and oral evidence to the Parole Board. She had been recently appointed as the claimant's Prison Offender Manager in place of Ms Green. Her written report, dated 20 September 2022, is factual in nature and does not express an opinion as to future progression.
37. In her oral evidence Ms Burns confirmed the claimant's mental state was stable and there were no recent concerns regarding substance misuse. She reported as significant four positive entries since September 2022. The Parole Board also noted the negative entries in February 2023 (the month preceding the hearing).
38. Ms Burns was concerned about security intelligence reports that suggested the claimant was involved in trading illicit items and bullying. She observed the similarity between this intelligence and the claimant's behaviour at Arnold Lodge. She noted that the claimant denied responsibility. She was concerned by

his denial because of the volume of intelligence about his conduct. The Parole Board recorded, "She believes he does not accept because he wants to be seen in a positive light." Ms Burns also commented on the claimant's improved behaviour and increasing maturity.

39. She had discussed with the claimant the alleged incident on 23 March 2020 of violence towards another prisoner. He had said it was a case of mistaken identity. He had offered no explanation to her for placing his clothes in the washing machine after the incident occurred; and she expressed concern that the nature of the incident and injury caused (the prisoner being left with a pen refill in his eye) was "offence paralleling behaviour" with the claimant's documented behaviour as a young child.
40. Ms Burns reported that the claimant could become fixated on one specific matter which "could lead to difficulties in the community due to his 'concrete thinking and his difficulty in seeing another's point of view'". She felt this could lead to conflict or tension but did not consider it would impact on his risk of causing serious harm.
41. She informed the Parole Board that she believed he had insight into his risk; he had no outstanding core risk reduction work to complete; and confirmed that the claimant had withdrawn from the psychological risk assessment for the Progressive Regime at HMP Warren Hill.
42. She believed he would, if necessary, seek support from professionals in the community.
43. The record of Ms Burns' evidence in the decision does not deal with her view of the appropriate route for progression other than in paragraph 3.15 where the Parole Board records that "professionals ... considered a period in open conditions as essential ..."
44. Dr J. Singh, Consultant Forensic Psychiatrist, reported on 25 January 2021. At paragraphs 12.19 to 12.24 of his report he specifically addressed risk. He explained that the predictive tool used for assessment of risk indicated a high risk for future violence if the claimant were to be released. He analysed the claimant's historic risk factors and clinical risk factors, highlighting the fact that the claimant had not taken full responsibility for the index offence. As to future risk he said this:

12.22 In terms of future risk factors, he has the propensity to decompensate mentally when faced with stress (relationships, psychology work being overwhelming, moving prisons, etc). this needs to be fully addressed.

12.23 Overall, I believe that his risk of causing serious physical harm remains high to public if he were to be released. His risks of causing serious physical harm in prison setting is medium. Although he has made a reasonable progress in his sentence plan, there are some areas that need further fine tuning, such as any undetected personality factors (emotionally unstable, dissocial) that could be associated to his risk of physical harm, developing robust coping strategies to deal with stress and developing more insights into his mental disorder and its link with risk of harm to others. He has grown up in prison estate exposed to criminal hierarchies; he has not been exposed to a life in community since 2007, especially as an adult, as he committed the offence when he was a Juvenile. Therefore it is important to test out his attitudes and approach to criminality as it is expected that he has been conditioned to a life of criminality, given his chaotic life style and not having had any opportunity to grow up in a community setting. It is unknown how he will cope with pressures of a non-structured and stressful life in a community as so far he has grown up as an adult in very tight structured conditions. It will be important to test all these aspects whilst he is in prison before embarking upon to release him suddenly to community. Therefore a careful testing out in open conditions could provide a fair assessment of all these risk factors that I have highlighted

12.24 The risk factors relevant in his case could be monitored and tested further in open conditions, and further progress in those conditions would give a better estimation of his future risk in community and thereby informing upon the care plan that would best help with his recovery and rehabilitation in community and alongside keeping his risk of harm to others minimal.

45. Dr Shenoy, Consultant Forensic Psychiatrist, provided written evidence to the Parole Board in a report dated 9 March 2022. His opinion was that “Mr Valentine would benefit from a step down to open conditions to not only help test the stability of his mental state but also give him an opportunity to acclimatise himself with a less restrictive regime and help progress his rehabilitation back into the community.”

46. Sam McCaw, Forensic Psychologist, wrote a brief case advice note dated 20 June 2022. He recorded “The assessment outlined two possible treatment

pathways; progression to open conditions or a transfer to Warren Hill Progressive Unit. All professionals are in agreement with the recommendations.” He did not express a preference for either of these potential routes.

47. Ms Carter’s first written report is dated 4 December 2020. She noted that the claimant had completed all core risk reduction work and the focus was now on consolidation. At paragraph 1.4 of her report she wrote:

He would benefit from a gradual and supported progressive route which enables him to develop the life skills (sic) required for independent living as well as consolidation of learning to manage any risks of violence. At present there appear to be two pathways available to support Mr Valentine’s consolidation of learning and preparation for release; open conditions or a progressive unit at HMP Warren Hill where he has already been accepted. In my opinion either option would be advantageous for Mr Valentine.

48. In her January 2022 addendum she repeated these comments. Her “Opinion and recommendation” then was that the claimant would benefit from a gradual and supported progressive route so he could develop life skills and consolidate his learning to manage any risks of violence. At paragraph 9.1.2 she wrote there were:

Previously two pathways available to support Mr Valentine’s consolidation of learning and preparation for release; open conditions or a progressive unit at HMPO Warren Hill where he has already been accepted. In my opinion either option would be advantageous for Mr Valentine. I do however acknowledge that Mr Valentine is keen to progress and therefore his preference would be to move to the open prison estate. In many ways it is my view that this could be the more challenging and testing of the two options...

49. In her oral evidence, she noted that the staff had differing views as to whether the claimant had been involved in the incident in March 2020.
50. She commented very favourably on the claimant’s level of commitment and his other strengths. The Parole Board recorded her comment that “it is important for him to take slow progress and learn to face the challenges.”
51. At paragraph 2.39 of its decision, the Board recorded, “Regarding his placement in a progression regime, Ms Carter said that there are positives and negatives between that and open conditions, because he has demonstrated the ability to

refrain from violence and requires consolidation. She was unable to comment any further because of the lack of contact over the last twelve months.”

52. Ms Elsmore gave both written and oral evidence. She had managed the claimant’s case since August 2017.

53. In her Addendum Parole Assessment Report Offender Manager (PAROM 1+) dated 19 March 2021 she expressed her recommendation in these terms:

Dr Singh and Ms Carter both note the merits of Mr Valentine testing his coping skills at a Category D establishment in their respective reports. Ms Carter states that Mr Valentine would also benefit from a progressive PIPE unit within a prison. Mr Valentine has been accepted at HMP Warren Hill PIPE unit and is currently on their waiting list. I note that Mr Valentine would prefer to move to a Category D prison, as he considers it a more progressive move, allowing him to develop his practical skills prior to his release. In my professional view, there are considerable merits to Mr Valentine moving to either a PIPE unit or a Category D prison. However I understand that a PIPE Unit offers the benefit of concentrating more on consolidation of learning therefore a move to the PIPE Unit may be more appropriate for Mr Valentine at this stage in his sentence.

54. In her report dated 4 October 2022 she referred to the claimant’s focus on his tariff date and the viability of release on that date. She wrote:

I continue to explain to Mr Valentine that he should try to appreciate professional opinion on his readiness to progress, rather than focus solely upon his tariff date. Mr Valentine struggles to envisage himself remaining in prison past his tariff date, despite my recommendations that he prepare himself for that possibility. Mr Valentine has focused on his tariff date for so long that he cannot easily apply flexibility to how he considers the date. Mr Valentine appreciates that reports from the previous review period explore evidence that a less restrictive regime would enable him to test his risk factors and work towards progression. Mr Valentine does appreciate that he may benefit from such a regime and is hoping that the pre-tariff review period will soon be concluded and that he would be able to progress to such a regime before his tariff date. He currently reels that he will not be motivated to move to such a regime following his tariff date, as he would consider this to be unfair.

55. While recognising that the claimant had developed in his insight and level of remorse, she wrote:

... it is of note that Mr Valentine continues to regard himself as a principal victim of his actions. Each time I talk to Mr Valentine, he is focussed on how long he has to serve in prison (always with the implication that this has been too long) and his need to “progress” through his sentence. He told me at our most recent meeting in HMP Ranby that when his tariff expires, he will have done his time and at that point will not owe anyone anything... He is clear that the crime was impulsive and continues to describe it as if it was almost accidental.

56. In her oral evidence, Ms Elsmore commented on the claimant not finding it easy to admit fault and his reluctance to accept things might be difficult, which obstructed him reflecting on where things could go wrong.

57. As with Ms Burns, the Parole Board does not record as part of Ms Elsmore’s oral evidence any specific recommendation for the route for progression, other than its comment in paragraph 3.15 to which I have referred above.

58. Having reviewed this evidence, my conclusion is that there was a clear consensus of professional opinion that the claimant would benefit from and should progress to a less restrictive regime, particularly in light of his age when he committed the index offence and the fact that his entire adult life had been spent in custody. It is though not accurate to characterise the consensus of professional opinion as being that a transfer to open conditions was the only appropriate option for progression, as Ms Beach fairly conceded during her submissions.

59. In its written reasons, the Parole Board first addressed the claimant’s past offending behaviour. It accurately summarised his antecedent history and the facts of the index offence. It noted that he had an extensive history of violent offending from a young age. His risk factors were identified as peers and associates, chaotic lifestyle, lack of appropriate accommodation, pro-criminal attitude and beliefs, deteriorating mental health, illicit drug use, non-compliance with medication and lack of family contact. It noted his diagnosis of paranoid schizophrenia and periods of admission to psychiatric hospitals. The second period of admission followed from concerns about him being non-compliant with his medication and being involved in gambling and drug dealing (as well as associated debt stresses).

60. The Parole Board next addressed the claimant’s current position and the evidence of change. It noted his Enhanced Status and adjudication history. It noted the allegation of assault in March 2020, the evidence supporting it and the

position taken by the Adjudication Governor, namely that the allegation was likely to be true but did not meet the adjudication threshold.

61. The Parole Board noted that the claimant had been allegedly bullying patients when at Arnold Lodge and Llarnath Court and had been involved in smuggling illicit drugs in Arnold Lodge. Security intelligence disclosed a number of entries corresponding with periods of deterioration in his mental health (and so prior to 2019). The Parole Board added, “But it is noted there are suggestions that he has attempted to manipulate staff.”
62. Both positive and negative entries in the Incentives and Earned Privileges Scheme were noted. The Parole Board recorded the claimant’s employment and qualifications obtained within the prison estate as positive features.
63. Offence focussed work had been carried out though had been interrupted because of the claimant’s admissions to hospital. He had monthly contact with the mental health service. Although there had been historic issues of self-harm and non-compliance with medication, he was currently compliant and stable.
64. The Parole Board then addressed specific evidence from the professional witnesses, much of which is set out above.
65. The claimant also gave evidence to the Parole Board. He was asked about the index offence and said that he had pulled out a knife when the victim had hit him in the face. He said, consistently with the written evidence of his attitude towards the offence, that things had got out of hand, “The victim hit him in the face, he pulled a knife and he ran towards him and stabbed him.” When asked how he had come to stab the victim eight times, he said “It did not feel like it, I was scared and wanted to get away.” There was no acceptance by the claimant of an intention to kill.
66. He attributed the increase in security intelligence to wing officers making false allegations because they were racist and prejudiced against him.
67. He denied the March 2020 allegation and said he had been washing his clothes out of caution due to the pandemic.
68. He said he had matured and was equipped with skills and learning from the programmes he had completed. He admitted sometimes struggling with being fixated.
69. He told the Parole Board he would not use cannabis in the community and asserted he had last used drugs in custody in 2009. He said he had no recollection of the positive drugs test for cannabis in 2011 when he had been in Arnold Lodge.

70. He had regular contact with the mental health team, understood the importance of his medication and his warning signs for deterioration in his mental health. He identified other risk factors (not managing his emotions, not taking medication, poor coping strategies, disengaging from mental health workers and reducing contact with family members).
71. He was asked about potential challenges in the community and gave a naïve response referring to challenges associated with changing technology, and how someone applies for employment or pays for goods and services. The Parole Board added the comment that it was “concerned that any transition should be carefully managed/paced by all involved in his management.”
72. In its analysis of future risk, the Parole Board accepted the risk assessments in evidence which included an OASYS assessment that he was a “high risk of serious harm towards the public”, albeit the professionals did not consider him to be an imminent risk of serious harm.
73. The focus of the analysis of risk was on the risks associated with release, which the Parole Board ultimately refused to recommend, concluding that the “presented plan is not capable of effectively managing his risks in the community.”
74. At paragraph 3.15 of its decision the Parole Board addressed progression to open conditions in this way:

Regarding Mr Valentine meeting the criteria for open conditions, professionals assessed him as a low risk of absconding; and considered a period in open conditions as essential, because he needs the opportunity to use his new skills in a less restrictive environment, the world has changed a lot, he needs to gain experience of outside employment and rebuild family ties, and he has no outstanding core risk reduction work and has addressed his risk to a level consistent with protecting the public from harm. The panel were satisfied with the assessments.

75. In its conclusion, the Parole Board repeated the risk assessment. It recorded it was not satisfied that the claimant had “sufficiently acquired the internal coping strategies to manage his behaviour.” It explained why he did not yet meet the test for release, a conclusion that is not challenged.
76. As to progression to open conditions, the Parole Board recorded the following:
- 4.5. The panel then considered whether he should progress to open conditions, and were satisfied that the benefits were clear:*

- *He would have a further opportunity to demonstrate that he has increased his insight and developed internal coping mechanisms to enable him to cope with stressors in his life, and the challenges of being in a less restrictive environment;*
- *He could prove to professionals (and himself) that he is able to sustain an extended period of stable, positive and compliant behaviour.*
- *He would be able to further develop his release plans (including employment) and continue to work honestly and openly with professionals.*
- *It would allow a gradual transition into the community to aid his residence in an AP and resettlement in the community.*

4.6. The panel concluded that his risk would be manageable in open conditions. The panel therefore recommends to the Secretary of State that he be transferred to open conditions.

77. The Parole Board did not express any view about progression through any alternative route, such as a Progression Regime.

78. There was no detailed written reasoning given for its conclusion that the level of risk it had found would be manageable in open conditions.

The decision made by Ms Churcher on behalf of the defendant

79. Ms P. Churcher was the defendant's decision-maker. She recorded her decision on the defendant's internal proforma, having reviewed the dossier and Parole Board's recommendation.

80. Her conclusions were expressed as follows:

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.

Offending history

Mr Valentine received his first conviction aged 11 years old. This was for 3 counts of robbery. There then followed a conviction for criminal damage (age 12), assault (age 12) and possession of class C drugs (age 15).

Mr Valentine was 17 years old when he was sentenced for the index offence or murder. He is now 32 years of age.

"In discussions, Mr Valentine has always reflected on his index offence with regret. He describes the offence as culminating from a fight that escalated out of control. He claims that his actions were not intentional and that he did not mean to kill Mr Spencer. Mr Valentine has not been able to sufficiently account for why he stabbed Mr Spencer 8 times in the chest. He has reported that he was attempting to scare Mr Spencer with the knife in order to end the fight and that Mr Spencer had somehow run towards the knife causing him to be accidentally stabbed. Clearly, this explanation does not take account of why Mr Valentine went on to stab Mr Spencer a further seven times in the chest." (PAROM1, Oct 2022, page 3)

Identified risks and assessment

Mr Valentine's OGRS3, OGP and OVP are all scored as medium, with RSR as low. He is assessed to pose a high risk of serious harm to the public, medium to staff and a known adult, and low to children.

Risk factors are identified as:

- *peers and associates;*
- *chaotic lifestyle;*
- *lack of appropriate accommodation;*
- *pro-criminal attitude and beliefs;*
- *deteriorating mental health;*
- *illicit drug use;*
- *noncompliance with medication; and*
- *lack of family contact.*

Mr Valentine has been and remains overly focussed on his tariff expiry date, and wants to progress to less restrictive security conditions or release as quickly as possible. This is understandable, however alongside this there are concerns about his level of naivety around what living in the community

will actually be like. There is also a series of intelligence built up over time which, while there have been no official outcomes in terms of adjudications or other investigations, is suggestive of a pattern of behaviour:

“The Parole Board will be aware that prison intelligence does suggest that there are concerns regarding his behaviour. There have been notes made over recent years in relation to alleged participation in the prison drug trade and indicating that he has bullied and assaulted other prisoners. Mr Valentine denies these allegations and considers that they should not be used against him as they are not proven. I would have some sympathy with this view if the incidences were few and far between but the intelligence does indicate a pattern of behaviour. I note that these concerns were also commented on during Mr Valentine's stays in psychiatric hospital.”
(PAROM1, July 2020, page 6)

Mr Valentine has been diagnosed with paranoid schizophrenia and has been hospitalised on 3 occasions during this sentence following mental health relapses.

Interventions

- *Sycamore Tree;*
- *Thinking Skills Programme;*
- *Engaged in ten one to one sessions based on the general violence Kaizen work*

Mr Valentine's several periods in secure units have meant that he has completed limited offence focused work, however, report writers agree that there remains no outstanding core risk reduction work. All agree that he must now work on consolidation.

“During his time in custody Mr Valentine has had three mental health breakdowns and was transferred to psychiatric hospital care on three occasions. During 2010 he was transferred to Arnold Lodge where he remained until 2011 after being diagnosed with paranoid schizophrenia. He was readmitted to Arnold Lodge - April between April 2021 to May 2014 after concerns that he was non-compliant with his anti-psychotic medications and involved in gambling and drug dealing and the

stress of associated debt that resulted in a decline in his mental health. His third transfer was November 2016 when he was admitted to Llanarth Court Hospital until March 2019. Mr Valentine has spent a total of five years of his sentence in secure psychiatric settings.” (Decision 1.7)

Mr Valentine screens in for OPD services.

Insight into offending

Mr Valentine’s insight into his behaviour and his mental health have increased over time and he has reportedly been able to learn following periods of relapse, which is positive. The length of time in prison and age when Mr Valentine was imprisoned have meant that he has done a lot of his growing up whilst in custody. It is therefore not surprising that he demonstrates a minimal understanding of how he will live in the community and how challenging things like securing accommodation, getting a job with no previous employment record, or maintaining solid relationships will be.

“He demonstrated some insight into his risk but appeared to have only a basic/simplistic view on how he would manage those risks” (Decision, 4.3 b)

“In general, it is fair to state that Mr Valentine's insight and level of remorse has developed significantly over the years. However, it is of note that Mr Valentine continues to regard himself as a principle (sic) victim of his actions. Each time I talk to Mr Valentine, he is focused on how long he has had to serve in prison (always with the implication that this has been too long) and his need to 'progress' through his sentence. He told me at our most recent meeting in HMP Ranby that when his tariff expires, he will have done his time and at that point will not owe anyone anything. He reiterated that he was young when he committed the murder and that he had not got up that morning intending to kill. He is clear that the crime was impulsive and continues to describe it as if it was almost accidental. Mr Valentine is keen to stress that he is a very different person now to the one he was when he committed the murder.” (PAROM1, Oct 2022, page 4)

Behaviour/compliance

Mr Valentine has maintained category C status since August 2015 and enhanced status on the IEP scheme since April 2019. Prior to this he spent his time at standard or enhanced in the main. There are 31 adjudication records, with 17 proven charges. The most recent of these dates back to December 2009 and was for fighting.

Intelligence has built up over the years which suggests that Mr Valentine's behaviour has not been quite what it should have, although it must be acknowledged that none of this intelligence has led to any formal action. The COM assesses that there is a pattern of behaviour that is not positive.

“There is no current security intelligence submitted relating to Mr Valentine. Mr Valentine continues to engage well with the metal (sic) health team in HMP Ranby and receives his monthly ‘depot’ injection, which is prescribed to stabilise schizophrenia, with no recorded issues. It is of note that Mr Valentine's behaviour has remained stable despite 3 consecutive oral hearings being cancelled on the day or near the day. Considering Mr Valentines history of mental illness, this is to be commended and certainly evidences a period of stability for Mr Valentine” (PAROM1 addendum, Oct 2022)

It is acknowledged that there is no recent intelligence and that Mr Valentine challenges the validity of the previous intelligence provided.

“Ms Burns commented that Mr Valentine disputed the majority of the security reports and gave explanations about him not being aggressive, violent or abusive. She also said that no further action has been taken on the intelligence. She found 9 E:107 his denial concerning, because with the volume of intelligence she would expect him to have a better understanding of his behaviour and accept some responsibility for some of it. She believes he does not accept because he wants to be seen in a positive light.” (decision, 2.16)

Risk management

Mr Valentine has a lot of work to do to develop his resettlement plans and will need support to do this successfully. He has not resided in the community as an adult and so has no lived experience of any of the routine tasks and considerations that will be required of him on release.

The key areas of risk are identified as:

- *deterioration in his mental health which would impact on other areas;*
- *his age and identity and his ability to adjust in the community;*
- *peer relationships; and*
- *his interaction with professionals – he does engage and gives his view openly and voluntarily but is concerned regarding the depth and suggest there could be some impression management, which could be a risk to compliance rather than violence.*

Move on plans must include a solid plan for management and support around Mr Valentine's mental health, and he will need to demonstrate that he can maintain prosocial relationships, especially with his COM.

Sentence planning objectives

- *maintaining employment in readiness for community living;*
- *demonstrating an ability to manage schizophrenia within a less restrictive regime; and*
- *demonstrating abstinence from alcohol and drugs within a less restrictive prison regime.*

The general consensus is that Mr Valentine now needs to spend time consolidating his learning from interventions and from during the course of his sentence more generally. He also needs to demonstrate that he can maintain compliance and positive behaviour.

“He demonstrated insight into his mental health and his current improvement and stability is positive, but the panel agreed that he required a further period to demonstrate he can sustain a period of compliant and positive behaviour, alongside being compliant with his prescribed medication.” (Decision, 4.3 d)

There are several options mentioned in reports from the COM, POM and psychologist. One is a progressive transfer to open conditions, a PIPE or a Progression Regime. Mr Valentine has spent a significant portion of his life, and his entire adult life to

date, in prison. It therefore follows that he will require significant support to be able to be safely released, and a phased approach should be taken in order to enable him to properly prepare for the transition into the community.

“...he does not find it easy to admit fault and is reluctant to anticipate that things might be difficult – a sign of weakness, consequently he does not reflect on where things could go wrong.” (Decision, 2.43)

Whether a Progression Regime or a PIPE would be an appropriate next step should be further explored with Mr Valentine as I understand he was accepted at Warren Hill but chose not to proceed with the move. A Progression Regime will offer Mr Valentine a progression focused environment where he will be able to concentrate on maintaining compliance and stable behaviour, work on resettlement plans and will also be able to be assessed for the Enhanced Behaviour Monitoring process.

Is the risk of abscond low?

Mr Valentine fled directly after he committed the index offence and remained hidden with relatives for a period of time. An offence of intimidation was to lie on file at his sentencing. This was for threats he made to his aunt whose flat he hid within after he committed the offence.

There are no recorded breaches or absconds for Mr Valentine. Report writers and the Panel are of the view that Mr Valentine's risk of absconding is low. I agree and in my view this criteria is met.

Is there a wholly persuasive case for transferring the ISP from closed to open conditions.

In my view there is not a wholly persuasive case for transfer to open conditions in this case at this time.

Mr Valentine still has consolidation work to do and despite progress in terms of his maturity and insight into his offending over the years, he still demonstrates a lack of understanding of how he will realistically resettle successfully, and how his development of skills to manage challenging situations is extremely important to achieve this. It is also important that he is able to demonstrate that he can maintain the current period

of compliance and stability. A period in a Progression Regime would allow him to consolidate and further develop his understanding and insight into his behaviours and should be re-explored.

Mr Valentine has spent a long time in prison and in order to be given the best chance of resettling, he will need to spend time preparing for life in the community as an adult. A period in an environment that can offer appropriate levels of support and challenge, while helping him to form realistic plans for the future, is now important before any further consideration should be given to open conditions. A transfer to open conditions at this time would be inappropriate and, bearing in mind Mr Valentine's inexperience as an adult in the community, further work should be undertaken to prepare him for that potential transition in the future.

Conclusion

For the avoidance of doubt, I have considered Mr Valentine's suitability for open conditions using the test for suitability which came into effect on 17 July this year.

This means, therefore, that I have not considered the criteria from the previous test which require a period in open conditions to be essential to inform future decision making and that the transfer would not undermine public confidence in the criminal justice system.

In my view, Mr Valentine requires a further period in closed conditions for the reasons set out above.

81. It is not suggested that Ms Churcher relied on any matters that were not within the evidence she considered; nor that she made any factual finding that differed from the facts found by the Parole Board. She set out in her conclusions factors that both supported and undermined the case for a transfer to open conditions and ultimately weighed them against accepting the recommendation.
82. The essence of her reasoning was recorded in the letter notifying the claimant of the defendant's decision. The letter stated (so far as relevant):

2. Outcome of the Parole Board Review

The decision maker carefully considered the test, alongside the information contained in your dossier, the Parole Board's recommendation and the views of Report Writers. As is his

*right, the Secretary of State has reached a different conclusion to that of the Parole Board panel. The Secretary of State had in mind when reaching this conclusion his published criteria and found the following criteria were **not** met:*

- ***The prisoner 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 prisoner in open conditions may be in the community, unsupervised under /licenced temporary release);***
- ***There is a wholly persuasive case for transferring the ISP from closed to open conditions.***

The Secretary of State notes you have demonstrated the following positive progress:

You have maintained Category C status since August 2015 and enhanced status on the IEP scheme since April 2019.

You have completed the following offence-focussed work:

- *Sycamore Tree;*
- *Thinking Skills Programme;*
- *Engaged in ten one to one sessions based on the general violence Kaizen work.*

Your periods in secure units have meant that you have completed limited offence focused work, however report writers agree that there remains no outstanding core risk reduction work. Your insight into your behaviour and mental health have increased over time and you have reportedly been able to learn following periods of relapse, which is positive.

The following evidence is considered to support the conclusion that the criteria in the Open Conditions Test is not met:

The prisoner 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 prisoner in open conditions may be in the community, unsupervised under licenced temporary release)

Whilst your insight and level of remorse has developed significantly over the years, it has been said that you continue

to regard yourself as a principal victim of your actions. You have previously said that when your tariff expires, you will have done your time, and at that point will not owe anyone anything. The general consensus amongst report writers is that you need to spend time consolidating your learning from interventions and from during the course of your sentence more generally. You also need to demonstrate that you can maintain compliance and positive behaviour.

There are concerns regarding your level of naivety around what living in the community will be like. It is noted that you have demonstrated a minimal understanding of how you will live in the community and how challenging things like securing accommodation, getting a job with no previous employment record, or maintaining solid relationships will be. Work needs to be done to develop resettlement plans and you will need support to do this successfully.

Transfer to a Progression Regime would offer you a progression focused environment where you would be able to concentrate on maintaining compliance and stable behaviour, work on resettlement plans and also be able to be assessed for the Enhanced Behaviour Monitoring process.

There is a wholly persuasive case for transferring the ISP from closed to open conditions

You still have consolidation work to do and despite progress in terms of your maturity and insight into your offending over the years, you still demonstrate a lack of understanding of how you will realistically resettle successfully, and how your development of skills to manage challenging situations is extremely important to achieve this. It is also important that you are able to demonstrate that you can maintain the current period of compliance and stability. A period in a Progression Regime would allow you to consolidate and further develop your understanding and insight into your behaviours, and should be re-explored.

You have spent a long time in prison and in order to be given the best chance of resettling, you will need to spend time preparing for life in the community as an adult. A period in an environment that can offer appropriate levels of support and challenge, while helping you to form realistic plans for the future, is now important before any further consideration

should be given to open conditions. A transfer to open conditions at this time would be inappropriate and, bearing in mind your inexperience as an adult in the community, further work should be undertaken to prepare you for that potential transition in the future.

The Secretary of State therefore confirms that it is necessary for you to remain in a closed prison environment and continue to work towards evidencing a reduction in your risk in preparation for your next parole review. You are encouraged to work with staff supervising you to understand what is required of you in the lead up to your next review to assist your progression and to explore the options available to you. There are various ways in which you can continue to demonstrate a reduction in your risk within a closed establishment for example you may wish to explore the option of a Progression Regime; however, you will need to meet both the eligibility and suitability criteria to be accepted onto the Regime.

For those that meet the eligibility and suitability criteria, participation in a Progression Regime gives prisoners the opportunity to build evidence, in an environment that requires them to take personal responsibility for their lives and their progress, to allow them to evidence to the Parole Board that their risks can be safely managed in the community. It is not however, the most appropriate route of progression for all prisoners but is an option you may wish to explore with your supervising staff.

Legal Framework

83. The statutory framework is uncontroversial.
84. Section 12 of the Prison Act 1952 provides that a prisoner may be lawfully confined in any prison and the defendant has the power to direct removal of a prisoner from one prison to another. Section 47 of the Prison Act confers on the defendant the function of making prison rules. It is rule 7 of the Prison Rules 1999 SI 1999/728 that provides for prisoners to be classified in accordance with the directions of the defendant. Category D prisoners are confined in open prisons which have “minimal perimeter and physical security features and are for those who are specifically assessed as suitable for conditions of low security” (see the defendant’s Security Categorisation Policy Framework (reissued 17 August 2021)).

85. Section 239(2) of the Criminal Justice Act 2003 imposes a duty on the Parole Board to advise the defendant “*with respect to any matter referred to it by him which is to do with the early release ... of prisoners*”. It is common ground that a transfer to open conditions is a matter relevant to early release and so falls within the scope of this subsection.

86. Section 239(6) of the Criminal Justice Act 2003 empowers the defendant to give the Parole Board directions as to the matters to be taken into account in discharging its function. At the time the Parole Board provided its advice to the defendant, it was directed to consider (inter alia) the following, set out in the June update of the Secretary of State’s Directions to the Parole Board 2022: Transfer of indeterminate sentence prisoners (ISPs) to open conditions:

ii the extent to which the ISP [indeterminate sentence prisoner] 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;

iii whether the following criteria are met:

- *The prisoner is assessed as low risk of abscond; and*
- *A period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community.*

87. With effect from 17 July 2023, and so after the Parole Board advice was given but before the decision under challenge was made, the policy changed. The policy Ms Churcher had to apply was that the defendant would accept the Parole Board’s recommendation for open conditions only where –

- *The prisoner 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 prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and*
- *The prisoner is assessed as low risk of abscond; and*
- *There is a wholly persuasive case for transferring the prisoner from closed to open conditions.*

88. It is common ground that in considering the Parole Board’s advice, the defendant has a discretion whether or not to accept its recommendation; and that it is possible for there to be differing views on the same facts, in the absence of irrationality on the part of either.
89. There is a considerable volume of jurisprudence addressing the threshold to be applied to the reasoning and justification for a decision by the defendant to depart from a recommendation of the Parole Board. At appellate level, in *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 802, the Court of Appeal, in considering the lawfulness of a policy restricting the transfer of absconders to open conditions, confirmed that the decision regarding transfer to open conditions was for the defendant who could, subject to his general public law obligation to act rationally, accept or decline to follow the Parole Board’s recommendation (per Sales LJ at para 61). Sales LJ rejected the submission that the Parole Board was better placed than the defendant to make judgments about prisoner risk, saying, “The Secretary of State and his department and its agencies are also experts in management of prisoners in the prison estate, including assessing prisoner risk when it is relevant to the wide range of decisions which such management may involve.” (paras 69 – 71)
90. In *R (Green) v Secretary of State for Justice* [2023] EWHC 1211 (Admin), Sir Ross Cranston reviewed a line of authorities and set out three essential principles he derived from them, which I set out below and respectfully adopt:

In drawing the threads together, it seems to me that the following applies if the Secretary of State is to disagree with the recommendations of the Parole Board for a prisoner’s move to open conditions:

- i. the Secretary of State must accord weight to the Parole Board’s recommendations, although the weight to be given depends on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make;*
- ii. on matters in respect of which the Parole Board enjoys a particular advantage over the Secretary of State (such as fact finding), he must give clear, cogent, and convincing reasons for departing from these;*
- iii. with other matters such as the assessment of risk, where the Secretary of State is exercising an evaluative judgment, he must accord appropriate respect to the view of the Parole Board and he must still give reasons for departing from it, but he can only be challenged on conventional public law grounds such as*

irrationality, unfairness, failure to apply policy, and not taking material considerations into account.

91. Before summarising those principles, the learned judge made specific reference to these obiter remarks of Chamberlain J in *R (Oakley) v Secretary of State for Justice* [2023] 1 WLR 751 (at para 51):

In my judgment, the correct approach is therefore as follows. When considering the lawfulness of a decision to depart from a recommendation of the Parole Board, it is important to identify with precision the conclusions or propositions with which the Secretary of State disagrees. It is not helpful to seek to classify these conclusions or propositions as “questions of fact” or “questions of assessment of risk”. The more pertinent question is whether the conclusion or proposition is one in relation to which the Parole Board enjoys a particular advantage over the Secretary of State (in which case very good reason would have to be shown for departing from it) or one involving the exercise of a judgment requiring the balancing of private and public interests (in which case the Secretary of State, having accorded appropriate respect to the Parole Board’s view, is entitled to take a different view). In both cases, the Secretary of State must give reasons for departing from the Parole Board’s view, but the nature and quality of the reasons required may differ.

92. The recent decision of *R (Cain) v Secretary of State for Justice* [2024] EWHC 426 (Admin) is an example of the Court applying these principles. Calver J, at para 67 of his judgment, said this:

In the present case, I have identified above the key propositions of the Parole Board (in paragraphs 4.4 and 4.6 of the Recommendation) with which the Defendant disagreed, to the effect that the support to develop robust plans to help Mr. Cain manage potential high risk scenarios is better offered in open conditions rather than via a Progression Regime. I consider that on that central question, which consists of the exercise of a judgment, balancing the interests of the prisoner against those of the public, whilst the expertise and experience of the Parole Board requires appropriate respect, the Defendant is entitled to form his own judgment as to where the balance of interests best lies. The exercise of an evaluative judgment to determine that question in the present case was not one in relation to which the Parole Board enjoyed a particular advantage over the Defendant.

93. Shortly before the decision in *Cain*, Fordham J gave judgment in *R (Sneddon) v Secretary of State for Justice* [2024] 1 WLR 1894. He set out what he regarded as the key principles from the preceding case-law as follows (at para 28):

(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).

94. Within these key principles at (2) and (6) is the learned Judge’s comment that expertise in risk assessment is an issue over which the Parole Board has a particular advantage. This was highlighted by Mr Howell as running counter to the approach in *Gilbert* insofar as it might be interpreted as not recognising the defendant’s expertise management of prisoners and assessing prisoner risk.

95. I recognise the advantage enjoyed by the Parole Board in being able to interrogate the factual and expert evidence before it to make findings and reach conclusions. But as Fordham J said in his seventh key principle, the ultimate evaluative assessment of risk is a multi-faceted judgment which relies on findings of fact as to the past, predictions for the future and the balancing of private and public interests. That process will engage not only the Parole Board's findings of fact and assessment of expert evidence of risk, but also the expertise and experience of the defendant in prisoner management and his responsibility for public safety in accordance with the approach of the Court of Appeal in *Gilbert*. I do not read the judgment of Fordham J as departing from that approach. If, though, I am wrong in my interpretation of his judgment, then I respectfully follow the approach in *Gilbert*.
96. Finally, I remind myself that the focus of my attention must be on the rationality of the defendant's decision and not that of the Parole Board.

The arguments

97. The claimant's submissions are directed primarily at the letter sent to him notifying him of the defendant's decision. Ms Beach relies on *R (Overton) v Secretary of State for Justice* [2023] EWHC 3071 (Admin) to support her submission that the proforma is not part of the decision, albeit she concedes it provides context for it.
98. Mr Howell takes the contrary view, that the proforma is the decision. He refers me to the decision of the Court of Appeal in *R (Electronic Collars Manufacturers Association) v Secretary of State for the Environment, Food and Rural Affairs* [2021] EWCA Civ 666 in support of his position. The Court of Appeal in that case rejected the submission that the "decision" under challenge for irrationality should be confined to the single page of consultation response; but instead, where there had been no challenge to the process by which the decision had been made, should include the written submission that summarised the considerations taken into account and relied on by the decision-maker. The Court in *Overton* was not referred to this binding authority.
99. In this case, there is no challenge to the evidence of Julia Whyte. She explains the defendant's decision-making procedure, the significance of the proforma, and that Ms Churcher and not the author of the letter was the defendant's decision-maker.
100. I accept Mr Howell's submission that applying *Electronic Collars*, the proforma should, on the facts of this case, be treated as the decision when considering its rationality; but in the event this difference between Counsel makes no difference to my conclusion. For the reasons set out below, I have

concluded that whether regard is had to the proforma or the notification letter alone, the threshold for irrationality is not made out.

101. Ms Beach concedes that the particular issue on which the defendant disagreed with the Parole Board was an evaluative one, namely that the risk of transferring the defendant to open conditions was currently too great to be acceptable. In light of that conclusion, the defendant decided that progressive options other than a transfer to open conditions should be explored at present. Ms Beach does not submit that any of the Parole Board's findings either of fact or credibility were rejected. She argues that in carrying out his evaluation, the defendant placed insufficient weight on the factors identified by the professional witnesses that supported a move to open conditions and undue weight on the factors that were in opposition to such a move. She argues that insufficient reasons were given for the defendant's conclusion.

102. Mr Howell submits (as is conceded by the claimant) that the defendant has not disagreed with any finding or credibility assessment of the Parole Board. Those were the issues in respect of which it had a particular advantage. The defendant has differed only in its evaluation of future risk where the defendant has expertise and is the guardian of public safety. The defendant's reasoning is rational when regard is had to the facts accepted by the Parole Board. The defendant has not been unfairly selective in his weighing of factors to reach a different conclusion from that of the Parole Board. It was not irrational in light of the risk factors identified by the Parole Board for the defendant to reject a transfer to open conditions in favour of exploring other routes for progression, for example, through the Progression Regime for which the claimant had previously been accepted.

103. Even if, contrary to his primary submission, the defendant could only reject the Parole Board's recommendation if it found some "defect" in its decision, Mr Howell argues there is such in this case. He identifies firstly the lack of any engagement by the Parole Board with progressive alternatives to open conditions (such as the Progression Regime); and the making of a conclusory finding that the risk engaged in a transfer to open conditions would be manageable in the absence of explicit reasoning.

Analysis

104. If I were to adopt the position advocated as most favourable to the claimant, I would consider only the notification letter.

105. Reading the notification letter alone and as a whole, I am satisfied that it affords appropriate respect to the Parole Board's findings and reasoning, albeit its evaluative conclusion on risk is different. I find the reasoning offered in the notification letter for that conclusion to be sufficient to explain why the

defendant's decision is different from that of the Parole Board. As such it is not in my judgment irrational.

106. The factors indicative of an unacceptably high level of risk which are identified by the defendant as persuasive and outweighing the positive progress made by the claimant are:

- a. The claimant's attitude to the index offence and his continued position that he was a victim rather than the perpetrator of a particularly violent and lethal crime;
- b. His attitude towards his sentence and his concerning comment that at the expiry of the minimum term he had "done his time and didn't owe anyone anything";
- c. The need the professional witnesses had identified for him to consolidate his learning from interventions (notwithstanding the completion of core risk reduction work);
- d. The need for the claimant to demonstrate he could maintain compliance and positive behaviour (in the context of recent negative entries about his conduct, the security intelligence and the adjudication governor's view of the March 2020 incident); and
- e. The claimant's naivety and minimal understanding of challenges he would face in the community (bearing in mind that part of this criterion makes reference to a prisoner in open conditions possibly being in the community unsupervised under licenced temporary release).

107. None of these factors departed from the evidence before the Parole Board and its findings. They cannot be said to be other than legitimate and rational concerns. In carrying out an overall evaluation of risk, balancing the claimant's interests against those of the public, the defendant was entitled to conclude these factors were sufficiently weighty to justify departing from the Parole Board's conclusion about the risk of moving the claimant to open conditions.

108. The defendant also concluded there was not a wholly persuasive case for transfer. The essential reasoning for this conclusion (which overlapped to some extent with the reasoning in relation to risk) was that the matters that needed to be addressed to reduce risk could be explored through a Progression Regime (which self-evidently did not carry the level of risk engaged in a transfer to open conditions). The length of time the claimant had spent in custody was recognised as a factor that supported a gradual transition through a progressive environment in closed conditions before a transfer to open conditions. The defendant did not reject the Parole Board's assessment of the need for the

claimant to experience open conditions before release; it simply concluded that the time was not yet right.

109. The Parole Board had not addressed alternative routes to progression in its decision or engaged with the possibility of the claimant progressing other than through open conditions. This was a gap or defect in its reasoning in view of the references in the evidence of the professional witnesses to this possibility. Taking account of the risk factors and level of risk identified by the Parole Board, together with the availability of an alternative progressive option, the defendant's conclusion that there was not a "wholly persuasive case" for transfer was reasonably open to him. It afforded appropriate respect for the Parole Board's view that progression was needed for the claimant but concluded that another route, not addressed by the Parole Board, was a more appropriate alternative in the circumstances. It was not irrational, even if the higher standard of requiring "very good reason" or "clear, cogent and convincing reasons" for departing from the Parole Board's recommendation was required. That is because the Parole Board had not considered alternative options at all. I accept Mr Howell's submissions on this point.

110. The notification letter recorded many positive aspects of the claimant's progress, including his enhanced status (maintained since April 2019), the risk reduction work he had completed, and his improved insight into his behaviour and mental health. I reject the submission that the defendant was unfairly selective or that the defendant gave insufficient consideration to the fact that the claimant had spent his adult life in custody. This was specifically addressed and the connection between this factor and the defendant's view of the need for a gradual transition was sufficiently explained. The defendant engaged with the Parole Board's findings and reasoning in these areas.

111. I also reject the submission that the letter simply recited facts without offering reasoning. I respectfully adopt the approach taken by Upper Tribunal Judge Elizabeth Cooke sitting as a High Court Judge in *R (McCoy) v Secretary of State for Justice* [2023] EWHC (Admin) 3047 at paragraph 46. Where, as here, the facts relied on by the defendant are so closely related to the issue under consideration, they can be fairly understood as reasons when the document is read as a whole.

112. If instead of only the notification letter, regard is also had to the proforma, on which the letter was based, greater detail is given for the defendant's decision to depart from the Parole Board's recommendation. The proforma draws extensively from the terms of the Parole Board's decision and the evidence in the dossier. In doing so, the author actively demonstrates appropriate respect for the Parole Board. There is no departure from the Parole Board's findings. The reasoning in the proforma, just as in the letter which is based on its contents, applies the relevant criteria and explains sufficiently why the recommendation

has not been followed. My reasoning set out above in relation to the notification letter applies with greater force to the proforma.

113. The irrationality challenge fails.

Outcome

114. The claim is dismissed.