Neutral Citation Number: [2024] EWHC 1559 (Admin)

Case No: AC-2023-CDF-000070

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 24/06/2024

Before:

Mr. Justice Eyre

- -

Between :

Robert Karoly Hahn	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

Stuart Withers (instructed by **Bhatia Best**) for the **Claimant**
Rachel Sullivan (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 6th June 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 24th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr. Justice Eyre:

Introduction.

1. The Claimant is now aged 57. He is serving a life sentence for murder and is currently detained as a Category C prisoner in HMP Erlestoke in the closed prison estate. Pursuant to permission granted by HH Judge Keyser KC the Claimant challenges the Defendant's decision of 9th March 2023 ("the Decision") rejecting the recommendation of the Parole Board that he be transferred to open conditions.

2. The sentence of life imprisonment was imposed on 13th December 2004 by Royce J who also imposed a concurrent term of 6 years imprisonment for an offence of wounding with intent in an unrelated incident. The judge imposed a minimum term (after taking account of time spent in custody) of 18 years 1 month and 20 days. That period expired on 2nd February 2023. It is not necessary to recite the details of the offences save to say that both were unprovoked attacks and that Royce J described the murder as a "gratuitous, savage, callous, and sustained" attack on "a defenceless and vulnerable man". The Claimant had numerous previous convictions including a number for offences of violence (albeit of limited gravity).

3. In March 2021 the Defendant referred the case to the Parole Board for advice as to whether the Claimant should be moved to open prison conditions. There was a Parole Board hearing on 29th June 2022 and on 20th July 2022 the Board recommended that the Claimant be moved to open conditions.

4. The Defendant rejected that recommendation doing so by reference to the criteria in paragraph 5.8.2 of the version of the Generic Parole Process Policy Framework ("the GPPPF") then in force.

5. The Claimant challenges the Decision on two closely related grounds: the adequacy of the reasons set out in the Decision and the rationality of the Decision.

6. In summary Mr Withers for the Claimant said that the Defendant failed to give sufficient explanation of the Defendant's reasons for departing from the Parole Board's recommendation. He also contended that the conclusion reached was not rational in circumstances where the reasoning which was articulated was vitiated by evidential gaps and by a failure adequately to address the reasoning of the Parole Board. For the Defendant Miss Sullivan accepted that the Decision was "not a model of clarity". However, she contended that the Decision was sufficiently clear to enable the Claimant and the court to understand the reason why the Parole Board's recommendation was not being accepted. Miss Sullivan submitted that the Decision was a rational one in which the Defendant had paid proper regard to the recommendation of the Parole Board but had differed from the view of that body on a properly reasoned basis. In addition Miss Sullivan said that, in the event that the Decision was found to have been flawed, section 31(2A) of the Senior Courts Act 1981 would preclude relief. That was because I should conclude that it was highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred but instead there had been a rational and adequately reasoned decision. In essence the Defendant's case on the latter issue was that it was rationally open to the Defendant to reject the Parole Board's recommendation in the circumstances of this case; that it can be seen that such

rejection would have been highly likely to have been the result of the Defendant's assessment of the issues; and that flaws in the reasoning leading to the Decision or in the articulation of the reasons did not affect the ultimate outcome. Mr Withers urged me to reject that contention. He submitted that account is to be taken of the approach taken by the Parole Board and that in the light of that it cannot be said to have been highly likely that a rational assessment of the position by the Defendant would have led the same outcome as the flawed one.

The Legislative and Policy Framework.

7. As explained in my judgment in *R (Overton) v Secretary of State for Justice* [2023] EWHC 3071 (Admin) at [5] – [7] the legislative background in summary is that:

> "5. Section 12(2) of the Prison Act 1952 provides that prisoners:
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> > 'shall be committed to such prisons as the Secretary of State may from time to time direct …'
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> 6. By rule 7 of the Prison Rules 1999 prisoners:
>
> > 'shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment…'
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> 7. Under section 239 of the Criminal Justice Act 2003 the Secretary of State can seek the advice of the Parole Board in respect of various matters including questions of a prisoner's categorisation and of a prisoner's suitability or otherwise for a transfer to open conditions. The section empowers the Secretary of State to give the Board directions as to the matters it is to take into account when discharging its functions including when giving such advice."

8. The relevant parts of the GPPPF have undergone a number of changes.

9. In the iteration of the GPPPF in force at the time of the Decision paragraphs 5.8.2 and 5.8.3 were:

> "5.8.2 The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP for open conditions) only where:
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> • the prisoner is assessed as low risk of abscond; and
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> • 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; and
>
> • a transfer to open conditions would not undermine public confidence in the Criminal Justice System.
>
> 5.8.3 Where the Parole Board recommendation was based on incorrect information, the Secretary of State (or an official with delegated responsibility) is unlikely to accept the recommendation. The case will normally be referred again to the Parole Board for a fresh consideration and new recommendation, with an explanation, rather than submitting it for formal rejection. For example, where the Board have recommended open on the basis that a particular course is available in open conditions and in fact it is only available in closed conditions."

10. In *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin) Fordham J set out the version of paragraphs 5.8.2 and 8.8.3 applicable to the decision in that case together with earlier iterations in the following terms at [6] – [9]:

> "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):
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> > ***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.***
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> Predecessor Policies
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> 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:
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> > ***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.***
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> 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.
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> 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."

11. A further version was issued in August 2023 as follows:

"5.8.2 The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP 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 ISP from closed to open conditions.

5.8.3 Where the Parole Board recommendation was based on incorrect information, the Secretary of State (or an official with delegated responsibility) is unlikely to accept the recommendation. The case will normally be referred again to the Parole Board for a fresh consideration and new recommendation, with an explanation, rather than submitting it for formal rejection. For example, where the Board have recommended open on the basis that a particular course is available in open conditions and in fact it is only available in closed conditions."

The Decisions of the Parole Board and of the Defendant.

12. The Parole Board's recommendation was made in its decision of 20th July 2022.

13. In that decision the Parole Board analysed the Claimant's offending behaviour. It rejected as "improbable" his explanation of why he had not sought medical assistance for the victim of the murder (and had, indeed, prevented him obtaining such assistance for 16 hours) concluding that the Claimant was "minimising his responsibility". The Parole Board analysed the Claimant's risk factors and potential protective factors. It then analysed his behaviour in custody and the evidence of change. In that analysis the Parole Board noted (at paragraph 2.4) that the Claimant's "conduct in custody has been mixed but much improved since about 2018"; that the Claimant had "received positive entries from many different members of staff" (paragraph 2.7); and that "all witnesses agreed that [the Claimant] has no further core risk-reduction work that he must complete in closed conditions" (paragraph 2.8).

14. Against that background the Parole Board turned to analyse the manageability of the risk posed by the Claimant. At paragraph 3.6 it noted that both professional witnesses giving evidence at the oral hearing:

"... considered that Mr Hahn's risk has reduced sufficiently for it to be managed in open conditions, including unsupervised periods in the community on temporary licence..."

15. The Parole Board then said, at paragraph 3.7:

"The panel agreed, noting that although Mr Hahn has intermittently received negative entries for being rude to staff, he has also for many years held trusted positions in

custody, and not lost Enhanced status. He complains but complies. Although he has convictions for breaching trust, these were all about 20 years ago."

16. Against that background the Parole Board set out its conclusion recommending a move to open conditions in these terms:

> "4.1 The matter that caused the panel perhaps most concern during the hearing was the number of instances (evident from the above record of the written and oral evidence taken) where Mr Hahn disputes an accepted or official account of events, and offers a different account more favourable to himself. The panel did not find reason to believe that, as he asserted, 'most staff in this prison' were against him. If the panel is to place some weight, as it does, on positive comments about him and his work, learning and progress, it is reasonable also to place weight on negative comments about his sometimes confrontational and inappropriate manner to staff (albeit these tend to come from officers rather than Probation or Psychology), unless there is compelling reason not to do so.
>
> 4.2 However, this did not materially affect the panel's assessment of his risks. To put it bluntly, the panel often did not believe or accept his denials or minimisation of responsibility for offending or poor custodial behaviour. Nor did the professional witnesses, in general; Ms Davies described him as 'perhaps not he most reliable story-teller'. She also said that if he takes responsibility for his future lifestyle and risk factors (as he does), then denial or minimisation of details of his past offences, limited acceptance of responsibility for custodial behaviour, and externalisation of past blame are not so important. Professionals', and the panel's risk assessments have 'factored in' his lack of honesty - which, to be charitable, may include an element of not understanding the question or being limited in his ability to communicate an answer.
>
> 4.3 Provided professionals supervising him continue to adopt a sceptical approach to his accounting of past events, his risk is manageable in open conditions. If, or when, he is released into the community on licence, there may be a need for particular measures (such as Integrated Offender Management with police, frequent Probation interviews, and possibly polygraph testing) to manage his unreliability in recalling his actions.
>
> 4.4 The panel was satisfied, and accepted the professional witnesses' evidence and judgement, that Mr Hahn 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 in open conditions he may be in the community, unsupervised, under licensed temporary release. His risk of violence is now low to moderate. He has learned from programmes (particularly the recent BNM+) and shown evidence of applying new skills and attitudes.
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> 4.5 The panel was also satisfied, for reasons given above, that he presents a low risk of absconding.
>
> 4.6 The panel carefully considered whether a period in open conditions is necessary for Mr Hahn. Witnesses agreed that it will be crucial for Mr Hahn's safe management in the community on licence that he have developed a trusting relationship with his community offender manager (COM), particularly as he does not have a large social support network in the community. This is not yet established, due to changes of COM. Open conditions would also test him in less restricted conditions, with freer access to alcohol and other contraband. It would also enable him to improve his employment prospects (he is interested in environmental management and HGV driving courses), which is a strong protective factor now. He has been in prison for almost 20 years, and adjusting to life in the community would be very difficult without a staged reintegration."

17. The Decision was taken on behalf of the Defendant by the Public Protection Casework Section which is within the Public Protection Group of HM Prison and

Probation Service. Julia Whyte is Head of Eligible Casework within the Public Protection Group and has provided a witness statement explaining the background to the changes in paragraphs 5.8.2 and 5.8.3 of the GPPPF and explaining the process leading to the Decision. Miss Whyte has exhibited a copy of the PPCS Open Recommendation Proforma ("the Pro-Forma") which was completed in relation to the Decision. This contained an assessment by Miss Whyte recommending rejection of the Parole Board's recommendation. The terms of that assessment were substantially carried over to the Decision. Miss Whyte's assessment was referred to Gordon Davison, the Head of the Public Protection Group, and the Pro-Forma records his comments as being:

> "I share your view here. Given his dishonesty and minimising of his responsibility for his crimes, I do not see how it can be argued that it is essential for him to go to open conditions now. Will an open prison, ie a less regulated environment, correct his dishonesty and refusal to accept responsibility? And those two traits will surely be key parts of the mix the next time the Parole Board comes to assess whether the statutory release test is met."

18. Miss Sullivan accepted that the contents of the Pro-Forma are not relevant to the issues of whether the Decision was rational and whether reasons for the Decision were properly given. Those matters are to be determined by reference to the Decision. The Pro-Forma cannot be relied upon to show a rationality if that is not apparent in the Decision nor to provide reasons which do not appear in the Decision. However, Miss Sullivan did say that the Pro-Forma would be relevant if the question arose of whether despite any deficiencies in the Decision the outcome of a rational assessment would have been highly likely to have been the same bringing section 31(2A) into play.

19. The Decision was set out in the Defendant's letter of 9th March 2023. In this the Defendant rehearsed the background and the recommendation of the Parole Board. The letter summarised the relevant law and policy background reciting the terms of paragraph 5.8.2 of the GPPPF. It noted the progress which had been made by the Claimant but said that the Defendant had concluded that the criterion that "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" was not met. The evidence which the Defendant relied on to support that conclusion was then said to be:

> ***"Essential criteria***
>
> • The panel deem that a period in open conditions is essential so that you can; develop a trusting relationship with your COM, be tested in less restricted conditions with freer access to alcohol and other contraband, improve your employment prospects and to adjust to life in the community with a staged reintegration.
>
> Your conduct in custody has been mixed, but much improved since about 2018; before that, there were occasional reports of you verbally threatening staff. There is an intermittent pattern of Security reports from 2013 through to the end of 2020, of you making inappropriate comments, or behaving inappropriately, towards female staff.
>
> It is acknowledged that you were not investigated or adjudicated for any of the alleged incidents, however, *"the panel did not find your blanket dismissal convincing"* (Page 9,Decision).

> It is not essential for you to transfer to open conditions to evidence progression. These behaviours can be demonstrated within the closed estate and could be used to inform future decisions about release.
>
> • The panel describe your behaviour as *"sometimes confrontational and inappropriate manner* to *staff"* (Page 11, Decision). In addition to this, the decision states the following: "the *panel often did not believe* or *accept your denials or minimisation of responsibility for offending or poor custodial behaviour ... nor did the professional witnesses in general"*(Page 11, Decision), and *"Professionals', and the panel's risk assessments have factored in' your lack of honesty"* (Page 11, Decision).
>
> You could evidence improved behaviour within the closed estate so that the next panel can review evidence of progress and compliance to inform any future decisions. It is therefore not essential for you to transfer to open conditions in order to evidence improved behaviour.
>
> *Within the conclusion, the panel have stated that providing professionals supervising* you *continue* to *adopt* a *sceptical approach to your accounting* of *past events, your risk is manageable in open conditions ... If,* or *when,* you *are released into the community* on *licence, there may be* a *need for particular measures (such as Integrated Offender Management with police, frequent Probation interviews, and possibly polygraph testing) to manage your unreliability in recalling your actions"* (Page 11-12, Decision).
>
> It is assessed that there is an overreliance on external controls for you to be transferred to open conditions at this stage.
>
> Within the psychological risk assessment report, the psychologist identifies the options available and acknowledges that a transfer to open conditions would test your skills in managing your risk factors but would not address the underlying cause (Page 32, Psychological Risk Assessment Report). They have recommended a transfer to open conditions but indicate that this is because the other option (either a therapeutic community or therapy in Cat C prison as part of a commissioned service) would not be preferential as firstly, you do not wish to undertake this form of therapy and secondly, the availability of such interventions.
>
> It is assessed, this evidences that a period in open conditions is not the only route to inform future decision about release and therefore, **is** not essential.
>
> Based on all the information available It is assessed that a period in open conditions is not considered essential at this stage to inform future decisions about your release. You should spend a further period in the security of closed conditions, evidencing further progress and positive behaviour. This will support a future panel in assessing risk and considering future release decisions.
>
> 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."

20. That passage was an expanded version of the assessment which Miss Whyte had set out in the Pro-Forma.

The Approach to be taken.

21. When seeking to identify the correct approach in light of the authorities it is necessary to have regard to the date of the authority in question and, more significantly, to the version of the GPPPF with which the court was concerned in the particular case.

22. The decision under challenge in *Overton* had been made applying the same iteration of paragraph 5.8.2 as is relevant in the current case. I explained my understanding of the approach to be taken as follows:

> "25. The decision on whether a prisoner should be moved from a closed to an open prison is a matter for the Secretary of State. He has to take account of and engage properly with a recommendation from the Parole Board but provided he does that and provided that his conclusion is rational the Secretary of State is not bound by the recommendation and can reach his own contrary conclusion. The point was recently put thus by Dexter Dias KC as a deputy judge in *R (Zenshen) v Secretary of State for Justice* [2023] EWHC 2279 (Admin) at [83]:
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> > '..What he must demonstrate is a genuine engagement with the material factors that arise in the case of the individual prisoner serving an indeterminate sentence. He can reach a different decision to the Panel. But his basis for departure must be rational and properly justified. If not, it is susceptible to public law challenge.'
>
> 26. Assessment of whether there has been the necessary genuine engagement by the Secretary of State with the recommendation of the Parole Board in a given case and or whether the Secretary of State's decision is rational will require close attention to the circumstances of the particular case and to the terms of the decision in question. In that regard and subject to one qualification I agree with Mr Leary's submission that the approach to reading a letter informing the prisoner of a decision to keep him or her in the closed estate is akin to that taken to reading decision letters in other contexts. The letter is to be read '(1) fairly and in good faith and as a whole; (2) in a straightforward down-to-earth manner without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case' (per Lang J in *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [19]). The qualification is that the court when considering the decision letter must at all times remember the subject matter in question. Even though the Secretary of State will not in cases such as this be differing from the Parole Board on the question of release or detention he is still making a decision determining the degree of the continuing deprivation of liberty of the prisoner. A prisoner in the open estate remains detained and not at liberty but the circumstances of such a person's life will be markedly different from those of a prisoner in the closed estate. In addition such a prisoner has opportunities (such as to apply for temporary release on licence) which are not available to those in the closed estate. This consideration does not require the court to adopt an artificially rigorous approach to the reading of the decision letter. Nor does it require the court to address the question with
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> the degree of anxious scrutiny which is required in cases when the decision relates to a distinction between life at liberty and life in detention. I note that in the case of *Browne v The Parole Board of England and Wales* [2018] EWCA Civ 2024 to which I was referred the court was concerned with a decision as to release. Nonetheless the point is a counterpoise to the benevolence of the reading and reflects the need for the appropriate degree of careful thought to have been applied to the matter by the Secretary of State. What is necessary is for the decision letter when read fairly and realistically to show why the Secretary of State has taken a different view from that of the Parole Board and for it

to set out his reasoning in sufficient detail to show that there has been the requisite engagement with the Board's assessment and that the resulting decision is

Rational.

27. Account is to be taken of the expertise of the Secretary of State's own department (see per Jackson J in *R (Banfield) v the Secretary of State for Justice* [2007] EWHC 2605 (Admin) at [29]). That is an expertise in the assessment of risk but also in the management of risk in the context of the prison estate.

28. In many cases it will be possible for different persons rationally to take different views (sometimes radically different views) as to the same assessments. This will be particularly so in the case of assessments as to the level of future risk; as to the acceptability of a particular level of risk; and as to the appropriate way forward for a particular prisoner. These are matters of judgement and in many cases they will turn on the view taken as to the likelihood of a number of future events: a matter as to which there will very rarely if ever be a single unquestionably correct answer. It follows that in the relation to the same prisoner there can be both a recommendation from the Parole Board which is wholly rational and a decision to the contrary effect made by the Secretary of State which is also wholly rational. It is for that reason that it is necessary for the court to maintain a determined focus on the rationality or otherwise of the Secretary of State's decision and to avoid being distracted by having regard to the

rationality of the Parole Board's recommendation (see per King J in *R (Wilmot) v Secretary of State for Justice* [2012] EWHC 3139 (Admin) at [47]).

29. The nature and quality of the reasoning exercise which the Secretary of State will have to undertake in order properly to engage with a recommendation of the Parole Board will depend on the nature and subject matter of the Parole Board assessment from which he is departing. It will be necessary to consider whether and to what extent the particular issue is one in respect of which the Parole Board is better-placed to make an assessment than the Secretary of State or in respect of which the Board had an opportunity not open to the Secretary of State. Such might be the case if the issue turns on some special expertise available to the Parole Board and not to the Secretary of State or if question is one of fact where the Board's finding is the result of having addressed the matter at a hearing at which there was oral evidence. The point was made thus by Chamberlain J in *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin) at [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.'

30. I respectfully agree with that analysis. It follows that there is not a bright line distinction between matters of fact on the one hand and assessments of risk or judgements as to the public interest on the other. Rather there is a continuum. The Secretary of State is free to differ from the Parole Board in relation to a matter at any point on the continuum. However, the more intensely connected with the determination of past matters of fact the issue is then the more cogent and detailed will be the reasoning which will need to be shown to demonstrate that the Secretary of State has properly considered the point and that he has properly taken account of such advantages as the Parole Board had in determining the point. Conversely the more predictive and/or policy/public interest related the issue then the less intense the reasoning required will have to be though reasoning there will still need to be.

31. Engagement with the Parole Board's recommendation does not necessarily require the Secretary of State to set out a critique of such a recommendation. Still less does it require that the statement of the Secretary of State's reasons for disagreeing take the form of a point by point rebuttal of the matters on which the Parole Board has expressed a view. It is sufficient for the Secretary of State to show that he has addressed the relevant issues and has done so with a consciousness of the view which the Parole Board has taken and for him then to explain the reason for the contrary conclusion which he has reached. Where there is a disagreement with particular factual findings made by the Parole Board then express explanation of the reason for this will normally be needed. Conversely where there is disagreement as to the inferences to be drawn from factual matters which are not contentious or as to the consequences of those matters for the assessment of other factors there will have to be an explanation of the Secretary of State's reasons for his conclusion. However, it will not always be necessary for this to take the form of an express statement of why the view of the Parole Board is thought to have been wrong. In many cases by setting out the reasons for the conclusion he has reached the Secretary of State will also be explaining why he disagrees with the Parole Board. Returning to the point I made at [26] all will depend on the circumstances of the particular case and of the terms of the decision under challenge

...

The Decision as to whether a Period in Open Conditions was Essential

33. If the second of the three elements in section 5.8.2 of the GPPPF were to be read literally it would apply to all or almost all prisoners serving indefinite terms of imprisonment and as a consequence would be satisfied in almost every case. Although it is possible for such a prisoner to be released from the closed prison estate directly into the community that will only be appropriate in a very small number of cases. In the vast majority of cases it will be necessary for the prisoner to spend some time in the open estate before his or her ultimate release. That will be in order for there to be an assessment of the degree of risk, if any, that the prisoner still poses when outside a closed setting and of the measures needed to address that risk. Such time will also normally be necessary to enable the prisoner to adapt to the move from a closed setting and to regain some of the skills needed for life in the community. In this regard Mr Buckley accepted that this criterion was not to be read literally.

> 34. If the criterion is not to be read literally what is its meaning? It is to be remembered that the criteria are, at least in part, concerned with the assessment of risk and with addressing the risk posed by the prisoner. In light of that I agree with Mr Leary that the criterion is to be read as imposing related requirements of timeliness and of preparedness. Taking account of those there are two aspects of the criterion. First, that time in the open estate is needed before the Secretary of State and/or the Parole Board can be satisfied that the risk posed by the prisoner is such that he or she can safely be released and also that the prisoner will cope with life in the community. As already noted that aspect will be present in almost all cases. The second aspect addresses the stage in the prisoner's progress and development which has been reached. In that regard it will be necessary to consider whether further work is needed by way of addressing risk reduction or the prisoner's offending behaviour or at least to consider whether such further work as is needed can adequately be undertaken in the open estate. However, it will also be necessary to consider whether the prisoner has reached a stage such that the level of risk which he or she poses can safely be managed in the open estate. The criterion will not be satisfied in respect of a prisoner for whom there is further work which can be done to address his or her offending behaviour at least unless that work can be done as effectively in the open estate as in a closed prison. Similarly, the criterion will not be satisfied in respect of a prisoner who cannot be managed safely in the open estate."

23. I handed down my judgment in that case on 7th December 2023. That was the same day as the hearing before Fordham J in *Sneddon*. Fordham J handed down his judgment on 21st December 2023 (having circulated it in draft eight days before). It follows that neither Fordham J nor I was aware of the other's decision when giving judgment.

24. In *Sneddon* Fordham J was concerned with the August 2021 version of the GPPPF. In that context he identified the principles to be derived from the case-law in the following terms:

> "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."

25. On 14th February 2024 HH Judge Keyser KC handed down judgment in *R (Oakley) v Secretary of State for Justice* [2024] EWHC 292 (Admin). In that case Judge Keyser was concerned with the 2021 version of the GPPPF. He expressed his agreement with the summary of the law set out in *Overton* (see at [19]) noting in particular the Secretary of State's expertise in the assessment of risk and that the issue was the rationality of the Secretary of State's decision not the rationality of the Parole Board's decision (see at [21]).

26. Calver J handed down his judgment in *R (Cain) v Secretary of State for Justice* [2024] EWHC 426 (Admin) on 29th February 2024. Calver J was concerned with the same iteration of the GPPPF as I am in this case. At [56] – [67] he adopted an approach similar to that which I had set out in *Overton*. However, at [65] Calver J expressed a qualification to part of the approach as articulated in *Overton* namely as to the position where there is further work which can be done on offending behaviour but which work can be done as effectively in open conditions as in closed conditions. The difference between the approach as set out in *Overton* and that approach as qualified in *Cain* is not material to the current case and I will not address it further. In addition Calver J emphasised the importance of having regard to the facts of the particular case (see at [56] and [65]): an emphasis which I respectfully adopt.

27. On 27th March 2024 HH Judge Walden-Smith handed down her judgment in *R (Uddin) v Secretary of State for Justice* [2024] EWHC 696 (Admin). The decision under challenge there had been made by reference to the same version of the GPPPF as is relevant here and as was in issue in *Overton* and *Cain*. Judge Walden-Smith adopted in part the approach set out in *Overton* and said, at [40]:

> **"**Whether a prisoner should be transferred from the closed to the open prison estate is a matter for the Secretary of State. The Parole Board advises the Secretary of State. It is clear to me, on the basis of the various recent authorities cited to me as referred to above, that in considering whether a decision of the Secretary of State not to follow the advice of the Parole Board is a lawful decision, the court is determining whether the Secretary of State's decision is *Wednesbury* irrational and not whether the Parole Board's determination was a rational one. It is necessary to identify with precision the conclusions or propositions with which the Secretary of State disagrees and, in doing so, determine whether the conclusion or proposition with which the Secretary of State disagrees is one in which the Parole Board has a particular advantage, in which case good reason must be shown, or whether it is one which involves the exercise of judgment balancing public and private interests with respect to which the Secretary of State is entitled to take a different view to the Parole Board, having accorded the Parole Board appropriate respect. Consequently, while the court will consider the nature and quality of

> the Secretary of State's reasoning exercise when engaging with the recommendation of the Parole Board, the nature and quality of that reasoning exercise will depend on the nature and subject matter of the Parole Board assessment:
>
> > '… there is not a bright line distinction between matters of fact on the one hand and assessment of risk or judgments as to the public interest on the other. Rather there is a continuum. The Secretary of State is free to differ from the Parole Board in relation to a matter at any point on the continuum. However, the more intensely connected with the determination of past matters of fact the issue is then the more cogent and detailed will be the reasoning which will need to be shown … Conversely the more predictive and/or policy/public interest related the issue then the less intense the reasoning required will have to be though reasoning there will still need to be.' per Eyre J in *Overton*."

28. Before me, counsel explained that permission to appeal to the Court of Appeal has been given in the cases of *Sneddon* and *Oakley* with a hearing listed for October 2024. They also explained that, at least in part, permission had been given because of the differences of approach set out in the authorities.

29. It is to be noted that in *Sneddon* Fordham J was considering a different version of paragraphs 5.8.2 and 5.8.3 of the GPPPF from that which is relevant in the current case and which was considered in *Overton, Cain,* and *Uddin.* HH Judge Walden-Smith summarised the differences between the versions thus in *Uddin* at [41]:

> "Prior to the re-issuing of the Generic Parole Process Policy Framework on 12 October 2022, the Secretary of State was limited in the circumstances in which he could depart from the recommendation of the Parole Board, which included where there was not a "wholly persuasive case" for transfer. After October 2022, the Secretary of State will only accept the Parole Board's recommendation if satisfied that all three criteria set out in paragraph 5.8.2 have been met."

30. Expanding that succinct analysis the following can be said. Under the earlier version of the GPPPF (as considered in *Sneddon)* the default position was that the Parole Board's recommendation was to be accepted. There was only to be rejection of the recommendation if the specified conditions were satisfied. In those circumstances the question for the court was whether the Secretary of State's decision that the conditions for rejecting the Parole Board's recommendation were present was rational. Under the version of the GPPPF with which I am concerned the default position is that the Parole Board recommendation will not be accepted. There is only to be acceptance of the recommendation if the specified conditions for acceptance are present. The position has been reversed. The question for the court in relation to this version of the GPPPF is whether it was rational for the Secretary of State to conclude that the conditions for accepting the recommendation were not satisfied. Moreover, the conditions for accepting the recommendation are expressed in different terms from the former conditions for rejection. There has not simply been a reversal of the default position but rather the criteria to be considered are different. In light of that it is not surprising that the approach to be taken by the court to those different considerations has been expressed in different terms. Moreover, judgments articulating the approach to be taken when considering the rationality of decisions taken under one version of the GPPPF are of no more than limited assistance in determining the approach to be taken to assessing the rationality of decisions taken under a different version.

31. In those circumstances I am satisfied that Fordham J's identification of the principles applicable when considering a decision made under the former version of the GPPPF does not call for a change of the approach to consideration of a decision made under the version with which I am concerned. I am satisfied that the approach to be taken remains that which I articulated in *Overton* albeit having regard to the clarification and refinement to be derived from the judgments of Calver J in *Cain* and of HH Judge Walden-Smith in *Uddin*.

Discussion.

32. The Decision has to be read as a whole, realistically, and in context. Even on such a reading the Decision does not demonstrate an adequate engagement with the recommendation of the Parole Board. Nor does it nor set out an adequate explanation of how the Defendant came to a different conclusion from the Board despite such engagement. In parts the Decision is inadequately reasoned and it also appears to have been based on a misreading or misunderstanding of the Parole Board recommendation.

33. The Decision adopted the process of identifying parts of the Parole Board's reasoning by way of bullet points and then setting out the Defendant's conclusions in respect of those points. The Decision is to be read as a whole and an infelicity in one part of that process will not undermine the conclusion reached if the explanation seen as a whole is properly reasoned and adequately articulated. There are, however, a number of flaws in the treatment of the particular elements which are not saved by reading the Decision as a whole and which, instead, combine to undermine the Decision.

34. In the conclusion on the first bullet point the Defendant said that a transfer to open conditions was not essential and that "these behaviours can be demonstrated within the closed estate". The difficulty is that the majority of the behaviours to which the Parole Board referred in the passage quoted in the Decision clearly cannot be demonstrated in the closed estate. This is definitely so in respect of the testing in less-restricted conditions with freer access to alcohol and other contraband and the adjustment to life in the community. It is also apparent that the Parole Board's reference to the improvement of employment prospects was made in the context of activities in the open prison estate. Some of the behaviours could be demonstrated in the closed estate namely the development of a trusting relationship with the Community Offender Manager and further improvements in the Claimant's behaviour towards staff. It may well be that this is what the Defendant had in mind. If the wording of this part of the Decision had been the only cause for criticism then it would not have been a fatal flaw. The difficulty is that this passage does not stand alone but is to be read with others also indicative of a misunderstanding of the Parole Board's reasoning.

35. In addressing the third bullet point the Defendant said "it is assessed that there is an overreliance on external controls for you to be transferred to open conditions at this stage". To the extent that this statement contains reasoning going beyond mere assertion the reasoning is condensed. That would not necessarily be a cause for criticism if the condensed reasoning was readily explicable in light of the passage from the Parole Board recommendation which had been quoted. However, as will now be seen the reverse is the case.

36. The Parole Board recommendation identified a number of potentially necessary external controls but subject only to one exception they were controls which would only be applicable after release and when the Claimant was subject to licence. Save for that one they would not be applicable when the Claimant was detained – even when detained in the open estate. The only external control which would be relevant in the open estate would be the need for the adoption of a sceptical approach by the supervising staff. The Decision appears to be taking the other external controls into account and regarding them as being necessary when the Claimant is in an open prison. That is the most natural reading of this part of the Decision and it amounts to a misreading of the Parole Board recommendation.

37. Alternatively, the Decision could be read as saying that the need for external controls if the Claimant is ultimately released on licence is relevant to the move to open conditions even though those controls will not be applicable there. Miss Sullivan submitted that it was not irrational for the Defendant to take account of the controls which would be needed on a release into the community when considering whether the criteria for a move to open conditions were satisfied. That is because the purpose of a move to open conditions would be to prepare for the Claimant's release into the community. The level of control which will be needed on a release into the community is relevant to whether the Claimant is at stage where he can properly be prepared for that release by a move to open conditions. That is an analysis which might be open to the Defendant in an appropriate case. However, it is not clear that it was the basis of this part of the Decision. As already noted the most natural reading is that the external controls are being seen as needed in open conditions. To the extent the intention was to express a different reason that was not done clearly. In addition the underlying reasoning is not set out. It was incumbent on the Defendant to explain, potentially in short terms, why in the Claimant's case the level of external controls which would be needed on a release into the community were a factor operating against a transfer to open conditions notwithstanding the recommendation of the Parole Board. That was not done.

38. The external control to which the Parole Board referred and which would be relevant if the Claimant were in the open estate was the need for the supervising professionals to adopt a sceptical approach to his account of past events. However, this is a factor which will be present in very many cases of indefinitely detained prisoners who are in the open estate. It will be a very rare case in which it will be appropriate for the supervising professionals to take at face value a prisoner's account of past events. The level of scepticism required will be a matter of degree but a questioning of the prisoner's account (or at the very least a readiness to question it) will be needed in almost all cases. There will be cases where a prisoner's account of his or her actions is persistently so untrustworthy that a move to open conditions is not justified and where it is necessary to wait until the prisoner has shown a history of openness and of a willingness to admit defaults before making such a move. It may be that this is what the Defendant had in mind in this part of the Decision (and Mr Davison's comments in the Pro-Forma suggest that was so) but the point was not expressed. Moreover, as just noted the level of scepticism required will be a matter of degree and will often not preclude a move to the open estate. Here the Parole Board expressly identified the need for a sceptical approach but did not regard that as precluding a move to the open estate. It was necessary for the Decision to show that the Defendant had engaged with that assessment and to explain why a different conclusion had been reached. The

demonstration of those matters could have been brief but it was not present, either expressly or impliedly, in the Decision.

39. The Decision's treatment of those parts of the Parole Board recommendation addressed in the first and third bullet points gives the impression that the recommendation had been misread or misunderstood. In neither of those parts of the Decision is it possible to see a reasoned explanation, even in the shortest of terms, of why the conclusions set out there had been reached despite the fact that the Parole Board had taken a different view.

40. In its treatment of the fourth bullet point the Decision addresses the Psychological Risk Assessment of 19th March 2022 and identifies two reasons for the Claimant's failure to undertake further work in the closed prison estate. One of those, the Claimant's unwillingness to engage in such work, is potentially a relevant factor. It was rationally open to the Defendant to take the view that to the extent that the work was not undertaken because of the Claimant's unwillingness to engage then it was a matter of the Claimant's choice and that there remained work which could and should be done in the closed estate. However, the rationality of such an approach depends on there being scope for the work to be done if the Claimant were to be willing to engage in it. If there is no opportunity for the work to be done then at the least there needs to be a reasoned explanation of why it is nonetheless regarded as a factor operating against a move to open conditions. The Decision refers to "the availability of such interventions" as a reason why the author of the Risk Assessment did not recommend such work to be done before a move to open conditions but does not engage with the point. The non-availability of a therapeutic community or of the equivalent individually-focused work had been addressed at paragraph 9.2 of the Risk Assessment. It was made clear there that the prospect of such treatment being available for the Claimant even if he were willing to engage in it was minimal. The Decision does not address this but instead says that the Risk Assessment "evidences that a period in open conditions is not the only route to inform further decisions about release". This appears to be a misreading of the Risk Assessment. To the extent that the Decision was on the basis that another route was available in circumstances where the author of the Risk Assessment had indicated it was not in reality available then the reason for the former view needed to be set out.

41. The crux of the Decision is set out in the paragraph beginning "based on all the information available". If the preceding parts of the Decision had demonstrated a proper engagement with the material then the first sentence of that paragraph could have been seen as a bringing together of an analysis of the material. The difficulty is that for the reasons I have just explained the preceding parts of the Decision fall very far short of a proper engagement with the Parole Board recommendation and are suggestive of a misunderstanding of the material on which that recommendation had been based.

42. When the Pro-Forma is considered Mr Davison's view appears to have been that further work was needed in improving the Claimant's behaviour and in increasing his willingness to be frank and honest with staff; that the work could be done in closed conditions; and that it was needed before a move to open conditions was appropriate. That was potentially a rational approach provided that it included a proper engagement with the assessment of the Parole Board that a move to open conditions was appropriate and provided that the explanation was set out clearly so that it could

be understood by the Claimant. That was not done. The Defendant's reasoning does not appear clearly from the Decision. Rather than giving a reasoned explanation for why the Defendant was taking a different view from that of the Parole Board the Decision suggests that there had been a misunderstanding of the Parole Board's analysis and at the least a failure to engage with it. In those circumstances both grounds of challenge are made out.

Does Section 31(2A) of the Senior Courts Act 1981 preclude the Grant of Relief?

43. Section 31(2A) of the 1981 Act provides that the court "must refuse to grant relief … if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

44. The parties were agreed that the applicable principles were correctly summarised by Kate Grange QC sitting as a deputy High Court Judge in *R(Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin) at [52].

45. It is common ground that the "highly likely" requirement imposes a high hurdle. Miss Sullivan submitted that the hurdle is nonetheless surmounted. She relied on the terms of the Pro-Forma and said that this showed that a key consideration was the Claimant's lack of honesty to those supervising him. Miss Sullivan said that it was rational to have regard to that as a matter of importance and that it is apparent that even after consideration of the Parole Board recommendation that factor would have caused the Defendant to make the same decision. Mr Withers submitted that it is significant that the Parole Board had recommended a move to open conditions even though it had taken account of the Claimant's lack of honesty. He submitted that in those circumstances it cannot be said that rational consideration of that factor necessarily precluded a move to open conditions. It cannot be said that if proper regard had been had to the Parole Board's analysis the same decision is highly likely to have been made.

46. I agree with Mr Withers. The Parole Board's analysis shows that it was possible to have regard to the Claimant's lack of honesty but still conclude that a move to open conditions was appropriate. Moreover, the Pro-Forma shows that Miss Whyte's analysis includes the elements which I have found to indicate a failure to understand or to engage with the Parole Board's recommendation. The focus of Mr Davison's comments was different but those comments were made in response to and in the light of Miss Whyte's assessment. It follows that this was not a case where there was a rational conclusion which was not adequately reflected in a poorly-drawn decision letter. Instead the Decision reflected the flaws which were present in the underlying assessment. Miss Sullivan is right to say that a refusal to move the Claimant to open conditions could rationally have been based on his lack of openness. However, it is not possible to say that it is highly likely that such would have been the decision if there had been proper engagement with the Parole Board recommendations. It follows that that section 31(2A) does not operate to preclude relief here.

Conclusion.

47. As a consequence the claim succeeds. Subject to further submissions as to the form of the order the Decision is to be quashed and fresh consideration of whether the Claimant is to be moved to open conditions undertaken.