Neutral Citation Number: [2024] EWHC 2144 (Admin)

Case No: AC-2023-LON-003362

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/08/2024

Before :

Hugh Mercer KC sitting as a Deputy Judge of the High Court

- -

Between :

THE KING

on the application of

JONATHAN ANDREW WILLIAMS **Claimant**

- and –

THE SECRETARY OF STATE FOR JUSTICE

Defendant

- -
- -

Carl Buckley (instructed by **Bhatia Best**) for the **Claimant**
Alexander Line (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 25 July 2024

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Approved Judgment

This judgment was handed down remotely at 16:30 on Thursday 15th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HUGH MERCER KC :

1. This is a judicial review of a rejection dated 10 August 2023 ("the Decision") by the Secretary of State for Justice, the Defendant, of a recommendation of the Parole Board dated 21 February 2023 ("the Recommendation") that the Claimant be transferred into open prison conditions. The essence of the Claimant's argument is that the Defendant's rejection of the Recommendation was without sufficient reasons.

2. The Claimant is a Category C prisoner serving an indeterminate sentence of imprisonment for public protection with a minimum tariff of 21 months at HMP Whatton. The sentence was imposed for two counts of rape against a female child under sixteen and two counts of sexual assault and indecent assault against a child under fourteen. The Claimant was sentenced on 25 July 2008 so it is clear that the Claimant is very significantly post tariff. Before the Parole Board, the Claimant was seeking release into the community subject to conditions.

The Legal Framework

3. Pursuant to section 12(2) of the Prison Act 1952, *"prisoners shall be committed to such prisons as the Secretary of State may from time to time direct".* The Defendant has a statutory power to determine the classification of prisoners, which derives from s.47(1) of the 1952 Act: *"The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions, secure training centres or secure colleges, and for the classification, treatment, employment, discipline and control of persons required to be detained therein."*

4. The relevant rules are the Prison Rules 1999 (1999/728). Rule 7(1) states: *"(1) 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 as provided by rule 3*."

5. Under s.239(2) of the Criminal Justice Act 2003, "*It is the duty of the [Parole] Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners."* Under s.239(6) of the 2003 Act, the Defendant may issue directions to the Parole Board as to the matters it must take into account when discharging its functions, having regard to *"(a)the need to protect the public from serious harm from offenders, and (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."*

6. The directions issued by the Defendant applicable at the time of the Recommendation required the following to be taken into account:

> *"2. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:*
>
> *i. all information before it, including any written or oral evidence obtained by the Board;*
> *ii. 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;

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.*

3.The Parole Board must only recommend a move to open conditions where it is satisfied that the two criteria (as described at 2(iii)) are met."

7. At the time of the Parole Board's decision dated 21st February 2023, the policy being applied by the Defendant was the Generic Parole Process Policy Framework (**'GPPPF'**), version dated 12th October 2022. This stated at paragraph 5.8.2 that the Defendant would only accept a positive recommendation of the Parole Board if: (a) the prisoner was assessed as low risk of abscond; and (b) a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence in the community; and (c) a transfer to open conditions would not undermine public confidence in the criminal justice system.

8. In July 2023 this GPPPF test for transfer to open conditions was amended, applicable immediately from 17th July 2023. This was the policy applied by the Defendant when she made her decision relating to the Claimant on 8th August 2023. The test now provides that the following conditions must be met for the Defendant to accept a recommendation from the Parole Board to transfer to open conditions:

- *"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."*

9. It is apparent therefore that the criteria for the Defendant to accept a recommendation from the Parole Board to transfer to open conditions have changed between the date of the Recommendation and the Defendant's decision.

The Recommendation and the Defendant's Decision

10. The Parole Board held a face to face hearing at HMP Whatton on 9 February 2023. The Prison Offender Manager, Mr Moore, the Community Offender Manager, Ms Jaines (attending remotely), the Prison Psychologist, Ms Molloy, and the Prisoner Commissioned Psychologist, Dr Andrew Nicoll attended and gave evidence at the hearing. The Claimant also attended the hearing with his solicitor, Ms Sievewright.

11. After concluding that the Claimant should not yet be released, the Board's oral hearing decision of 21 February 2023 went on to consider whether the Claimant should progress to open conditions. The Board's conclusions on the issues they were required to consider are at paragraphs 4.17-4.19. It is relevant also to quote the evidence recorded in paragraph 2.23.

"*2.23. Ms Molloy thought that Mr Williams could find it difficult to navigate with less support within Open conditions, but that he could be supported with Enhanced Behavioural Monitoring (EBM) although it was not guaranteed. Dr Nicoll did not believe a period of time in Open conditions would be essential and thought that Mr Williams would find Open conditions stressful with insufficient support. Ms Molloy thought that gradual exposure to the community and ROTL could be helpful. Mr Williams did not think he would like Open conditions as he would have to adapt again, and he did not think he would benefit from day release but would deal with it. The professionals considered the abscond risk to be linked to how he felt he was coping. Ms Jaines said there was not an obvious abscond risk but if something went wrong for him he might act impulsively.*

…

4.17 As to the risk to the public the panel noted:

- *There would be an initial lie down period where he would not be granted release, while he was monitored and supported on transition.*

- *There would be further risk assessment before temporary release was granted. There would be conditions imposed on release, which itself would be graduated in scope.*

- *Risk is most likely to occur if he becomes frustrated, has difficulties in his emotional management, enters a relationship where he can gain access to children, or starts to use drugs and alcohol. He had completed risk reduction work on his sexual offending, on his thinking skills and on his personality traits.*

- *The panel noted that some of the professionals were concerned about the level of support that would be available to him in open conditions. He could be supported by the EBM process and the SOLAR project at HMP North Sea Camp. He had demonstrated at HMP Whatton that he was capable of developing professional relationships and responding to their feedback, sometimes after a period of reflection.*

- *The panel noted that Dr Farrington had assessed Mr Williams to have ASD at Level 1, the lowest level, and that he would require support. Mr Williams' behaviour had become more stable over the last 3 years and demonstrated that he is able to use some of his coping and his thinking skills in custody when supported by professionals.*

- *The panel were of the view that his risk is manageable in open conditions should he receive the correct support.*

4.18 When discussing the risk of abscond, the COM noted that he would not overtly intend to abscond. Ms Molloy had noted that the risk of abscond could increase should he fear being victimised, although did not consider it to be an imminent risk. The panel formed the view that Mr Williams' confidence had grown and that he had demonstrated that he was able to approach professionals to express his concerns and to seek support. As such he should be a low risk of abscond if he applied the skills he had put to use at HMP Whatton.

4.19 Ms Molloy noted that a period in Open conditions could offer gradual exposure to the community whilst retaining external controls. The panel thought it would be essential at this stage to inform his future risk management as he had not independently lived in the community as an adult. It would enable him to build his resettlement plans, and to build relationships with people in the community. It would also enable him to build his relationships with professionals in the community. Further, he would be able to prepare for the transition into a community setting gradually whilst having the routine and structure of the open prison estate."

12. Underlying the Recommendation is the Parole Board dossier which runs in this case to some 560 pages and includes the written evidence of the witnesses as well as documents generated within the prison such as the periodic OASys Assessments.

13. The Defendant's Decision was communicated to the Claimant by a letter dated 10 August 2023 of which the salient part reads as follows:

"*The prisoner is assessed as low risk of abscond*

The Panel are of the view that you are a low risk of abscond if you apply the skills you have been putting to use at HMP Whatton. Report writers state that the risk of abscond increases depending on how you are feeling and coping, and your impulsive behaviours. This is evidenced within the dossier:

"On discussion with POM Mark Moore it was agreed that there would be concerns in relation to abscond should Mr Williams be moved to Open Conditions. However this would likely be on impulse rather than involve any pre-planning. For instance if Mr Williams was late and decided he then had nothing to lose or if he felt the need to push boundaries of the regime." (OASys, Jan 2023, R9.1.1)

"The professionals considered the abscond risk to be linked to how he felt he was coping. Ms Jaines said there was not an obvious abscond risk but if something went wrong for him he might act impulsively." (Decision, 2.23)

It is not evident to the Secretary of State that this constitutes a low risk of abscond. Bearing in mind you often present as impulsive and erratic, the risk of you not utilising skills learned becomes harder to manage. Therefore, in the Secretary of State's view, this criteria is not met.

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

You require a level of structure and support that is not necessarily available in open conditions. There is recorded difficulties in you engaging in group environments, and

you have a tendency to react impulsively and erratically to challenges, which indicates that you require a more structured level of support that could be better offered by a PIPE or Progression Regime.

There are also questions around the level of abscond risk you are assessed to pose, which the Secretary of State is not satisfied equates to low risk.

As such, the Secretary of State takes the view that there is not a wholly persuasive case for transferring you to open conditions."

14. The Decision was preceded by a PPCS Open Recommendation Proforma ("the Proforma") of which the first part was completed by the Case Manager, Edwin Nichols, on 23 February 2023, and the second part by Polly Churcher, a Senior Manager, on 8 August 2023. The first part of the Proforma addressed the then current criteria under the Defendant's policy, in particular whether the prisoner was assessed as a low risk of abscond. No conclusion is provided by Mr Nichols. Ms Churcher records that she has reviewed: Mr Nichols' summary, the Recommendation and "*I … have had access to the various reports within the dossier*".

15. Ms Churcher records that *"[The Claimant] is assessed to pose a high risk of serious harm to children and a known adult*". She notes on page 7 of 9 that it is not clear why the Claimant chooses not to take his medication as that is thought negatively to impact his behaviour "*in terms of his impulsivity and erratic tendencies*". Ms Churcher records her agreement with the assessment of "*Report writers*" that "*release direct to a PIPE approved premises would be a better option for [the Claimant] than a period in open conditions*" and quotes the outcome of an April 2022 meeting that "*a move to open conditions would see [the Claimant] quickly returned to closed owing to the lack of structure and specific understanding of specific needs*". Reference is made in the comments to the risk of abscond, both in the section headed "*Is the risk of abscond low*" and in the section headed "*Is there a wholly persuasive case for transferring the ISP from closed to open conditions*". Ms Churcher's conclusions in relation to the risk of abscond and wholly persuasive case criteria are very similar to those quoted above from the Decision.

16. It is common ground that the Decision is based on the facts found in the Recommendation and those found within the dossier. There has been no suggestion that the position is otherwise for the Defendant's Proforma.

17. This claim was filed on 13 November 2023. By order of 31 January 2024, permission was granted by Jonathan Moffett KC sitting as a Deputy Judge of the High Court in respect of the Claimant's second ground and the application in respect of the Claimant's first ground has not been renewed. The second ground alleged a lack of proper consideration of the Parole Board's reasoning in particular in the light of the Parole Board's "particular advantage over the Defendant in making an assessment (per *Oakley* at §51)". Mr Moffett KC found it to be arguable that the point of difference as between the Parole Board and the Defendant was one of predictive judgment in relation to which the Parole Board (having heard the experts and the Claimant) enjoyed a particular advantage and that it did not involve the type of balancing of private and public interests in relation to which the Secretary of State is entitled to take a different view (see *Oakley*, §§48-52). Accordingly the Deputy Judge considered it to be arguable that the

Defendant was required to give very good reasons for departing from the Recommendation and that that level of reasoning had not been achieved.

The Submissions

18. The Claimant is represented by Mr Buckley of counsel and the Defendant by Mr Line of counsel and their written and oral submissions have been of significant assistance in the preparation of this judgment.

19. Mr Buckley placed particular emphasis in his oral submissions on the second, third and fourth principles identified in Mr Justice Fordham's distillation in *R (on the application of Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin) at §28 of the principles to be considered by the Defendant when departing from a recommendation of the Parole Board:

"*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)."

20. Relying in particular on the second principle and the expertise of the Parole Board in assessing prisoners, Mr Buckley submitted that very good reasons were required in this case; and alternatively that in any event the Defendant had failed to accord sufficient weight to the Recommendation. In relation to the wholly persuasive case criterion, Mr Buckley submitted that the Defendant's reliance on risk of absconding under this heading meant that the two criteria are intrinsically linked and that the Defendant had not explained what was not available to the Claimant in open conditions or why he needed relevant support.

21. Mr Line for the Defendant started by emphasising Fordham J's first principle, that the Secretary of State is the primary decision maker. He also pointed to the fact that the Defendant, because of the wholly persuasive case criterion, was required to address a different test to that addressed by the Board by virtue of that additional question which he submitted gave a wider basis to depart from the Recommendation. Mr Line took the Court through the development of the relevant authorities considered below and he contrasted situations where the Defendant differs from the Parole Board in relation to findings of fact (*Gilbert*, §91) or credibility (*Hindawi*, §63) or medical diagnosis (*Oakley*, §48), where he would accept that the Board does have a particular advantage, with situations involving a predictive assessment, where he submitted that the Board did not have such an advantage. In the light of that review, Mr Line submitted that Fordham J's second criterion took insufficient account of the caselaw and that the relevant difference in this case as regards abscond risk was not one where the Board had a particular advantage. Mr Line submitted that the reasons given were succinct but adequate even if the Board did have a particular advantage. His final submission was

that, even if there were an error of approach in relation to abscond risk, it was highly likely that the outcome would not have been substantially different.

Discussion

22. In *R (Banfield) v Secretary of State for Justice* [2007] EWHC 2605 (Admin) at paragraph 28, Jackson J, as he then was, derived five principles from the authorities of which the first was that *"(1) The decision of the Secretary of State is not lawful if he fails to take into account the recommendation of the Parole Board and the fact that the Parole Board has particular expertise in assessing the risk posed by individual prisoners. Nevertheless, it is a matter for the Secretary of State what weight he assigns to those factors in any given case.*" Also paragraph 29 records both the fact that categorisation of prisoners (with which this case is concerned if a Category C prisoner were to be recategorized as Category D) is for the Secretary of State and that, in taking that decision, the "*Secretary of State has the benefit of the expertise of his department, in addition to the benefit of any advice given by the Parole Board.*"

23. *Banfield* was referred to with approval by Lord Justice Sales in the Court of Appeal decision of *R (on the application of Gilbert) v. Secretary of State for Justice* [2015] EWCA Civ 802 from which I shall include an extended citation given first that counsel's submission in that case was, as regards the expertise of the Parole Board, similar to that of Mr Buckley in this case (even though deployed to support an alleged obligation to refer issues of prisoner risk to the Parole Board) and second that it is a Court of Appeal decision among many first instance decisions:

"*69. Ms Hirst submitted that the Board is an expert body in relation to prisoner risk, which is better placed than the Secretary of State to make judgments about such risk; and that since the Secretary of State is obliged to have regard to all relevant factors when deciding how to exercise his discretion, he is obliged to refer any case where prisoner risk may be in issue to the Board for its advice in relation to whether it should give a general recommendation for transfer to open conditions (or at the very least in respect of whether exceptional circumstances exist for the purposes of the absconder policy).*

70. I do not agree with this analysis. There is no authority which supports it. The discretion enjoyed by the Secretary of State in relation to seeking advice from the Board under section 239(2) of the 2003 Act is to be contrasted with the obligation he has to refer cases to it periodically to consider applications for release on licence under section 28 of the 1997 Act. The 2003 Act confers a discretion on the Secretary of State whether to seek advice or not, and the fact that it refers to advice rather than mandatory directions (as in section 28) also underlines the discretion enjoyed by the Secretary of State in this regard: he is not bound to follow advice. Moreover, the Act does not even refer expressly to advice about transfer to open conditions, but only to advice about matters referred to the Board by the Secretary of State "with respect to any matter … which is to do with the early release or recall of prisoners." The statute does not confer on the Board any express function to advise on the question of transfer to open conditions.

71. 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. The

statutory regime recognises this. They do not require input from the Board for every decision they have to make, including those in relation to which prisoner risk may be a significant factor. If, in light of the Secretary of State's policy regarding transfer to open conditions, he does not consider it helpful to refer individual cases to the Board for advice under section 239(2), that is lawful and does not deprive the Board of any function which the statute contemplates it must fulfil (as distinct from a function which it might fulfil, if the Secretary of State thinks it appropriate to ask it to do so).

72. The most far-reaching aspect of Ms Hirst's argument under this ground, as I understood it, was that in the case of every prisoner covered by the absconder policy where the question of transfer to open conditions arises the Secretary of State ought to be asking the Board in general terms whether it would recommend such a transfer and then ought to abide by such recommendation (at any rate, absent very good reason not to).

73. However, this submission ignores the distribution of responsibility between the Secretary of State and the Board as contemplated by statute. The Secretary of State has the relevant discretion whether to transfer a prisoner to open conditions; he can therefore promulgate his own policy as to how that discretion should be exercised (and has done so, so far as is relevant here, by way of the absconder policy); he has a discretion whether to seek advice from the Board; and even if he seeks its advice, he is not bound to follow that advice provided there is sufficient good reason not to (see, e.g., R (Banfield) v Secretary of State for Justice [2007] EWHC 2605 (Admin) at [22] and [28]). The Secretary of State is not obliged to seek the advice of the Board. Further, if the advice given by the Board fails for whatever reason to take into account the relevant policy of the Secretary of State governing the question of transfer to open conditions, that is likely to constitute a good reason for the Secretary of State to decline to follow the advice.

…

92. In so far as Ms Hirst sought to suggest that it was irrational for the Secretary of State to decline to accept the recommendation of the Board that Mr Gilbert be transferred to open conditions, I do not regard that as a sustainable contention. The Secretary of State is entitled not to accept such a recommendation, provided he acts rationally in doing so: see Banfield, above, at [22] and [28] and R (Wilmot) v Secretary of State for Justice [2012] EWHC 3139 (Admin), [47]. In some cases where the Parole Board has reached a view on some point which is the same as a point which the Secretary of State has to consider and the Board is better placed to make an assessment (e.g. it finds a relevant fact after hearing oral evidence from witnesses), it might well be difficult for the Secretary of State to show that it is rational for him to take a different view; …"

24. What I take from *Gilbert* is, in particular, the fact that the Secretary of State and her department have their own expertise which includes assessing prisoner risk. Moreover I regard this conclusion as consistent with Jackson J's first principle in *Banfield* which requires the Defendant to take account of the Parole Board's expertise in assessing the risk posed by prisoners.

25. I was also taken to the judgments of Heather Williams QC sitting as a Deputy Judge of the High Court in *R (on the application of John) v Secretary of State for Justice* [2021]

EWHC 1606 (Admin); Chamberlain J in *R (on the application of Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin); Sir Ross Cranston in *R (on the application of Green) v Secretary of State for Justice* [2023] EWHC 1211 (Admin); and of Eyre J in *R (on the application of Overton) v Secretary of State for Justice* [2023] EWHC 3071 (Admin). The statement of the legal position by Eyre J in *Overton* (in which he quotes the material part of Chamberlain J's judgment in *Oakley*) is both relevant to the current issue and states the law as I understand it currently to be, conscious as I am that counsel informs me that the issue currently before me is to be considered by the Court of Appeal in October 2024:

"*26. … The [Secretary of State's decision] 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]). … 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."

26. I turn then to consider the Claimant's submission, on the basis of *Sneddon*, that my starting point must be that the Parole Board does enjoy a particular advantage in relation

to the assessment of risk so that "very good reasons" are required for the Defendant to depart from the Recommendation. The heading to Fordham J's second principle in Sneddon quoted above is "*legally significant advantage*" and the sixth principle requires "*very good reason*" for departure by the Defendant from the Parole Board recommendation on questions where the Parole Board has a "*significant advantage*". The ordinary meaning of the words used would suggest that Fordham J's view is that the Board *does have* a significant advantage in relation to the assessment of the risks posed by individual prisoners. However that aspect of Fordham J's first principle is derived from *Banfield* §28(1) which was repeated in *R(on the application of Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin) at §6 and *R (on the application of Stephens) v Secretary of State for Justice* [2021] EWHC 3257 (Admin) at §20. I would not read taking into account relevant expertise of the Parole Board (*Benfield*) to be the same as considering the Parole Board, by reason of its expertise in relation to risk, to have a legally significant advantage (*Sneddon* §28(2)) unless proper account is taken of the Defendant's own expertise. The Defendant has her own expertise in relation to assessing prisoner risk (*Gilbert,* §71) so that she must also take account of her department's own experience in making her evaluative judgment. But in any event, I note that Fordham J's principle 7 takes the evaluative judgment of the Defendant as an example of a case where departure from the Parole Board recommendation requires good reason. It is possible therefore that any difference between *Sneddon*, *Gilbert* and *Overton* may be more apparent than real. However I respectfully follow the Court of Appeal's decision in *Gilbert* that the Defendant and her department and its agencies are also experts in the management of prisoners in the prison estate. To the extent necessary, I would prefer the reasoning of Eyre J in *Overton* on the question of whether the Parole Board has a particular advantage in relation to assessing risk. That said, I fully accept Eyre J's comments in paragraph 30 of *Overton* to the effect that there is no brightline distinction between matters of fact on the one hand and assessments of risk or judgments as to the public interest on the other.

27. In the light of those legal principles, I return to the Recommendation at paragraph 4.18 which is the paragraph which addresses the criterion "*the prisoner is assessed as low risk of abscond*" in the Defendant's direction to the Parole Board. In doing so, I am conscious that I should not read this paragraph outside of its context. I would regard in particular paragraphs 2.7, 2.21, 2.23, 4.17 and 4.19 as providing the most relevant context (and, in part, the relevant factual findings) against which to read paragraph 4.18.

28. The first point to make about paragraph 4.18 is that it does not in terms state that the Claimant is assessed as low risk of abscond. The paragraph starts with what may well be a finding of fact when it records Ms Jaines view that the Claimant would not overtly intend to abscond. This is not however the point of difference with the Defendant. Reference is made next to Ms Molloy's recognition of an abscond risk which, though not imminent, could increase if the Claimant were victimised. The Board then expresses the view that the Claimant's confidence has grown so that he is able to express concerns to professionals and to seek support, which, particularly when read with the view that the Claimant's risk to the public is "*manageable in open conditions should he receive the correct support*", appears to reflect a view that the Claimant's abscond risk has diminished. Indeed, the words "*as such*" in the last sentence appear designed to link the fourth sentences with the three preceding sentences. Mr Line sought to persuade me that those words are limited to the third sentence but in my view that would be to read the Board's words in too legalistic a way. At all events, the fourth

sentence is conditional ("*if*") and also predictive ("*should be*"). In my judgment, the fourth sentence is of a more tentative nature than say a finding that "*we assess the Claimant to be a low abscond risk*". Had there been a finding in such terms, it would be much closer to a finding of fact than is in my judgment the case here.

29. I turn then to consider the Decision. It was submitted by the Claimant that all that preceded the final paragraph in relation to abscond risk was a mere narrative of the Recommendation so that the reasoning was limited to a single paragraph. In my judgment that does not do justice to the Decision. The first sentence seeks to summarise the Board's view. However the Decision then makes three factual points albeit that the first and third would appear to incorporate significant overlap:

    i) That the reports state that abscond risk increases depending on how Claimant is feeling/coping and on Claimant's impulsive behaviour;

    ii) That the OASys Assessment of 30 January 2023 (a few days before the hearing before the Parole Board) records an abscond risk albeit likely on impulse rather than by pre-planning;

    iii) The professionals before the Board considered abscond risk to be linked to how Claimant felt he was coping, so that if something went wrong, he might act impulsively.

30. In the next sentence commencing "*It is not evident …*", the word "*this*" refers to those three factual points drawn from a combination of the Recommendation and the dossier. In the light of those factual points, the Defendant is clearly disagreeing with the Board's prediction that the Claimant should be low risk even though it is based on the same evidence. The next sentence (commencing "*Bearing in mind …*") explains the basis of the disagreement as being that because the Claimant "*often present[s]*" as "*impulsive and erratic*", the risk of the Claimant not using skills learned becomes harder to manage. That sentence directly addresses the express condition incorporated into the Board's assessment without which the Board's assessment of low abscond risk is not valid. It also evaluates the reality of the Board's assessment in the third sentence of paragraph 4.18 that the Claimant is "able to approach professionals" when considered against the background of the Claimant's impulsive conduct.

31. I repeat that there is no suggestion that any of the factual averments by the Defendant either differ from the findings of the Board and/or are not found within the dossier.

32. In my judgment, the Board's assessment is based on a prediction but the facts in the dossier are reasonably capable of bearing a different interpretation, in particular when weighed against the public interest where this prisoner is recorded in the Proforma as having been assessed as "*a high risk of serious harm to children and a known adult*". That places the relevant element of the Recommendation firmly at the evaluative/predictive end of Eyre J's continuum in paragraph 30 of *Overton*, an area where the Secretary of State must retain the freedom to balance the public interest against the genuine private interest of a Claimant who is still in prison even though he is 14 years beyond a 20 month minimum tariff. The result is that less intense reasoning is required from the Secretary of State in deciding not to accept the Recommendation and it is not necessary to show "very good reasons" for departing from the

Recommendation. In my judgment, the Decision is sufficiently reasoned in that it explains the basis on which it differs from the Recommendation on the key issues.

33. Even if that were not the case, and it were subsequently established that the Board does have a particular advantage in relation to the assessment of abscond risk, then even though the Defendant's reasoning is compressed, the same can be said of the Board's reasoning in paragraph 4.18. Given the Board's reliance on the condition that the Claimant applies the skills he had put to use at HMP Whatton, a decision which identifies a range of circumstances in which the condition may not be fulfilled, when considered in conjunction with the fact that the Defendant is answerable both to the public and to Parliament for decisions on categorisation of prisoners, in my judgment supplies very good reasons for departing from the Recommendation.

34. Thus far I have not relied in my reasoning on the Defendant's Proforma. Mr Line relied on the Proforma to buttress the reasoning in the Decision whilst Mr Buckley was more neutral, promising to refer me to two judgments on this issue. When one considers the close proximity in time of the two documents (8 and 10 August 2023) and the almost identical reasoning in the conclusion to both documents, in a very real sense the Proforma is at least part of the preparatory work for the Decision. The Proforma looks intended to be an internal process but there is no suggestion that there is any difficulty in practice in claimants or their representatives having access to such proformas. Moreover such proformas have the evident advantage of being constructed around the legal tests set out in the relevant policies so that they help to ensure that the resultant decision has followed the required process and addressed the relevant criteria. Given the similarity in drafting of the Decision and the conclusions in the Proforma, it is apparent that the Proforma must have been before the Secretary of State when the Decision was taken. In the Court of Appeal decision of *R (Electronic Collar Manufacturers' Association) v Secretary of State for the Environment, Food and Rural Affairs* [2021] EWCA Civ 666 at paragraph 95, the Court of Appeal took into account in assessing the decision a ministerial submission to which was attached a draft consultation response document of which the final section entitled "Government response" was considered to constitute the decision. In circumstances where there was evidence that the draft consultation response and the submission had been before Ministers at the time of the decision, Laing LJ held that "*the Judge was entitled, and right, to take [them] into account*".

35. If my conclusion stands that this was not a case where the Parole Board enjoyed a particular advantage is correct, it seems to me that the Decision provides sufficient reasoning and so the Proforma makes no difference. If however, contrary to my finding, the Parole Board did enjoy a particular advantage, in my judgment the Proforma can be taken into account to support my decision that very good reasons have been provided. Whilst I note the acceptance by the Defendant's counsel in another case concerned with Parole Board recommendations, *R (Hahn) v Secretary of State for Justice* [2024] EWHC 1559 (Admin) at paragraph 18, that the contents of the proforma were not relevant to the rationality of the decision in that case, the Court of Appeal judgment in *Electronic Collar* was not referred to and it seems to me that, to the degree to which the question is relevant, the circumstances of this case indicate that the contents of the Proforma, whilst not the Decision, inform and amplify the reasons for the Decision and in my judgment confirm that very good reasons were present here for departing from the Parole Board's recommendation, if, contrary to my finding, that were the relevant

test. I refer in this regard, in addition to the material under the headings "Is the risk of abscond low?" and "Is there a wholly persuasive case for transferring the ISP from closed to open conditions" to the material under the earlier headings ("Identified risks and assessment", "Interventions", "Behaviour/compliance", "Risk Management") from which it is apparent that:

i) The Claimant is assessed to pose a high risk of serious harm to children and a known adult and medium to the public;

ii) The Claimant declined medication to manage ADHD and impulsivity;

iii) Not taking medication is thought to negatively impact his behaviour in terms of his impulsivity and erratic tendencies;

iv) Report writers consider that release direct to a PIPE approved premises would be a better option for the Claimant than open conditions. Ms Churcher expresses agreement with that assessment;

v) All professionals in a meeting on 17 March 2022 agreed that "*a move to open conditions would see [the Claimant] quickly returned to closed owing to the lack of structure and specific understanding of his specific needs*".

Wholly persuasive case

36. I turn now to the criterion which the Board was not required to, and did not, address. The Defendant's own reasoning establishes a clear link between the abscond risk and a wholly persuasive case for transferring the Claimant from closed to open conditions. Whilst the reference to the level of structure and support available at open prisons is, to a degree, a separate point, the Defendant establishes a further overlap with the abscond risk reasoning by relying on the Claimant's "tendency to act impulsively". I accept that the context is different in that the concern expressed under this heading is not that there will be impulsive conduct but rather that, in the light of the Claimant's difficulties in group environments together with impulsive and erratic conduct, a more structured level of support is required which could better be offered within the closed prison estate where "PIPE or Progression Regime" are available. In my judgment, those considerations do answer the questions posited by Mr Buckley as not answered: a) What is not available? - PIPE or Progression Regime are not available in open conditions; b) why Claimant needs that support? – because of Claimant's difficulties in group environments together with impulsive/erratic conduct.

37. Despite the distinction identified between this criterion and the abscond risk, I do accept that, on the facts of this case, there is an air of unreality in considering this criterion separately from the abscond risk. The Defendant's reliance on the Claimant's impulsiveness knits the Defendant's reasoning on the two criteria together. If, contrary to this judgment, it were later to be considered for example that any impulsiveness were marginal and insufficient to ground the Decision, such a finding would undermine the Defendant's consideration of both criteria. Accordingly, though I consider the Defendant's reasoning on "wholly persuasive case" to support her reasoning on abscond risk, I would not base my judgment that the Defendant is entitled to depart from the Recommendation on the fact that Defendant was here considering an additional criterion.

Conclusion

38. The claim is dismissed.