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Case No: AC-2023-CDF-000152

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

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

Date: 24 September 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

THE KING on the application of BRENDON OXENDALE	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Carl Buckley (instructed by **Bhatia Best Solicitors**) for the **Claimant**
Tom Cockroft (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 10 September 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. The claimant, Mr Brendon Oxendale, who is now aged 40 years, is a Category C prisoner at HMP Ashfield. On 7 November 2008, when he was aged 24 years, he was sentenced to Imprisonment for Public Protection ("IPP") with a minimum tariff of 5 years (less 140 days served on remand) for rape of a female under the age of 13, penetrative assault of a female under the age of 13, and penetrative sexual activity with a female under the age of 16. His tariff expired on 20 June 2013. Between August 2017 and July 2020 the claimant was held at an open prison, but he was then transferred back to closed conditions.

2. The Secretary of State referred the claimant's case to the Parole Board for determination under section 28 of the Crime (Sentences) Act 1997 as to whether he should be released on licence and, if he should not, for advice pursuant to section 239(2) of the Criminal Justice Act 2003 as to whether he should be transferred to open conditions. The Parole Board issued its decision on 28 April 2023, having held a hearing ("the Hearing") on the previous day. The Parole Board made no direction for the claimant's release. However, it recommended that he be transferred to open conditions.

3. By a decision dated 26 September 2023 ("the Decision") the defendant, the Secretary of State for Justice, rejected the Parole Board's recommendation.

4. With permission granted on 25 April 2024 by His Honour Judge Lambert, sitting as a Judge of the High Court, the claimant applies for judicial review of the Decision.

5. I am grateful to Mr Buckley and Mr Cockroft, counsel respectively for the claimant and the defendant, for their helpful submissions.

The Legal Framework

6. Section 12(2) of the Prison Act 1952 provides:

> "(2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct; and may by direction of the Secretary of State be removed during the term of their imprisonment from the prison in which they are confined to any other prison."

7. Section 47(1) of that Act empowers the Secretary of State to make rules for *inter alia* the classification, treatment, employment, discipline and control of prisoners. The Prison Rules 1999 were made in exercise of that power. Rule 7(1) provides:

> "(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."

8. Section 239(2) of the Criminal Justice Act 2003 provides:

> "(2) 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."

9. The Secretary of State has the power to ask the Parole Board for its advice on whether a prisoner is suitable for transfer to open conditions. However, the Secretary of State is not obliged to ask for such advice. The decision whether to transfer a prisoner to open conditions is that of the Secretary of State, not that of the Parole Board. The Secretary of State is not bound to accept the Parole Board's recommendation but, if it is to be rejected, sufficient reasons must be given to justify the rejection. (The law on this point is further considered below.)

10. At the time of the Panel's recommendation in April 2023, the Directions issued to the Parole Board, as recorded in its decision, were as follows:

> "If release is not directed, panels are to consider if a recommendation for transfer to open conditions can be made. Before recommending the transfer, 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.
>
> The Parole Board must only recommend a move to open conditions where it is satisfied that the two criteria as described at (iii) are met."

11. Those Directions reflected the terms of the Secretary of State's policy document, the Generic Parole Process Policy Framework ("the Policy Framework"), as re-issued on 30 September 2022. Under paragraph 5.8.2 of the Policy Framework as it then stood, the Secretary of State would only accept a recommendation to transfer to open conditions where:

> (i) The prisoner was assessed as low risk of abscond; and

(ii) A period in open conditions was considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and

(iii) A transfer to open conditions would not undermine public confidence in the Criminal Justice System.

(The third limb of the test was a matter solely for the Secretary of State, not for consideration by the Parole Board.)

12. However, the text of the Policy Framework was amended on 16 August 2023. At the date of the Decision, paragraph 5.8.2 read:

> "The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP [Indeterminate Sentenced Prisoner] 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."

13. With effect from 1 August 2023, the standard Directions to the Parole Board have changed, so as to reflect the current text of paragraph 5.8.2 of the Policy Framework.

14. As the principles of judicial review are reasonably well settled, and as it is also clear that the issue for the courts is whether the decision of the Secretary of State to reject a recommendation to transfer a prisoner to open conditions was lawful, not whether the Parole Board was entitled to make its recommendation, it is perhaps a little surprising that the case-law on the point is so extensive, not to say elaborate. In addition to the 13 authorities to which counsel in this case referred me, I have had regard to two very recent decisions: *R (Hahn) v Secretary of State for Justice* [2024] EWHC 1559 (Admin) (Eyre J), and *R (Carrigan) v Secretary of State for Justice* [2024] EWHC 1940 (Admin) (Fordham J). My own understanding of the law has been set out in *R (Oakley) v Secretary of State for Justice (No. 2)* [2024] EWHC 292 (Admin) and *R (McPhee) v Secretary of State for Justice (No. 2)* [2024] EWHC 1247 (Admin), as well as in *R (Khalisadar) v Secretary of State for Justice* [2024] EWHC 2408 (Admin), which is being handed down this morning. It may be that the Court of Appeal, which is shortly to hear appeals in *Oakley (No.2)* and *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin), will streamline the analysis. At all events, for the purposes of this case, the clear and succinct statement of Sir Ross Cranston in *R (Green) v Secretary of State for Justice (No. 2)* [2023] EWHC 1211 (Admin) will suffice:

> "42. In drawing the threads together, it seems to me that the following applies if the Secretary of State is to disagree with the recommendations of the Parole Board for a prisoner's move to open conditions:
>
> i. the Secretary of State must accord weight to the Parole Board's recommendations, although the weight to be given depends on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make;
>
> ii. on matters in respect of which the Parole Board enjoys a particular advantage over the Secretary of State (such as fact finding), he must give clear, cogent, and convincing reasons for departing from these;
>
> iii. with other matters such as the assessment of risk, where the Secretary of State is exercising an evaluative judgment, he must accord appropriate respect to the view of the Parole Board and he must still give reasons for departing from it, but he can only be challenged on conventional public law grounds such as irrationality, unfairness, failure to apply policy, and not taking material considerations into account."

I add only, with respect, that I tend to think that the courts should be wary of the risk of allowing concepts like "legally significant advantage" or "due process advantage" to undermine the Secretary of State's position as the person with constitutional authority and responsibility for the decisions in question.

The Parole Board's Recommendation

15. At the Hearing, the claimant was represented by a solicitor. The defendant was not represented. The Panel received evidence from five witnesses: Sarah Lowe, the Prison Offender Manager ("POM"); Lucy Merrick, the Prison Psychologist; Emma John, a prisoner-commissioned Psychologist; Tina Jay, the Community Offender Manager ("COM"); and George Rayment, the Security Manager. A victim statement was read to the Panel by the Prison Chaplain.

16. The Panel's decision recorded that, prior to the index offences, the claimant had one conviction for common assault upon his partner in 2006, when he was 22 years old. In 2004 another woman, with whom he was having an affair, made an allegation of rape against him; however, he denied the allegation and no charges were brought. The index offences, which took place between May 2005 and July 2008, were described as being similar, in that all three victims were considerably younger than the claimant, lived near him, and were befriended by the claimant and encouraged by him to come to his home when his partner was out and their young child was asleep in the house. The decision recorded that there was "grooming, pre-planning and distorted thinking" on the claimant's part and that he had minimised his conduct, maintaining that the activity had been consensual and that one of the victims had been "trying it on". The Panel's analysis of the claimant's pre-sentence history concluded:

> "1.11. From Mr Oxendale's previous offending and index offences, the panel considers that his risk factors include sexual preoccupation, sexual interest in children, sexual entitlement, child abuse supportive beliefs, aggression and violence, his attitude towards offending, inappropriate relationship management, negative lifestyle and associates, poor thinking skills, and a lack of victim awareness. The need for stable accommodation, education, training and employment, are criminogenic needs not linked to the risk of reoffending."

17. Section 2 of the Panel's decision considered the evidence of the claimant's progress while in prison. It quoted at length from the Parole Board's last review of the claimant in May 2021, which recorded that, having been in open conditions at HMP Leyhill, in July 2020 the claimant was returned to closed conditions

> "following a series of intelligence concerns linking you to the supply of pornography at the prison. Concerns were raised that you were involved in the repair or corruption of other prisoners' gaming devices, rendering them internet enabled. Your workplace was searched, and a large number of illicit items were recovered including a handwritten list of pornographic websites and material, some with titles which suggested links to child pornography. It appeared that you had been taking 'orders' from other inmates to upload certain websites to their games consoles. Whilst the websites may not have been illegal the prison was rightly concerned that you had broken prison rules. Furthermore, following a room search a DVD was located, which when interrogated contained a large amount of downloaded material, which although not pornographic, was suspected of being downloaded illicitly. The panel [in 2020] noted that at the time of your recategorisation you denied any involvement in distributing pornography at the prison or being in control of the illicit items found. This is set out in updated legal representations dated 21st August 2020. For this reason, a new hearing date was set to consider the matter. However, as already noted at the behest of those representing you a PNA was then requested. The PNA was duly completed and recommended further core risk reduction work. The work recommended is the Horizon Programme, and to your credit you have already relocated to HMP Ashfield to complete the same. It is hoped that you will be able to access this work ahead of your next parole review."

The Panel's decision in April 2023 recorded that the claimant had indeed completed the Horizon Programme in November 2021; he had previously completed the Enhanced Thinking Skills (ETS) in 2009 and the Core Sex-Offender Treatment Programme (C-SOTP) in 2012. However:

> "2.5. After completing Horizon, on 04/03/22, Mr Oxendale was found in possession of USS components and a USS blocker (the panel confirmed with Mr Rayment, head of security, that

> this was an item to block off a USS port). He was adjudicated and returned to standard IEP regime. It was suggested that this raised concerns regarding his attitude and whether he was simply 'going through the motions of completing programmes'. It was suggested that Mr Oxendale remains sexually preoccupied with an interest in under 18 year olds.
>
> 2.6. On 04/04/22, further intelligence suggested that Mr Oxendale had a DVD player which had a hard drive built in full of porn and that he was charging £20 - £30 to upload porn onto USS sticks and was targeting prisoners who have just completed programmes. An intelligence led cell search was conducted and a DVD player was found in his possession which was not his and which was removed from his possession. The allegation of distributing porn remains unproven."

18. The Panel noted that Ms Lowe, the POM, had recorded in an updated report in November 2022 that the claimant had received positive comments about his work ethic but "negative entries for issues of poor compliance with the prison regime." Ms Lowe told them that she had managed the claimant during his earlier time at HMP Ashfield and had seen no change in him across that time. She considered that he was minimising his behaviour, in particular by blaming prison officers for allowing him to bring the DVD player from HMP Leyhill. She said that, despite encouragement, he had not provided any "sexual thoughts diaries", which he said he found unhelpful.

> "2.11. Ms Lowe considered Mr Oxendale should be returned to open conditions to demonstrate better compliance with rules, less boundary pushing and to build his relationship with his Community Offender Manager (COM), which she described as volatile, or to have a fresh start with a new COM. She did not consider there to be any Core Risk Reduction work for Mr Oxendale to complete, saw a period in open conditions as essential, and that Mr Oxendale presented a low risk of absconding."

19. Ms Merrick had undertaken a psychological risk assessment, which indicated that the claimant "had made progress in addressing his risk factors and should focus on practising and consolidating his acquired skills." The Panel's decision records:

> "2.23. Ms Merrick considered that the imminence of Mr Oxendale's risk of sexual violence would increase in less secure settings, if he experienced low self-esteem, feelings of inadequacy, lack of pro-social support, conflict within relationships, an absence of emotional intimacy within relationships, sexual preoccupation, unhealthy sexual thinking, poor coping, mental health instability or disengagement from professional support. The imminence of risk of intimate partner violence would increase should Mr Oxendale enter a relationship which is or becomes unhealthy, and where he is unable to use his skills to cope; if events went undetected the

> risk of serious physical or psychological violence could increase over time.
>
> 2.24. Ms Merrick identified warning signs to Mr Oxendale's risk increasing and proposed supervision strategies. She concluded that release would require a robust release risk management plan. Open conditions would allow Mr Oxendale to continue to strengthen his protective factors. If Mr Oxendale were to remain in closed conditions, consideration could be given to a Progression PIPE referral, with the continuation of the NEW ME MOT and sexual thought diaries."

In her oral evidence to the Panel, Ms Merrick expressed her opinion that the claimant should be returned to open conditions. That was also the recommendation of Ms John. She considered that the claimant could be evasive when discussing sexual matters, and she "remained concerned that he was not being open and honest about his sexual thought frequency; this might translate to his future use of pornography, which would impact on his management." The Panel recorded:

> "2.31. Neither psychologist considered Mr Oxendale required further offending behaviour work beyond consolidation, or to be at risk of absconding from open conditions, and both considered a period in open conditions to be essential to future risk management."

20. Ms Jay, the COM, accepted that her relationship with the claimant had been volatile. She viewed his "boundary pushing and minor infringements as holistically demonstrating a lack of acceptance of his risk" and did not support his release. She considered his biggest risk factor to be his sexual interest and preoccupation and was concerned about his ability to be open and honest in that area.

21. The claimant gave evidence to the Panel. (I note that the two psychologists heard his evidence before giving their own.) He expressed regret for his past conduct and accepted that there had been grooming of his victims. He denied the allegations that he had modified devices to have internet access or downloaded anything, but he admitted having a list of pornographic website addresses and said that he would like to look at legal pornography in the community. He said that his sexual interest was in adult females of a similar age to his own, not young females. He said that he had been angered by the fact that, when he had kept diaries in respect of his sexual thoughts, they had not been reviewed regularly. (Ms Merrick observed that it would be preferable if he were able to see the value in such diaries beyond them being reviewed by others. The Panel expressed the view that it was more important for the claimant to have regular open and honest discussions with professionals.) He said that, if he were not released, he would see a move to open conditions as a progression that would afford him the opportunity to prove himself, to build his support network, and to explore training and employment options.

22. The Panel's conclusions as to the risk presented by the claimant were as follows.

> "2.38. Mr Oxendale's risk assessment is shown in the latest reports as low risk of proven reoffending, general reoffending,

> and violent reoffending. There is a medium risk of contact sexual reoffending, with a low dynamic risk. A previous Spousal Assault Risk Assessment (SARA), placed Mr Oxendale at a low risk of intimate partner violence, however, Ms Merrick did not repeat the assessment, noting that their [sic] was an absence of collateral information. There is a high risk of serious harm to children, with a medium risk to known adults. The panel agrees with this assessment based on the record of offending to date, and considers that sexual preoccupation, sexual interest in children, sexual entitlement, child abuse supportive beliefs, aggression and violence, his attitude towards offending, inappropriate relationship management, negative lifestyle and associates, poor thinking skills, and a lack of victim awareness, are factors that justified the analysis of risk. However, given Mr Oxendale's admitted interest in internet pornography, and the frequency of the security intelligence regarding illicit access, his risk of indecent image offending should not be overlooked.
>
> 2.39. The panel considered that Mr Oxendale's abstention from alcohol use, and family support were protective factors, which would reduce the risk of offending in the community. Whilst his motivation to complete offending behaviour work and to engage with professionals was positive, he needs to demonstrate that he can be open and honest and work with all professionals, regardless of past differences."

23. As regards the future management of risk, the Panel did not direct the claimant's release, because it considered that the proposed release risk management plan "[did] not address the identified risk of sexual preoccupation, sexual interest in children, sexual entitlement, and child abuse supportive beliefs. These areas required clear evidence of the demonstration of internalised risk management skills, which was currently lacking in Mr Oxendale."

24. The Conclusion was in the following terms:

> "4.1. The panel considers that Mr Oxendale presents a medium risk of sexual contact reoffending because he has yet to demonstrate full understanding of the areas that place him at risk of further offending. The panel considered that Mr Oxendale minimised his offending, and ongoing risk arising from not appropriately managing himself. The panel also identified evidence of 'permission giving' associated with his index offences, which remained apparent in his responses to challenges about his breaches of rules and boundary pushing.
>
> 4.2. The panel also concludes that Mr Oxendale presents a high risk of serious harm to children because his sexual interests, if acted upon, place others at risk of physical or psychological harm.

> 4.3. The panel carefully considered the potential of Mr Oxendale being released into the community and not re-offending, deciding that unless he addresses his thinking skills in relation to risk management and openness and honesty with professionals, further work in the community was unlikely to succeed and the risk of offending would remain. The risk of offending and harm Mr Oxendale presents is not manageable within the plan, given his level of risk. Therefore, the panel does not direct release.
>
> 4.4. The panel agreed with all the professional witnesses that Mr Oxendale had completed all core risk reduction work available to him in closed conditions. There are benefits from a further period in open conditions including further testing of his compliance with boundaries, building relationships with professionals, developing his release risk management plan. The panel considered that the residual risk can be safely managed in open conditions, including when on temporary release. There was no heightened risk of Mr Oxendale absconding. Therefore, the panel recommends that he be transferred to open conditions."

The Secretary of State's Decision

25. Although the Secretary of State's own policy was to consider the Parole Board's recommendation within 28 days of receiving it, the Decision was not provided until nearly five months later; this delay was due to a backlog of cases within the Public Protection Casework Section. The Decision set out the criteria for transfer to open conditions and stated that the decision-maker had carefully considered the test alongside the information contained in the claimant's dossier, the Parole Board's recommendations and the views of the report writers. The evidence filed by the Secretary of State states that the decision-maker had particular regard to the Parole Assessment Report Offender Manager Report dated 11 April 2022 and the Offender Assessment System (OASys) Report dated 7 April 2022. The Decision stated that the Secretary of State had concluded that

> "the following criteria were <u>not</u> met:
>
> - *The prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licenced [sic] temporary release);*
>
> - *There is a wholly persuasive case for transferring the ISP from closed to open conditions.*"

26. The reasons for concluding that the criteria were not satisfied were stated by reference to material in the Panel's decision and documentation that was before the Panel.

Regarding what I shall call the Sufficient Progress Criterion, the Decision gave the following reasons (I omit the quotations).

> "• There is a disconnect between your successful participation in interventions, and your actions and behaviour following these. After completion of the Core SOTP and ETS, you progressed to open conditions at HMP Leyhill in August 2017. Prior to your removal from open conditions in July 2020, you were found in possession of pornographic materials in 2019. In July 2020, intelligence received led to a number of unauthorised items being found in your cell, including a number of tools and paraphernalia relating to the modified use of internet enabled devices, and porn, including a list of pornographic websites, one of which describing content involving teenaged girls. Intelligence at the time also suggested that you were involved in the supply of pornographic material at the prison. You have not fully accepted responsibility for this instead seeking to minimise it. The disconnect suggests that the interventions you have completed have not had the desired impact on your actions and behaviours.
>
> • On your return to the closed estate, you completed the HORIZON programme to a very good standard.
>
> • Whilst you have completed interventions to address your identified risks, and to a good standard, you do not appear to be able to put this learning fully into practice. It is not clear whether this is an area of learning for you, or if you do indeed understand these issues and are instead choosing not to apply the skills you have gained. There have been incidences since your completion of the HORIZON programme which indicate there is further work for you to do to explore your inability to avoid behaviours that have been clearly identified to you as problematic.
>
> • There also remain concerns around your relationship with your Community Offender Manager (COM). Having managed you over a 15 year period, the COM knows you well and is therefore appropriately able to challenge you. You do not always respond well to this, however, …
>
> • With the exception of the period as a category D prisoner, between 2017 and 2020, you have been category C since May 2013. At the time of your oral hearing, you were enhanced on the IEP scheme, but you have also spent time at standard and basic. Prior to the recent parole hearing there were 14 adjudication records, with 8 proven charges, the most recent of which took place in March 2022 for possession of an unauthorised item (USB related). Other

proven charges are for using threatening or abusive words or behaviour, possession of unauthorised articles, and disobeying lawful orders.

- There have been concerning incidences reported since completion of the HORIZON programme which suggests that you are not utilising the learning from interventions completed. Although your Prison Offender Manager (POM) is of the view that you should be returned to open conditions, they have set out that they consider you to be minimising your behaviour. There are also references in the OASys assessment to a 'casual and blasé' attitude to expectations of you during periods of temporary release which appears to mirror your general attitude to issues raised with you that you do not agree warrant attention.

- You have not taken responsibility for your behaviour in prison [this observation was made with specific reference to material in the OASys Report from November 2022], and have tended to blame others for the situations you have found yourself in. There are also concerns around your ability to be fully open and honest with those managing you, as demonstrated by your behaviour whilst on temporary release at HMP Leyhill. A build-up of relatively minor issues/infringements could potentially lead to more significant concerns, with wider implications for the protection of the public if you were to reside in an open prison.

- Use of pornography and relationships with women are risk factors for you. Your removal from open conditions due in part to possession of pornography, and your lack of honesty around periods of ROTL in terms of meeting up with a female friend, is concerning when considered in light of the identified areas of risk."

27. Regarding what I shall call the Wholly Persuasive Case Criterion, the Decision gave the following reasons.

> "• There are continuing concerns around your ability to utilise the learning you have gained from interventions undertaken. Also of concern is whether you are fully engaging with those managing you when it comes to acknowledging your risk or being fully open and honest, including around undertaking work that you may not view as necessary.
>
> • Your last period in open conditions ended when you were found in possession of a number of items demonstrating offence paralleling behaviours. Your subsequent

> completion of the HORIZON programme, albeit completed to a very good standard, has not resulted in your full compliance with your sentence plan.
>
> • As such, the Secretary of State is of the view that options for further work to consolidate learning gained from interventions, and to explore the continued behavioural concerns in closed conditions is appropriate at this time."

28. The Decision concluded by encouraging the claimant to work with staff "to understand what is required of you in the lead up to your next review to assist your progression and explore the options available to you."

The Grounds of Challenge

29. There are two grounds of challenge to the Decision:

    1) That the defendant failed to have regard to material considerations;

    2) That the rejection of the Parole Board's recommendations was irrational.

30. As to Ground 1, it is submitted on behalf of the claimant that the defendant failed to take into account two material considerations: first, the expert opinions of the two psychologists; second, the evidence, accepted by the Panel, that there was no further work for the claimant to complete in closed conditions. As to the evidence of the psychologists, Mr Buckley submits that the Decision does not even mention it, far less engage with it. As to the evidence that no further work remained to be done in closed conditions, Mr Buckley submits that this was addressed squarely by the witnesses and by the Panel, that no work was identified that needed to be done in closed conditions, and that the Decision itself does not explain why there is such work and does not identify any such work.

31. As to Ground 2, the submission on behalf of the claimant is that the defendant failed provide sufficient reasoning, in engagement with the Panel's reasoning and conclusions, to justify the rejection of its recommendation. The Decision focuses on the negative aspects of the claimant's case, all of which were expressly considered by the Panel, but does not engage in the necessary reasoning to show why they weighed more heavily in the balance than the Panel had considered. To that extent, the Decision rests at the level of mere assertion.

32. For the defendant, Mr Cockroft submits that neither ground should succeed. The Decision was based on the conclusion that there was no "wholly persuasive case" for moving the claimant to open conditions, a matter that was outside the Parole Board's remit and on which it made no direct findings. The assessment of risk and its manageability in the open estate was a matter on which the Secretary of State was entitled to differ from the Panel, whose opinion on the point was baldly stated in paragraph 4.4 of its decision. The Secretary of State identified the matters leading to the conclusion that there had not been sufficient progress, was entitled to depart from the Parole Board's recommendation and gave sufficient reasons for doing so.

33. These summaries do not do justice to counsel's detailed submissions, but I think they summarise the main points.

Discussion

34. In my view, Ground 2 is the nub of the challenge. Mr Buckley, who did not draft the grounds, agreed; while he did not abandon Ground 1, the focus of his submissions was on the alleged irrationality of the Decision having regard to the entirety of the material considered by the Panel and to its own conclusions. The contention that the Secretary of State simply failed to have regard to the psychologists' evidence or to the evidence before the Panel, and the Panel's conclusions, regarding further work in closed conditions seems to me to be impossible to maintain. The Secretary of State was not obliged to recite all the evidence or all the matters considered, provided that the central issues were addressed and the decision explained. Further, the Decision makes clear that the Panel's decision and the evidence of the writers of reports had been considered. The real point of the challenge is, I think, that in the light of these matters and the other evidence and the Panel's reasoning and recommendation, the rejection of the Panel's recommendation has not been justified by reasons sufficient to establish its rationality.

35. In my judgment, however, when read fairly, as a whole and in context, the Decision provides a sufficient rational justification for rejecting the Parole Board's recommendation.

36. Most of the focus in argument was on the defendant's treatment of the Sufficient Progress Criterion (paragraph 12 above). Mr Buckley's central complaint was that the Decision merely picks out adverse factors that are "copied and pasted" from the Panel's decision without either engaging with the Panel's consideration of them or giving a proper explanation of why they are determinative. In my view, that is unfair. In reaching the conclusion that the Sufficient Progress Criterion was not met, the decision-maker did not reject any factual findings, far less any that turned on expert evidence, nor did she dissent from any finding on which the Panel might have had a significant advantage, such as a diagnostic issue that had been explored in the course of oral evidence. Rather, the Secretary of State's decision-maker was well able to consider the matter, including the opinions of the psychologists, on the papers, and she made an evaluative assessment on the basis of a number of identified matters of obvious concern. These included the following: that, when previously transferred into open conditions and released on temporary licence after completing various interventions, the claimant had shown a level of disregard for what was expected of him while on temporary release on licence and had been "found in possession of a number of items demonstrating offence paralleling behaviours"; that, even since thereafter completing the Horizon programme to "a very good standard", the claimant had received an adverse adjudication, was considered to be minimising his behaviour, and was still manifesting a lack of openness and honesty and a lack of engagement with work that he did not consider necessary and issues that he did not think warranted attention, as well as antagonism towards his COM. The decision-maker was concerned that completion of formal learning was not reflected in objective practice but that there was "a disconnect between [the claimant's] successful participation in interventions and [his] actions and behaviour following these", suggesting that "the interventions [he has] completed have not had the desired impact on [the claimant's] actions and behaviours." All of this is clearly substantiated by the

evidence. It is all, moreover, to be seen in a context where the claimant was unable to explain under-age content on one of the porn websites he had identified as being of interest (Panel's decision, paragraph 2.16), where Ms John considered that the claimant could be evasive when discussing sexual matters and was not being open and honest about his sexual thought frequency, which might have consequences for his management (paragraph 2.30; see the similar concerns of Ms Jay, at paragraph 2.36), and where the Panel itself concluded that there was an ongoing risk from lack of appropriate self-management (paragraph 4.1) and that the claimant's sexual interests indicated that he presented a high risk of serious harm to children (paragraph 4.2).

37. I do not accept that the lack of mention in the Decision of the psychologists' evidence indicates a lack of proper engagement with the materials before the Panel or its conclusions. Psychological evidence may inform a decision regarding the Sufficient Progress Criterion, in particular because psychologists make use of certain risk-assessment tools including the Risk for Sexual Violence Protocol (RSVP) and the Structured Assessment of Protective Factors for violence risk (SAPROF), but such a decision is itself one regarding risk-management in the open estate, not psychology, and on that matter the Secretary of State and the departmental officials have acknowledged expertise as well as primary constitutional responsibility. Further, although the psychologists did address risk-management as well as progression-management, it is worth bearing in mind that they were doing so as part of one exercise. The fact that a period in open conditions is essential prior to the claimant's eventual release was a relevant matter for the Parole Board and the witnesses before it to consider (see, in this regard, the conclusion of paragraph 2.31) but is not the issue for the Secretary of State under the Sufficient Progress Criterion, which addresses the specific question whether the period in open conditions ought to be at this particular juncture. The decision-maker had to make an evaluative assessment on the question whether the Sufficient Progress Criterion was met. She addressed that issue head-on and, having rationally explained why it was not met, she did not have to pile reasons upon reasons by adding a further explanation why she differed from the opinion of the psychologists and (though shortly stated) of the Panel that the residual risk could be safely managed in open conditions and when on temporary release.

38. Mr Buckley submitted that the Decision failed to identify any particular learning that the claimant might undertake to reduce his risk, mentioning only the possibility of entering a Progression Regime subject to eligibility and suitability requirements, a possibility that none of the professionals had ever suggested. Again, I do not think that there is anything of substance in this point. The Decision itself concerned the question of transfer to open conditions and, in particular, whether the Sufficient Progress Criterion was met. It was not a decision for the purpose of planning a programme for the prisoner's future progress. The mention of a Progression Regime was contained in two general paragraphs that appear to be routinely included in decision letters whether or not they are useful or appropriate. However, although no one has identified core work that remains to be undertaken and the psychologists saw no requirement for further offending behaviour work "beyond consolidation" (paragraph 2.31), this is not a case where nothing remains for the claimant but to demonstrate in open conditions that what he has learned so far can be put into practice in a less-regimented context, or where there are only potential but not demonstrably actual risk factors. Thus Ms Merrick said that the claimant "needed to develop and demonstrate his use of internal management" (paragraph 2.28: my emphasis; and see

the Panel's comments on self-management in paragraph 4.1) and that, if he were to remain in closed conditions, consideration could be given to a Progression PIPE (Psychologically Informed Planned Environments) "with the continuation of the New Me MOT [a toolkit providing ongoing support to those who have completed the Kaizen or Horizon programme] and sexual thought diaries" (paragraph 2.24). There were clear areas of actual and continuing concern and a clear need to address them, even if not by way of core work. The psychologists considered that the work could be done in the open estate, but the defendant, having regard to the Sufficient Progress Criterion, was entitled to take the view that it ought to be done prior to transfer to the open estate.

39. In short, there was plenty of material to justify the defendant's view that the claimant's risk factors could be further reduced and that this ought to be done before he was again transferred into open conditions. That was a conclusion reasonably open to the defendant and rationally justified in the Decision. The Panel's contrary opinion may also have been a reasonable one to hold. But the decision is that of the defendant, not of the Parole Board. In *R (Green) v Secretary of State for Justice (No. 2),* Sir Ross Cranston said:

> "48. In this case the Secretary of State was not rejecting a factual finding of the Parole Board nor a finding where it enjoys a particular advantage. Rather he was disagreeing with its assessment of risk. This was a straightforward difference in the assessment of risk on the same facts. He was entitled to substitute his own views on risk if he disagreed with the Parole Board on that question. It was a matter for him to decide that despite the Parole Board's recommendation there was not a wholly persuasive case for transferring the prisoner to open conditions, provided he accorded appropriate respect to the views of the Parole Board and gave reasons for departing from them."

Those words appear to me to be apt in this case also.

40. The conclusion as to the Sufficient Progress Criterion is enough for present purposes. However, I briefly mention the second basis of the Decision, namely that the Wholly Persuasive Case Criterion was also not met. Mr Buckley submitted that the conclusion in that regard was entirely dependent on the conclusion on sufficient progress. I do not agree. The lack of progress in respect of risk-reduction was clearly a major factor. However, the Decision also shows that the decision-maker did not consider that the claimant had learned the importance of fully complying with his sentence plan. See the second bullet point in paragraph 27 above, together with, in particular, the first, fourth, fifth, sixth, seventh and eighth bullet points in paragraph 26 above. These concerns are obviously relevant to risk, but they go more generally to the need for proper observance of prison discipline before the case for transfer to open conditions can be wholly compelling. Further, that a risk *can* be managed in the open estate (as the Panel thought) does not mean that there is a wholly persuasive case that it *ought* to be so managed. These are matters that did not fall for consideration by the Parole Board and were clearly material to the second basis of the defendant's Decision. In my judgment, on this ground alone, the defendant was entitled to consider that the Wholly Persuasive Case Criterion was not met.

41. Accordingly, I refuse the claim for judicial review.