Neutral Citation Number: [2024] EWHC 292 (Admin)

Case No: AC-2023-CDF-000087

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

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

Date: 14 February 2024

Before:

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

- -

Between:

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

- -
- -

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

Hearing date: 25 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 February 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 and Background

1. The claimant, Mr Karl Oakley, is a prisoner in HMP Erlestoke, a category C prison, where he is serving a life sentence for manslaughter. In these proceedings he challenges the decision of the Secretary of State for Justice on 20 April 2023 ("the Index Decision") to reject the recommendation of the Parole Board on 25 May 2021 that he be transferred to open conditions. I granted permission to apply for judicial review on 26 October 2023.

2. The Index Decision is the second occasion on which the Secretary of State has refused to accept the Parole Board's recommendation that the claimant be transferred to open conditions. The first such occasion was in a decision made on 29 June 2021 ("the Previous Decision"). The claimant challenged the Previous Decision and on 17 October 2022 Chamberlain J quashed it and remitted the matter to the Secretary of State for reconsideration. The Index Decision was made upon that reconsideration.

3. The judgment of Chamberlain J, *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin), [2023] 1 WLR 751, sets out the background as follows:

> "3. On 21 February 2009, Mr Oakley stabbed his ex-partner, Taylor Burrows, 34 times. The injuries were consistent with a frenzied, dynamic assault. Severe force was used. He had been cautioned in 2006 for harassment of a former partner and convicted in 2007 of assault occasioning actual bodily harm and possession of an offensive weapon, both offences arising out of an attack on another partner.
>
> 4. Mr Oakley was sent for psychiatric assessment and diagnosed with emotionally unstable personality disorder. He was charged with murder but pleaded guilty to manslaughter by reason of diminished responsibility. The plea was accepted and, on 18 December 2009, he was sentenced to life imprisonment with a minimum term of 15 years. The minimum term was reduced on appeal to 12 years: see *R v Oakley* [2010] EWCA Crim 2419, [2011] 1 Cr App R (S) 112.
>
> 5. While in prison, Mr Oakley was diagnosed with autism spectrum disorder ('ASD').
>
> 6. Mr Oakley's case was considered by the Parole Board in December 2019. Transfer to open conditions was not recommended. His tariff expired on 21 February 2021. His case was referred to the Parole Board under s. 28(6)(a) of the Crime (Sentences) Act 1997, to consider whether to direct his release and, if not, to advise the Secretary of State on his suitability for transfer to open conditions."

4. The Parole Board did not direct that the claimant be released, but it did recommend that he be transferred to open conditions. As I have said, Chamberlain J quashed the Previous Decision of the Secretary of State to reject that recommendation and remitted the matter for reconsideration. The claimant contends that, by the Index Decision, the Secretary of State has simply repeated the error of law he made previously and has failed to give any adequate reason for rejecting the Parole Board's recommendation.

5. Since the present proceedings were commenced the Parole Board has remained engaged with the claimant's case. In December 2023 the claimant stated that, because of what he said was the Parole Board's failure to have proper regard to his ASD, he did not wish for the parole process to continue. However, he has now, through his mother, asked to have his case considered at an oral hearing, and a letter dated 12 January 2024 from the Parole Board indicates that such a hearing will be held. I am told that the likely date of the hearing will be in August or September 2024, and accordingly the continuing process does not render these proceedings unnecessary or academic.

The Law

6. Section 12(2) of the Prison Act 1952 provides that prisoners "shall be committed to such prisons as the Secretary of State may from time to time direct".

7. Section 47(1) of the Prison Act 1952 provides:

> "The Secretary of State may make rules for the regulation and management of prisons … and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

Adult male prisoners are classified in Categories A to D. The claimant is currently a Category C prisoner. Only Category D prisoners can be held in open conditions.

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

> "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. By section 239(6) of the Criminal Justice Act 2003 the Secretary of State may give directions to the Parole Board as to the matters to be taken into account by it in discharging any of its functions.

10. Pursuant to section 239(6) the Secretary of State has given directions entitled *Transfer of indeterminate sentence prisoner to open conditions* ("the Directions"). I refer to the text as it stood at the date of the Index Decision. The Introduction contains the following passages:

> "1. A period in open conditions can in certain circumstances be beneficial for those indeterminate sentence prisoners (ISPs) eligible to be considered for such a transfer.
>
> …
>
> 3. The main facilities, interventions, and resources for assessing and reducing core risk factors exist principally in the closed prison estate. The focus in open conditions is to test the efficacy of such core risk reduction work and to address, where possible, any residual aspects of risk.
>
> …
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> 5. A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect and comment in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered."

The substantive directions include the following:

> "6. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-
>
> - all information before it, including any written or oral evidence obtained by the board; and
>
> - each case on its individual merits without discrimination on any grounds.
>
> 7. The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:-
>
> a) 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 …
>
> …
>
> 9. In assessing risk in all the above matters, the Parole Board shall consider the following information, where relevant and available, before recommending the ISP's transfer to open conditions, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:-

a) the ISP's background, including the nature, circumstances and pattern of any previous offending;

b) the nature and circumstances of the index offence and the reasons for it, including any information provided in relation to its impact on the victim or victim's family;

…

d) whether the ISP has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;

e) the nature of any offences against prison discipline committed by the ISP;

f) the ISP's attitude and behaviour to other prisoners and staff;

…

h) the ISP's awareness of the impact of the index offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of sentence plan targets;

i) any medical, psychiatric or psychological considerations (particularly if there is a history of mental instability);

…

k) any indication of predicted risk as determined by a validated actuarial risk predictor model or any other structured assessment of the ISP's risk and treatment needs.

10. Before recommending transfer to open conditions, the Parole Board shall also consider the ISP's relationship with the National Probation Service (in particular the Offender Manager), and other outside support such as family and friends."

11. The decision to move a prisoner to open conditions rests on the Secretary of State. The recommendation of the Parole Board is not binding on him, but he must take it into consideration and give it appropriate weight. (By contrast, the Parole Board has power to direct the release of a prisoner after the expiry of his tariff, the Secretary of State's power to reject a recommendation for release having been progressively

restricted over several years and entirely removed in 2010.) The policy governing the circumstances in which the Secretary of State will depart from the recommendations of the Parole Board is set out in the *Generic Parole Process Policy Framework* ("the Policy"), the current version of which is dated 27 January 2020 and was re-issued with revisions on 13 May 2021. Its provisions include the following:

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

12. The Index Decision was made on the basis of paragraph 5.8.3 of the Policy: that it was considered that there was not a wholly persuasive case for transferring the claimant to open conditions at that time. That ground, as it appeared in an earlier policy, was considered by Andrews J in *R (Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin), [2019] 4 WLR 47, where she said:

> "53 The current Policy has added a third ground, namely, that the Secretary of State does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at the relevant time. This was the target for much of Mr Rule's criticism. Bearing in mind that this follows an express acknowledgment of the 'very limited parameters' for departure from the recommendation of the Board, it is clear that the purpose of that ground is not to widen those parameters, but to preserve the ability of the Secretary of State (or the person to whom he has delegated the power to make the decision on his behalf) to exercise his discretion to reject a recommendation which does not strictly fall within either of the preceding grounds, but which appears to him (for good reason) to be unjustified or inadequately reasoned."

13. A number of cases have considered the proper scope of the Secretary of State's discretion to reject a recommendation of the Parole Board. I shall refer to only some of them; the other authorities are exhaustively analysed in the few I mention.

14. In *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB), the Divisional Court quashed one of the last exercises by the Secretary of State of his former power to reject the Parole Board's recommendation to release a prisoner. Thomas LJ, with whose judgment Nicola Davies J agreed, drew a distinction between

the approaches to be taken to the Parole Board's assessment of the risk presented by the prisoner and to its findings of fact. As to the former he said:

> "50. The Parole Board is expert in the assessment of risk and immunised from external pressures. The assessment of risk, by the application of publicly promulgated criteria, is a task with no political content. The panels that carry out the work operate in a manner much like a court, sifting and analysing the evidence, and when there is an oral hearing making relevant findings on disputed issues which could not be resolved by a review of the papers. The task is not one to which the Secretary of State can bring any superior expertise: see the judgment of Lord Bingham of Cornhill at paragraphs 23 and 33 of *R (Clift, Hindawi and Headley) v Secretary of State for Justice* [2007] 1 AC 484. The removal by Parliament of the Secretary of State's last remaining power to reject a recommendation is confirmation by Parliament that the Parole Board is the appropriate body to take these decisions and the Secretary of State has no superior expertise.
>
> 51. However, at the time of the decision under review the decision maker under the statutory scheme remained the Secretary of State for these few prisoners. He must therefore have been entitled to come to his own conclusion on the assessment of risk provided he did so by a process which was fair and the decision was rational. As Mr Owen QC accepted, he had some expertise, though not superior expertise. I cannot accept that he was only entitled to reject the recommendation on the narrow grounds suggested by the claimant, particularly given that assessment of risk is, as experience has more clearly shown over the years, a task of great difficulty where those entrusted with it can reasonably differ.
>
> 52. It is self-evident that he should and would accord weight to the recommendation of the Parole Board. However the weight the Secretary of State should accord to the recommendation must depend 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. The grounds for impugning the decision he makes which does not follow the recommendation must depend on the fairness of the way in which he approached his decision-making in the light of the foregoing and whether the decision has a rational basis."

Regarding findings of fact made by the Parole Board, both in *Hindawi* itself and generally, Thomas LJ said:

> "58. In approaching these issues, it is, in my view, necessary for a clear distinction to be made between findings of fact made by the Parole Board panel and its assessment of the risk. The findings of fact related to his credibility, the effect of his PTSD,

and the reasons for his failure always to cooperate with the risk assessment process. These were all matters on which decisions had to be made on whether the claimant was telling the truth in the light of all the evidence.

59. The claimant's credibility was the central issue as the finding on the credibility of the claimant was, if not decisive, of significant weight in determining his future risk. …

60. In my view, the Secretary of State, when making the decision on parole, also had to distinguish between the findings of fact made by the panel and the assessment of risk. The findings of fact were the basis on which the Secretary of State was entitled to reach his own view, using the Appendix 7 criteria, to determine risk, according appropriate respect to the views of the panel on their assessment of risk.

61. In a case where there had been an oral hearing, very good reason was needed to depart from the findings of fact made by the panel that has seen the witnesses, particularly the claimant. The oral hearing had been ordered … because issues could not be resolved by a review of the papers. …

62. There is strong authority relating to appeals from decisions from trial courts which makes clear that findings of fact or on credibility should not be overturned without good reason: see *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle* [1927] AC 37; *Thomas v Thomas* [1947] AC 1984; *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep. 403; *The Ocean Frost* [1986] 1 AC 717 and *Powell v Streatham Manor Nursing Home* [1935] AC 243. As Viscount Sumner said in *The Hontestroom*:

> 'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their

> own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.'
>
> 63. In this case, the Secretary of State was the primary decision maker and not, as in the cases to which I have referred, an appellate court. Yet it is difficult to see why such principles are not applicable to circumstances such as this case where the Secretary of State has not seen the witnesses. In my view therefore good reasons were necessary for him to reach a different decision on credibility.
>
> 64. Whether there were good reasons depended on whether circumstances permitted the Secretary of State to undertake a detailed examination of the evidence and whether he could properly justify a different conclusion. In considering whether he could do so, he should have asked himself the type of question posed by Lord Shaw in *Clarke v Edinburgh Tramways Co* 1919 S.C (HL) 35 cited by Viscount Sankey in *Powell v Streatham Manor Nursing Home* [1935] AC 243:
>
> > 'Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'"

15. In *R (John) v Secretary of State for Justice* [2021] EWHC 1606 (Admin), [2021] 4 WLR 98, Heather Williams QC sitting as a deputy High Court judge referred at [38] to *Hindawi* for the proposition, not disputed before her, that the Secretary of State may not depart from findings of fact made by the Parole Board following an oral hearing unless there is good reason for doing so. She then examined the authorities in order to understand the distinction between findings of fact, to which that proposition applied, and the Parole Board's evaluative assessment, which the Secretary of State was only obliged to take into account. She concluded:

> "47. The key distinction for present purposes is between, on the one hand, a finding of fact made by the Parole Board after having had the benefit of hearing oral evidence, which the defendant can only depart from with good reason and, on the other, a matter of evaluative assessment by the Board, which the defendant must take into account, but may give such weight to as he determines appropriate (paras 38–44 above). Mr

> Bunting [counsel for the claimant] rightly accepted during his oral submissions that a conclusion that a prisoner's risk can be managed safely in open conditions is a matter of evaluative assessment, as is a conclusion that a prisoner poses a high risk of violence to the public. Mr Grandison [counsel for the Secretary of State] agreed with Mr Bunting's helpful proposition that generally in this context a finding of fact will concern a conclusion as to past events, whereas an evaluative assessment will entail a prediction as to future eventualities including risk of violence, risk of absconding and ability to manage the same."

16. In *Oakley,* Chamberlain J considered the authorities concerning the circumstances in which the Secretary of State may depart from findings and recommendations made by the Parole Board, among them *Hindawi* and *John*. His approach was essentially similar to that taken in those cases but was nuanced:

> "46. … For my part, I doubt that it is helpful to seek to classify parts of a Parole Board recommendation as either findings of fact (to which the approach in *Hindawi* [2011] EWHC 830 (QB) applies) or assessments of risk (to which lesser weight attaches).
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> 47. The issue on which the Secretary of State disagreed with the Parole Board in *Hindawi* was whether the prisoner was telling the truth when he said he had renounced violence. This was, quintessentially, the type of question on which a panel (whose members have heard oral evidence from the prisoner) would enjoy a significant advantage over the Secretary of State (who has not). It is for this reason that appellate courts are typically very reluctant to disturb findings of fact by first instance courts which turn on the credibility of witnesses who have given oral evidence.
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> 48. There may be other questions which do not turn on the credibility of oral evidence, where, for other reasons, the panel has an advantage over the Secretary of State. Contested questions of diagnosis are likely to fall into this category. For example, if a Parole Board panel found that particular behaviours were best explained by a prisoner's personality disorder (rather than, say, mental illness), or that a particular treatment was likely to be effective in substantially reducing risk, the Secretary of State would no doubt need a very good reason to depart from such a finding. This is because the Parole Board's process (in which experts are questioned by representatives for the prisoner and the Secretary of State and by tribunal members who are themselves experts) is well suited to resolving issues of this kind, even ones where reasonable experts differ. On questions such as these, the Secretary of State could depart from Parole Board decisions if the Parole Board has overlooked or misunderstood some key piece of

evidence or failed to give adequate reasons for its view, but not simply because he would have resolved the dispute differently.

49. Disputes about the level of risk posed by a prisoner will often turn on precisely these kinds of questions on disputed issues of fact or prediction. Where they do, the Secretary of State will need to show a very good reason for taking a view that differs from the Parole Board on the disputed question. But, as the reasoning in *Hindawi* shows, 'risk assessment' will generally involve a further and qualitatively different exercise that falls to be undertaken against the background of the facts as found and the predictions as made by the Parole Board. This is the evaluative assessment required when reaching the ultimate decision whether to recommend transfer to open conditions.

50. As encapsulated in paragraph 7(a) of the Directions, the Parole Board has to consider 'the extent to which the [prisoner] has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm'. Reaching a conclusion on this involves something beyond the resolution of disputes about the factual and expert evidence. It involves a judgment, balancing the interests of the prisoner against those of the public. On this kind of question, the expertise and experience of the Parole Board entitles it to 'appropriate respect' (as Thomas LJ put it in *Hindawi*), but not to presumptive priority over the view of the Secretary of State. Constitutionally, the Secretary of State, who is accountable to Parliament, must form his own view about where the balance of interests lies.

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."

17. I respectfully agree with Chamberlain J's basic approach. However, I have some misgivings about his exposition of it. To my mind, the fundamental distinction is between matters in relation to which the Parole Board enjoys a particular advantage over the Secretary of State (in which case, a very good reason would have to be shown for departing from the Parole Board's conclusion on such a matter) and matters in relation to which the Parole Board does not enjoy a particular advantage (in which case, the Secretary of State must accord appropriate respect to the Parole Board's view but is entitled to take a different view provided he justifies it). Between the poles of that distinction, there will be a range, and the strength of justification required of the Secretary of State will surely depend on the facts and, in particular, on the nature and extent of any advantage enjoyed by the Parole Board in respect of the specific point in issue. However, it is important to have firmly in mind that the decision is that of the Secretary of State, not of the Parole Board; consequently, the relevant question for this court will always be whether the Secretary of State's decision is impeachable on public law grounds, not whether the Parole Board's recommendation is open to criticism on similar grounds. That being so, I have difficulty with paragraph 48 of Chamberlain J's judgment (apart from the first sentence) and, in that context, with the formulation of the alternatives in the sentence beginning "The more pertinent question …" in paragraph 51. The fact/assessment distinction used in the cases and explained by Thomas LJ *Hindawi* is directed to the case where the fact-finding in question is significantly informed by oral evidence. The typical case is where the matter turns on "the estimate of the man", as Viscount Sumner put it in *The Hontestroom*. Not every finding of fact is of that sort. To take the example of diagnosis, used by Chamberlain J in paragraph 48: those who heard oral evidence from opposing experts may or may not have a significant advantage over the Secretary of State. It is by no means obvious, at least to me, that an issue of that sort will always (or even usually) better be decided by those who heard the evidence (whose assessment of it may or may not be faulty, and who may or may not have been overly influenced by the manner of the opposing witnesses) than by those who assess the evidence on paper, including transcripts. Now, in paragraph 48 Chamberlain J is ostensibly dealing with cases where the Parole Board has an advantage over the Secretary of State, and he only says that matters of diagnosis are "likely" to be such cases. However, if the issue of diagnosis is one on which reasonable experts could disagree I cannot, I fear, see why the Secretary of State should not be entitled to prefer his own view to that of the Parole Board, provided of course that he justifies it, or why he should be restricted to public law review grounds (such as are mentioned in the final sentence of paragraph 48) if he wishes to depart from the Parole Board's view. It seems to me that the difficulty plays out in the dichotomy in paragraph 51 between matters on which the Parole Board has a particular advantage and matters "involving the exercise of a judgment requiring the balancing of private and public interests". Those alternatives do not exhaust the possibilities. There may well be matters of judgement that do not involve the balance of private and public interests—for example, how to assess differing expert opinions —on which the Parole Board does not necessarily have any substantial advantage over the Secretary of State or on which the Secretary of State's freedom to disagree with the Parole Board should not be limited to analogy with public law grounds for judicial review. In my view, although Chamberlain J's basic approach is (in my respectful view) sound, paragraphs 48 and 51 of his judgment might tend to encourage an undue limitation of the scope of the Secretary of State's freedom in his decision-making. The issue, as I have said, is whether the conclusion of the Secretary

of State on a particular matter is rational and sufficiently justified, not whether the same can be said of that of the Parole Board. In some cases, sufficient justification will require a "very good reason" for departing from the Parole Board's view, in others it will not; but even in the former case I should not myself think it right to stipulate that some form of public law error by the Parole Board must necessarily be identified.

18. Two very recent decisions have considered the relevant law: *R (Overton) v Secretary of State for Justice* [2023] EWHC 3017 (Admin) (Eyre J) and *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin) (Fordham J). Mr Buckley appeared for the claimant in *Overton*, and Mr Grandison appeared for the defendant in *Sneddon*. The judgment in *Overton* was handed down on 7 December 2023, which was the day on which *Sneddon* was heard, and accordingly Fordham J did not have the benefit of seeing Eyre J's judgment.

19. Because I respectfully consider Eyre J's statement of the law in *Overton* to be entirely accurate (subject only to my qualms regarding *Oakley* at [51]) and cannot hope to improve on it, I shall set out the entire passage.

> "25. The decision on whether a prisoner should be moved from a closed to an open prison is a matter for the Secretary of State. He has to take account of and engage properly with a recommendation from the Parole Board but provided he does that and provided that his conclusion is rational the Secretary of State is not bound by the recommendation and can reach his own contrary conclusion. The point was recently put thus by Dexter Dias KC as a deputy judge in *R (Zenshen) v Secretary of State for Justice* [2023] EWHC 2279 (Admin) at [83]:
>
> > '...What he must demonstrate is a genuine engagement with the material factors that arise in the case of the individual prisoner serving an indeterminate sentence. He can reach a different decision to the Panel. But his basis for departure must be rational and properly justified. If not, it is susceptible to public law challenge.'
>
> 26. Assessment of whether there has been the necessary genuine engagement by the Secretary of State with the recommendation of the Parole Board in a given case and of whether the Secretary of State's decision is rational will require close attention to the circumstances of the particular case and to the terms of the decision in question. In that regard and subject to one qualification I agree with Mr Leary's submission that the approach to reading a letter informing the prisoner of a decision to keep him or her in the closed estate is akin to that taken to reading decision letters in other contexts. The letter is to be read '(1) fairly and in good faith and as a whole; (2) in a straightforward down-to-earth manner without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case' (per Lang J in *Wokingham BC v Secretary of State for Housing,*

Communities and Local Government [2019] EWHC 3158 (Admin) at [19]). The qualification is that the court when considering the decision letter must at all times remember the subject matter in question. Even though the Secretary of State will not in cases such as this be differing from the Parole Board on the question of release or detention he is still making a decision determining the degree of the continuing deprivation of liberty of the prisoner. A prisoner in the open estate remains detained and not at liberty but the circumstances of such a person's life will be markedly different from those of a prisoner in the closed estate. In addition such a prisoner has opportunities (such as to apply for temporary release on licence) which are not available to those in the closed estate. This consideration does not require the court to adopt an artificially rigorous approach to the reading of the decision letter. Nor does it require the court to address the question with the degree of anxious scrutiny which is required in cases when the decision relates to a distinction between life at liberty and life in detention. I note that in the case of *Browne v The Parole Board of England and Wales* [2018] EWCA Civ 2024 to which I was referred the court was concerned with a decision as to release. Nonetheless the point is a counterpoise to the benevolence of the reading and reflects the need for the appropriate degree of careful thought to have been applied to the matter by the Secretary of State. What is necessary is for the decision letter when read fairly and realistically to show why the Secretary of State has taken a different view from that of the Parole Board and for it to set out his reasoning in sufficient detail to show that there has been the requisite engagement with the Board's assessment and that the resulting decision is rational.

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

28. In many cases it will be possible for different persons rationally to take different views (sometimes radically different views) as to the same assessments. This will be particularly so in the case of assessments as to the level of future risk; as to the acceptability of a particular level of risk; and as to the appropriate way forward for a particular prisoner. These are matters of judgement and in many cases they will turn on the view taken as to the likelihood of a number of future events: a matter as to which there will very rarely if ever be a single unquestionably correct answer. It follows that in the relation to the same prisoner there can be both a recommendation from the Parole Board which is wholly rational and a decision to the

contrary effect made by the Secretary of State which is also wholly rational. It is for that reason that it is necessary for the court to maintain a determined focus on the rationality or otherwise of the Secretary of State's decision and to avoid being distracted by having regard to the rationality of the Parole Board's recommendation (see per King J in *R (Wilmot) v Secretary of State for Justice* [2012] EWHC 3139 (Admin) at [47]).

29. The nature and quality of the reasoning exercise which the Secretary of State will have to undertake in order properly to engage with a recommendation of the Parole Board will depend on the nature and subject matter of the Parole Board assessment from which he is departing. It will be necessary to consider whether and to what extent the particular issue is one in respect of which the Parole Board is better-placed to make an assessment than the Secretary of State or in respect of which the Board had an opportunity not open to the Secretary of State. Such might be the case if the issue turns on some special expertise available to the Parole Board and not to the Secretary of State or if question is one of fact where the Board's finding is the result of having addressed the matter at a hearing at which there was oral evidence. The point was made thus by Chamberlain J in *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin) at [51]: *[see above]*.

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."

20. In *Sneddon* Fordham J considered all of the relevant authorities that were available to him, including several that I have not mentioned and concluded as to the law (each proposition was supported by a reference to authority, which I shall omit from the quotation without showing ellipses):

> "28. In my judgment the key principles identifiable from the case-law are as follows:
>
> (1) Decision-Maker. The primary decision-maker is the SSJ. The Parole Board, in recommending transfer to open conditions, is giving advice.
>
> (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; 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. These advantages can make it difficult for the SSJ to show that it is reasonable to take a different view.
>
> (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.
>
> (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"). There can be no substitution of the views of a civil servant for the views of the Parole Board without reasonable "justification".
>
> (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; nor to errors of law or fact or additional evidence having come to light. Examples of deficiencies would be a Panel assessment: (a) running counter to professional views without a sufficient explanation; (b) based on demonstrably inaccurate information; (c) failing to apply the correct test or address the correct criteria; or (d) appearing to fly in the face of the evidence or the nature of the risks found by the Panel.
>
> (6) Questions of Significant Advantage. The reasonable basis for rejection will require 'very good reason' – or 'clear, cogent and convincing reasons' – 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; (b) of any question of fact from evidence at a hearing; or (c) of questions of expert evaluation of risk, such as professional diagnosis or professional prediction. 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.
>
> (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'. 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, as part of the question in Direction §7(a) (§12 above)."

21. Before me, Mr Grandison submitted that Fordham J had failed, both in his formulation of key principles and in his reasoning on the case before him, to have proper regard to the Secretary of State's expertise in the assessment of risk, and that he had come very close to suggesting that the Secretary of State had positively to

demonstrate a serious error in the Parole Board's reasoning or process in order to justify a different view. (There is a pending application by the Secretary of State to appeal against the decision in *Sneddon*.) Of the decision in *Sneddon*, I say nothing. It is well-recognised that the Secretary of State has expertise in the assessment of risk (cf. for example, *Overton* at [27]). And it is, or ought to be, clear that the question is the rationality of the Secretary of State's decision, not the rationality of the Parole Board's decision (cf. for example, *Overton* at [28]; also paragraph 17, above).

The Parole Board's Recommendation

22. The Parole Board's recommendation is summarised in some detail in paragraphs 7 to 12 of Chamberlain J's judgment, which I shall not reproduce here. The following passage in section 8 of the panel's recommendation explained its reasoning:

> "Ms Rowe [the Community Offender Manager] assesses that you need to do further work in closed conditions on the areas that she has identified but it remained unclear to the panel how this work was to be delivered and the panel was concerned that there would be a further period of delay increasing your sense of unfairness and frustration.
>
> The panel assesses that you cannot at present be safely managed in the community and in particular there is not a fully developed Risk Management plan. The panel gives you credit for recognising the reality of the situation. The panel therefore determines that it is necessary for the protection of the public that you remain detained and do not direct your release.
>
> However, the panel is persuaded that, with proper support in place, you can be safely managed in open conditions including ROTLs [Releases on Temporary Licence] and that there is no further work for you to undertake in closed conditions. It was persuaded that you would benefit from further intervention to help you understand your ASD diagnosis and how to manage your emotions better, and that this will be offered to you within the open estate. While you have demonstrated (even within the oral hearing) that you can become easily aroused and abusive, you have a strategy to manage situations by walking away. Clearly, it would be helpful if you were able to develop a broader range of coping mechanisms. However, the panel was mindful that your negative behaviour has not led to any incidents of physical violence for many years. There is clearly a benefit to you in testing you in less secure conditions and to allow you to develop your release plans. The panel does not assess your risks in open conditions as imminent. Further the panel is persuaded that you do not represent an abscond risk. Accordingly, the panel recommends to the Secretary of State that you are transferred to open conditions."

The Previous Decision and Chamberlain J's Judgment

23. Chamberlain J identified the Secretary of State's reasons for the Previous Decision in the following passage in his judgment:

> "17. … The only reasons for rejecting the Parole Board's recommendations are to be found in a single sentence of the seventh paragraph and in the thirteenth paragraph. Most of the seventh paragraph records the community offender manager's view that Mr Oakley has outstanding treatment needs, which focus on developing more consistent coping strategies, increased tolerance to stress and improved emotional regulation before a progressive move can be safely managed. The writer then adds: 'Officials are of the view that such work should be completed prior to a move to less secure conditions.' The thirteenth paragraph reads as follows:
>
> > 'Whilst officials acknowledges [sic] the positive work you have completed, the concerns raised regarding your emotional fragility, outstanding core risk work and the need for further support cannot be ignored, particularly in the context of your very serious index offence which led to the very tragic loss of Ms Burrows life. Consequently, having carefully considered the Panel's recommendation and all the evidence presented, on this occasion officials on behalf of the Secretary of State have rejected the Panel's recommendation. This does now mean you will remain in the closed estate, as a minimum, until the outcome of your next parole review is known.'"

24. Chamberlain J's reasons for quashing the Previous Decision appear from the following passages in his judgment:

> "52. In this case, the key conclusion of the Parole Board with which the Secretary of State disagreed was that 'there is no further work for you to undertake in closed conditions'. Mr Grandison accepts that the Secretary of State needed a very good reason for departing from this conclusion. The concession was, in my view, rightly made. …
>
> …
>
> 57. What then was the Secretary of State's reason? The kernel of it is to be found in the single sentence in para 7of the letter of 29 June 2021, quoted at para 17 above: that further work to develop more consistent coping strategies, increase tolerance to stress and improve emotional regulation should be completed prior to a move to open conditions. In my judgment, this did not engage with the Parole Board's view, reached after hearing

> the experts questioned, that there was no such further work to be completed in closed conditions. It may be that the Secretary of State had a proper basis for doubting that conclusion. If so, the decision letter does not reveal it. The decision is inadequately reasoned and, for that reason, unlawful."

25. Chamberlain J gave two reasons for rejecting the submission on behalf of the claimant that he should rather grant a mandatory order requiring the Secretary of State to accept the recommendation of the Parole Board: first, that the Previous Decision was quashed because it was inadequately reasoned, but it did not follow that there were in fact no sufficient reasons on which it could have been taken; second, that decisions on transfer had to be taken on the basis of up-to-date information, and matters might have moved on. Instead he quashed the Previous Decision and remitted the matter to the Secretary of State for reconsideration.

Additional Material considered on the Reconsideration

26. The matter was reconsidered on behalf of the Secretary of State by individuals within HM Prison and Probation Service who had not been involved in the Previous Decision but who were familiar with the judicial review proceedings before Chamberlain J. In addition to the original papers and the Parole Board's recommendation, they considered the following documents:

- A security report dated 7 June 2022
- A POM [Prison Offender Manager] report dated 21 June 2022
- A witness statement dated 5 September 2022 from Mr Martin Fisher, the Regional Lead Psychologist for South Central Prisons and HMP Erlestoke
- A COM [Community Offender Manager] report dated 22 December 2022
- An adjudication report
- Legal representations on behalf of the claimant dated 30 January 2023.

I shall refer here to two of these documents: the statement of Mr Martin Fisher and the legal representations on behalf of the claimant.

27. Mr Fisher's statement was prepared for use in the earlier judicial review proceedings, although as it had not informed the Previous Decision Chamberlain J refused to admit it in evidence. Mr Fisher explained that expert advice had been sought from the team that he managed of 27 psychology staff across five prison sites and from the wider HM Prisons and Probation Psychology Services Group "in order to understand the interaction between the claimant's autism spectrum disorder (ASD), his emotionally unstable personality disorder (EUPD) and his offending, and to suggest potential treatment or support available to help the claimant to develop additional coping strategies and manage his emotions." He said that consideration had also been given to what outstanding consolidation work might be required and how the claimant could

be helped to apply learning already acquired to situations that approximated open conditions. The conclusions were set out at paragraphs 5 to 9 of the statement:

> "5. The team considered that the claimant's offending involves stalking former partners, as well as coercive and controlling behaviour within relationships (including familial) and how this should be reflected in any core risk reduction work to address his ability to manage his emotions. The risk still posed by the claimant needs to be examined and assessed against the risk reduction work already completed and responsivity assessments available to see what, if anything, is outstanding.
>
> 6. It seems that after a relationship has ended the claimant has been fixated on re-establishing contact, which relates to his rigidity of thought. Learning to effectively manage his emotions at these times would be beneficial, as this fixation leads to his proximity seeking and then impulsive action when his version of how things will/should go, do not go that way. Developing this hypothesis in the context of specific assessments such as a Stalking Risk Profile (SRP) and functional analysis would act as an extension to the work already completed and enable a progression plan to be agreed with the claimant, within normal business and operational processes within HMPPS and its partner agencies.
>
> 7. The SRP is a structured approach to functional assessment of risk given that behaviours in relationships, and when they end, is central to both the claimant's offending behaviour and how he is able to respond to such situations and so should be central to core risk management planning. Assessment using the SPR would be informed by the relevant clinical assessment guidelines for assessing those with ASD and would begin with a period of initial contact (rapport building, motivation, and consent) which could begin in November 2022, with the main assessment planned for February-March 2023. In undertaking this process a period of time spent building rapport and motivation and ensuring the prisoner's informed consent is important to a meaningful outcome for both the prisoner and the assessor. This could be completed at HMP Erlestoke without the claimant needing to transfer as it is part of the suite of assessments that are normally carried out with prisoners in custody at the site.
>
> 8. The SRP is proposed to identify all areas of risk and need and to separate those that have already been addressed (through previous programmes the claimant has completed) from those that may still require further input. The assessment will identify relevant options for the claimant which will support him to develop coping strategies and address his emotional instability.

> 9. Until such an assessment has been carried out it is difficult to be certain about which option will be most relevant however a working hypothesis is that the claimant's offending may indicate a particular sensitivity to rejection and that his ASD traits, while not increasing his risk of offending per se, may influence the particular pathway taken to his offence. Hence the assessment will aim to discriminate aspects of his functioning that are relevant to his risk and/or its management, from those which reflect his ASD but do not bear on his risk. The claimant's emotional instability could relate to one or both of those things at different times, and so the assessment will help to identify when this is likely to be risk relevant and when it is not. As has been noted, this is likely to relate to claimant's chosen coping strategies."

28. The legal representations prepared by the solicitors then acting for the claimant included the following passages:

> "It is our position that the Secretary of State for Justice should be wholly persuaded by the Parole Board decision and the contents of further reports. We note that the only dissenting voice at the Parole Board oral hearing of 20 May 2021 was the recommendation of the Community Offender Manager (COM) Anne Rowe that Mr Oakley remain in closed conditions. This single dissenting view was explored and rejected by the Parole Board who recommended a progressive move to open conditions.
>
> …
>
> The Parole Board panel at the oral hearing on 20 May 2021 was a particularly eminent and consisted of two psychiatric members, one judicial member and a lay member. While a Secretary of State representative attended the hearing, they asked no questions and did not submit closing written submissions. As such the Secretary of State's representative put forward no objection to Mr Oakley progressing to open conditions.
>
> As stated above, all witnesses at the Parole Board hearing of 20 May 2021 (two Prison Offender Managers, a mental health worker and the independent psychiatrist Dr O'Shea) supported release with the single exception of the then Community Offender Manager Anne Rowe. However, this dissenting view was properly and exhaustively explored during questioning and as such presents no obstacle to the Secretary of State being wholly persuaded as they need to be in this current decision.
>
> In respect of Ms Rowe's doubts in 2021 that support for Mr Oakley's Autism Spectrum Condition (ASC) would be available in open conditions, other professionals put forward

> their views that proper support would be available. Indeed, under the Equalities Act and the Autism Act, it is now a legal requirement that support for autism is provided, and that the regime is differentiated to adapt for a disability such as autism."

The Secretary of State's Index Decision

29. The Secretary of State's reasons for the Index Decision appear from the decision letter. I shall set out the relevant passage in full.

> "On receipt of the Parole Board recommendation, and following your case being looked at afresh, the Secretary of State has decided, exceptionally, that there is not a wholly persuasive case that you transfer to open conditions at this time. The Secretary of State had in mind when reaching this conclusion his published criteria and found the following criteria were not met
>
> - *There is not a wholly persuasive case for transferring the prisoner to open conditions at this time.*
>
> Evidence considered to support the conclusion that the criteria is [sic] not met is as follows:
>
> - Firstly, it was noted you committed the index offence whilst on a community order suggesting neither the order nor potentially the sentence would act as a deterrent to further offending, particularly given the concerns in relation to rigidity of thinking which remains a live factor.
>
> - During your sentence you have completed a range of risk reduction work, including the Kainos programme, the Thinking Skills Programme (TSP), the Healthy Relationships programme, work on victim awareness, work on anger management and you have engaged with significant 1:1 work with the Clinical Psychologist, which is to your credit. Though you have completed this work, there remains evidence of rigid thinking as noted by Dr [Kevin] O'Shea [consultant psychiatrist instructed by the Prison Service] after she [sic] conducted an interview with you on 18 March 2021 (page 9 PB decision*), 'You came across as over inclusive in your responses and rigid in your views and beliefs as well as in your understanding of what other people may have said or their motives in so doing, whether it related to those seeking to help you professionally as well as from past relationships*

Including your victim. You tended to be quite concrete and matter-of-fact when describing even painful episodes from your past.' In addition, despite the work undertaken the Panel noted you can be easily aroused and the Secretary of State would be concerned at the implications of this from a risk perspective outside of the closed prison environment.

- Furthermore Dr O'Shea suggested that *'many of the issues which had been previously raised as possible symptoms of your EUPD, were probably as a result of a combination of that disorder as well as autism. Dr O'Shea also believed that attention needs to be given to your Attachment Disorder which described the problems you had experienced as a child, the trauma sustained, and a lack of support in overcoming that trauma'* (page 9 PB decision).

- In the Parole Board decision the Panel (page 16 PB decision) noted that:

> *'However, the panel is persuaded that, with proper support in place, you can be safely managed in open conditions including ROTLs and that there is no further work for you to undertake in closed conditions, it was persuaded that you would benefit from further intervention to help you understand your ASD diagnosis and how to manage your emotions better, and that this will be offered to you within the open estate.'*

The Secretary of State disagrees. The Secretary of State notes from the Parole Board decision that:

> *'Ms Rowe assesses that you need to do further work in closed conditions on the areas that she has identified but it remained unclear to the panel how this work was to be delivered and the panel was concerned that there would be a further period of delay increasing your sense of unfairness and frustration'* (page 15 PB decision).

Whilst the Secretary of State acknowledges this concern, public protection must be the overriding feature of decision-making particularly where an offender convicted of the most serious of offences may come into contact with the public.

> *'Ms Rowe's recent report and evidence focused on the need for you to remain in closed conditions. She acknowledged the work that you had completed and*

> *that you continued to show insight into your risk factors. She noted that you remained fixed on progression and refused to engage with further work in closed conditions primarily with the view that your ASD needs would not be met'* (page 13 PB decision).

- The lead psychologist for South Central Prisons Groups [viz. Mr Martin Fisher] has confirmed and identified a suitable course that you could undertake at HMP Erlestoke that should be undertaken, specifically a Stalking Risk Profile. The psychologist was of the view that you have been able to benefit from Offender Behaviour Programme's (OBP's) but that there have been difficulties in you being able to demonstrate your learning. It is suggested that the Stalking Risk Profile assessment will be key to identifying the additional support required to enable you to do this, and whether you could engage in existing structured regime options to assist this. The Secretary of State has reached the conclusion that this assessment is a priority and must be undertaken prior to a transfer to the open estate in the knowledge of your history and the nature of your risk.

- The lack of protective factors including an open and honest relationship with your COM [Community Offender Manager] is an additional concern. You have previously disengaged from three COMs, though there has been a recent attitude shift, which is most helpful but is still in its infancy. Your engagement with the Probation Service is essential should you wish to progress and achieve a successful resettlement[.] It is essential also to your management in the open estate, particularly given your specific complex needs and support needs following any significant change. The Secretary of State would be concerned at the implications otherwise for your abscond risk. Whilst it is very positive that you have started to engage with your COM, this is fairly recent and it is not believed that your engagement has been tested for a sufficient period of time, specifically given the level of support that you would require, and the limited support network you have.

  This is supported by your former COM who indicated that a high level of support is required to manage you and this is less likely achievable in open conditions, as noted in the On/post Tariff Parole Assessment Report Offender Manager (PAROM1) dated 11 July 2022, given the nature and purpose of the environment which

will have an impact on your risk of abscond, risk management and quite likely your welfare.

- Your current COM indicated that further work on relationships is needed in custody, a topic relevant to your index offence. He added that whilst any further work that you are suitable to undertake may be difficult or not available in closed conditions, a move to open conditions would not provide further opportunity either. As noted above, the lead psychologist for South Central Prisons Groups has identified a suitable course such as a Stalking Risk Profile ('SRP') which can be undertaken in closed conditions and is considered essential.

- There is a suggestion that consolidation work is required, and for the purpose of public protection, such work at this stage requires completion in closed conditions, where it can be tested without implications for public safety. Such consolidation work can be undertaken in closed conditions and will include evidencing sustained and positive engagement with those responsible for supervising you, to include your COM, evidencing openness and honesty and the ability to demonstrate learning from interventions you have completed. Further consolidation work may also be identified as part of the SRP process.

- Lastly, there are several reasons to suggest that the risk posed by you has the potential to become imminent and it is contended that this relates also to the potential for your abscond risk to become heightened. You evidently, and to some degree understandably, struggle with the frustration of what you consider to be a lack of progress, or slow progress. You can become agitated if responses are not received in a period you consider to be acceptable and the Panel noted you can become 'easily aroused'. There is evidence of firm rigidity in your views and beliefs in terms of what other people may have said or their motives in so doing. It is therefore the view of the Secretary of State that the challenges of an open environment, particularly given the added complexity of the need for support and structure, and difficulties with change raises the imminency of your risk."

The Parties' Submissions

30. The claimant's ground of challenge to the Present Decision is that it is an unreasonable departure from the findings and recommendation of the Parole Board

and is therefore unlawful.

31. For the Secretary of State, it is submitted that proper justification has been shown for refusal to follow the Parole Board's recommendations. There are, in essence, two connected limbs to the justification. First, in disagreement with the panel's view that there was no further work for the claimant to undertake in closed conditions, and contrary to its expressed doubts as to how further work was to be delivered in closed conditions, the Secretary of State has identified further work that can (and in his view ought to) be undertaken in closed conditions, namely the Stalking Risk Profile. Second, the Secretary of State judges that the balance of private and public interests requires that the further work be completed in closed conditions, "where it can be tested without implications for public safety."

32. For the claimant, by contrast, it is submitted that the Secretary of State's supposed justification merely repeats at greater length the error identified by Chamberlain J at [57] in his judgment: the Secretary of State merely rejects the panel's conclusion that there was no further work to develop more consistent coping strategies etc to be completed in closed conditions, but he does not give any substantial reason for rejecting that view. Regarding the Secretary of State's reliance on Mr Fisher's statement, two main points are made: first, the matters raised in that statement were not raised at all in front of the Parole Board, with the result that the Secretary of State's approach results in cutting the Parole Board out of a critical part of the process; second, when Chamberlain J was considering section 31(2A) of the Senior Courts Act 1981 he said at [43]:

> "In this case, the material in Mr Fisher's statement does no more than identify certain assessments which (depending on their outcome) might identify work which could (perhaps with adaptations designed to mimic open conditions) be undertaken in closed conditions. That seems to me to fall very far short of the kind of evidence necessary to satisfy the high threshold set by section 31(2A) of the 1981Act."

33. For the claimant, it is further submitted that, while referring to the doubts of the claimant's current COM concerning the availability of opportunity for further work in open conditions, the Secretary of State failed to have regard to the Parole Board's conclusion that further work *could* be undertaken in open conditions and failed to justify his own insistence that such work *must* be undertaken in closed conditions. The Secretary of State has also (it is said) failed to accord appropriate respect to the Parole Board's consideration of the claimant's issues with arousal, the measures that have been taken to address those issues and the evidence of successful self-management by the claimant. It is also submitted that the Secretary of State has failed to justify his remarks regarding the risk of absconding, which was a matter carefully considered by the Parole Board.

34. The foregoing paragraphs are only a short summary of points fully developed in writing and orally by Mr Buckley for the claimant and Mr Grandison for the Secretary of State. I have regard to their developed submissions, but the summary identifies what I regard as the main points.

Discussion

35. In my judgment, the Secretary of State was entitled to come to the conclusion he reached and has provided sufficient justification in law for doing so. Accordingly the claim will be dismissed.

36. As I have mentioned more than once, the decision fell to the Secretary of State, not to the Parole Board; the latter's role was advisory. Parliament could have removed the decision from the Secretary of State but it has not done so. At least two consequences follow. First, as I have also mentioned more than once, the relevant question is whether the Secretary of State's decision is impeachable on public law grounds, not whether the Parole Board's recommendation is open to criticism on similar or analogous grounds. Second, the Secretary of State is entitled to have regard to material that was not before the Parole Board. Mr Buckley's contrary submission regarding this second point seems to me to rest on a confusion as to the respective roles of the Parole Board and the Secretary of State. Of course, whether such further material will justify rejection of the Parole Board's recommendation depends on the facts and circumstances of the particular case.

37. A starting point, which ought not to be overlooked merely because it is obvious, is that the Parole Board considered that the claimant "[could not] at present be safely managed in the community" and that it was "necessary for the protection of the public that [he] remain detained".

38. The Index Decision rested on the Secretary of State's rejection of the Parole Board's conclusion that "there [was] no further work for [the claimant] to undertake in closed conditions." Mr Grandison accepted that, in light of the current authorities, the Secretary of State was required to show "very good reasons" for disagreeing with the panel on this issue. I am prepared to proceed on that basis, provided that it is understood that the strength of the required reason is a relative rather than an absolute matter. However, it is worth considering what findings are represented by the Parole Board's conclusion. It appears from section 8 of the panel's recommendation (paragraph 22, above) that the panel found as facts (1) that the claimant needed to undergo further work, namely intervention to "help [him] understand [his] ASD diagnosis and how to manage [his] emotions better" and (2) that such intervention was available in open conditions. It appears also to have found as facts (3) that no appropriate further work was available in closed conditions and, implicitly (4) that no work was required except that mentioned under finding (1). These are certainly not findings as to a past event or occurrence, such as Heather Williams QC mentioned in *R (John) v Secretary of State* at [47] (paragraph 15, above). Nor have they got anything to do with credibility. They are assessments of the claimant's need to undergo further work and of the availability of resources. An assessment of the claimant's need to undergo further work is fundamentally a matter concerning risk. The question of the resources of the closed estate to address a particular need is not, in my view, one in respect of which the Parole Board enjoys a particular advantage over the Secretary of State.

39. The Secretary of State formed the view that a Stalking Risk Profile was necessary. He was entitled to form that view. The claimant's life sentence for manslaughter was upheld by the Court of Appeal: *R v Oakley* [2010] EWCA Crim 2419, [2011] 1 Cr. App. R. (S) 112. In its judgment the Court said at [48]:

> "[T]he judge was entitled to treat this as a particularly grave case warranting a life sentence. The offence itself took place against a background of threats and violence used by the appellant against those with whom he had been in a relationship and who had tried to end it. In the case of the deceased he had, as submitted by Mr Coffey QC for the Crown, been relentless in his pursuit of her contrary to her wishes. He had previously threatened to kill her, putting a knife to her throat. He had disregarded police, her friends, and her family in persisting in his attempts to contact her. He deliberately sought her out, following her even to her work place and to the home where she was staying with a friend on the occasion when she was killed. In that house he armed himself with a knife and engaged in a truly brutal and frenzied attack and he acted with the intent to kill."

In its decision letter the Parole Board summarised the background mentioned by the Court of Appeal:

> "Your offending history since May 2007 shows three previous convictions for five offences. These include theft by employee, possession of an offensive weapon and ABH. The assault and offensive weapon have some parallels with the Index offence, you initially denied to the panel that there had been any involvement of the police in an earlier relationship. It was then pointed out to you that, in May 2006, you were cautioned for harassment of another former partner, [name]. She had ended a relationship with you and you have disclosed that for a year you pursued her, waiting outside her place of work and home and telephoning her and her family. In June 2006, following the caution, you attended her home again trying to speak to her. You were turned away by the family but then went to her place of work and again returned to her home address entering her rear garden. In your evidence you admitted stalking [that former partner], particularly by visiting her workplace uninvited; you denied stalking [another former partner]. Ms Mercieca [one of the Prison Offender Managers] told the panel there had not been a stalking assessment as she believed there needed to be a conviction for stalking. The panel considered that you may fit the profile of the 'Rejected Stalker'. On 10 May 2007, you were sentenced for ABH and possession of offensive weapon. The ABH involved an assault on your then partner, [a third woman]. You claimed that she had slapped you first and you retaliated. There was a further incident two days later when you went to the victim's home to talk to her and you took a baseball bat; you said it was purely for show in case her brother was there, as you claimed that he had previously threatened you."

40. The relevant parts of Mr Fisher's statement have been set out above. As he noted in paragraph 5 of that statement, the claimant's history not only involved stalking former partners but also indicated "coercive and controlling behaviour within relationships (including familial)". Mr Fisher's team considered that the Stalking Risk Profile was a necessary assessment when deciding on the risk still presented by the claimant and on the options for addressing that risk. Ms Mercieca's evidence to the Parole Board might explain why no stalking assessment had been carried out, but it rested on a misapprehension as to the requirements for such an assessment. I see no reason at all why the Secretary of State should not have accepted that such an assessment was required.

41. It seems to me that, once it is decided that the claimant requires to undergo further work that has not been identified by the Parole Board, its recommendation for transfer to open conditions loses the force it might otherwise have had, because the recommendation rested on a contrary premise. Further, the work identified by Mr Fisher was available in closed conditions and, according to him, usually undertaken in closed conditions; and paragraph 3 of the Introduction to the Directions expressly noted that the resources for assessing and reducing core risk factors existed principally in the closed prison estate (see paragraph 10 above).

42. Mr Buckley relied on the following passage in Chamberlain J's judgment, at [43], regarding Mr Fisher's statement:

> "Evidence post-dating the challenged decision could in principle be relevant when considering relief. But if the decision were shown to be flawed, it would be appropriate to withhold relief only if it appeared to the court that it was highly unlikely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred: section 31(2A) of the Senior Courts Act 1981 ('the 1981 Act'). In this case, the material in Mr Fisher's statement does no more than identify certain assessments which (depending on their outcome) might identify work which could (perhaps with adaptations designed to mimic open conditions) be undertaken in closed conditions. That seems to me to fall very far short of the kind of evidence necessary to satisfy the high threshold set by section 31(2A) of the 1981Act."

I do not think that that passage assists the claimant. Chamberlain J was considering the test in section 31(2A) of the 1981 Act. I, on the other hand, am considering the lawfulness of the actual decision. It was perfectly reasonable for the Secretary of State to consider that the assessments identified by Mr Fisher ought to be done before, not after, transfer to open conditions. As the Parole Board had not identified the need for those assessments, his opinion in that regard did not involve any rejection of a contrary view by the Parole Board (the only contrary view having related to the identification of required work). Anyway, as the Stalking Risk Profile is designed to assess the risk presented by the claimant, I should see no good reason why the Secretary of State should not form and act upon his own opinion as to whether it ought to be undertaken before transfer to open conditions.

43. Although it did not, of course, inform the Secretary of State's decision-making, the current stance of the Parole Board is worth noting. In its Directions of 8 November 2023 regarding its next review of the claimant's case, the Parole Board wrote:

> "As detailed in the July 2023 adjournment note, there are several references in the dossier to stalking behaviour. Mr Oakley admitted to the last Parole Board panel that he had stalked a former partner, particularly by visiting her workplace uninvited. He had denied stalking the victim of the index offence. The panel has reviewed the dossier and continues to believe that an assessment of this behaviour is essential to fully understand the risk presented by Mr Oakley and how to manage this risk particularly given the offending of the index offence when he attended a residential property uninvited."

The belief of the panel stated in the final sentence of that passage is unsurprising and is precisely the same as the Secretary of State's belief that underlay the Index Decision. He was entitled to hold that belief and to consider that it was necessary to understand the risk presented by the claimant and how that risk should be managed before deciding whether or not to transfer the claimant to open conditions.

44. Mr Grandison submitted that, if I were to find that the Index Decision was unlawful, I ought not to quash the decision because in the circumstances now prevailing it would be inevitable that the same decision would be taken. (Cf. *R (Michael) v Governor of HMP Whitemoor* [2020] EWCA Civ 29, [2020] 1 WLR 2524, at [51]-[53].) I agreed to receive written submissions on the point, should it arise. However, it does not arise. The claim is dismissed.

Addendum

45. After this judgment had been circulated in draft, Mr Grandison very properly drew my attention to the following passage in Fordham J's judgment in *R (Dobson) v Secretary of State for Justice* [2023] EWHC 50 (Admin), a case concerning release on temporary licence, where the judge referred to authority concerning transfer from closed to open conditions:

> "67. The Agreed Issue is this: When reviewing DG Bailey's decision for the purposes of a rationality challenge, is it necessary and/or appropriate for the Court to exercise 'anxious scrutiny'?
>
> 68. Mr Bimmler submits that 'anxious scrutiny' of the impugned decision is necessary and appropriate for the reason given by Saini J in *R (Wells) v Parole Board* [2019] EWHC 271 (Admin) at §35, that: 'under the modern context-specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the Decision.' I agree.
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> 69. *Wells* was a case in which the impugned decision was a decision of a panel of the parole board, not to direct the claimant's release. *In R (M) v SSJ* [2009] EWHC 768 (Admin), Silber J observed at §60 that that was 'a case calling for intense scrutiny'. *M* was a case in which

> the impugned decision was a decision of the SSJ not to transfer the claimant to open conditions, in the application of relevant criteria on transfer (see §§35-36) and on security categorisation (see §§49-50). In *R (SP) v SSJ* [2010] EWHC 1124 (Admin) at §21, Burnett J (as he then was) also described the principle of 'anxious scrutiny' as applicable. *SP* was a case in which the impugned decision was a transfer direction from prison to a psychiatric hospital. Reference was also made to *R (Browne) v Parole Board* [2018] EWCA Civ 2024 at §52 and *R (PP) v SSJ* [2009] EWHC 2464 (Admin) at §§20, 65. Mr Pritchard points out, rightly, that none of these cases concerned ROTL. He submits that a decision on the application of the Rule 9(4) test (§2 above), whose consequences are to grant or decline ROTL, does not engage the principle of 'anxious scrutiny'. I cannot accept that submission. In my judgment, it would be odd and incoherent if 'anxious scrutiny' applied to a decision – applying relevant criteria – whether to release on licence, whether to move a prisoner from prison to a psychiatric hospital, and whether to transfer a prisoner from closed to open conditions, but not whether to grant ROTL. Although 'temporary' – whether day-release (RDR) or overnight release (ROR) – ROTL is a species of release on licence. It directly engages the liberty of the individual. It also constitutes a material stage in a prisoner's transition towards release on licence, on which they may in practice be reliant as a 'stepping stone': cf. *R (Hirst) v SSHD* [2001] EWCA Civ 378 at §18. This reality is reflected in the Transfer Decision at [9c] (§6 above). In that sense too, individual liberty is very much what is at stake.
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> 70. I accept the further submission of Mr Pritchard, citing *Browne* at §52, that the 'anxious scrutiny principle' is a contextual 'minor modification' to the 'relatively high threshold' of public law unreasonableness. Tracing 'anxious scrutiny' back to its source, a good working illustration is *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514at 537H-538A, where judicial review succeeded because it was 'not clear' that the defendant public authority 'took into account or adequately resolved' relevant matters. That was reflective of an enhanced scrutiny, but in the context of entirely conventional public law principles and standards. I have already touched on the 'due process' analogue, which again concerns conventional standards: §64 above. The intensity of the scrutiny that leads to a conclusion on reasonableness, or unreasonableness, coheres within entirely conventional – and equally always entirely contextual – public law standards, in the exercise of the court's secondary and supervisory review jurisdiction."

46. This passage does not affect my reasoning or conclusions. The language of "anxious scrutiny" is of course well-established in public law, though perhaps one might be forgiven for doubting just how helpful this rather psychological turn of phrase is. The approach evinced in this passage in *Dobson* suggests some difference in degree, or at least formulation, from that evinced at [26] in *Overton*. Lord Templeman's dictum in

Bugdaycay was that "where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process." The same must apply to the original decision-maker. A decision on transfer to open conditions affects liberty to some limited extent, though it cannot properly be said to concern imperilment of life. The issue is not the decision-maker's degree of anxiety but whether appropriate care and rigour is evident in the decision and reasoning. I consider that the correct and helpful test is that set out by Eyre J at [26] in *Overton.*