Neutral Citation Number: [2024] EWHC 696 (Admin)

Case No: AC-2023-LON-001007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2024

Before :

HHJ Karen Walden-Smith sitting as Judge of the High Court

- -

Between :

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

- -
- -

CARL BUCKLEY (instructed by **BAILEY NICHOLSON GRAYSON**) for the Claimant
MYLES GRANDISON (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the Defendant

Hearing date: 14 March 2024

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Approved Judgment

HHJ KAREN WALDEN-SMITH:

1. This case is concerned with the lawfulness of the determination on 13 December 2022 of the Secretary of State for Justice ("the Secretary of State") rejecting the recommendation of the Parole Board made on 30 September 2022 to transfer Mr Ripon Uddin (hereinafter referred to as the claimant), an indeterminate sentence prisoner, to open prison conditions. The application for judicial review was made on 13 March 2023. Permission to bring the judicial review proceedings was granted on the papers by Mr Justice Jay on 24 October 2023.

2. The claimant was sentenced to an indeterminate sentence with a tariff minimum of 2 years and 183 days on 4 December 2007. The tariff expired on 15 June 2010.

3. The determination of the Secretary of State, rejecting the recommendation of the Parole Board, was that:

> "the decision maker carefully considered the test, alongside the information contained in your dossier, the Parole Board's recommendation and the review of Report Writers. As his is right, the Secretary of State has reached a different conclusion to that of the Parole Board panel. The Secretary of State had in mind when reaching this conclusion his published criteria and found the following criteria were not met:
>
> - 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;
>
> - A transfer to open conditions would not undermine public confidence in the Criminal Justice System"

4. The sole issue for the court is whether the decision of the Secretary of State to accept the Parole Board's recommendation was an unreasonable departure from the Parole Board's finding so as to render the Secretary of State's decision irrational and/ or *Wednesbury* unreasonable.

5. The claimant, was represented by Mr Carl Buckley of Counsel and the Secretary of State for Justice ("Secretary of State") by Mr Myles Grandison of Counsel. The court has been greatly assisted by their thorough and focussed written and oral submissions.

The Factual Background

6. The claimant was sentenced on 14 December 2007 at Wood Green Crown Court to a sentence of Imprisonment for Public Protection (an IPP) with a minimum tariff of 2 years and 183 days (3 years less time spent on remand). That minimum tariff therefore expired in June 2010 and the claimant is now approximately 14 years post-tariff. The claimant had pleaded guilty to an offence of assault occasioning grievous bodily harm with intent (contrary to section 18 of the Offences Against the Person Act 1861). He had also pleaded guilty to an offence of common assault but he had received no separate sentence for the common assault.

7. The Parole Board recommendation dated 30 September 2022 sets out details of the index offence as follows:

> "1.16 The index offence occurred on 12 June 2007. Mr Uddin and "H" [the claimant's girlfriend] had gone to the usual hotel and there "H" had received a text message from a male friend. Mr Uddin read it and concluded that "H" had slept with this man. He asked her if she had, and she said "Yes". He then became angry and assaulted her (according to her, threatened to cut her vagina with a broken glass). He then made her go with him to his car and drove her to his family home where they got a blanket and slept together for the rest of the night in the living room.
>
> 1.17 In the morning they made breakfast but he then became angry with her again, questioning her about why she had slept with the other man. He left the room and returned carrying a Samurai sword which he swung at her head. She put up her right hand to defend herself and received a severe injury resulting in the loss of 70% of the use of her hand. He took her to hospital where she pretended she had cut herself while cutting vegetables (a familiar action on the part of a victim of domestic abuse).
>
> 1.18 Mr Uddin pleaded guilty to wounding with intent but until very recently he maintained to professionals that the injury to "H" had occurred accidentally. So far as the panel is aware it was during his evidence at the June hearing that he first accepted that the injury was not accidental and that if she had not put her hand up to defend herself the sword would have struck her in the face."

8. The judge sentenced the claimant only for the index offence but in doing so, as he was entitled to, took into account the background to that offence which included the manner in which the claimant had behaved towards his victim. In his sentencing remarks the judge set out the following:

> "That injury is serious enough, but it positively pales compared to the psychological damage you have caused to her during the course of your relationship with her and, although I sentence you only for the matters on the indictment to which you have pleaded guilty, I cannot and will not ignore the material that has been placed before me."

9. The sentencing judge would have had before him the Pre-Sentence Report from probation which set out the context of the relationship between the claimant and his victim:

> " "H" states that she was only seventeen years old when she first met Mr Uddin but that the relationship quickly deteriorated and he would use physical violence against her on a regular

> basis. This included punching her, kicking her, kicking her in the head, stamping on her head, and using weapons to beat her with (metal bar) and threaten her with (knives). She also claims to have been beaten to initiate sexual contact between them, that Mr Uddin anally raped her the night before the index offence, and that he made her have sexual intercourse with him in front of others and made her watch him do the same with others. She lists the injuries she has received which include black eyes, bruising, a broken nose, back injuries, losing teeth, staple injuries, cigarette burns and attempted strangulation. She also states that as a result of the physically abusive behaviour that Mr Uddin used against her she suspects that she miscarried their baby. "H" also states that she was held against her will in Mr Uddin's home by him for a five month period starting from Christmas 2006."

10. In addition to setting out details of the index offence, the Parole Board also set out an analysis of the claimant's past offending behaviour including the general background to his offending, his previous convictions and intimate relationships with women and their allegations against him, his marriage to Ms Begum and the risk factors identified as having contributed to his offending.

11. The Parole Board recorded, amongst other things, that the claimant came from a Bangladeshi family and was brought up in London. He had a troubled childhood and was expelled from mainstream school. By the time he was 20 years old he was using cocaine, having previously been a cannabis user, and became a heavy drinker. He was not employed. He had been in a number of intimate relationships with women which had ended because of his violent behaviour. The first relationship referenced started when he was a teenager, the woman "S" being 6 years older than him. He was arrested in 2002 for threatening to kill "S" and was found in possession of an 8-inch carving knife. In 2003 he was arrested for kidnapping "S", forcing her into his car and taking her to the family house, holding a knife to her and threatening to stab her. Charges against him were dropped when "S" withdrew her complaint. While on remand he made false claims to a psychiatrist that he had been hearing voices. In 2004 he threatened to petrol bomb "S's" home. In another relationship with a woman "W" he punched her in the face, attempted to force her to kill her own new baby and threatened to burn her with a cigarette. He was given a conditional discharge having admitted to assault occasioning actual bodily harm. The next relationship was with "H".

12. The Parole Board noted that, in general, the claimant denied the specific allegations made against him but admitted to "elements of truth" in some of them. The Parole Board considered that the allegations were more likely than not to be true (para 1.12). In another part of the report the Parole Board note that "He has frankly admitted to the panel that he was leading an antisocial lifestyle (clubbing and drinking and so on) and that his attitudes and behaviour towards women were bad. He says that he is now thoroughly ashamed of his behaviour. The panel accepts that his remorse is genuine" (para 1.6). These two paragraphs do not sit easily together in that his denial of matters the Parole Board considered to be more likely than not to be true does not point towards genuine remorse.

13. The recommendation records that in 2005 the claimant travelled to Bangladesh where he met and married Ms Begum. She remained in Bangladesh until October 2006 when she moved into the claimant's family home. The claimant continued his relationship with "H" after his marriage and after Ms Begum moved into the family home. " H's" account, that she would have sex with the claimant in front of Ms Begum and that Ms Begum would have sex with the claimant (her husband) in the presence of "H", was accepted by the Parole Board as being more likely than not.

14. In addition to the Parole Board's assessment that the allegations made against the claimant were more likely than not to be true, the pre-sentence report contained information that "H" had seen the claimant physically abuse both his wife and mother in front of her. Ms Begum denied having been assaulted by the claimant when she gave evidence before the Parole Board.

Parole Board Reviews

15. The tariff expiry date was 15 June 2010 and the Parole Board reviewed the claimant on three occasions prior to the recommendation of 30 September 2022. On each of the three prior occasions the Parole Board had recommended that the claimant should remain in closed conditions.

16. The review resulting in the 2022 recommendation was very long and drawn out. The Secretary of State referred the case to the Parole Board in March 2017, some 5 ½ years before the decision was promulgated. There had been an oral hearing in January 2019 at which three of the four professional witnesses recommended that the claimant should remain in closed conditions to complete further risk reduction work, but the panel decided not to make a negative decision but to adjourn for 6 months in order give the claimant the opportunity to re-engage. There was then significant improvement in the claimant's engagement, although the panel noted his stance was "that he had served longer than was fair and he did not need to do any further risk reduction work." He did complete the "Way Forward" course in August 2019. At this time, the Secretary of State expressed concern that the psychologist member of the panel had previous engagement with the claimant's case and, as a consequence, she was obliged to recuse herself. The remaining two members of the panel were unable to agree as to the recommendation to be made.

17. With no majority outcome from the first panel, the case was re-allocated to another panel, but the next hearing did not take place until 13 August 2020 for a variety of reasons. During the intervening period there was a deterioration of the Claimant's mental health and in September 2021 Dr Singh tentatively diagnosed him as suffering a psychotic illness. After a readjustment in his medication, the claimant's mental state improved.

18. The oral hearing for the new panel was eventually scheduled to commence in June 2022. The second day's hearing was adjourned as a result of a late service of an addendum report from Dr Singh (the consultant psychiatrist) advising that Mr Uddin should remain in closed conditions. An application was also made for Ms Begum to give evidence, which was objected to (for fear of the claimant's potential coercive control of Ms Begum) but was acceded to by the chair. The final hearing was listed for 27 September 2022, which hearing continued until 2 minutes to 6pm to take account of the fact that the chair was retiring on 30 September 2022. Over the two

days of Parole Board hearings in June and September 2022, evidence was taken from the claimant himself, Ms Hooper (the Probation Practitioner who had also been the author of the original PSR), Mr Matthews (an independent psychologist) and Ms Hodgkin (the prison psychologist), Dr Singh (the psychiatrist), Mr Dan-Jumbo (the prison offender manager) and Ms Begum (the claimant's wife). Dr Singh, Ms Hooper and Ms Hodgkin did not support a progressive move. Mr Matthews recommended a move to open conditions and the panel found his evidence more persuasive. Mr Dan-Jumbo had only been the claimant's prison offender manager for a short time, but he reported that the claimant did not come across to him as he had expected: that he engaged positively, and appeared very coherent and clear in everything he said. There was an incident in March 2022 when there had been an altercation between the claimant and a member of staff which resulted in him receiving a negative work report. The claimant contended that it was the member of staff who had been rude to him and the panel determined that the incident did not have any real bearing on him presenting a risk of serious harm to the public. Between the first and second day of Parole Board hearings there were a couple of incidents, the insertion of a USB into his laptop (he said to charge his vape) and the finding of a padlock and a DVD with built in hard-drive. The Parole Board determined that none had any real impact on his risk of serious harm to the public in the community. There was a more serious outstanding issue with respect to whether the claimant had been involved in an incident which took place on 21 August 2022 where a prisoner had been assaulted. The claimant denied involvement, and the Parole Board noted that he had not been involved in any other incidents of violence during his time in custody, but was unable to conclude whether he had been involved in this particular incident.

19. Ms Begum gave evidence on 27 September 2022. Ms Hooper expressed concern that she had been subjected to coercive control by the claimant as he had been making calls to her late in the evening. Ms Begum said she did not have any problem with him phoning and denied that he was coercing her. There were parts of Ms Begum's evidence, for example where she denied knowing that he had a girlfriend, which the Parole Board found they could not accept.

20. In assessing the claimant's risk to the public, the Parole Board referred to statistical predictions of the probability of his reoffending and the probation's OASys assessment of his risks of serious harm. The statistical prediction recorded the probability of proven non-violent re-offending within 2 years, the probability of proven violent re-offending within 2 years, and the probability of proven seriously harmful re-offending within 2 years, as all being a medium probability. Despite this, the probability of proven re-offending of any kind within 2 years was recorded as low which seems to fly in the face of the other statistical predictions. The Panel decided not to attach too much weight to the statistical predictions in circumstances where there were a small number of convictions but one was of extreme seriousness. However, the probation's OASys prediction set out that the claimant was a very high risk of serious harm to known adults, high risk to the public and children, and low risk to staff. Ms Hooper explained that the claimant continued to pose a very high risk of harm to past, present and future partners based on the very serious nature of the index offence and the details from police of his previous relationships. The panel agreed that at least until he had demonstrated by a sustained period of compliance and good behaviour in the community, the claimant could properly be assessed as posing a high

risk of serious harm to future intimate partners, children and the public but had difficulty in seeing how he meets the criteria for a very high risk of harm to future intimate partners *"Certainly he will not pose such a risk if, as the panel recommends, he is moved to an open prison."* None of the professional witnesses considered that the claimant had demonstrated a reduction in risk to a level manageable on licence in the community. Ms Hodgkin, Ms Hooper and Dr Singh believed that unless and until he had completed further risk reduction work in closed conditions he could not be said to have demonstrated the necessary reduction. Mr Matthews did not believe such risk reduction work was necessary or appropriate and that his risk could be safely manageable in open conditions, though not in the community. Mr Matthews's reason for recommending open conditions was *"due to the length of time Mr Uddin has spent in custody and now needs a gradual reintegration back into the community as well as the opportunity to put realistic goals into place."* Ms Hodgkin, when she interviewed him in May 2022, remained of the opinion that *"he presents a high risk of intimate partner violence in the community and a moderate risk of general violence. This is due to his lack of insight into risk and the presence of a number of problematic personality traits which impact on his engagement with others…"* Dr Singh advised that his view was that the claimant's risk of causing serious physical harm, mainly in domestic settings, remains high if he were to be released into the community and that he did *"not recommend his release into the community or for progression to open conditions"*. The Parole Board much preferred the evidence of Mr Matthews over that of Dr Singh. Mr Matthews concluded that he was not able to recommend the claimant's release but did recommend *"that he be progressed to open conditions where he should be subject to Enhanced Behavioural Monitoring, demonstrate compliance with licence conditions and develop a release and risk management plan"* without the need for any further risk reduction work which he needed to undertake in closed conditions.

21. Having considered all the evidence presented before them, the panel determined that the Claimant *"has succeeded in demonstrating a reduction in his risk to a level at which he no longer needs to be confined in closed conditions."* (para 3.53) and that *"it is essential for him to have a period of testing in open conditions before it can be said that his risk will be safely manageable in open conditions. He has been in prison for many years and his lifestyle while he was living in the community was an unsatisfactory one. He needs a gradual reintegration into the community in the course of which his progress can be monitored and tested …"* (para 3.54).

22. In its conclusion, the Parole Board set out that although the claimant had been able to demonstrate a significant reduction in is risk of serious harm to the public *"it is not yet at a level where it would be safely manageable on licence in the community…"* (para 4.2) and that (subject to ongoing investigation with respect to the allegation of an assault) his *"risk will be safely manageable in open conditions and that the criteria for a move to open conditions set out at the beginning of this decision are satisfied."* (para 4.3).

Secretary of State's Decision

23. In the decision letter dated 13 December 2022, the Secretary of State set out that the recommendation of the Parole Board was not binding on him and that he would only

accept the recommendation to approve an indeterminate sentence prisoner for open conditions where the published criteria are met. While the Secretary of State agreed that the claimant was not at risk of abscond, the Secretary of State determined that the following two, of the three, criteria were not met:

- A period of open conditions is essential to inform future decisions about release and to prepare for possible release on licence into the community;

- A transfer to open conditions would not undermine public confidence in the Criminal Justice System

24. It is not the role of the Parole Board to comment upon the third criteria and the Secretary of State takes account of whether moving a prisoner to an open prison "would not undermine public confidence in the Criminal Justice System". In order to establish that the Secretary of State acted unlawfully in not following the Parole Board's advice, it will be necessary for the claimant to establish that his decision with respect to both criteria was irrational.

The Legal Framework

25. Section 12(2) of the Prison Act 1952 provides that a prisoner may be lawfully confined in such prisons as the Secretary of State directs 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."* Section 47 of the Prison Act empowers the Secretary of State to make rules for the classification and treatment of prisoners. Rule 7 of the Prison Rules 1999/728 provides that prisoners shall be classified in accordance with the directions of the Secretary of State having regard to specified matters.

26. The functions of the Parole Board are conferred upon it by section 239 of the Criminal Justice Act 2003 ("CJA 2003") which provides, amongst other things, that

> "(1) …
>
> (2) It is the duty of the 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
>
> (3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider –
>
> (a) any documents given to it by the Secretary of State, and
>
> (b) any other oral or written information obtained by it;
>
> and if in particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to

> interview him and must consider the report of the interview made by that member.
>
> (4) …
>
> (5) …
>
> (6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the Secretary of State must have regard to –
>
> > (a) the need to protect the public from serious harm from offenders, and
> >
> > (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation
>
> (7) …"

27. While the Secretary of State was under no obligation to refer this matter to the Parole Board for the purpose of his determination of whether the claimant should be transferred to open conditions (see Sales LJ, as he then was, in *R (on the application of Gilbert) v The Secretary of State for Justice* [2015] EWCA Civ 802 para 70), there was an obligation to refer the claimant's case in order that the Parole Board could consider the issue of release – which they did not support.

28. At the time of the Parole Board reporting in this matter, directions dated 28 June 2022 had been issued to the Parole Board by the Secretary of State pursuant to the provisions of section 239(6) of the CJA 2003. Those directions set out the following with respect to the transfer of prisoners who had been given a sentence for public protection:

> "**Transfer of indeterminate sentence prisoners (ISPs) to open conditions**
>
> **Suitability for Open Conditions Test**
>
> 1. The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (to approve an ISP for open conditions) only where:
>
> - the prisoner is assessed as a 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; and

- a transfer to open conditions would not undermine public confidence in the Criminal Justice System.

Directions

2. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-

   i. all information before it, including any written or oral evidence obtained by the Board;

   ii. the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release

   iii. whether the following criteria are met

      - the prisoner is assessed as a low risk of abscond; and

      - a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community

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

29. The Generic Parole Process Policy Framework re-issued on 12 October 2022, and therefore relevant to the decision the claimant seeks to impugn, provides the following:

> "5.8.2 The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP for open conditions) only where
>
> - the prisoner is assessed as a 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; and
> - a transfer to open conditions would not undermine public confidence in the Criminal Justice System"

Discussion

30. The claimant submits that the decision of the Secretary of State was an unreasonable departure from the findings and decision of the Parole Board so as to render the decision of the Secretary of State irrational and/or *Wednesbury* unreasonable.

31. It is accepted by the claimant that it is entirely possible for two parties to reach two differing decisions on the basis of the same factual matrix but that does not necessarily mean that one party is acting irrationally. As was set out by Eyre J in *R (on the application of Overton) v Secretary of State for Justice* [2023] EWHC 3071, in relation to the same prisoner there can be both a recommendation from the Parole Board which is totally rational and a decision to the contrary effect by the Secretary of State which is also wholly rational:

> "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 judgment 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 rarely if ever be a single unquestionably correct answer."

32. The role of the court is to focus upon the rationality of the decision of the Secretary of State which is being impugned, rather than being distracted by the rationality of the decision of the Parole Board (see King J in *R(Wilmot) v Secretary of State* [2012] EWHC 3139). In doing so, the court will consider the nature and quality of the Secretary of State's reasoning exercise when engaging with the recommendation of the Parole Board. The Secretary of State needs to consider the nature and subject matter of the Parole Board's assessment and whether the Parole Board was better-placed than the Secretary of State to make that assessment or whether the Parole Board had some special expertise or whether there was an opportunity to assess not open to the Secretary of State.

33. Some kind of distinction has to be made between the findings of fact of the Parole Board, who have had the benefit of hearing oral evidence, and the assessment of risk, albeit that distinction is not some bright line or fixed boundary. As set out by the then Lord Chief Justice, Lord Thomas, in *R (on the application of Hindawi) v The Secretary of State for Justice* [2011] EWHC 830, in which it was held that the Secretary of State must distinguish between the approach necessary in relation to the findings on credibility and the assessment of risk.

> "It is self-evidence that he [the Secretary of State] 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 upon 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."

34. Lord Thomas went on to say that *"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 are the basis upon which the Secretary of State was entitled to reach his own view, whilst according appropriate respect to the Parole Board's own assessment. A Secretary of State would require a very good reason to depart from a panel's findings of fact where there had been an oral hearing as *"decisions had to be made on whether the claimant was telling the truth in light of all the evidence."*

35. As was set out in *R(John) v Secretary of State for Justice* [2021] EWHC 1606, there is a distinction between:

> "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 as he determines appropriate"

36. In *R (on the application of Oakley) v The Secretary of State for Justice* [2022] EWHC 2602, Chamberlain J adopted a more nuanced approach, saying that he doubted it was helpful to classify the Parole Board's recommendation as findings of fact or assessment of risk while recognising that when the court is considering the lawfulness of a decision of the Secretary of State who has disagreed with the recommendation of the Parole Board, it was necessary to identify with precision the conclusions or propositions the Secretary of State disagreed with:

> "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."

37. In the more recent case on this issue *R(on the application of Sneddon) v Secretary of State for Justice* [2023] EWHC 3303, Fordham J set out in paragraph 28 of his judgment a number of key principles that he had derived from his consideration of the case law. These principles can be summarised as follows:

(i) The primary decision maker is the Secretary of State;

(ii) The Parole Board has legally significant institutional and due process advantages over the Secretary of State, including expertise on assessing the risk posed by individual prisoners, and the due process of an expert assessment. Fordham J found that "These advantages can make it difficult for the SSJ to show that it is reasonable to take a different view"

(iii) The Secretary of State is required to accord weight to the recommendation of the Parole Board and the weight to be accorded depending on matters in issue, type of hearing and nature of the assessment;

(iv) The Secretary of State 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"".

(v) The reasonable basis for rejection may lie in something having "gone wrong" or "come to light"; an idea of deficiency. Examples given include running counter to professional views without a sufficient explanation, decisions made on demonstrably inaccurate information; failing to apply the correct test or address the correct criteria; appearing to fly in the fact or evidence or the nature of risks found by the Panel;

(vi) The reasonable basis for rejection will require very good reason, or clear, cogent and convincing reasons in respect of evaluative conclusions, where the Panel has a significant advantage over the Secretary of State; for example, credibility after a oral hearing, questions of fact from evidence at the hearing, questions of expert evaluation of risk;

(vii) For questions other than where the Parole Board has a significant advance "the reasonable basis for rejection will still always require "good reason" because the Secretary of State must always afford to the Parole Board's evaluative assessments "appropriate respect", the ultimate evaluative assessment being the balance of the interests of the prisoner against those of the public.

38. Having set out those principles, as he saw them, Fordham J set out that "when all of this is understood, it can readily be seen why it is right, in principle to speak of "very limited parameters" for rejection". It appears that Fordham J did not take into account in his statement of principles the expertise of the Secretary of State "in the assessment of risk [and] also in the management of risk in the context of the prison estate" per Eyre J in *Overton,* para 27 with reference to Jackson J in *R(Banfield) v Secretary of State for Justice* [2007] EWHC 2605.

39. I was informed by Counsel at the outset of oral submissions that an application for leave to appeal to the Court of Appeal has been granted in *Sneddon*. An application for permission to appeal has also been submitted in the case of *R (on the application of Oakley) v Secretary of State for Justice* [2024] EWHC 292, where HHJ Keyser KC sitting as a Judge of the High Court, expressed "misgivings" as to Chamberlain J's exposition of the approach to be taken. I do not have those same misgivings and, insofar as HHJ Keyser was doubting the approach being taken in *Oakley*, Calver J in, *R (on the application of Cain) v Secretary of State for Justice)* [2024] EWHC 426, also respectfully disagreed.

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

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

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

42. It is agreed that the claimant is a low risk of abscond.

43. The first criterion where the Secretary of State's view differs to that of the Parole Board is whether a period in open conditions is essential to inform future decisions and to prepare for possible release. As is set out by Eyre J in *Overton*, the first aspect of the criterion, namely that time in the open estate is needed before the Secretary of State can be satisfied that the risk posed by the prisoner is such that he can be safely released and will cope with life in the community, is present in almost all cases:

> "The second aspect addresses the stage in the prisoner's progress and development which has been reached. In that regard it will be necessary to consider whether the prisoner has reached a stage that the level of risk which he or she poses can safely be managed in the open estate. The criterion will not be satisfied in respect of a prisoner for whom there is further work which can be done to address his or her offending behaviour at least unless that work can be done as effectively in the open estate as in a closed prison. Similarly the criterion will not be satisfied in respect of a prisoner who cannot be managed safely in the open estate."

44. It is not sufficient for the claimant to show that the further work to address offending behaviour could be carried out in the open estate in order to be entitled to be transferred to the open estate. The claimant has to establish that a period of time in open conditions is essential to inform future decisions about release and to prepare for possible release on licence into the community:

> "If the further work on the prisoner's offending behaviour can be done just as well in closed conditions on a Progressive Regime then the test of essentiality may very well not be met, depending always on the particular facts of the case" per Calver J in *R(on the application of Cain) v Secretary of State for Justice* [2024] EWC 426

45. I have taken it to be a typographical error where it says in paragraph 3.54, *"The panel believes that it is essential for him* [the claimant] *to have a period of testing in open conditions before it can be said that his risk will be safely manageable in open conditions"* as that sentence makes little sense and is entirely circular. This report was written in a rush in order to meet the chair's retirement on 30 September 2023, I take it that the final words of the sentence were meant to read "safely manageable in the community." Even if that is correct, the Parole Board do not appear to have engaged with the central issue which is why it is essential for the claimant to be moved to the open estate and why a progressive regime cannot prepare the claimant

for release and living in the community. The Parole Board do not provide any details as to why transfer to open conditions are necessary for the claimant to evidence suitability for release. The determination as to whether it is essential for a prisoner to be transferred into the open estate is not one over which the Parole Board has a significant advantage. It is ultimately an exercise of judgment, balancing the interests of the public and the prisoner and, while the Secretary of State must give appropriate respect to the considered view of the Parole Board, the Secretary of State is entitled to form his own judgement and, indeed, it could be said that the Secretary of State is in the best position to judge competing interests of the individual prisoner against the wider interests of the public. In *Overton*, Eyre J referred to the expertise of the Secretary of State in the assessment of risk but also in the management of risk in the context of the prison estate and "… the Defendant is entitled to form his own judgment as to where the balance of interest best lies. The exercise of an evaluative judgment to determine that question in the present case was not one in relation to which the Parole Board enjoyed a particular advantage over the Defendant" per Calver J in *Cain.*

46. Three of the four professional witnesses before the Parole Board, Dr Singh, Ms Hooper and Ms Hodgkin all considered that the claimant required further risk reduction work within the closed estate. Mr Matthews did not consider he did and the Parole Board preferred his evidence, which they were entitled to do. But, as has already been set out, the Parole Board and the Secretary of State can come to different determinations on the same evidence. Neither of the decisions was irrational.

47. In accordance with the guidance given by Eyre J in *Overton* following the determination of Lang J in the planning field in *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (namely to read the decision letter fairly and in good faith and as a whole, in a straightforward and down to earth manner without excessive legalism or criticism, as if by a well-informed reader who is aware of the points of controversy) there can, in my judgment, be no criticism of the way in which the Secretary of State explains his decision and the reason as to why he disagreed with the Parole Board on the "essential test" in five out of six bullet points:

- The Secretary of State notes that paragraph 3.10 of the Parole Board decision letter states "Mr Matthews' main reason for recommending open conditions was due to the length of time Mr Uddin has spent in custody and now needs a gradual reintegration back into the community as well as the opportunity to put realistic goals into place." The Panel relied on this point in recommending a transfer to open conditions; however, the length of time an individual has spent in custody does not determine that a move to an open prison is essential.

- In addition, a gradual reintegration back into the community needs to be appropriately sequenced and cannot come before the completion of core risk reduction work, said by several witnesses to be outstanding. This is further supported by the following assessment by Dr Singh: "Overall, on balance, it is my view that Ripon Uddin's risk of causing serious physical harm, mainly in domestic settings, remains high if he were to be released into the community at this point in time." A transfer to Open

Conditions cannot be considered essential prior to the completion of such work.

- In addition, it is noted at Page 1137 of the dossier: "There is a long-standing history of Camden Social Services involvement with Arif Shah based on the risks of harm posed by Ripon Uddin to Arif and his mother for the past 15 years". The prolonged involvement of Social Services, due to the risk you are assessed to pose, does not appear to have been given sufficient weight in the context of current Risk Assessments and, in the knowledge of the outstanding work mentioned above, it cannot be considered essential to transfer you to a more open environment at this stage.

- You have not yet demonstrated a reasonable period of sustained stability in closed conditions as evidenced by the report writers who have recommended the following options: engaging with Personality Disorder Pathway Services, transferring to a Progressive Regime, Therapeutic Community or PIPEs. With this range of options available to you to assist you to reduce your risk, it cannot be said that it is essential to transfer you to Open Conditions.

- The Panel also appear to have given minimal weight to the concerns of the Probation Service and MAPPA in the knowledge of the evidence that you have demonstrated controlling and coercive behaviours, your offending history and the current risk assessments. The panel themselves were "mindful of the seriousness of the index offence and the pattern of attitudes and behaviour of which it formed part" which leads to further concern at the approach taken here, and the minimal weight given to the concerns raised by the Secretary of State and his witnesses. In the knowledge of such concerns, the 'very high' risk assessment (see further below), the outstanding work and the options available in closed conditions, the Secretary of State reaches the firm conclusion that it cannot be considered essential that you transfer to Open Conditions.

48. The Secretary of State properly engaged with the determination of the Parole Board, and it is not correct to say that the Secretary of State mischaracterised the Parole Board's determination as relying on time spent in custody for recommending a transfer to open conditions. The Parole Board cited Mr Matthews's "main reason for recommending open conditions" as being the length of the time the claimant had spent in custody and that he needed gradual reintegration (see paragraph 3.10). The Secretary of State was additionally entitled to consider the necessity of a sustained period of stability while risk reduction work was undertaken in the closed estate. The Parole Board set out that it was mindful of the seriousness of the index offence and the pattern of attitudes and behaviour of which it formed part, but then determined that it preferred the evidence of Mr Matthews over the other three experts who considered that he should remain in closed conditions to complete risk reduction work. While Dr Singh's conclusions were criticised on the basis of Mr Matthew's comments, all three were wholly consistent with earlier decisions that had been made.

On this review, all of the experts agreed that the claimant should not be released and three of the four agreed that he should not be transferred. The panel failed to deal head on with why it was "essential" to transfer to the open estate and in the circumstances the Secretary of State was entitled to disagree and explain, as he did, the reason for that disagreement.

49. The Secretary of State properly considered whether further risk reduction work was required and he determined, on the basis of expert evidence, that it was. He further considered whether it was essential for there to be a transfer to open conditions. As set out in his second bullet point, the gradual integration back into the community had to be properly sequenced and the transfer into open conditions could only take place once the core risk reduction work had taken place. The Secretary of State was entitled to conclude that it was not essential for the claimant to be transferred in order for that work to be carried out.

50. Further, the Secretary of State was properly entitled to take into account the engagement of social services and the concerns that they had with respect to the claimant's engagement with his son.. The Parole Board in its considerations seemed to place limited weight upon the evidence of both probation and MAPPA, and the assessments of risk that had been given as being high or very high, including with respect to his wife (who he had been married to at the time of the index offence). The Secretary of State was entitled to depart from the Parole Board's decision – that departure was not, in all the circumstances of this matter, an irrational one. The Parole Board did not set out why a transfer to the open estate was essential other than with respect to the time he had already spent in the closed estate. That did not give a basis for the move to the open estate being essential.

51. As the decision of the Secretary of State that transfer to the open estate did not meet the "essential test" and that decision was made on the basis of the relevant issues, with a consciousness of the view the Parole Board and with an explanation for his contrary conclusion, this judicial review cannot succeed as it is not possible to show that his decision making was irrational or *Wednesbury* unreasonable. The Secretary of State did provide sufficient cogent reasons for his decision to depart from the recommendation of the Parole Board, having given the Parole Board an appropriate level of respect for its decision making.

52. However, for completeness, the final criterion of whether a transfer to open conditions would not undermine public confidence in the Criminal Justice System needs to be considered. This assessment is solely for the Secretary of State and with due respect I do not agree with the view of Dexter Dias KC, sitting as a Deputy High Court Judge, as expressed in *R (on the application of Zenshen) v Secretary of State for Justice* [2023] EWHC 2279, that this criterion adds nothing.

53. Whether the public's confidence in the criminal justice system would be undermined by the move of a prisoner to the open estate is entirely a matter of judgment. The Parole Board does not advise on this aspect and the Secretary of State is entitled to rely upon the OASys tools available which provide that the claimant is a "very high" risk to known adults and a "high" risk to the public. Very high risk is defined as an imminent risk of serious harm, with the potential event more likely than not to happen imminently with the impact serious. It is because of this assessment that the Secretary of State determined that the final criterion was not met:

> Lastly, you are assessed as 'very high' risk of harm to known adults and a 'high' risk of harm to the public, who are entitled to have the confidence that decision-making is undertaken in the interest of public safety. This must be the priority. In this instance the evidence suggests your risk has not sufficiently reduced, despite the length of time you have spent in custody, to begin to gradually reintroduce you to the community. It is therefore assessed that a decision to transfer you to Open Conditions at this stage may undermine public confidence in the Criminal Justice System.

54. While a transfer to open conditions would not result in the claimant being immediately allowed into the community unaccompanied, it is not *Wednesbury* unreasonable or irrational for the Secretary of State to reach the determination that a transfer of the claimant into open conditions, without any perimeter fence, and with the prospect of being allowed out into the community, in the circumstances of this case, fails to meet the final criteria. The Secretary of State was entitled to conclude, on the evidence that had been presented to the Parole Board, that the claimant's risk had not sufficiently reduced, despite the length of time he had spent in custody, to begin to gradually reintroduce him to the community.

Conclusion

55. The Secretary of State gave cogent reasons for departing from the recommendation of the Parole Board, and his determination cannot be said to be irrational for the reasons set out in detail above. The Secretary of State was entitled to reach a different conclusion as to whether time in the open estate at this stage was "essential" given the evidence of three of the four professional witnesses and he was entitled to take a different view to the Parole Board on issues of judgment. The challenge to the Secretary of State's determination of December 2023 on the basis that it was an unreasonable departure from the Parole Board's finding so as to render the Secretary of State's decision irrational and/ or *Wednesbury* unreasonable does not succeed for the reasons set out.