Neutral Citation Number: [2021] EWHC 1606 (Admin)

Case No: CO/2753/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2021

Before :

HEATHER WILLIAMS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

R (on the application of ELTON JOHN)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Jude Bunting (instructed by **Bhatt Murphy)** for the Claimant
Myles Grandison (instructed by **Government Legal Department**) for the Defendant

Hearing dates: 18 May 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am

Heather Williams QC, sitting as a Deputy High Court Judge:

Introduction

1. The Claimant is serving an indeterminate sentence for public protection ("IPP sentence"). He is a Category A prisoner at HMP Whitemoor. He applies for judicial review of the Defendant's decision dated 27 May 2020 not to accept the 4 March 2020 recommendation of the Parole Board that he be transferred to open conditions. Permission to apply for judicial review was granted on consideration of the papers by Richard Clayton QC, sitting as a Deputy High Court Judge on 8 February 2021.

2. The Claimant contends that:

   i) The Defendant's decision was based on factual findings that were inconsistent with factual findings made by the Parole Board, in circumstances where there was no good reason to depart from those earlier findings ("Ground One");

   ii) The Defendant failed to give any or any adequate weight to the Parole Board's conclusions when making the decision ("Narrower Ground Two"); or

   iii) In light of the principles identified by the Supreme Court in *R (Evans) v HM Attorney-General* [2015] UKSC 21; [2015] AC 1787 ("*Evans*"), the Defendant could only depart from the Parole Board's determination if there was the clearest possible justification for doing so and no such justification was identified in this instance ("Wider Ground Two"). Mr Bunting accepts that this alternative, broader submission involves a reappraisal of the existing caselaw as to when the Defendant can reject a recommendation from the Parole Board that a prisoner be transferred to open conditions.

3. In summary, the Defendant's response to these Grounds is as follows:

   i) The decision was not based on factual findings that were inconsistent with those made by the Parole Board;

   ii) Due weight was given to the Parole Board's conclusions; and

   iii) *Evans* does not warrant the proposed re-appraisal of the relationship between the Parole Board's recommendation for a transfer to open conditions and the Secretary of State for Justice's determination.

The facts

The offences

4. On 9 February 2011, the Claimant received an IPP sentence, with the minimum term set at 7 years and 245 days. That term expired on 12 October 2018, at which stage he became eligible for release on parole. The sentence was imposed for offences of conspiracy to rob, possession of a firearm with intent to endanger life and possession

of a prohibited firearm. The offences related to an incident where the Claimant was found to have approached the security guard of a cash transit van, whilst carrying a semi-automatic pistol. Post-conviction, the Claimant has maintained that he was carrying the gun for a friend and that he was not involved in an attempted robbery.

5. The Claimant has previous convictions dating back to 1976, including two for firearms related incidents. In 1993 he was sentenced to two years imprisonment for possessing a firearm and on another occasion he was sentenced to a total of 17 years imprisonment for an incident which the Parole Board described as similar to the index offences.

The Claimant in custody

6. At all material times during his sentence the Claimant has been a Category A prisoner, held in high security conditions. He has completed a series of programmes aimed at addressing his assessed risks. These programmes include the thinking skills programme in June 2017, the A-Z programme in August 2013, the Sycamore Tree victim awareness course in December 2013 and the self-change programme ("SCP") in August 2018. Reports indicate that there are no security concerns about the Claimant and he has incurred no disciplinary findings since 2012. He is an enhanced prisoner (the highest level) on the incentives and earned privileges scheme and holds trusted employment as a wing cleaner.

7. On 15 March 2018, following a consideration of the papers, the Parole Board decided not to direct the Claimant's release or to recommend transfer to open conditions. His case was referred back to the Parole Board on 14 February 2019.

8. On 20 September 2019, following a paper based review, the Defendant's Category A Team within the Long Term and High Security Prison Group decided that the Claimant should remain in Category A conditions. The conclusion expressed in the letter notifying him was that:

> "The Category A Team recognises that you engage well with prison regimes and your custodial behaviour is highly praised by staff. It acknowledges your positive engagement with offence focussed intervention and you [sic] progress made in developing insight into your risk areas. However, it agrees with the prison local advisory panel's recommendation that you need to address important outstanding areas of concern in relation to the pre-planned nature of your offending, as there appears to be some lack of clarity surrounding your index offence. Concerns are also noted about your limited plans in relation to risk management in preparation for your release. Further consolidation of your learning and further engagement with recommendations from your current risk assessment is needed to accurately determine the nature and extent of your outstanding risks to the public and reoffending.
>
> The Category A Team considered that you should continue to engage positively with prison regimes and with staff to address

> your outstanding areas of concern to provide significant evidence of risk reduction."

The reports before the Parole Board

9. The Parole Board considered written reports and oral evidence from Roisin Orchard, Forensic Psychologist in Training; Suzanne Loosley, the Offender Supervisor ("OS"); and Rachel Horton, the stand in Offender Manager ("OM") and Supervisor of the allocated OM.

10. Ms Orchard had prepared a Sentence Planning and Review Report dated 6 June 2019 and an addendum report dated 13 November 2019. In the June report at para 6.27, Ms Orchard concluded that the Claimant had demonstrated "some progression in developing his insight into his risk of violence use and in the skills in which he can use to manage this risk, through his engagement in SCP". She considered he had previously taken limited responsibility for his use of violence, but that he had "progressed significantly in developing his understanding of the thoughts and beliefs which have supported his use of reactive violence in the past". She noted that he continued to deny the offence he had been convicted of and needed "to develop his insight into the pre-planned acquisitive nature of his violence use". After noting that he had limited plans for his release and needed to develop a relationship with his OM, she indicated he was assessed as a high risk of future violence in the community. At para 6.28 Ms Orchard concluded that the Claimant was at low risk of future violence in the high security estate, given his stable custodial behaviour. At para 6.29 she said:

> "In my opinion if Mr John were to be located in open conditions, there would be a high risk of future violence if he absconded. Provided he effectively implements his skills he has developed from SCP and develops professional relationships with staff, in open conditions, I would assess Mr John to be **high risk of future violence in open conditions**. It is my opinion that he would benefit from consolidating his skills, developing robust resettlement and relapse preventions plans. I would therefore recommend that he remains in closed conditions at this time." (Bolded text in the original.)

11. In her addendum report, Ms Orchard endorsed her earlier conclusion as to the Claimant's level of risk, indicating that her recommendation remained the same and that in her opinion "he remains low risk of future violence in the high security estate, high risk of future violence in open conditions and high risk of future violence in the community". She said that from her conversations with professionals working with the Claimant, it did not appear he had used this support to develop his insight into the risk factors she had earlier identified; although she noted that he had met with the Kaizen Treatment Manager to re-engage in a consolidation of his SCP skills and to address some outstanding areas of risk. (Kaizen had by then replaced SCP as the high intensity violence offending behaviour programme.)

12. Ms Loosley's report dated 14 January 2020 concluded that the Claimant "should be progressed through the prison system until he is assessed as ready for a move to open conditions". She quoted extensively from the recent Category A status review. She confirmed the Claimant's good behaviour in custody and her lack of security concerns.

13. The Parole Assessment Report Offender Manager ("PAROM 1") dated 25 June 2019 recommended that the Claimant be re-categorised, given he had successfully completed his SCP, so that he could progress within the prison regime to a transfer to open conditions. Ms Horton, who was not the writer of the PAROM 1, provided addendum reports dated 10 January and 29 January 2020. She referred to recent telephone conversations with the Claimant and him telling her that he had received nine sessions of consolidation from the psychology department around the SCP. She said she concurred with Ms Orchard's assessment that the Claimant needed to continue to apply his skills "and consolidate progress he has made during the SCP programme, to manage his risk particularly when released into the community". She recommended "a progressive move to open conditions once Mr John has progressed through the prison system". She also described this as a "staggered transition to open conditions".

The Parole Board's decision

14. A five hour hearing before the Parole Board took place on 11 February 2020. The three report writers I have referred to gave evidence, as did the Claimant. Unusually, the panel was comprised of four members, including a specialist psychologist member and two judicial members. The panel considered a dossier of 341 pages of evidence, including the reports I have referred to, plus two additional documents (SCP Revisit papers and a WAIS assessment (a cognitive assessment) undertaken in 2015). The Claimant did not seek a direction for his release, but invited the panel to recommend his transfer to open conditions. He was represented by his solicitor, Simon Creighton. The Defendant was not represented at the hearing and did not express a view.

15. I will identify the particular passages in the Parole Board's decision letter that Mr Bunting says were findings of fact which the Defendant departed from when I come on to discuss Ground One. At this stage I will set out the panel's assessment of the report writers' opinions and its conclusions.

16. In Section 4 of the decision letter, the panel identified risk factors and protective factors which applied in the Claimant's case. The panel considered that: "[T]he risks you pose are sufficiently reduced as to be manageable in a less restrictive prison location, and whilst on agreed periods of un-accompanied leave from the establishment".

17. In Section 5 of the letter, the panel addressed "Evidence of change since last review … and progress in custody". The text said that the panel and witnesses other than Ms Loosley considered he posed a low risk of absconding and Ms Loosley had conceded in her evidence that the Claimant "probably wouldn't abscond now". The panel noted Ms Loosley's evidence that he had not complied with licences in the past and that his engagement could be inconsistent, but expressed the view that: "these are areas that can be safely monitored and developed in open prison conditions". The letter said that when asked where the Claimant would go if he could not go to open prison, Ms Loosley had

replied "he could cope in open – and it would test him"; and that she had confirmed his behaviour in custody was very different from his previous sentences.

18. The decision letter said that Ms Horton supported the recommendation of the allocated OM that the Claimant was progressed to open conditions.

19. As regards Ms Orchard's assessment, the decision letter made five points that Mr Bunting emphasises:

    i) Whilst Ms Orchard indicated she wanted to see greater insight on the part of the Claimant into his offending and risk factors; "[t]he panel assesses that you have provided evidence of having those insights having taken your evidence and also when considering the content of post programme reports";

    ii) Although Ms Orchard had assessed the risk of the Claimant committing further violence to be high if he did abscond, she had indicated she did not believe that he would do so;

    iii) Ms Orchard had expressed concern in her reports about the risk of the Claimant using reactive violence, but she had conceded that he had not in fact used reactive violence at any time during his current sentence, including when he felt disrespected or treated unfairly;

    iv) The panel disagreed with Ms Orchard's concern that the Claimant might not understand the stress of being in an open prison, given he had spent time in an open prison during an earlier sentence; and

    v) Whilst Ms Orchard recommended that the Claimant spend further time in closed prison conditions to consolidate the skills he had learnt, build a relationship with his OM and develop a robust risk management and release plan, the panel "queried how your current location would facilitate you in developing any of those areas…the panel assesses that the areas to be developed can safely be developed in open prison conditions, as much as your personality and cognitive abilities will allow".

20. In Section 6 of the decision letter headed "Panel's assessment of current risk" reference was made to the actuarial assessments. The panel agreed with the OASys score of there being a high risk of serious harm to the public, but considered that the medium risk of serious harm to children, a known adult, staff, and prisoners, overestimated the actual risk the Claimant posed.

21. In Section 7 headed "Evaluation of effectiveness of plans to manage risk" the panel assessed that the current risk management plan "will manage the risks you pose were you to be in open prison conditions and whilst in the community on agreed periods of accompanied and un-accompanied leave from the open prison".

22. The panel's conclusions, set out in Section 8 of the decision letter, were that the Claimant continued to pose a risk of harm to the public such that he needed to be confined to custody, but that the recommendation was that he be transferred to open conditions:

> "The panel concluded that it was satisfied that you have addressed your risk factors, to a degree, that they would be manageable in the less restrictive regime in open prison conditions; and whilst on agreed absences on town visits or ROTLs where you would be un-escorted. The panel assesses that the benefits of you being transferred to open prison conditions, outweigh the risks. You are assessed as posing a low risk of abscond….
>
> The panel is of the opinion that it is now necessary for you to be tested in open conditions to ascertain whether you have internalised the lessons you have been taught and can act upon them in conditions that are more realistic and where you will be exposed to more realistic stimuli and challenges. You will be tested in terms of your ability to comply and self-manage in less restrictive prison conditions."

The Defendant's decision

23. The 27 May 2020 letter containing the decision to reject the Parole Board's recommendation was signed by Mr J. Lambert, from the Public Protection Casework Section ("PPCS"). It summarised the Claimant's offending and listed the risk factors identified by the Parole Board and the course work undertaken by the Claimant. It said the question of whether an IPP sentence prisoner may be transferred to open conditions was a categorisation decision for the Secretary of State for Justice and that in practice the decision was made on his behalf by officials under approved delegated authority. It was noted that the Parole Board's recommendation was not binding on the Defendant and reference was made to the criteria for rejecting such a recommendation set out in his published policy (paragraph 34 below). The letter said that the relevant reports in the dossier, the Parole Board's decision and the September 2019 Categorisation Review had been taken into account. It was noted that in their oral evidence to the panel, the OM and the OS had supported a progressive transfer to open conditions, whereas the prison psychologist considered the Claimant should remain in closed conditions to consolidate the skills he had learnt through offending behaviour work. The Parole Board's conclusions from Section 8 of the decision letter were then referenced (paragraph 22 above).

24. The crux of the reasoning was then set out as follows:

> "The Secretary of State gives you credit for the work you have completed which has given you an insight into your risk factors. That said the Secretary of State considers that a longer period of consolidation since completing the Self Change Programme is necessary before he can be satisfied that your risks of harm could be managed in less secure conditions. He further considers that, after a this [sic] period of consolidation you might be suitable for gradual progression through your sentence which will enable you to gain resettlement skills and demonstrate you would be able to manage yourself effectively in open conditions.

> While the Parole Board concluded that a transfer to open conditions would provide you with an opportunity to develop your plans for returning to live in the community, it is the Secretary of State's firm view that you should demonstrate your suitability to progress first in a Category B establishment following a further period of consolidation in the High Security estate. The Secretary of State therefore finds that there is not a wholly persuasive case for you to transfer now to open conditions.
>
> This decision is consistent with the Secretary of State's overarching duty to protect the public from harm."

25. In light of matters raised in the Claimant's Statement of Facts and Grounds, the Defendant filed a witness statement dated 12 March 2021 from Gordon Davison, a Deputy Director of Her Majesty's Prison and Probation Service and Head of the Public Protection Group ("PPG"). The views expressed in a contemporaneous email and in this witness statement are now relied upon by the Claimant in support of his Grounds.

26. In his statement Mr Davison explained that the Parole-Eligible Casework ("PEC") Team (who are a part of PPCS) are responsible for considering whether to accept a Parole Board recommendation that a prisoner be transferred to open conditions and that where they are minded to reject a recommendation, the case is referred to Mr Davison for final decision. Mr Davison said that in the rare situation where the recommendation for transfer to open conditions concerns a current Category A prisoner (as in the present case) he consults with the Executive Director of the Long Term High Security Estate, Mr Vince, before making a decision. The PPCS prepare a summary of the case setting out the report writers' recommendations and any changes in their views expressed in their oral evidence which is furnished to Mr Davison and Mr Vince, along with the Parole Board's decision. These arrangements were contained in para 3 of Annex Y to PSI 22/2015, the Defendant's previous published policy, but were inadvertently omitted from the current Generic Parole Policy Framework ("GPPF"; paragraph 34 below). They are included in a revised version which is currently in preparation and in the interim these arrangements have continued as a matter of practice.

27. Mr Davison's statement exhibited the PPCS summary dated 16 April 2020 that was prepared in the Claimant's case ("the Summary"). It described his offending, listed the identified risk factors, included excerpts from the views expressed in the reports from the OS, the OM and the prison psychologist (the latter incorrectly described as a "psychiatric report") and in the September 2019 Categorisation Review. A paragraph headed: "Witnesses Recommendations at Oral Hearing 11 February 2020" stated:

> "In evidence to the panel Mr John's offender supervisor stated that she was surprised by the outcome of the Categorisation Review. When pressed by the panel she said that Mr John could cope in open prison and it would test him. The psychiatrist did not support release or progression and considered Mr John should remain in closed conditions to consolidate the skills he had learned. The author of the PAROM1 completed in June 2019

> was unable to attend the hearing but the author of the addendum completed in January 2020 gave evidence that Mr John's risks were manageable in open conditions and supported a transfer."

28. Mr Davison summarised the decision he had made in the Claimant's case in paras 16 – 20 of his statement. He described it as involving a balance between the imperative of protecting the public, against allowing the Claimant an opportunity to meet his sentence plan objectives and reduce his risk sufficiently to work towards a release. He said the decision would "need to give all due weight to the Parole Board's decision letter and the reasoning provided in it", but that following discussion with Mr Vince he was not wholly persuaded that it was an appropriate time to transfer the Claimant to the open estate. Mr Bunting relies upon particular aspects of what was said in paras 17 – 19:

> "He has only very recently completed the Self Change Programme…I also considered evidence provided by the prison psychologist and the OS, as to the level of risk presented by the Claimant. The prisoner was considered to present a "high risk of violence in open conditions". Within written evidence the OS, in my opinion, presented a strong argument against his transfer to the open estate, highlighting the need for him to progress gradually through the prison system although it is acknowledged the OS did later suggest within oral evidence that he could cope in the open estate. The Psychologist also presented arguments against his transfer to the open estate.
>
> In addition, his categorisation review just four months prior to his parole hearing had concluded with a decision that the Claimant must remain a Category A prisoner at this time.
>
> I concluded that a move to open conditions without any evidence of the Claimant having consolidated skills learnt during his time in custody, and following completion of SCP, would not be appropriate at this time, particularly in the context of the Claimant being considered a 'high risk of violence' in open conditions. Once such skills were evidenced, it was agreed that it may be appropriate for him to progress to a Category B establishment."

29. The Defendant disclosed a short internal email sent by Mr Davison on 6 May 2020 following his discussion with Mr Vince. It indicated that he was going to reject the Parole Board's recommendation:

> "We discussed Mr John's long list of risk factors, the fact that he committed the index offence at the age of 51, that he is not long out of the SCP and that the psychiatrist and the OS offered strong arguments against the open conditions ("high risk of violence in open conditions"). Richard considered that, after a period of

> consolidation for the learning from SCP, Mr John might be suitable to progress to Cat B."

The Legal Framework

Legislative provisions

30. Section 12(2) of the Prison Act 1952 states that a prisoner may be lawfully confined in such prisons as the Defendant 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 Act empowers the Defendant to make rules for the classification of prisoners; and rule 7 of the Prison Rules 1999/728 provides that prisoners shall be classified in accordance with directions of the Secretary of State having regard to specified matters.

31. Section 239(2) of the Criminal Justice Act 2003 provides as follows:

> "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."

32. As a transfer to open conditions is a matter which is relevant to the early release of a prisoner, section 239(2) gives the Defendant a discretionary power to ask the Board for advice on whether a prisoner is suitable for transfer to open conditions. A period in open conditions is a way for a prisoner to demonstrate that he can be safely trusted to be granted parole and released on licence. There is no statutory requirement on the Defendant to refer this question to the Board; if the Secretary of State rationally considers the assistance which the Board might be able to provide in any particular case is limited and it is not worth the additional expenditure of resources and effort, it is lawful for him to decline to refer the case to the Board to seek advice: *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 802 at para 68.

33. Rule 24 of the Parole Board Rules 2018/1038 addresses the oral hearing procedure and rule 24(3) provides (amongst other matters) that the parties are entitled to hear each other's witnesses and representations, put questions to each other, call witnesses and question witnesses appearing before the panel. For these purposes "the parties" are the prisoner and the Secretary of State: rule 2. Rule 25(4) provides that where a panel receives a request for advice from the Secretary of State concerning whether a prisoner should be moved to open conditions the panel must recommend either that: "(a) the prisoner is suitable for a move to open conditions, or (b) the prisoner is not suitable for a move to open conditions". Mr Bunting and Mr Grandison are agreed that the Parole Board acts as a court when undertaking this role: *R (Gourlay) v Parole Board* [2017] 1 WLR 4107 CA at paras 65 – 66[1].

[1] The Supreme Court subsequently indicated that it would be slow to interfere with the Court of Appeal's conclusion: *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344.

The Defendant's policy

34. The GPPF replaced PSI 22/2015 (paragraph 26 above). Para 5.8.2 of the GPPF provides that the PPCS may consider rejecting the Parole Board's recommendation for a transfer to open conditions if it "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". Those criteria were also in PSI 22/2015. Para 5.8.3 includes a relatively new ground that was first included in PSI 22/2015, as follows: "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". This reason was relied upon in the Defendant's 27 May 2020 letter. In *R (Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin); [2019] 4 WLR 47 ("*Kumar*") at para 52, Andrews J (as she then was) rejected a challenge to the Defendant's adoption of this new criterion, determining that the Secretary of State was entitled to prescribe the policy to be followed when exercising a discretion that Parliament had conferred upon him as the ultimate decision-maker, including making changes to the policy from time to time. She described the new reason for rejection (at para 53) as follows:

> "Bearing in mind that this follows an express acknowledgement 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."

Principles identified in the caselaw

35. In *R (Banfield) v Secretary of State for Justice* [2007] EWHC 2605 (Admin) ("*Banfield*") at para 28, Jackson J (as he then was) distilled five principles from the earlier authorities. The first and fifth of those principles are relevant for present purposes and were as follows:

> "(1) The decision of the Secretary of State is not lawful if he fails to take into account the recommendation of the Parole Board and the fact that the Parole Board has particular expertise in assessing the risk posed by individual prisoners. Nevertheless, it is a matter for the Secretary of State what weight he assigns to those factors in any given case.
>
> …

> (5) Even if the procedure adopted by the Secretary of State is fair, if his final decision is irrational it may still be quashed on traditional **Wednesbury** grounds." (Bolded text in the original.)

36. Jackson J went on to note in para 29 that in reaching his decisions on categorisation, the Secretary of State has the benefit of the expertise of his department, in addition to the benefit of advice given by the Parole Board. At para 41 he emphasised that decisions on categorisation were for the Secretary of State, who was not bound by the Parole Board's recommendations.

37. Referring to the principles identified in *Banfield,* King J (as he then was) observed in *R (Wilmot) v Secretary of State for Justice* [2012] EWHC 3139 (Admin) at para 47, that the only bases upon which a court on a judicial review will interfere with the Secretary of State's decision is on the public law constraints of fairness and rationality; and that accordingly it was not for the court itself to assess the reasonableness of the Parole Board, but to direct its attention to the rationality of the Secretary of State's decision.

38. In light of Ground One in this case, the question arises as to whether the Secretary of State is entitled to depart from findings of fact made by the Parole Board following an oral hearing. There is no dispute that the applicable principle is that as the panel has seen the witnesses, the Defendant may not depart from findings of fact made by the panel, save where there is good reason for doing so: *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) ("*Hindawi*") at para 62. Mr Grandison does not suggest that good reason to do so existed in this case.

39. It is instructive to examine the case law in order to understand the dividing line between the Parole Board's findings of fact, to which this principle applies and the Board's evaluative assessment, which on the present authorities the Defendant is only obliged to take into account when making the decision on categorisation.

40. *Hindawi* concerned the Secretary of State's decision to reject the Parole Board's recommendation to release the prisoner on parole. The case pre-dated legislation removing the power to decide questions of release (as opposed to transfer) from the Defendant. In arriving at his decision, the Defendant rejected the panel's finding that Mr Hindawi was a credible witness, a finding which was, in turn, central to the assessment of the future risk he posed: paras 3, 53 and 54. The Divisional Court (Thomas LJ and Nicola Davies J, as they then were) noted at para 50 that the Parole Board was "expert in the assessment of risk and immunised from external pressures…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". When addressing the extent to which the Defendant was free to depart from the Parole Board's reasons, Thomas LJ said at paras 58 and 60:

> "…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 light of all the evidence.
>
> …
>
> 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 was entitled to reach his own view…according appropriate respect to the views of the panel on their assessment of risk."

41. In *R (Harris) v Secretary of State for Justice* [2014] EWHC 3752 (Admin) ("*Harris"*) the Court rejected a submission that the Defendant had failed to give adequate weight to the Parole Board's recommendation in deciding not to transfer the prisoner to open conditions. Dove J emphasised the court would only interfere on conventional public law grounds and that the decision in *Hindawi* was based on the Defendant's irrational overturning of a credibility finding. Dove J contrasted that scenario with the case before him; the Defendant was not seeking to gainsay any credibility findings reached by the Board or findings about the progress which the prisoner had made in closed conditions; rather he had lawfully determined that in light of Mr Harris' immigration status and the outstanding prospect of his deportation, the risk of him absconding required reassessment (para 32).

42. In *R (Noye) v Secretary of State for Justice* [2017] EWHC 267 (Admin) ("*Noye*") Lavender J quashed the Defendant's decision to reject the Parole Board's recommendation that Mr Noye be transferred to open conditions (paras 48 and 53). He rejected a submission that the Defendant had erred in departing from the Board's assessment of the risk of absconding as "highly unlikely"; this was not a finding of fact, but "an assessment of the extent of the future risk", which the Secretary of State was entitled to disagree with (paras 40 and 41). By contrast, the principles set out in *Hindawi* meant it was not open to the Secretary of State to disagree, as he did, with the panel's finding "that the Claimant had made significant progress in changing his attitudes and tackling his behaviour problems"; this was a finding of fact and no good reason had been identified for departing from it, the Defendant's decision relied on matters that had been considered by the panel in making this finding (paras 44, 46 and 47).

43. The extent to which the Defendant can depart from the Parole Board's conclusions was also discussed by Andrews J in *Kumar* (paragraph 34 above). After observing at para 54 that the Defendant's discretion to reject a recommendation by an expert panel which had had the advantage of seeing and hearing the witnesses must be exercised in a manner "that pays due regard to those advantages and to the particular expertise of the body", she continued at para 55:

> "…The Secretary of State must have due regard to the justification given for the Board's recommendation, but he is entitled to adopt a policy which enables the decision-maker to explore that justification and to form a view as to whether it, and the reasoning behind it, is cogent…He or she [the decision-

> maker] is bound to take into account any aspects of a report writer's oral evidence that the Board has referred to in its decision and the fact-findings it has made, including any relevant findings on credibility. As *Hindawi* … makes clear, the decision-maker cannot depart from those findings without good reason…"

44. Andrews J went on to note at para 57 that the Defendant's GPPF policy did not "involve challenging the Board's findings on credibility or any other findings in respect of which an oral hearing would give it an advantage over the ultimate decision-maker".

Ground One

The submissions of the parties

45. Mr Bunting submits that it is apparent from the 27 May 2020 decision letter, particularly when read with the 16 May 2020 email and para 19 of Mr Davison's witness statement, that the Defendant's conclusions were based on factual findings that were inconsistent with the Parole Board's findings of fact. In oral submissions he identified four findings of fact made by the panel which he says the Defendant departed from.

46. As I indicated earlier, the Defendant accepts he can only depart from the Parole Board's findings of fact with good reason, but Mr Grandison submits that the findings relied upon by Mr Bunting were, in some instances, matters of assessment rather than findings of fact; and where they were findings of fact, the Defendant's decision was based upon them, rather than inconsistent with them.

Discussion and conclusions

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 (paragraphs 38 - 44 above). Mr Bunting 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 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.

Findings of fact or evaluative assessments?

48. Mr Bunting grouped the findings of fact he relied upon in the Parole Board's decision letter as follows:

i) The Claimant had successfully completed risk reduction work and there had been a significant change in his attitudes. In Section 6 of the letter ("Panel's assessment of current risk") the panel referred to: "the amount of risk reduction work you have successfully completed and the significant change in your attitudes and beliefs";

ii) The Claimant had developed skills, consolidated his learning and developed insight. A number of passages were relied upon in this context, namely:

a) "There is strong evidence that you have matured emotionally and that you are able to seek advice and to express your thoughts and emotions appropriately" (in Section 4 of the letter);

b) "You participated in those programmes [the Thinking Skills Programme and the SCP] to positive treatment effect; in your evidence and in information provided by some witnesses, the Panel assesses that you are using the skills and strategies that you learnt on the programmes" (in Section 5);

c) "Ms Loosley confirmed that you do not show anger or irritability when asking for things repeatedly" (Section 5);

d) "You stated (and it is confirmed) that you are careful about who you choose to associate with, you enjoy cooking and have a lot of interaction with other prisoners in the kitchen" (Section 5);

e) "Ms Orchard stated that she wanted to see greater insight into your offending and risk factors and how they link to previous offending and insight into how you will manage your finances. The panel assesses that you have provided evidence of having those insights having taken your evidence and also when considering the content of post programme reports" (Section 5); and

f) "You evidenced insight in asking for a recommendation for a transfer to open prison and not a direction that you are released" (Section 8);

iii) The Claimant's account of having changed his criminal attitudes was credible. Specifically, the panel said: "…the panel had first to ask themselves whether your performance was rehearsed impression management or someone trying to make the best case for Parole. Having observed you closely for a relatively long period of time over the course of the Oral Hearing, which lasted for around five hours, the panel concluded this was not the case for a number of reasons: It would be quite a feat to pull the wool over the eyes of six experienced professionals and you made concessions to your detriment…Additionally there

is evidence of a persistent change in criminal attitudes and behaviour over your time in custody…As such it considered your behaviour evidence of an internalised move towards desistance rather than impression management" (Section 8); and

iv) There was no evidence of a risk of absconding. In Section 5 the decision letter said: "…the panel notes that the "abscond" to which Ms Loosley refers relates to the fact that on a previous release you did not attend at the AP [approved premises] as Directed, not an absconsion from an Open Prison, and that it happened in 2007. The panel assesses that the matter is historical, there is no other evidence that you pose a risk of abscond and that the circumstances of that absence from the AP are not relevant now in terms of informing an assessment of abscond from open prison".

49. Mr Grandison accepted that the first and third of these were findings of fact, namely (in terms of their composite effect) that the Claimant had successfully completed risk reduction work and there had been a significant and persistent change in his attitudes and beliefs, including towards his offending. As regards the second matter relied upon, Mr Grandison accepted that the panel made findings of fact that the Claimant had gained skills and insight and that there had been some element of consolidation. However, he submitted that the *extent* to which *further consolidation work* was required and where it should be undertaken was a matter of evaluative assessment. I agree. This distinction is consistent with the principles I have discussed earlier and accurately respects the dividing line between findings of fact as to past events and predictive assessments. As regards the fourth finding identified, I accept Mr Grandison's submission that evaluation of the risk of absconding is a matter of assessment rather than a finding of fact, as confirmed by the decision in *Noye* (paragraph 42 above). Whilst the panel's reference to the 2007 incident when the Claimant did not attend the AP was itself a matter of (undisputed) fact, there is no suggestion that the Defendant's decision involved any departure from that.

Departure from the Board's findings of fact?

50. Having identified the relevant findings of fact, I turn to the Defendant's decision letter to see if there was a departure from those findings. Mr Bunting accepts that, unlike the position in some of the earlier cases I have discussed, there was no explicit rejection of the Board's findings of fact. However, he submits that this is to be inferred from the reasoning in the decision letter, reinforced by the contents of the 16 May 2020 email and Mr Davison's statement.

51. The starting point is the Defendant's decision. The letter states that the Parole Board's decision was taken into account and it identifies a potentially permissible reason for departing from the panel's recommendation, namely that the Secretary of State does not consider there is wholly persuasive case for the Claimant's transfer to open conditions at this time. The letter says in terms that the Defendant "gives you credit for the work you have completed which has given you an insight into your risk factors". Accordingly, the decision-maker appears to be *acknowledging* the panel's findings that the Claimant had successfully completed the SCP and other programmes and had gained insight, rather than refuting them. Mr Bunting submitted that this sentence was

inconsistent with the panel's findings because it did not spell out the *extent* of the insight the Claimant had gained and/or because the reference to "an" insight was to be read as qualifying the degree of insight he had obtained. I do not agree. Acceptance of either of those propositions entails reading far more into this one sentence than the language warrants; and the fact that such a fine distinction of language is relied upon, tends to illustrate the absence of any real inconsistency with the Board's factual findings.

52. Mr Bunting also submitted that the reasoning in the letter amounted to a finding that there had been an *absence* of consolidation on the Claimant's part, which was inconsistent with the panel's findings. However, I do not read the letter as saying this. It refers in terms to the perceived need for "a longer period of consolidation since completing the Self Change Programme" and to "a further period of consolidation". These phrases indicate that the Defendant accepted there had been consolidation on the part of the Claimant since he completed the SCP, but he took the view that *additional*, future consolidation work was required before he was transferred from high security conditions. As I have already accepted, that was a matter for the Defendant's assessment, rather than a finding of fact.

53. Furthermore, the Parole Board did not make a finding that all necessary work on addressing insight and risk had been undertaken; in both Section 5 and Section 8 of the decision letter, the panel referred to further work in relation to insight and addressing risk factors. (However, unlike the Defendant, it considered that these matters were better addressed in open conditions and the risks involved in this were manageable.)

54. Whilst there may have been differences of degree or emphasis, the material before the Parole Board and the Defendant identified both that insight had been gained and consolidation work undertaken and that further work was required. By way of example:

    i) The decision that the Claimant should remain a Category A prisoner referred to "[f]urther consolidation of your learning" (paragraph 24 above);

    ii) Ms Horton's report indicated the Claimant had received nine sessions of consolidation from the psychology department around the SCP (paragraph 13 above);

    iii) As I have summarised at paragraphs 10 - 11, Ms Orchard's reports referred to consolidation that had taken place and further work in this area she considered to be necessary.

55. Mr Bunting also relies upon the internal email that Mr Davison sent after his discussion with Mr Vince, specifically the following: "Richard considered that, after a period of consolidation for the learning from SCP, Mr John might be suitable to progress to Cat B". He submits that this shows the decision-maker was proceeding on an erroneous factual basis that no consolidation had yet taken place. I do not accept this. The words need to be seen in their context. Firstly, it was a brief email indicating the decision Mr Davison was going to make; it was not intended to be a full recitation of his reasoning. Secondly the sentence is a reference to Richard Vince's view, although, an inference may be drawn that the writer of the email agrees with it. Thirdly, the words used do not in fact say that no consolidation has yet taken place. Fourthly, as I have noted, the decision letter itself, consistent with the Parole Board's findings (and the material in

the dossier), accepted in terms that some consolidation work had already been undertaken.

56. Mr Bunting also places reliance on part of the first sentence in para 19 of Mr Davison's statement, where he says: "a move to open conditions without any evidence of the Claimant having consolidated skills learnt during his time in custody and following completion of SCP, would not be appropriate at this time…". Taken in isolation, the sentence is plainly incorrect; I have already referred to the Board's findings and to reports from the dossier that indicated there had been at least some consolidation of the Claimant's learning from the SCP. However, the question for me is whether the Defendant's decision made in May 2020 was based on a finding that no consolidation had taken place after completion of the SCP (a finding which, if made, would have been inconsistent with the Board's findings of fact). I do not consider that it was. As I have already noted, the decision letter itself recognised that some consolidation work had taken place; and, in turn, this was consistent with the material that was before the decision-maker at the time, including the Summary prepared for him. In all the circumstances, I do not consider that this one phrase used in a witness statement made ten months later (primarily to explain the process by which the decision was made) and which is not reflected in the Defendant's contemporaneous documents should lead me to conclude that the Secretary of State departed from the Parole Board's factual findings when the recommendation was rejected.

57. Accordingly, the Claimant's Ground One fails.

Narrower Ground Two

The submissions of the parties

58. For the purposes of his narrower Ground Two, Mr Bunting accepts (in accordance with the principles I have summarised earlier), that weight is for the Defendant, if matters were considered by him, and that the Claimant has to show there was a failure to take into account the matters he relies upon. Specifically, he submits that the Secretary of State failed to take into account the Parole Board's analysis of the views expressed by Ms Loosley as to the risk of absconding (paragraph 17 above) and/or its dissection of Ms Orchard's opinion (paragraph 19 above). He says that the Defendant in effect turned the clock back and simply relied on the earlier reports written by Ms Loosley and Ms Orchard.

59. Mr Bunting places particular reliance upon the reference in the 16 May 2020 email and in paras 17 and 19 of Mr Davison's statement to there being a "high risk of violence in open conditions". He says this is a quote from para 6.29 of Ms Orchard's 6 June 2019 report (paragraph 10 above), where she expressed this opinion in the context of the risk of violence *if* the Claimant absconded; a risk which the Parole Board and the witnesses apart from Ms Loosley considered to be low, but which the decision-maker took out of context to suggest there was thought to be a high risk of violence, in a more general sense, if the Claimant was transferred to open conditions.

60. Mr Grandison, on the other hand, submits that the Defendant took into account the Parole Board's assessment; and the weight that was placed on it was a matter for him

as the decision-maker. Further, that the decision-maker legitimately considered that the panel had failed to fully grapple with the assessment that the Claimant presented a high risk of violence in open conditions, which was not confined to a situation where he absconded.

Discussion and conclusions

61. Notably, the proposition that the Defendant failed to take into account the Parole Board's assessment of the evidence given by Ms Loosley and by Ms Orchard is again largely derived from the 16 May 2020 email and the contents of Mr Davison's March 2021 statement (specifically the references therein to a "high risk of violence in open conditions"), rather than the decision letter itself. Indeed I do not detect anything in the Defendant's decision letter which indicates that these matters were not considered. In particular:

    i) The letter referred to the Parole Board's decision and accurately summarised its conclusions;

    ii) This cannot be inferred from the sheer fact that the Defendant came to a different view on some matters of evaluative assessment; and

    iii) The Summary prepared for Mr Davison and Mr Vince referred in terms to the evidence given by the report writers at the oral hearing (paragraph 27 above).

62. Mr Bunting's reliance on the references to a "high risk of violence in open conditions" in the 16 May 2020 email and in paras 17 and 19 of Mr Davison's statement, depends on the proposition that Ms Orchard's opinion about this level of risk was only expressed in relation to circumstances where the Claimant absconded (a likelihood, which, in turn, the Parole Board considered to be low). However, I do not read Ms Orchard's reports in this way. Although the second sentence in her para 6.29 is a little oddly phrased ("Provided he…I would assess Mr John to be high risk of violence in open conditions": paragraph 10 above), it does not appear that here, as opposed to in her preceding sentence, she is referring specifically to a situation where the Claimant absconded. Furthermore, Ms Orchard expressed the same opinion in general terms – not caveated by any suggestion that her assessment only applied if he absconded – in her addendum report (paragraph 11 above). In turn, it was this quotation from her addendum report that was reproduced in the Summary document prepared for Mr Davison and Mr Vince; and thus it is likely that it was the addendum report assessment that was the source of the references in the email and in Mr Davison's statement.

63. Accordingly, I do not consider that the references to a "high risk of violence in open conditions" show that Mr Davison ignored the panel's assessment of Ms Orchard or took this part of her report out of context. The panel's observation that she "assesses your risk to be high if you did abscond but reiterated that she does not believe you would do so" (paragraph 19 above), related to one aspect of Ms Orchard's assessment that there was a high risk of violence in open conditions. It appears to me, as Mr Grandison submits, that the decision-maker could rationally conclude that the panel had not fully grappled with the Claimant's assessed high risk of violence in open conditions, not least because he would be undertaking release on temporary licence if he was placed

in an open prison; and that the Defendant was entitled to attach less weight than the panel did to the factors it highlighted in respect of the Forensic Psychologist's evidence.

64. Accordingly, I do not consider that the Claimant has shown that the Defendant failed to take into account the Parole Board's recommendation, or its assessment of the report writers' opinions in particular.

Wider Ground Two

Submissions of the parties

65. The Claimant submits that the approach identified by a majority of the Supreme Court in *Evans* should apply to the present context, so that the Defendant is required to follow the Parole Board's evaluative assessment (not just its findings of fact) unless he has the "clearest possible justification" for not doing so; and no such justification was identified in this case. He further submits that in so far as this approach differs from the *Hindawi* line of authorities and in particular from the conclusion of Dove J in *Harris* that the Court of Appeal's decision in *Evans* was distinguishable from the present context, I should decline to follow these earlier authorities on the basis they are wrong and/or decided without the benefit of the Supreme Court's decision in *Evans*.

66. The Defendant does not agree that the Supreme Court's decision in *Evans* goes as far as Mr Bunting suggests. Further, Mr Grandison submits that in any event, I should follow the *Hindawi* line of authorities and the decision in *Harris*, since they are plainly correct or in any event not so clearly wrong that I should depart from these earlier decisions of the High Court, including, in the case of *Hindawi*, a decision of a Divisional Court.

Discussion and conclusions

67. The logical starting point is to identify what was decided by the Supreme Court in *Evans*. The proceedings concerned a journalist's application for judicial review of the Attorney General's issue of a certificate pursuant to section 53(2) of the Freedom of Information Act 2000 ("FOIA") that he had on reasonable grounds formed the opinion that there had been no failure to comply with the relevant provisions of the Act by government departments refusing to disclose communications passing between the Prince of Wales and the departments. The effect of the certificate was to prevent such disclosure. However, prior to the issue of the certificate, Mr Evans had successfully challenged part of the refusal to disclose in the Upper Tribunal, a decision which was not appealed. A central issue raised in the judicial review proceedings was the extent to which the Attorney General was bound by the Upper Tribunal's decision or free to form his own view. A majority of the Supreme Court (Lord Wilson and Lord Hughes JJSC, dissenting) held that the Attorney General had not been entitled to issue the section 53 certificate in the way that he had done and dismissed his appeal from the Court of Appeal's decision that the certificate was invalid. However, within the majority, Lord Neuberger of Abbotsbury gave a judgment with which Lord Kerr of Tonaghmore and Lord Reed agreed; and Lord Mance gave a separate judgment, with which Baroness

Hale of Richmond agreed. As I describe below, Lord Neuberger took a broader view than Lord Mance as to the circumstances in which a later decision-maker could depart from a court's earlier determination of the same points.

68. After reviewing three earlier authorities, *R v Warwickshire County Council ex parte Powergen plc* (1997) 96 LGR 616 ("*Powergen*"); *R v Secretary of State for the Home Department ex pate Danaei* [1998] INLR 124 ("*Danaei*"); and *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114 ("*Bradley*") at paras 60 – 65, Lord Neuberger set out the principles he abstracted in paras 66 – 67 as follows:

> "…In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (eg, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme.
>
> Although Sir John [Chadwick in *Bradley*] expressed his propositions so as to apply to "findings of fact", it seems to me that they must apply just as much to opinions or balancing exercises. The issue is much the same on an appeal or review, namely whether the tribunal was entitled to find a particular fact or to make a particular assessment…"

69. Applying this approach, Lord Neuberger went on to conclude that: "there was a very strong case for saying that the accountable person cannot justify issuing a section 53 certificate simply on the ground that, having considered the issue, which the benefit of the same facts and arguments as the Upper Tribunal, he has reached a different conclusion from that of the Upper Tribunal on a section 57 appeal" (para 68). At para 69 Lord Neuberger summarised his reasons for this conclusion: the earlier conclusion was reached by a tribunal whose decision could be appealed by the relevant departments; the tribunal had a particular expertise and had conducted a full hearing with witnesses and adversarial argument; and the Attorney General had received no fresh facts or evidence, but simply took a different view.

70. Mr Bunting emphasises that Lord Neuberger made it clear in para 67 that he drew no distinction for these purposes between findings of fact and evaluative opinions reached by the first decision-maker. Whilst that is correct, I note that in para 66 Lord Neuberger emphasised that the extent to which a decision-maker is bound by an earlier conclusion reached by an adjudicative tribunal is dependent upon the statutory context; the

respective roles of the tribunal and the decision-maker within the statutory scheme; and the procedure by which each arrives at its decision.

71. In terms of the circumstances in *Evans*, Lord Neuberger expressed particular concern that if the certificate was valid, its effect would be that a member of the executive could override / overrule a decision of a judicial body that had not been appealed: see paras 2, 51, 52, 53, 58, 59, 60, 69, 89 and 115 in particular. Plainly, that context is distinct from the present case; although the Parole Board sits as a court, its statutory role is to provide advice to the Secretary of State, not to arrive at judicial determinations which might be expected to be final unless appealed.

72. Lord Neuberger also discussed the difference between his analysis and that preferred by Lord Mance. Although it produced the same result on the particular facts, Lord Neuberger disagreed with the proposition that the Attorney General was bound by findings of facts and law made by the Upper Tribunal, but not by the latter's conclusion as to the weight to be attributed to the competing interests (paras 96 – 97). Lord Mance's approach was as follows (at paras 130 – 131):

> "When the court scrutinises the grounds relied on for a certificate, it must do so necessarily against the background of the relevant circumstances and in light of the decision at which the certificate is aimed. Disagreement with findings about such circumstances or with rulings of law made by the tribunal in a fully reasoned decision is one thing. It would in my view, require the clearest possible justification, which might I accept only be possible to show in the sort of unusual situation in which Lord Neuberger PSC contemplates that a certificate may validly be given…But disagreement about the relative weight to be attributed to competing interests found by the tribunal is a different matter and I would agree with Lord Wilson JSC that the weighing of such interests is a matter which the statute contemplates and which a certificate could properly address, by properly explained and solid reasons.
>
> …The discussion below shows that the Attorney General did not undertake the weighing of interests which the statute contemplates, that is, normally at least, against the background and law established by the tribunal's decision. On the contrary, he was undertaking his own redetermination of the background circumstances. Neither on my analysis nor on Lord Neuberger PSC's was he entitled to do that."

73. Accordingly Lord Mance's reference to the need for the "clearest possible justification", upon which Mr Bunting relies, was said in the context of a subsequent decision-maker departing from findings of fact or law made by the judicial body, not in relation to departures from evaluative assessments. Furthermore, as Lord Mance and Baroness Hale did not agree with Lord Neuberger's view that findings of fact and evaluative assessments were to be treated in the same way for these purposes, only a

minority, namely three of the seven Justices, supported the approach that Mr Bunting advocates.

74. I also note that in common with Lord Neuberger, Lord Mance emphasised that the applicable test "must depend upon the particular legislation under consideration" (para 128).

75. In the present circumstances, the Parole Board acts in an advisory capacity to the statutory decision-maker, the Secretary of State, when he asks it to consider whether a prisoner should be transferred to open conditions. Given this particular context and given that a majority of the Supreme Court in *Evans* did not go as far as Mr Bunting suggests, I do not consider that any basis has been shown for me to depart from the established line of authorities that I have summarised earlier.

76. In *Hindawi*, the Divisional Court rejected a submission that the Secretary of State "should give very great weight to the Parole Board's recommendation to release the claimant in light of the Parole Board's acknowledged expertise and the panel's detailed and thorough review of the evidence; he was only entitled to depart from it if he identified errors of law or fact or additional evidence came to light" (see para 48). Thomas LJ said at para 51:

> "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 reasonable differ."

77. Mr Bunting places specific reliance on *Bradley*, one of the three cases considered in *Evans*, submitting that there is no material distinction between the circumstances there and the present case, so that the approach identified by Sir John Chadwick in that context should be applied. He emphasises that the Ombudsman's role was to make *recommendations* to Government departments after a paper based examination (rather than the equivalent of a court hearing). It is therefore necessary to consider *Bradley* in a little more detail.

78. The case concerned a report presented to Parliament under section 10(3) of the Parliamentary Commissioner Act 1967 prepared by the Parliamentary Commissioner for Administration, more commonly known as the Parliamentary and Health Service Ombudsman. The report addressed the role of government in circumstances where final salary pension schemes were wound up underfunded. The Ombudsman made three findings of maladministration and also went on to find that the complainants had suffered injustice as a result. On the basis of her findings, the Ombudsman made five recommendations aimed at remedying that injustice. The Secretary of State for Work and Pensions rejected the Ombudsman's findings and her recommendations, claiming he was not bound by them. On a judicial review brought by members of pension schemes that had been wound up underfunded, the Court of Appeal had to consider the extent to which the Secretary of State was bound by or entitled to reject the Ombudsman's conclusions.

79. Notably, the Court of Appeal was only concerned with the extent to which the Secretary of State could depart from the Ombudsman's *findings of fact*. At para 10 of his judgment, Sir John Chadwick said:

> "I should add that the judge noted that it was accepted by Ms Rose on behalf of the claimants that the recommendations of the ombudsman (in contrast to her findings) cannot be binding on the Secretary of State."

80. Sir John Chadwick described "the principal question for this court on appeal" at para 37 as follows:

> "whether in principle, the ombudsman's findings of maladministration are binding upon the Secretary of state, unless themselves flawed or irrational, or whether the Secretary of State, acting rationally, is entitled to prefer his own view. That, as it seems to me, is a question to be answered in light of an understanding of the scheme and purposes of the 1967 Act."

81. Sir John Chadwick then addressed the scheme and the particular provisions of the 1967 Act in considerable detail, before also considering *Powergen* and *Danaei*. At para 70 he set out the principles he identified:

> "(i) the decision-maker whose decision is under challenge…is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal…; (ii) a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on Wednesbury grounds; (iii) in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational; (iv) in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal; (v) in particular, the court will have regard to the nature of the fact found…the basis on which the finding was made (eg on oral testimony tested by cross examination, or purely on the documents), the form of the proceedings before the tribunal (eg adversarial and in public or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme."

82. When he came to apply this approach to the question of whether the Secretary of State's rejection of the central finding of maladministration was irrational, Sir John Chadwick said at para 91:

> "As I have said earlier in this judgment, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act: he must have a reason (other than simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act."

83. The Court of Appeal went on to dismiss the Secretary of State's appeal on the basis that his decision to reject the Ombudsman's finding that government information had been potentially misleading and amounted to maladministration had been irrational.

84. Accordingly, whilst it appears that the Court of Appeal in *Bradley* favoured a slightly broader approach than the *Hindawi* 'good reason' test in terms of the circumstances in which the subsequent decision-maker could depart from the *earlier findings of fact*, the Court of Appeal did not decide that the Secretary of State's power to reject *a recommendation* was circumscribed in a similar way, indeed counsel conceded that it was not. As such, there is, in my judgment, no direct assistance that Mr Bunting is able to derive from *Bradley*. Additionally, it is clear from the focus of Sir John Chadwick's judgment and the test which he identified, that the question will always depend upon the statutory context.

85. It also follows that I consider Dove J was correct in rejecting the equivalent submission at paras 38 – 41 of *Harris,* albeit he did not have the benefit of the Supreme Court's analysis in *Evans* at that point.

86. I therefore find that the Claimant's Wider Ground Two fails as well.

87. In the circumstances the claim for judicial review is dismissed. I would like to thank both Counsel for their very helpful submissions.

88. Since circulating this judgment in draft, the parties have agreed a draft Order, which I approve.