Neutral Citation Number: [2022] EWHC 2602 (Admin)

Case No: CO/4345/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT BRISTOL CIVIL JUSTICE CENTRE

Bristol Civil Justice Centre
2 Redcliffe Street
Bristol BS1 6GR

Date: 17/10/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING
on the application of
KARL OAKLEY **Claimant**

- and –

SECRETARY OF STATE FOR JUSTICE **Respondent**

- -
- -

Edward Hetherington (instructed by **Bobbetts Mackan**) for the **Applicant**
Myles Grandison (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates: 7 October 2022

- -

Approved Judgment

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Mr Justice Chamberlain:

Introduction

1 Karl Oakley is serving a life sentence for manslaughter. He is currently detained in HMP Erlestoke, a category C prison. He challenges the decision of the Secretary of State for Justice, communicated on 29 June 2021, to refuse to accept the Parole Board's recommendation that he be transferred to open conditions.

2 Permission to apply for judicial review was granted by Steyn J on 13 June 2022.

Background

3 On 21 February 2009, Mr Oakley stabbed his ex-partner, Taylor Burrows, 34 times. The injuries were consistent with a frenzied, dynamic assault. Severe force was used. He had been cautioned in 2006 for harassment of a former partner and convicted in 2007 of assault occasioning actual bodily harm and possession of an offensive weapon, both offences arising out of an attack on another partner.

4 Mr Oakley was sent for psychiatric assessment and diagnosed with emotionally unstable personality disorder. He was charged with murder, but pleaded guilty to manslaughter by reason of diminished responsibility. The plea was accepted and, on 18 December 2009, he was sentenced to life imprisonment with a minimum term of 15 years. The minimum term was reduced on appeal to 12 years: see *R v Oakley* [2010] EWCA Crim 2419, [2011] 1 Cr App R (S) 112.

5 While in prison, Mr Oakley was diagnosed with autism spectrum disorder ("ASD").

6 Mr Oakley's case was considered by the Parole Board in December 2019. Transfer to open conditions was not recommended. His tariff expired on 21 February 2021. His case was referred to the Parole Board under s. 28(6)(a) of the Crime (Sentences) Act 1997, to consider whether to direct his release and, if not, to advise the Secretary of State on his suitability for transfer to open conditions.

The panel decision

7 A panel was convened, consisting of a judicial member, two psychiatrist members and an independent member. The panel heard oral evidence from Mr Oakley, Dr Kevin O'Shea (a consultant psychiatrist instructed by the Prison Service), Mr Kevin Meek (Wellbeing Team Manager), Ms Emma Mercieca and Ms Kirsty Phillips (Prison Offender Managers) and Ms Ann Rowe (Community Offender Manager). It considered written and oral representations on behalf of Mr Oakley (in favour of a transfer to open conditions) and on behalf of the Secretary of State (against). It also saw a dossier containing 669 pages, which included victim personal statements from Taylor Burrows' mother and father. The mother's statement was read at the start of the hearing.

8 The panel issued its recommendation that Mr Oakley be transferred to open conditions on 25 May 2021. This ran to 16 pages and included an analysis of the index offence and previous offending (section 3); an analysis of the risk factors (section 4); a long and detailed summary of the evidence of change since the last review and progress in custody

(section 5); a current assessment of risk (section 6); an evaluation of the effectiveness of plans to manage risk (section 7); and a final section detailing the panel's conclusion and decision (section 8).

9 In section 5, the report detailed the courses and programmes which Mr Oakley had completed: the Thinking Skills Programme (2011), Kainos (2011), non-accredited programmes on victim awareness and anger management, the Healthy Relationships Programme (2016) and 60 one-to-one sessions with Consultant Clinical Psychologist Dr Rachel Probert (2016-2018).

10 The views of the various professionals were then set out. Ms Mercieca told the panel that "no progress has been made regarding further treatment in closed conditions". She assessed that Mr Oakley could be managed safely in open conditions though she recommended an open prison with a Pathways Enhanced Resettlement Service (PERS). Dr O'Shea considered that further treatment should be focussed on Mr Oakley's ASD. He did not think this treatment needed to be delivered in a closed setting and supported a move to open conditions. Mr Meek confirmed that ASD support in closed conditions was very limited. He supported the move to open conditions and believed that if Mr Oakley remained in closed conditions there could be a deterioration in his condition.

11 Ms Rowe, however, did not support a move to open conditions. She considered that further work was required to develop more consistent coping strategies, increase tolerance to stress and better emotional regulation as well as being able to maintain good working relationships with professionals. In suggesting how this might be achieved, she suggested In-reach or Outreach stress intolerance and emotional regulation work. There was also a reference to Dialectic Behavioural Therapy, though the panel accepted Dr O'Shea's evidence that this would not be appropriate for Mr Oakley, because of his ASD diagnosis. The panel continued:

> "Ms Rowe was unclear under the OMIC system as to who had the responsibility to try and set up this work. On the basis of the evidence it had received and mindful of the limited support with your ASD that you had been given since the last oral hearing, the panel had concerns as to how these proposals could be put into operation within the closed estate."

12 In section 8 of its recommendation, the panel said this:

> "Ms Rowe assesses that you need to do further work in closed conditions on the areas that she has identified but it remained unclear to the panel how this work was to be delivered and the panel was concerned that there would be a further period of delay increasing your sense of unfairness and frustration.
>
> The panel assesses that you cannot at present be safely managed in the community and in particular there is not a fully developed Risk Management plan. The panel gives you credit for recognising the reality of the situation. The panel therefore determines that it is necessary for the protection of the public that you remain detained and do not direct your release.
>
> However, the panel is persuaded that, with proper support in place, you can be safely managed in open conditions including ROTLs and that there is no

> further work for you to undertake in closed conditions. It was persuaded that you would benefit from further intervention to help you understand your ASD diagnosis and how to manage your emotions better, and that this will be offered to you within the open estate. While you have demonstrated (even within the oral hearing) that you can become easily aroused and abusive, you have a strategy to manage situations by walking away. Clearly, it would be helpful if you were able to develop a broader range of coping mechanisms. However, the panel was mindful that your negative behaviour has not led to any incidents of physical violence for many years. There is clearly a benefit to you in testing you in less secure conditions and to allow you to develop your release plans. The panel does not assess your risks in open conditions as imminent. Further the panel is persuaded that you do not represent an abscond risk. Accordingly, the panel recommends to the Secretary of State that you are transferred to open conditions."

The Secretary of State's decision

13 Documents disclosed during the course of the judicial review proceedings cast some light on what happened next. On 4 June 2021, Darren Henry MP wrote a letter on behalf of Carol Burrows and another constituent to Alex Chalk MP, Parliamentary Under Secretary of State at the Ministry of Justice, expressing concern about the move to open conditions. In it he described Mr Oakley as "the man who brutally murdered" Ms Burrows' daughter, though Mr Oakley was never convicted of murder. As soon as this letter was received, Mr Oakley's case was flagged as an "MC" (ministerial correspondence) case.

14 The case was later described as a "noteworthy" case and allocated by the Deputy Head of Parole Eligible Casework to a team member, who in due course completed the PPCS Open Recommendation proforma. This is dated 22 June 2021. To the question "Is the report based on inaccurate information?" the writer answered "No", before recording accurately that the Offender Supervisor (the old term for Prison Offender Manager), Prison Psychiatrist and Wellbeing Team Manager, but not the Community Offender Manager, all favoured a move to open conditions. The writer then said this:

> "Mr Oakley has completed a number of programs and has shown good progress in custody. Much of his negative behaviour stems from frustrations resulting from his lack of progress, not receiving specialist care and staff being unable to answer his questions. This behaviour is exacerbated by him being a victim of bullying from other inmates, and being moved around a lot which triggers his ASD. I note that he has not had any violent incidents for many years, and has proven himself capable of walking away when faced with difficult situations. His OS' believes there is no further work available for him to complete in closed conditions, and the psychologist believes him remaining in close conditions will cause him to regress. I am therefore persuaded that the move to open conditions is the best outcome, as it will enable him to access specialist care and put into practice the skills he has gained from the programs he has completed. I believe as he is so focused on progression, his negative behaviour towards staff should reduce, especially if in receipt of specialist care and support."

15 The proforma has boxes for the Team Leader's recommendation and for the Head of Casework's agreement, neither of which were filled in. The proforma was sent on 24 June 2021 to the Deputy Head of Parole Eligible Casework, who on 25 June 2021 sent Gordon Davison of the National Offender Management Service some draft text for a rejection letter, including the following final paragraph:

> "Although there is support from the majority of report writers for progression to open conditions, and taking into account the concern a further period of detention in closed conditions may be detrimental to Mr Oakley, it is of note that Mr Oakley has continued to display negative outbursts and behaviour in regards to staff, as well as his mother who all professionals shared a concern for, and that he received an adjudication in October despite the work he has already completed. In view of the information I am not wholly persuaded that Mr Oakley should be transferred to open conditions at this stage and agree with the COM's view that further work is required to develop consistent coping strategies/emotional regulation."

16 Mr Davison agreed with the conclusion that the Parole Board's recommendation should be rejected and sent a few suggested changes.

17 The decision letter itself, dated 29 June 2021, contains fourteen paragraphs. It is agreed by Myles Grandison (counsel for the Secretary of State) and Edward Hetherington (counsel for Mr Oakley) that almost all of that letter is a summary of the evidence before and conclusions of the Parole Board. The only reasons for rejecting the Parole Board's recommendations are to be found in a single sentence of the seventh paragraph and in the thirteenth paragraph. Most of the seventh paragraph records the Community Offender Manager's view that Mr Oakley has outstanding treatment needs, which focus on developing more consistent coping strategies, increased tolerance to stress and improved emotional regulation before a progressive move can be safely managed. The writer then adds:

> "Officials are of the view that such work should be completed prior to a move to less secure conditions".

The thirteenth paragraph reads as follows:

> "Whilst officials acknowledges [sic] the positive work you have completed, the concerns raised regarding your emotional fragility, outstanding core risk work and the need for further support cannot be ignored, particularly in the context of your very serious index offence which led to the very tragic loss of Ms Burrows life. Consequently, having carefully considered the Panel's recommendation and all the evidence presented, on this occasion officials on behalf of the Secretary of State have rejected the Panel's recommendation. This does now mean you will remain in the closed estate, as a minimum, until the outcome of your next parole review is known."

Law

18 The Parole Board's functions are those conferred on it by Chapter 6 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act") and by Chapter 2 of Part 2 of the Crime

(Sentences) Act 1997 ("the 1997 Act"). By s. 239(2) of the 2003 Act, 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. By s. 239(6), the Secretary of State may give directions to the Board as to the matters to be taken into account by it in discharging any of its functions.

19 The Secretary of State has given directions entitled *Transfer of indeterminate sentence prisoner to open conditions* ("the Directions"). At the relevant time, they contained two separate sections headed respectively "Introduction" and "Directions".

20 The Introduction includes the following:

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

21 The Directions include these passages:

> "6. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-
>
> - all information before it, including any written or oral evidence obtained by the board; and
>
> - each case on its individual merits without discrimination on any grounds.
>
> 7. The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:-
>
> a) the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open

> conditions may be in the community, unsupervised, under licensed temporary release…
>
> …
>
> 9. In assessing risk in all the above matters, the Parole Board shall consider the following information, where relevant and available, before recommending the ISPs transfer to open conditions, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:-
>
> e) the nature of any offences against prison discipline committed by the ISP;
>
> f) the ISPs attitude and behaviour to other prisoners and staff…"

22 The policy governing the circumstances in which the Secretary of State will depart from Parole Board recommendations is set out in the Generic Parole Process Policy Framework ("the Framework"). The current iteration of the Framework was promulgated on 27 January 2020 and provides as follows:

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

23 In this case, the Secretary of State's decision to depart from the recommendation was taken on the basis set out at para. 5.8.3 (that there was not a "wholly persuasive case" for transferring the prisoner to open conditions).

24 The courts have considered this criterion. In *R (Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin), Andrews J drew attention to the context in which the phrase appeared in an earlier iteration of the Framework, which had acknowledged the "very limited parameters" for departure from the recommendation of the Board. She noted at [53] that "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".

25 One circumstance in which the Secretary of State can properly conclude that a Parole Board decision is unjustified or inadequately reasoned is where it fails to follow directions made by the Secretary of State under s. 239(6) of the 2003 Act and, in

consequence, fails to apply the correct test or address the correct criteria: *R (Stephens) v Secretary of State for Justice* [2021] EWHC 3257 (Admin), [37]-[39] (Whipple J).

26 More generally, the circumstances in which the Secretary of State may depart from findings and recommendations made by the Parole Board have been considered on many occasions in the authorities.

27 In *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB), the Divisional Court (Thomas LJ and Nicola Davies J) distinguished between findings of fact by a Parole Board panel and assessments of risk. The findings of fact were "the basis on which the Secretary of State was entitled to reach his own view… according appropriate respect to the views of the panel on their assessment of risk": see at [60]. At [61], it was said that, in a case where there had been an oral hearing, very good reason was needed to depart from findings of fact made by a panel which had seen witnesses. Whether such reason was shown "depended on whether circumstances permitted the Secretary of State to undertake a detailed examination of the evidence and whether he could properly justify a different conclusion": [64].

28 In *R (Adetoro) v Secretary of State for Justice* [2012] EWHC 2576 (Admin), HHJ Gilbart QC said that *Hindawi* does not prevent the Secretary of State from rejecting a Parole Board recommendation if he disagrees with a factual conclusion reached by it from factual material before it. However, "when the Secretary of State considers a Parole Board recommendation, he must do so fairly and properly, and give adequate reasons. If he misinterprets it, or fails to take the Board's reasoning into account, he will have failed to have regard to it in the manner required by law": [56].

29 In *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 802, Sales LJ (with whom Sir Terence Etherton C and King LJ agreed) emphasised at [73] that the Secretary of State is not bound to accept the advice of the Parole Board "provided there is sufficient good reason not to". He added this:

> "Further, if the advice given by the Board fails for whatever reason to take into account the relevant policy of the Secretary of State governing the question of transfer to open conditions, that is likely to constitute a good reason for the Secretary of State to decline to follow the advice."

30 Some of the other authorities were helpfully summarised by Heather Williams QC (as she then was) in *R (John) v Secretary of State for Justice* [2021] EWHC 1606 (Admin), [2021] 4 WLR 98, at [35]-[44]. At [47], she said this:

> "The key distinction for present purposes is between, on the one hand, a finding of fact made by the Parole Board after having had the benefit of hearing oral evidence, which the defendant can only depart from with good reason and, on the other, a matter of evaluative assessment by the Board, which the defendant must take into account, but may give such weight to as he determines appropriate (paras 38–44 above). [Counsel for the claimant] rightly accepted during his oral submissions that a conclusion that a prisoner's risk can be managed safely in open conditions is a matter of evaluative assessment, as is a conclusion that a prisoner poses a high risk of violence to the public. [Counsel for the Secretary of State] agreed with

> [counsel for the claimant'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."

Post-decision evidence

31 Mr Hetherington sought to rely on a letter dated 11 April 2022 from Jamie Cooke, a Senior Support Worker at the integrated Mental Health and Substance Support Team at HMP Erlestoke. The letter includes the following:

> "The retraction of the parole boards recommendation means there are no suggestions of work, interventions or support for Mr Oakley to progress. He is stuck in limbo with a lack of adequate support for his needs and only the hope of a positive appeal outcome keeping him going. There has been a very in-depth multi-disciplinary approach and collaboration of departments to find Mr Oakley adequate and appropriate interventions within close conditions and they are not available.
>
> If there is no identified adequate support it is not acceptable to keep someone in an environment indefinitely with no suggestion or recommendation of how to move on. There is no benefit to him remaining in closed conditions and the general prison environment itself is not helpful for Mr Oakley. Most prison establishments are not adequate for a person with ASD, only a handful of prisons hold autism accreditation and while this should be embraced by all establishments it has not and Mr Oakley cannot just simply wait around until there is.
>
> There is no more he can do in this establishment or environment and an outcome needs to happen at the soonest possibility so that Mr Oakley and the professionals supporting him can make a plan for his progression. We are doing what we can to support Mr Oakley but this is not a situation that can be resolved with mental health intervention. The situation needs to be resolved with progression or at the very least an outcome in an acceptable timeframe."

32 This letter was shown to the court at the permission hearing. In response, the Secretary of State applied to adduce a witness statement dated 5 September 2022 from Martin Fisher, the Regional Lead Psychologist for South Central Prisons and HMP Erlestoke. He suggests various investigations that could be undertaken, including the Stalking Risk Profile and functional analysis. Mr Fisher notes that these assessments would be able to identify any additional support required and "whether he could engage in existing structured regime options to assist this (such as the Progression Regime at Erlestoke)". If it was assessed that this could assist, these options have their own formal processes. Alternatively, something similar could be achieved through local agreement of a structured multi-disciplinary team process with scheduled reviews. If Mr Oakley were to engage meaningfully with this, it could be expected that he would attend appointments and act on feedback received.

Submissions for Mr Oakley

33 For Mr Oakley, Mr Hetherington advanced two overlapping grounds of challenge. The Secretary of State's decision had failed to respect the expertise and factual findings of the Parole Board; and it reached an irrational conclusion by requiring Mr Oakley to achieve the impossible (to undertake further work in closed conditions, which cannot be done in such conditions). The Parole Board's recommendation was a model of its kind: reasoned, analytical and balanced. The Secretary of State had given no cogent or adequate reason for departing from it.

34 At the oral hearing, Mr Hetherington concentrated on the Parole Board's conclusion that there was no further work to be carried out in the closed estate. This, he said, was a factual conclusion, reached after consideration of written and oral evidence. Applying *Hindawi*, the Secretary of State was entitled to depart from it only for very good reason – and none was given.

Submissions for the Secretary of State

35 For the Secretary of State, Mr Grandison submitted that it was important to distinguish those parts of the Parole Board's recommendation which involved findings of fact from those which involved assessments of risk. On analysis, the only matter falling into the former category was the conclusion that "there is no further work for [Mr Oakley] to undertake in closed conditions". This conclusion was reached notwithstanding the Parole Board's conclusion, in the same paragraph, that Mr Oakley would benefit from further intervention to help him understand his ASD diagnosis and how to manage his emotions better (an intervention which would be offered to him in the open estate).

36 The Secretary of State was entitled to depart from this finding, because it failed to follow the Directions, para. 3 of which made clear that "[t]he main facilities, interventions, and resources for assessing and reducing poor risk factors exist principally in the closed prison estate". Reference was also made to paras 5, 7(a) and 9(e) and (f). The Parole Board failed even to mention the Directions. This was a sufficient reason to depart from their recommendation.

37 That core risk reduction work remained necessary was evidenced by the aggressive outbursts documented throughout the Parole Board's decision, including in the months before the hearing, most notably that which led to an adjudication against him on 6 October 2020, but also those in December 2019, January, March (three separate incidents), October and November 2020. Although Mr Oakley had developed one coping strategy (walking away), the Parole Board had said that it would be helpful if he were to develop a broader range of such strategies and the Secretary of State was entitled to conclude that this should be done prior to a move to less secure conditions.

38 The Secretary of State's decision did not impose requirements that were impossible to meet. There was no dispute that further work was required. The Secretary of State was entitled to take the view that it should be carried out in the closed estate in the interests of public safety. It was not incumbent on the Secretary of State to identify the precise courses which would be provided to Mr Oakley. In any event, the witness statement of Mr Fisher showed that there was further work which could be done in closed conditions.

Although this statement post-dated the decision, it should be admitted because "it would be wrong and artificial to consider this case as if the factual scenario were frozen at the point at which these proceedings were commenced": *R (Tancock) v Secretary of State for Justice* [2012] EWHC 3225 (Admin), [53]. In any event, the Secretary of State had a duty to provide suitable courses to Mr Oakley. These proceedings were not a challenge to the failure to discharge that duty. They should be determined on the footing that the duty would be complied with.

Discussion

Admissibility of post-decision evidence

39 Before focussing on the challenged decision, it is necessary to address the admissibility of the post-decision evidence. In *Tancock*, what was challenged was an ongoing failure to comply with the Secretary of State's duty to make reasonable adjustments under the Equality Act 2010 and an ongoing breach of his general public law duty to provide risk reduction courses to prisoners. It was in that context that Wilkie J made the comments relied upon by Mr Grandison.

40 In this case, by contrast, what is challenged is a single, discrete decision taken on a particular day (29 June 2021). In such a case, evidence post-dating the challenged decision is only admissible in judicial review proceedings for limited purposes. Evidence elucidating reasons already given is acceptable; evidence supplying wholly new reasons is generally not: see my judgment in *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin), [78], and the case law cited there.

41 Here, neither Mr Cooke's evidence nor Mr Fisher's was before the Parole Board when it made its recommendation; and neither was before the Secretary of State when the challenged decision was taken. Mr Grandison does not and could not submit that Mr Fisher was "elucidating" what was in the mind of the decision-maker; he was giving his own expert view about what could now be done, a view that did not inform the Secretary of State's decision-making process.

42 In this case, orthodox principles lead to the clear conclusion that neither Mr Cooke's letter nor Mr Fisher's witness statement are admissible. This outcome is not mere procedural pedantry. It focuses attention on the key question for the court: whether the challenged decision was lawful when taken. If not, the usual remedy to is remit it to the Secretary of State to re-take it in accordance with law. That is the proper way for evidence post-dating the challenged decision (no doubt including Mr Cooke's letter, Mr Fisher's statement and any responses to these) to be considered.

43 There is one caveat. Evidence post-dating the challenged decision could in principle be relevant when considering relief. But if the decision were shown to be flawed, it would be appropriate to withhold relief only if it appeared to the court that it was highly unlikely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred: s. 31(2A) of the Senior Courts Act 1981 ("the 1981 Act"). In this case, the material in Mr Fisher's statement does no more than identify certain assessments which (depending on their outcome) might identify work which could (perhaps with adaptations designed to mimic open conditions) be undertaken in

closed conditions. That seems to me to fall very far short of the kind of evidence necessary to satisfy the high threshold set by s. 31(2A) of the 1981 Act.

Was the Secretary of State's decision lawful?

44 I turn, then, to the challenged decision of the Secretary of State. To assess its lawfulness, it is necessary to consider first the reasoning of the Parole Board.

45 The Parole Board panel members had the opportunity to question the witnesses who appeared before them. They recorded Ms Rowe's view that Mr Oakley needed to do further work on developing more consistent coping strategies, increasing tolerance to stress and improving emotional regulation. She suggested In-reach and Outreach courses. The panel noted, however, that she was "unclear under the OMIC [Offender Management in Custody] system as to who had the responsibility to try and set up this work". The panel note, on the basis of the evidence it had heard, its "concerns" as to how these proposals could be put into place within the closed estate. Later, they concluded that "there is no further work for you to undertake in closed conditions".

46 Mr Grandison accepted that this was a finding of fact, with the consequence that very good reason was required for departing from it. For my part, I doubt that it is helpful to seek to classify parts of a Parole Board recommendation as either findings of fact (to which the *Hindawi* approach applies) or assessments of risk (to which lesser weight attaches).

47 The issue on which the Secretary of State disagreed with the Parole Board in *Hindawi* was whether the prisoner was telling the truth when he said he had renounced violence. This was, quintessentially, the type of question on which a panel (whose members have heard oral evidence from the prisoner) would enjoy a significant advantage over the Secretary of State (who has not). It is for this reason that appellate courts are typically very reluctant to disturb findings of fact by first instance courts which turn on the credibility of witnesses who have given oral evidence.

48 There may be other questions which do not turn on the credibility of oral evidence, where, for other reasons, the panel has an advantage over the Secretary of State. Contested questions of diagnosis are likely to fall into this category. For example, if a Parole Board panel found that particular behaviours were best explained by a prisoner's personality disorder (rather than, say, mental illness), or that a particular treatment was likely to be effective in substantially reducing risk, the Secretary of State would no doubt need a very good reason to depart from such a finding. This is because the Parole Board's process (in which experts are questioned by representatives for the prisoner and the Secretary of State and by tribunal members who are themselves experts) is well-suited to resolving issues of this kind, even ones where reasonable experts differ. On questions such as these, the Secretary of State could depart from Parole Board decisions if the Parole Board has overlooked or misunderstood some key piece of evidence or failed to give adequate reasons for its view, but not simply because he would have resolved the dispute differently.

49 Disputes about the level of risk posed by a prisoner will often turn on precisely these kinds of questions on disputed issues of fact or prediction. Where they do, the Secretary of State will need to show a very good reason for taking a view that differs from the

Parole Board on the disputed question. But, as the reasoning in *Hindawi* shows, "risk assessment" will generally involve a further and qualitatively different exercise that falls to be undertaken against the background of the facts as found and the predictions as made by the Parole Board. This is the evaluative assessment required when reaching the ultimate decision whether to recommend transfer to open conditions.

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

51 In my judgment, the correct approach is therefore as follows. When considering the lawfulness of a decision to depart from a recommendation of the Parole Board, it is important to identify with precision the conclusions or propositions with which the Secretary of State disagrees. It is not helpful to seek to classify these conclusions or propositions as "questions of fact" or "questions of assessment of risk". The more pertinent question is whether the conclusion or proposition is one in relation to which the Parole Board enjoys a particular advantage over the Secretary of State (in which case very good reason would have to be shown for departing from it) or one involving the exercise of a judgment requiring the balancing of private and public interests (in which case the Secretary of State, having accorded appropriate respect to the Parole Board's view, is entitled to take a different view). In both cases, the Secretary of State must give reasons for departing from the Parole Board's view, but the nature and quality of the reasons required may differ.

52 In this case, the key conclusion of the Parole Board with which the Secretary of State disagreed was that "there is no further work for you to undertake in closed conditions". Mr Grandison accepts that the Secretary of State needed a very good reason for departing from this conclusion. The concession was, in my view, rightly made. If the Parole Board had been saying "Mr Oakley could in principle do this further work in either closed or open conditions but we think his level of risk is low enough that he should be transferred to open conditions before he starts it", it might be said that the conclusion involved an evaluative judgment on which the Parole Board enjoys no particular advantage over the Secretary of State. But the Parole Board was not saying that. When their decision is read as a whole, they were expressing the view that – on the evidence before them and given Mr Oakley's unusual constellation of problems, including his ASD, the fact that he had already completed a number of courses and the limited availability of other relevant provision in the closed estate – the further work which Mr Oakley needed to complete could not be undertaken in the closed estate. This was a conclusion of fact reached by a partly expert panel after considering expert evidence and after questioning and assessing the evidence of the single witness who took a contrary view.

53 Mr Grandison submitted that there was a very good reason for departing from the Parole Board's view on this question – namely their failure to follow, or even refer to, the

Directions. Where a Parole Board recommendation fails to refer to the Directions, and as a result misdirects itself as to the test to be applied, or fails to have regard to a mandatorily relevant consideration, that will be a good ground for departing from it, as Whipple J made clear in *Stephens*.

54 In this case, however, the main passages on which Mr Grandison relies are not in the operative part of the Directions at all, but in the Introduction. Paragraph 3 observes that the "main" facilities, interventions and resources for addressing and reducing core risk factors exist "principally" in the closed estate. Nothing in the Parole Board's decision is inconsistent with that observation; its conclusion was that, on the particular facts of Mr Oakley's case, no such facilities, interventions or resources suitable for him were available in the closed estate. Paragraph 5 directs the Parole Board to concentrate on assessing whether the prisoner has made "significant progress" in changing his/her attitudes and tackling behavioural problems in closed conditions. Although the recommendation does not use the phrase "significant progress", their recommendation sets out in great detail the progress made on the various courses Mr Oakley had attended. The panel concluded that, with the proper support in place, he could be safely managed in open conditions. Although he had on occasion displayed verbally aggressive behaviour, "this had not led to any incidents of physical violence for many years". Reading the recommendation as a whole, it is clear that the panel considered that Mr Oakley had made significant progress in changing his attitudes and tacking his behavioural problems in closed conditions.

55 Whether Mr Oakley had made "sufficient" progress and whether his risk had reduced "to a level consistent with protecting the public from harm" (see para. 7(a) of the Directions) were evaluative questions. Again, although the Parole Board did not recite these forms of words, they must have answered both questions in the affirmative: see their conclusions that he could be "safely managed in open conditions", did not pose an "imminent risk" in open conditions and did not "represent an abscond risk". As to the obligation to consider the nature of any offences against prison discipline and the prisoner's attitude and behaviour to other prisoners and staff (para. 9(e) and (f) of the Directions), both were considered in the body of the recommendation.

56 The Directions are, accordingly, a red herring in this case. The Parole Board's failure to refer to them did not lead to any misdirection or failure to have regard to a mandatorily relevant consideration. They do not supply a reason for the Secretary of State to depart from the Parole Board's recommendation. In any event, it may be noted that they were not mentioned by the Secretary of States' in his reasons for doing so.

57 What then was the Secretary of State's reason? The kernel of it is to be found in the single sentence in paragraph 7 of the letter of 29 June 2021, quoted at para. 17 above: that further work to develop more consistent coping strategies, increase tolerance to stress and improve emotional regulation should be completed prior to a move to open conditions. In my judgment, this did not engage with the Parole Board's view, reached after hearing the experts questioned, that there was no such further work to be completed in closed conditions. It may be that the Secretary of State had a proper basis for doubting that conclusion. If so, the decision letter does not reveal it. The decision is inadequately reasoned and, for that reason, unlawful.

Relief

58 The ordinary relief where a decision is found unlawful because it is inadequately reasoned is a quashing order. The effect of such an order is that the decision-maker has to re-take the challenged decision applying the law as set out in the court's judgment.

59 Mr Hetherington at one stage suggested (albeit tentatively) that, if on the evidence there was no proper basis for departing from the Parole Board's decision, I should also grant a mandatory order requiring the Secretary of State to accept the recommendation of the Parole Board.

60 There are two major difficulties with that form of relief. First, the challenge has succeeded on the ground that the decision is inadequately reasoned. It is not possible to say that there was no basis for departing from the decision, only that none was shown. Secondly, decisions as to transfer have to be taken on up-to-date information. Matters may have moved on since 29 June 2021. The Secretary of State must be entitled, and indeed obliged, to have regard to any relevant developments of which he is aware before re-taking the challenged decision. For these reasons, the proper form of relief is an order quashing the decision and remitting the matter to the Secretary of State to reconsider the decision according to law.