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Case No: CO/3308/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2023

Before :

Sir Ross Cranston sitting as a High Court judge

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Between:

THE KING **(on the application of THOMAS GREEN)**	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE (No 2)	**Defendant**

- -
- -

MICHAEL BIMMLER (instructed by Youngs Law) for the Claimant
DAVID MANKNELL (instructed by **GLD**) for the **Defendant**

Hearing date: 11 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR ROSS CRANSTON

INTRODUCTION

1. The claimant is serving a life sentence for murder as a Category A prisoner, the highest security category in the prison estate. Early last year the Parole Board recommended that he be transferred to open conditions, which is the lowest security category. The Secretary of State rejected that recommendation in a decision in June 2022. In this judicial review the claimant challenges that decision.

BACKGROUND

2. The claimant is a Category A (Standard Escape Risk) prisoner, detained at HMP Whitemoor. He was a career criminal with cash-in-transit armed robberies, including the shooting of security guards. He was sentenced to life imprisonment for murder in 2000. He was also sentenced for firearms offences. He shot his victim using a 12 bore sawn-off shotgun, striking him first in the lower abdomen and then at close range to the back of his head. The sentencing judge described it as akin to an execution. He buried the body in a shallow grave in his back garden and built a patio on top of it. His tariff was fixed at 14 years and one day. That period expired in February 2013. He is now in his early 70s.

Categorisation review

3. For the purposes of this judicial review, the appropriate stating point is the claimant's categorisation review in October 2021, conducted in accordance with PSI 08/2013. The outcome was that he remained a Category A prisoner. The claimant challenged the review in *R (on the application of Green) v Secretary of State for Justice* [2023] EWHC 626 (Admin). HHJ Karen Walden-Smith held that it was not unfair for the Secretary of State to maintain his category A status without holding an oral hearing.

4. What the Category A team considered is summarised in the Secretary of State's June 2022 decision. The Category A team noted that the claimant's behaviour had been good during the reporting period. However, it said, regime compliance alone, or simply the absence of "offence paralleling behaviour", did not provide sufficient evidence of a significant reduction in his risk if he were unlawfully at large. The team took the view that it still needed clear and convincing evidence that the claimant had significantly addressed the risk factors shown by his offending. The team noted that the claimant had recently undergone some medical procedures and spent some time in healthcare. However, there was no evidence that his health or mobility significantly reduced his risk or showed that escape was impossible in less secure conditions.

Parole Board's decision letter

5. The Parole Board considered the claimant's position in late 2021. Its decision letter is dated 7 January 2022.

6. At the outset of the decision letter, the Parole Board recalled the basis on which it could recommend open prison conditions. It then recorded that it had a dossier which included updates from the claimant's prison offender manager (Mr Mobius) and his community offender manager (Ms Breeden). The dossier also included a report by Ms

Tapley, the prison psychologist, who had conducted a psychological assessment. Her written report records that an updated HCR-20 risk assessment was completed in March 2018, and that in her view it was still an accurate reflection of the claimant's level of risk of future violence.

7. After analysing the claimant's offending, and setting out the risk factors in his case, the decision letter continued that Ms Tapley had concluded that the claimant was at a high risk of causing serious harm. She could not support his progression or release given some enduring evidence of verbal aggression. Ms Tapley supported his remaining in closed prison conditions to engage in a Psychologically Informed Planned Environment ("PIPE") Unit, although this was not core risk reduction work. The decision letter added that Mr Mobius, the claimant's prison offender manager, considered that the claimant's presentation could have been affected by the very limited COVID regime within custody, when he spent a lot of time on his own in his cell.

8. The decision letter recalled that the claimant's solicitor had arranged for an independent psychologist, Dr Beckley, to conduct a psychological assessment. Dr Beckley had concluded that the claimant posed a medium risk of resorting to violence or causing serious harm. While Dr Beckley noted the claimant's enduring verbal aggression, she concluded that the claimant could be progressed to open prison conditions.

The oral evidence

9. The decision letter then summarised the oral evidence the Board had heard, including from the claimant and his legal representative, Ms Shotter, who made submissions on his behalf.

10. Mr Mobius, the prison offender manager, confirmed that there had been no recent concerns about the claimant's conduct and compliance. He had no proven adjudications since September 2019. Mr Mobius reported that there had been no recent negative behaviour. The claimant remained as "enhanced" on the incentives and earned privileges ("IEP") scheme. His offender group reconviction scale (OGRS) score indicated a low risk of reconviction. On the Offender Assessment System ("OASys"), he was assessed as having a medium risk of further general reconviction and a medium likelihood of further violent reconviction. The Board noted that Mr Mobius had supported the claimant's re-categorisation in the review conducted by the Category A Team.

11. In the past, the decision letter continued, there was evidence of verbal aggression and threats towards staff, although there had been no recent evidence of this. Mr Mobius had known the claimant for several years and he considered that his verbal outbursts were due to personal stresses that he was facing at the time: he was "venting", without perhaps ever intending to act on any of the threats. Mr Mobius considered that the healthcare unit, where the claimant had spent a considerable period, was a stressful environment. The Board noted that the claimant still showed some signs of verbal aggression and that he had clashed with some staff, but that he had avoided physical violence, substance misuse or proven adjudications for several years. Mr Mobius did not consider that the claimant required further risk reduction work and considered that his risks could be managed in the open estate. He considered that the claimant would

be able to cope with the transition to open conditions. Mr Mobius could even consider direct release.

12. Dr Beckley, the psychologist instructed on the claimant's behalf, said that she remained supportive of the claimant's progression to open conditions but not his release. She said that the claimant appeared to understand his past criminal lifestyle and the factors that led him to make the decisions he did. Accepting that the claimant still had the potential to be verbally aggressive, Dr Beckley considered that this was different to his past instrumental violence and did not pose an imminent risk of causing serious harm to others. Dr Beckley took the view that there was a moderate level of protective factors including the claimant's current relationships with professionals, his compliance within custody and his enduring familial support that he could rely upon. She did not consider that his risks would escalate in the open prison estate, as postulated by Ms Tapley. There may be some verbal outbursts, but physical violence would be unlikely. No risk reduction work was outstanding.

13. The psychologist working in the Prison Service, Ms Tapley, remained concerned about the claimant's verbal outbursts and considered that he needed time on a PIPE Unit to consolidate his emotional self-management. There had been a negative behaviour warning in September 2021, although that had not been properly processed. Ms Tapley agreed with Dr Beckley that there should be warning signs before the claimant's risks of causing serious harm became more imminent. His underlying and enduring challenging presentation and personality traits gave Ms Tapley cause for concern in terms of his current progression or release. However, engagement on a PIPE was not core risk reduction work.

> "When asked, Ms. Tapley appeared to accept that [the claimant] may meet the Parole Board test for progression, but she was clear that this was not her recommendation."

14. Ms Breeden, the community offender manager, confirmed that she could support either the claimant's progression or his release. Ms Breeden disagreed with the concerns expressed by Ms Tapley and did not consider that the claimant needed to remain in the closed prison estate. Ms Breeden considered that there had been progress over the last few years since the claimant was last linked to violence and that he had shown a period of positive behaviour. Ms Breeden suggested that she and Mr Mobius had a better knowledge of the claimant than Ms Tapley. On a pure risk basis, his current presentation led her to consider that his risks could be managed if his release was directed.

Parole Board's recommendation

15. The Parole Board concluded that although the claimant did not currently meet the test for release, he could be transferred to open prison conditions. It noted the concerns of Ms Tapley about the claimant's enduring capacity for verbal outbursts but did not consider that this meant that he posed an elevated risk of causing serious harm to others if he were in open conditions. The panel added:

> "No professional witness considered you to pose an imminent risk of causing serious harm, no professional witness considered core risk reduction work to be outstanding and no

> witness considered you to pose an elevated risk of abscond. The panel could also identify multiple benefits to you being tested outside of the closed prison environment, developing your release and resettlement plans and demonstrating that you can manage your emotions in a less structured and controlled environment."

Mr Mobius's letter

16. In early March 2022 the Secretary of State decided to reject the Parole Board's recommendation. That decision was later withdrawn following pre-action correspondence from the claimant's solicitors. Following the Secretary of State's March decision, both the claimant's prison offender manager, Mr Mobius, and the community offender manager, Ms Breeden, wrote to the claimant's solicitor on 16 March 2022 about their concern with the Secretary of State's decision.

17. In his letter Mr Mobius drew attention to the fact that with both the October 2021 Category A team review and the Parole Board hearing he had drawn attention to the lack of current information in Ms Tapley's psychology report which, in his view, was both misinformed and out of date. Mr Mobius added:

> "The prison psychologist felt that there was no need to undertake a HCR-20 since the one from 2018 remained valid, something that I strongly disagreed with due to it being completed only mere months after an assault carried out by [the claimant], when there had been no further acts of violence since the incident in 2017."

18. In pre-action correspondence with the Secretary of State in the first judicial review, dated 14 April 2022, as well as in the second, the claimant's solicitors drew attention to these letters. They also pointed out that, at the hearing, the claimant's representatives raised the following: (a) the absence of references to more recent positive behaviour; (b) the failure to complete an updated HCR-20 assessment despite the existence of recent significant changes (positive behaviour and transfer back to normal location); and (c) a reference to a lack of engagement with the PIPE referral, when the claimant had in fact been unable to transfer for health reasons, knee operations, and then a parole "hold".

Secretary of State's decision

19. The Secretary of State rejected the Parole Board's recommendation in a decision dated 9 June 2022. Having carefully considered the Panel's recommendation and all the evidence presented, he said, he

> "has reached a different conclusion, that there is not a wholly persuasive case for transferring you to open conditions at this time…"

20. His decision set out six factors where the Secretary of State acknowledged the claimant's positive progress, including his completion of offending behaviour programmes, the improvement of his behaviour in prison during the last reporting

period, that he was an enhanced prisoner under the IEP scheme, and the positive recommendations of his prison offender manager, Mr Mobius, his community offender manager, Ms Breeden, and Dr Beckley.

21. However, the decision continued, the Secretary of State had also considered first, the claimant's review by the Category A team in October 2021; secondly, that despite what Mr Mobius, Ms Breeden, and Dr Beckley had recommended, Ms Tapley's view was that after a very long period of time in the high secure estate a progressive move to a PIPE would allow for a review of progress - which aligned with the position of the Category A team; thirdly, that his positive behaviour did not necessarily correlate with a reduction in risk; and fourthly, that he had been assessed as having a medium risk of further general reconviction, a medium likelihood of further violent reconviction, with a high risk of serious harm to the public and known adults. This part of the decision concluded:

> "Whilst it is noted that there has been an improvement in your behaviour in recent years and there is no further core risk reduction work for you to undertake, the Secretary of State is of the view that, due to your extensive period in the Category A estate, progression through lower categories within the closed estate is necessary before you are transferred to an open prison and eventually gain access to the public."

22. The decision then set out that, going forward, it was necessary for the claimant to continue to show good progress and evidence of a reduction in his risk. He was encouraged to work on progress to a lower category prison within the closed estate, and to engage in a PIPE, where possible, to demonstrate a further period of consolidation and evidence that he had put into practice what he has learned from his risk reduction work, and to maintain a further sustained period of good behaviour.

POLICY BACKGROUND

Secretary of State's policy

23. The Secretary of State's policy "Generic Parole Process Policy Framework" in force at the time of the claimant's case contained these paragraphs relevant to the transfer of indeterminate sentenced prisoners ("ISP") like the claimant to open conditions.

> "3.8.17 Upon receipt of the Parole Board decision, PPCS [the Public Protection Casework Section] are responsible for ensuring that all papers considered by the panel are considered when making a decision on the prisoner's transfer to open.
>
> 3.8.18 PPCS are responsible for deciding whether to accept or reject the Parole Board's recommendation for an ISP to move to open conditions, taking into account the Secretary of State's directions to the Parole Board. This decision must take place within 28 calendar days of receipt of the Parole Board decision.

> 3.8.19 PPCS may consider rejecting the Parole Board's recommendation for open conditions if the criteria in constraint paragraph 4.6.1 are met. See further guidance at 5.8.2."

24. Paragraph 4.6.1 has no application in this case.

25. However, the guidance provides, under the heading "ISPs Transferring to Open Conditions", 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."

26. Also relevant under this heading of the Guidance is the following paragraph:

> "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."

Secretary of State's Directions

27. The Secretary of State has issued Directions to the Parole Board for the transfer of indeterminate sentence prisoners to open conditions. The Directions applicable in this case were those issued in 2015.

28. In their introductory part the 2015 Directions state that open conditions can be particularly beneficial for such ISPs, where they have spent a long time in custody, and that their focus is to test the efficacy of core risk reduction work and to address, where possible, any residual aspects of risk. Point 5 in the introduction states: "A move to open conditions should be based on a balanced assessment of risk and benefits."

29. After providing that the Parole Board should consider all information and each case on its individual merits, under their operative part the Directions state that the Parole Board must take into account, when considering a move to open conditions, the risks of transfer against the benefits and the extent to which the prisoner has made sufficient progress in changing attitudes and tacking behavioural problems.

THE LEGAL FRAMEWORK

30. At the hearing, a wealth of jurisprudence was canvassed bearing on the reviewability of decisions of the Secretary of State vis à vis a recommendation of the Parole Board. The caselaw builds on the statutory framework of the Secretary of State's discretion under section 12 of the Prison Act 1952 and the Prison Rules 1999 (made under section 47 of that Act) as to how prisoners are to be held, and the advisory function of the Parole Board under section 239(2) of the Criminal Justice Act 2003.

31. The starting point is the decision in *R (Banfield) v Secretary of State for Justice* [2007] EWHC 2605 (Admin). There Jackson J held that the Secretary of State was entitled to order that a life prisoner should remain in closed conditions despite the recommendation of the Parole Board that he be transferred to open conditions. Jackson J drew on the case law up to that point to enunciate five principles, two of which are relevant to the present case. First, that 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 it has particular expertise in assessing the risk posed by individual prisoners, albeit that it is a matter for the Secretary of State what weight he assigns to those factors; and secondly, that 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: [28].

32. Next is the decision of the Divisional Court (Thomas LJ and Nicola Davies J) in *R (on the application of Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB). The court held that the Secretary of State had acted unfairly in rejecting the Parole Board's recommendation for release having based his decision upon a document setting out the reasons for refusing parole but not the reasons for granting it. In the course of his judgment, Thomas LJ underlined the expertise of the Parole Board in assessing risk, a task to which the Secretary of State could not bring any superior expertise: [50]. He continued that the weight the Secretary of State should accord to its recommendation must depend on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make: [52].

33. Under the heading "The approach to the finding on the claimant's credibility", Thomas LJ drew "a clear distinction to be made between findings of fact made by the Parole Board panel and its assessment of the risk":[58]. On the basis of the Board's findings of fact, he said, the Secretary of State was entitled to reach his own view of risk, using what are now the Directions to the Parole Board, according appropriate respect to the Board's assessment of risk: [60]. Where there had been an oral hearing, very good reason was needed to depart from the Board's findings of fact: [61]. The Secretary of State was the primary decision maker: [63].

34. In *R (on the application of Adetoro) v Secretary of State for Justice* [2012] EWHC 2576 (Admin) HHJ Gilbart QC (as he then was) restated the principles in *Hindawi*: the Secretary of State must accord weight to the Board's recommendation and reasoning, but was not prevented from disagreeing with it so long as he did so fairly and properly, and gave adequate reasons: [55]-[56]. The Secretary of State had to have regard to all material considerations but was not required to spell them all out in the decision letter: [62].

35. Dove J in *R (on the application of Harris) v Secretary of State for Justice* [2014] EWHC 3752 (Admin) held that as the ultimate decision maker, the Secretary of State, was entitled to depart from the Parole Board's recommendation to transfer a prisoner to open conditions, in that case because there was an absconding risk given that the claimant might be deported because of his immigration status: [29]-[32], [40].

36. By contrast, in *R (on the application of Noye) v Secretary of State for Justice* [2017] EWHC 267 (Admin) Lavender J quashed the Secretary of State's decision that a prisoner serving a life sentence for murder should not be transferred to open conditions, which was contrary to the Parole Board's recommendation. The Secretary of State had departed from a finding of fact by the Board about the prisoner's attitude to violence, but there was no good reason to do so when the Board had already considered the matter.

37. *R (on the application of Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin) was an unsuccessful challenge to the Secretary of State's policy and its application, what are now paragraphs 5.8.2 and 5.8.3 quoted earlier but with the words, now omitted, that the "parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited". Andrews J held that the Secretary of State was entitled to adopt a policy which enabled him to explore whether the recommendation had been reached after a proper evaluation of the evidence and the application of his directions, and to explore the cogency of the Board's justification for its recommendation and the reasoning behind it.

38. As well as the challenge to the policy, the claimant in that case sought review of its application. Andrews J held that paragraph 5.8.3 (rejecting a Parole Board recommendation if the Secretary of State considers "that there is not a wholly persuasive case") was to enable him to reject a Parole Board recommendation which does not strictly fall within either of the preceding grounds (now paragraph 5.8.2), "but which appears to him (for good reason) to be unjustified or inadequately reasoned": [54].

39. In *R (on the application of John) v Secretary of State for Justice* [2021] EWHC 1606 (Admin), Heather Williams J (as she now is) held that the Secretary of State for Justice was entitled to depart from Parole Board's recommendation for a transfer to open conditions on the basis that the prisoner needed further consolidation work. That was an evaluative assessment as to the future, not a finding of fact.

40. In *R (on the application of Stephens) v Secretary of State for Justice* [2021] EWHC 3257 (Admin) Whipple J held that the Secretary of State could reject a recommendation by the Parole Board for open conditions as unjustified or inadequately reasoned where the Parole Board had failed to follow his Directions and in consequence had not applied the right criteria: [38]-[39].

41. In *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin) Chamberlain J quashed a decision of the Secretary of State where, without good reason, he had departed from the key conclusion of the Parole Board. That conclusion was that there was no further work for the prisoner to undertake in closed conditions, a conclusion of fact reached by a partly expert Board having considered expert evidence in relation to which it enjoyed a particular advantage. In *obiter* remarks, Chamberlain J said that it was not helpful to draw, as in other cases, a bright line

between questions of fact and those involving the assessment of risk, since there may be other questions which do not turn of the credibility of oral evidence, where, for other reasons, the Parole Board has an advantage over the Secretary of State:[51].

42. In drawing the threads together, it seems to me that the following applies if the Secretary of State is to disagree with the recommendations of the Parole Board for a prisoner's move to open conditions:

i. the Secretary of State must accord weight to the Parole Board's recommendations, although the weight to be given depends on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make;

ii. on matters in respect of which the Parole Board enjoys a particular advantage over the Secretary of State (such as fact finding), he must give clear, cogent, and convincing reasons for departing from these;

iii. with other matters such as the assessment of risk, where the Secretary of State is exercising an evaluative judgment, he must accord appropriate respect to the view of the Parole Board and he must still give reasons for departing from it, but he can only be challenged on conventional public law grounds such as irrationality, unfairness, failure to apply policy, and not taking material considerations into account.

THE GROUNDS OF CHALLENGE

The claimant's case

43. The claimant advances his challenge on two grounds, Ground 1, that the Secretary of State failed to evaluate the Parole Board recommendation to transfer to open conditions in accordance with his published policy; and Ground 2, that there was a failure to give good reasons for preferring the evidence of one expert over the evidence of the other experts.

44. As to the Ground 1, the claimant submitted firstly that the Secretary of State in relying on the ground at paragraph 5.8.3 of the policy (there is not a wholly persuasive case for transfer) did not properly evaluate the Parole Board's recommendation in a legally compliant manner. To do this he needed to find that the Parole Board's recommendation for good reason appeared to be unjustified or inadequately reasoned. In other words, he had to evaluate the Parole Board's reasoning and determine whether it was cogent and his conclusion reached after a proper evaluation of the evidence.

45. Instead, the claimant contended, the Secretary of State had listed various factors in favour of progression to open conditions, followed by a list of factors which he asserted were against that course. There was no consideration or evaluation of the Parole Board's reasoning and there was no basis for finding that it was not cogent, inadequately reasoned, had overlooked relevant evidence, or failed to apply the correct test.

46. The claimant also submitted under Ground 1 that the Secretary of State also failed to apply his own Directions to the Parole Board which, he contended, was required by paragraph 3.8.18 of his policy, for example, that it is particularly beneficial for indeterminate sentence prisoners who have spent a long time in custody (as the claimant has) to move to open conditions.

47. Ground 2 is that the Secretary of State failed to give good reasons for preferring the evidence of one expert over the evidence of the other experts. If the Secretary of State was to disagree with the majority recommendation of the professionals, which the Parole Board had accepted, there was a heightened duty to give reasons. Cited in support was *Crawford v Parole Board of Scotland* [2021] CSOH 44, [16], per Lord Braid; *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), [40], per Saini J and *R (O'Sullivan) v Parole Board* [2009] EWHC 2370 (Admin), [13], [18], per Irwin J. In particular, the Secretary of State did not engage with criticism made of Ms Tapley's report, the claimant contended, that she had omitted to update the 2018 HCR-20 risk assessment when significant circumstances affecting the claimant's risk factors had taken place.

Discussion

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

49. To my mind it cannot be said that the Secretary of State did not engage with the Parole Board's reasoning. He adopted a proper approach, taking account of the positive features that had been presented in the evidence before the Parole Board and its reasoning, going on to explain why he considered the balance of risk differently. He preferred the evidence of the prison psychologist, Ms Tapley, about risk over that of the claimant's prison offender manager, Mr Mobius, his community offender manager, Ms Breeden, and the independent psychologist, Dr Beckley. He was giving greater weight, as he was entitled to, to the view of one professional over the views of the other professionals.

50. In doing this he explained with sufficient clarity why he reached his decision, and the considerations he had taken into account. I accept the submission of the Secretary of State that it cannot be said that his decision leaves room for genuine doubt as to what he has decided or why. The caselaw the claimant cited, involving judicial review of the decisions of the Parole Board, not the Secretary of State, does not mean that there was a heightened duty on him to give reasons for preferring Ms Tapley's opinion when it disagreed with the recommendation of the other professionals, which the Parole Board had accepted.

51. Nor do I accept the claimant's submissions about the Secretary of State needing to follow his Directions to the Parole Board. This is a misreading of what was paragraph 3.8.18 (before its amendment), which required the Secretary of State to ensure that the

Parole Board took into account his directions to the Board. The language of the Directions makes clear that they are designed for the Parole Board, not him. They are not a statement of the policy that the Secretary of State must apply when deciding whether to depart from its recommendation, although they are the sort of matters which he might want to refer to in making his own decision.

52. There remains the criticism made of Ms Tapley's report by Mr Mobius, that Ms Tapley had not updated the 2018 HCR-20 risk assessment when significant circumstances affecting the claimant's risk factors had taken place in the meanwhile. That criticism was before the Secretary of State before his June 2022 decision. It was also before the Category A team, as Mr Mobius explained in his March 2022 letter. As I have said the point was advanced by the claimant as an omission in the Secretary of State's reasons. It cannot succeed on that ground alone. To go anywhere it must constitute a breach on conventional public law grounds.

53. In his June 2022 decision letter the first reason the Secretary of State gave for his rejection of the Parole Board's recommendation was the Category A team's finding, and the second, Ms Tapley's view which, the decision letter said, "aligns with the recent position of the Category A team assessing your risks". The absence of an up to date HCR-20 risk assessment cast a shadow over both reasons, in other words, two of the four reasons which the Secretary of State gave against the claimant's transfer to open conditions. A material consideration is one realistically capable of causing the decision-maker to reach a different conclusion: *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [116]-[119], per Lords Hodge and Sales (with whom other members of the Supreme Court agreed). In my view the HCR-20 risk assessment was a material consideration. There was a failure on the Secretary of State's part to take it, or at least its absence, into account. Consequently, there was a flaw in his decision rejecting the Parole Board's recommendation in conventional public law terms. That vitiates his decision.

Conclusion

54. The decision is quashed and remitted for the Secretary of State to make a fresh decision.