Neutral Citation Number: [2023] EWHC 3047 (Admin)

Case No: CO/4733/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2023

Before :

UPPER TRIBUNAL JUDGE ELIZABETH COOKE SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

The King on the application of Zarak McKoy	**Claimant**
- and -	
The Secretary of State for Justice	**Defendant**

- -
- -

Mr Carl Buckley (instructed by **Reece Thomas Watson solicitors**) for the **Claimant**
Mr William Irwin (instructed by **the Government Legal Department**) for the **Defendant**

Hearing date: 22 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 1 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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UPPER TRIBUNAL JUDGE ELIZABETH COOKE SITTING AS A DEPUTY HIGH COURT JUDGE

Judge Elizabeth Cooke:

1. The Claimant, Mr Zarak McKoy, is serving a discretionary life sentence. He seeks judicial review of the Defendant's decision, dated 14 September 2022, to reject the advice of the Parole Board that he be transferred to open prison conditions.

2. The Claimant was represented by Mr Carl Buckley and the Defendant by Mr William Irwin, both of counsel, to whom I am most grateful.

The factual, legal and policy background

3. The Claimant is now aged 30. In 2015 he was found guilty after trial of two offences of wounding with intent to cause grievous bodily harm and of possession of a firearm with intent to endanger life. His victims, one male and one female, sustained very serious injuries and have suffered lasting trauma. The Claimant had previous convictions for robbery and violence. He was sentenced to life imprisonment with a tariff of nine years and 114 days which will expire on 11 July 2024.

4. Because his tariff has not expired there is no question yet of the Claimant being released. But in a pre-tariff review (explained below) in June 2022 the Parole Board recommended that he be transferred to open conditions. The Defendant rejected that recommendation on 14 September 2022, and that is the decision sought to be reviewed.

5. The relevant law and policy can be summarised as follows.

6. 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".

7. 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. In practice as is well known a prisoner will be held in a category A, B or C prison in closed conditions or in category D in open conditions. Generally a period in open conditions is an important prelude to release on licence.

8. 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".

9. A transfer to open conditions is a matter which is relevant to the early release of a prisoner, and therefore 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. The Parole Board provides advice, but the decision is the Defendant's; by contrast, decisions about release are for the Parole Board to make.

10. The Defendant has issued directions to the Parole Board, pursuant to section 239(6) of the Criminal Justice Act 2003, about the matters that it must consider before recommending a transfer to open conditions for a prisoner serving an indeterminate sentence (an "ISP"). The Directions provide at paragraph 7 that

> "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;
>
> b) the extent to which the ISP is likely to comply with the conditions of any such form of temporary release (should the authorities in the open prison assess him as suitable for temporary release);
>
> c) the extent to which the ISP is considered trustworthy enough not to abscond; and
>
> d) the extent to which the ISP is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage."

11. Where an inmate has no more than three years before his tariff expiry he can be considered for a "pre-tariff review" in which the question of transfer to open conditions is considered, and that process was followed in the present case. It is governed by the Generic Parole Process Policy Framework ("GPPPF") which states at paragraph 5.4.1:

> "Pre-Tariff ISPs are eligible to have their case referred to the Parole Board to consider their suitability for transfer to open conditions up to three years prior to their TED. In order to target Parole Board and HMPPS resources effectively, the Secretary of State only refers those pre-tariff cases to the Parole Board where there is a reasonable prospect of the Board making a positive recommendation. Prior to a scheduled pre-tariff review, a pre-tariff sift will take place to ascertain whether an ISPs pre-tariff review should take place".

12. So as Mr Buckley observed, it can be inferred from the fact that the Claimant's case was referred to the Parole Board that a judgement had been made there was a reasonable prospect of a positive recommendation.

13. As noted above, in this context the Parole Board can only advise. The Defendant's assessment of that advice is described in Part 2, paragraph 3.4 of the GPPPF:

> "All indeterminate sentenced prisoners will have their cases reviewed by the Public Protection Casework Section (PPCS) to ascertain whether all three of the criteria in the current test for open conditions has been met (see

> guidance 5.8.2) and that there is a reasonable prospect of the Parole Board making a positive recommendation that they progress to open conditions. This takes place before a decision made about whether a case should be referred to the Parole Board for a recommendation around suitability for open conditions"

14. The GPPPF goes on to say this:

> "5.8.2 PPCS may consider rejecting the Parole Board's recommendation if the following criteria are met:
>
> - The Parole Board's recommendation goes against the clear recommendations 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."

15. The Defendant's decision to reject the Parole Board's recommendation was stated to be made on that third basis, that there was not a wholly persuasive case for transfer to open conditions. The other two are therefore irrelevant to these proceedings.

The Parole Board's advice

16. The Parole Board was provided with a 296-page dossier including reports from the Claimant's Prison Offender Manager ("POM") and Community Offender Manager ("COM"), and gave directions for evidence to be produced by psychologists. It conducted an oral hearing on 31 May 2022 at which the Claimant was represented and gave evidence, as did the POM, the COM, a member of the Prison Security Team, a psychologist instructed by the prison service and a psychologist instructed by the Claimant. A personal statement from one of the Claimant's victims was read to the panel.

17. The Parole Board produced a 10-page decision in which it first set out the details of the offences for which the Claimant is now imprisoned and summarised his previous offences. It set out what were said to be the Claimant's "risk factors", with which it said it agreed, namely "pro-criminal associates; use of violence and weapons; vengeful thinking; poor thinking skills; living in an environment characterised by aggression and an antisocial orientation; and poor response to treatment and supervision." It set out some of the Claimant's troubled background.

18. The panel went through the Claimant's record in custody, observing that in the early years he accumulated a number of adjudications for possession of unauthorised articles, disobeying orders, using threatening, abusive or insulting words, and poor behaviour towards staff. On one occasion a cell phone was found concealed in his cell. In 2018 the Claimant completed the Self Change Programme ("SCP"), and after that staff recorded an improvement in his behaviour.

19. Nevertheless, the panel recorded:

> "In September 2018, you were downgraded to Basic due to your alleged involvement in an act of concerted indiscipline along with others which included serious assaults on staff and extensive damage to a residential unit. Generally, you have been said to display manipulating behaviour after your requests were refused...
>
> You received an adjudication for disobeying a lawful order in July 2019. On another occasion 2019, a body scan had revealed that you had foreign objects in your anal cavity. There were further adjudications in July/August 2020 for using threatening abusive or insulting words and behaviour and in December 2020 for two offences of possession of an unauthorised article.
>
> It was alleged that on 3 July 2020, you became angry and shouted at a male officer telling him to 'fuck off' and that he was a 'pussy hole'. You admitted to the panel that you made these comments. On 13 August 2020, you were said to have made repeated abusive comments to a female officer including: 'tell your SO fuck his negatives and fuck his IEP's'; 'fucking slag' and 'fucking bitch'; you only admitted these last two comments. … You commented that she had come into work with a split lip and black eye and that you were glad that her husband beats her and you said, 'I hope you go home and your husband kills you, you fucking slag'. You denied in evidence making these comments although they were reportedly witnessed by other officers...
>
> Security information during 2021 related to threats to another prisoner, possession of drugs, bullying and inappropriate behaviour. A strong smell of cannabis from your cell had been reported on 13 November, 24 November and 1 December 2021. It appears no further action was taken."

20. The panel noted that in December 2021 both the POM and the COM had taken the view that the Claimant should remain in closed conditions. It said that Security reports from November 2021 and early January 2022, and again in May 2022, suggested involvement in cannabis usage and possible possession of a mobile phone. A report dated 5 February 2022 suggested that he was accessing Facebook and might be in possession of a mobile phone. An unauthorised extension lead was found in his cell. There were further records of a smell of cannabis emanating from the Claimant's cell in 2022.

21. The two psychologists agreed that the Claimant should be moved to open conditions, while expressing concerns about recent security intelligence. They agreed that the Claimant presented a "low-moderate risk of violence in open conditions" but that he had shown genuine change. The POM observed that the recent security entries were "not life-threatening" and that even if true she did not believe they increased the "imminency of [the Claimant's] risk". She noted that his last "act of aggression" had taken place in 2018 and the last verbal aggression in 2020. The Claimant was now working in the prison laundry in a trusted role. She cast some doubt on the security entries by commenting that she had visited the Claimant and neither seen nor smelt evidence of cannabis, and said that the smell could have come from other nearby cells. She believed that he had matured, and was highly motivated to build a relationship with his son, born just before he was sentenced.

22. All the professional witnesses supported a move to open conditions.

23. The panel recorded the Claimant's OASys scores (that is, computerised risk assessments) and said it agreed with them, including the assessment that the Claimant poses a moderate risk of violent re-offending and "a high risk of causing serious harm to the public and known adults and a medium risk to children and staff".

24. In conclusion, the panel referred again to the violence of the Claimant's offences, which the sentencing judge regarded as premeditated, and continued:

> "These violent attitudes persisted into the early years of your sentence when you displayed continuing poor behaviour leading to adjudications. However there appears to be a turning point following your completion of SCP in 2018 which all professionals agree seems to have had a genuine impact on you in terms of a change in attitude and the skills that you learnt and now utilise. Your behaviour gradually improved although there were concerning incidents in 2020; there has been no use of violence since 2018. Although the panel is concerned with the volume of security reports relating to mobile phones and cannabis use, these had not been substantiated by other evidence. Even if correct, the panel agrees with professionals that they do not indicate an increase in risk of serious harm.
>
> All the professionals agree that there is no further work for you to complete in closed conditions and that your skills need to be tested in a less secure environment and in periods of temporary leave in the community. There is clear benefit to you in a move to open conditions to enable you to re-establish links with your family as well as exploring employment opportunities. The professionals agree that you can be safely managed in open conditions including during periods of ROTL and there is no evidence that you would present an abscond risk. Accordingly, this panel recommends to the Secretary of State that you are transferred pre-tariff to open conditions."

The Defendant's decision

25. The Defendant's decision was communicated to the Claimant by letter on 14 September 2022. The letter said this:

> "Having carefully considered the Panel's recommendation and all the evidence presented to the Panel, the Secretary of State has reached a different conclusion, that there is not a wholly persuasive case for transferring you to open conditions at this time and therefore, he is rejecting the Panel's recommendation
>
> The Secretary of State when reaching this decision did acknowledge the positive progress you have made and took into account the following:
>
> • It is noted that your general behaviour has improved since the downgrade of your IEP status in 2018
>
> • All core offending behaviour work has been completed.

> However, the Secretary of State also considered the following points:
>
> • There is evidence that you continue to display aggression and your attitude and behaviour remain a real cause for concern. This behaviour took place despite your engagement in the Self Change Programme.
>
> • Your current risks are assessed as high risk of causing serious harm to the public and known adults and a medium risk to children and staff. In the knowledge of this your attitudes, behaviours and the volume of security reports, the Secretary of State is not persuaded you are manageable in open conditions.
>
> • It is noted that you also present a moderate risk of violence in open conditions.
>
> • There is live evidence your risk factors remain active, primarily based on the extensive security intelligence where there is a clear link to your risk factors, mainly your thinking skills.
>
> • Despite being in close proximity of a parole review, with benefits for your liberty, there have been concerning incidents as recently as 2020."

26. The letter went on to say what the Claimant needed to do:

> "Going forward, the Secretary of State considers that it is necessary for you to continue to work towards demonstrating sufficient evidence that you have reduced your risk to a point that you can be safely managed in open conditions or released into the community, and focus on continuing to consolidate your learning to date by undertaking the relevant interventions. The completion of core risk reduction work and/or the lack of further core risk reduction work being required does not necessarily suggest a prisoner is manageable in open conditions. In your case, you need to demonstrate a sustained period of positive behaviour, and avoid attracting of interest from the prison's Security Department."

27. In the course of these proceedings the Defendant has disclosed the proforma setting out the review of the decision by the Public Protection Casework Section ("the PPCS proforma"). It set out the Parole Board's decision and some of its reasoning, including the comments made by the POM and the COM, and then the views of the Case Manager, the Team Leader and the Head of Casework. All agreed that there was not a wholly persuasive case for a transfer to open conditions, citing the behaviour incidents since 2018 and the OASys risk scores. The Case Manager said:

> "I am of the view that Mr McKoy needs to demonstrate a consistent period of positive custodial conduct and a reduction in security intel on his record. Although professionals confirm there is no further risk reduction work to undertake, based on the extensive security intel there is a clear link to his risk factors mainly his thinking skills."

28. The Team Leader said:

> "Mr McKoy continues to display aggression and I believe his attitude and behaviour are a real concern which has not been given sufficient weight by the report writers and the Board."

29. The Head of Casework said:

> "I do note some of the positive progress Mr McKoy such as his engagement with SCP, however, it is not sufficient to suggest he is manageable in open conditions. I am in agreement with the case manager that Mr McCoy must demonstrate a consistent period of positive behaviour."

30. The Claimant has permission, granted by Mrs Justice Lang, to seek judicial review of the decision on two grounds:

First, that the Defendant's decision to depart from the Parole Board's recommendation was irrational or unreasonable.

Second, that the decision was taken contrary to the principles of procedural fairness because there are no published criteria to say what constitutes "a wholly persuasive case".

Ground 1: irrational or unreasonable departure from the Parole Board's recommendation

The argument for the Claimant

31. For the Claimant, Mr Buckley accepted that the Defendant is entitled to depart from the Parole Board's advice; the Claimant's case is that the Defendant's decision was irrational or unreasonable because he gave insufficient reasons. He did not engage with what the professional witnesses said. He did not say why he disagreed with the views of the POM and the COM who cast doubt on the seriousness of recent security incidents and carefully explained their positions. All he did was to recite facts of which the Parole Board was aware and which it had discussed; he did not say why those facts led him to a different conclusion.

32. There is a body of case law about the level of reasoning required of the Defendant in these circumstances. It focusses on the need to identify exactly what it is in the Parole Board's report that the Defendant disagrees with; there might, for example, be a disagreement of fact, or on a point of expert evidence, or about risk. In (*R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) Thomas LJ said at paragraph 60:

> "In my view, the Secretary of State, when making the decision on parole, also had to distinguish between the findings of fact made by the panel and the assessment of risk. The findings of fact were the basis on which the Secretary of State was entitled to reach his own view … to determine risk, according appropriate respect to the views of the panel on their assessment of risk.
>
> In a case where there had been an oral hearing, very good reason was needed to depart from the findings of fact made by the panel that has seen the witnesses, particularly the claimant."

33. That analysis was developed by Chamberlain J at paragraphs 46 and following in *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin), and it is worth setting out what he said at length (as did Mrs Justice Steyn in *R (Wynne) v Secretary of State for Justice* [2023] EWHC 1111 (Admin)):

> 46. "For my part, I doubt that it is helpful to seek to classify parts of a Parole Board recommendation as either findings of fact (to which the *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."

34. Mr Buckley also relied on the decision in *R (Zenshen) v Secretary of State for Justice* [2023] EWHC 2279 (Admin) where Mr Dexter Dias KC sitting as a Deputy High Court Judge said that in giving reasons for departing from a recommendation of the Parole Board:

> "What [the Secretary of State] must demonstrate is a genuine engagement with the material factors that arise in the case of the individual prisoner serving an indeterminate sentence. He can reach a different decision to the Panel. But his basis for departure must be rational and properly justified."

35. Here, said Mr Buckley, that basis was not properly justified. The decision did not necessarily fall readily into the two-part classification in *Oakley*; rather, it was a more straightforward case where the Defendant in this case has failed to engage with what the Parole Board said and failed to provide appropriate or any justification for reaching a different decision.

36. In particular, said Mr Buckley, the Defendant has not addressed the views expressed by the POM about her own interactions with the Claimant and her view of recent security concerns. Instead, the Defendant has set out facts, of which the Parole Board was aware, and did not say why those facts led him to a different conclusion on the question whether the risks presented by the Claimant could not be managed in open conditions.

37. Mr Buckley added that the PPCS proforma – whose contents were disclosed to the Claimant in the course of the proceedings – provided no further reasoning or explanation; it refers to the security intelligence and acts of indiscipline but does not engage with them to say why they had the effect that there was not a "wholly persuasive case". However the proforma did demonstrate the perfunctory nature of the

Defendant's decision; the final section of the PPCS stated that the Claimant's next review would be in 14 months' time and stated the purposes of that review, which included "a resettlement period in open conditions" as well as a note about the Claimant's ability to apply for release on temporary licence after arrival in open conditions – neither of which could possibly be engaged on the next review since the transfer to open conditions was being refused.

The argument for the Defendant

38. Counsel for the two parties were in agreement about the relevant law. To the authorities cited for the Claimant, Mr Irwin for the Defendant added *R (O'Dell) v Secretary of State for Justice* [2023] EWHC 899 (Admin) where HHJ Carmel Wall sitting as a Deputy High Court Judge said this at paragraph 65:

> "Where, as here, the Defendant has reached a different conclusion from the Parole Board on the ultimate question of where the balance of public protection and the interests of the prisoner lies, the Defendant must form his own view after giving due weight to the matters over which the Parole Board has an advantage over him. The Parole Board's conclusion on that ultimate issue, where the Defendant has constitutional responsibility for public safety, has no 'presumptive priority.'"

39. Mr Buckley of course did not suggest that the Parole Board's advice had any such priority. But Mr Irwin stressed the Defendant's constitutional responsibility to balance the interests of the Claimant against the protection of the public. He argued that the decision taken in the present case fell into the second category of decisions described by Chamberlain J in paragraph 51 in *Oakley*, being a matter "involving the exercise of a judgment requiring the balancing of private and public interests".

40. Mr Irwin pointed out that the Defendant did not disagree with the facts found by the Parole Board, Importantly, the Defendant did not disagree about the level of risk presented by the Claimant. Where he disagreed was in the assessment of whether that risk could safely be managed in open conditions.

41. The decision letter set out the factors the Defendant took into account when concluding that there was not a "wholly persuasive case" for transfer. The existence of the bullet-pointed factors (set out in paragraph 25 above) gave rise to the need for continued work by the Claimant to demonstrate that he could safely be managed in open conditions, and were the reasons why the Defendant rejected the Parole Board's views about the management of risk in open conditions. The management of risk and the protection of the public fall within the Defendant's constitutional responsibility, and in setting out the factors that led him to disagree with the Board's conclusion he gave a proper reason for that disagreement and for his conclusion that there was not a wholly persuasive case for transfer.

42. Mr Irwin argued that the reasons given in the decision letter were sufficient and that the Defendant did not rely upon the PPCS proforma to supplement them. But he pointed out that the proforma shows the analysis of the Parole Board's decision by three different civil servants, in ascending order of seniority. It notes that the professionals who gave evidence to the Parole Board had taken a different view of the

case quite recently (in December 2021) thus indicating that the matter was not a straightforward one for the professionals involved.

43. As to the inaccuracies in the description of the purpose of the future review (paragraph 37 above) Mr Irwin argued that they arose from a copy-and-paste error and did not form part of the reason for rejecting the Parole Board's recommendation.

Ground 1: discussion and conclusion

44. I agree with Mr Irwin that it is useful to look at the Defendant's decision in the light of the classification described by Chamberlain J in Oakley, which distinguishes between matters on which the Parole Board is better placed to decide (in particular facts, as well as matters of expert evidence such as diagnosis) and matters where the Secretary of State must form his own judgment. This case clearly falls within the latter category. So the Secretary of State was obliged to accord appropriate respect to the Parole Board's view and had to give reasons for departing from it, but those reasons need not be as detailed as would be required in the case where the Defendant disagreed on a matter where the Parole Board is best placed to decide, in particular maters of fact.

45. It is important that in this case the Defendant agreed with the Parole Board not only on the facts, but also about risk. The Defendant did not say that the risk of the Claimant harming the public would increase on his moving into open conditions. Risk remained the same. The difficulty was managing it in open conditions. That fell squarely within the Defendant's expertise and responsibility. He was entitled to take a different view, as the Claimant accepts, but did he give sufficient reasons for doing so?

46. In my judgment he did. Mr Buckley argued that the decision letter did not give reasons, it only recited facts. But the statement of a fact can amount to a reason, if the fact is relevant and sufficient (which is a matter of judgement). The answer to a question about, say, the risk of fire can be answered by a statement of fact about the construction of a building. The answer to a question about the risk of a prisoner absconding (not in issue in this case) can be answered by setting out the facts that give rise to the risk. In the present case the Secretary of State's answer to whether the risk posed by the Claimant could be managed in open conditions was "no" because, to quote the reasons given but in the third person, "there was evidence that the Claimant continued to display aggression and that his attitude and behaviour remained a real cause for concern.", because he posed a high risk of serious harm to the public and a medium risk of violence, and because there were recent security incidents and concerns about his thinking skills.

47. Those are facts which explain the Defendant's assessment. If those facts were irrelevant, or trivial, or long-distant in time then they would not be reasons for the view the Defendant took. But they are none of those things. They are all legitimate reasons for reaching a conclusion that risk might be difficult to manage and that therefore there was not a "wholly persuasive case" for transfer.

48. They are all factors that the Parole Board was aware of and explicitly considered. They did not lead the Parole Board to think that risk could not be managed but they

did lead the Defendant to take that view, and the nature of those factors is such that they comprise reasons for the view the Defendant took.

49. I would add that I regard the decision letter as sufficient in itself and that one does not need to look at the PPCS to understand why the Defendant made the decision he did. I accept what Mr Irwin said about the inaccuracies in the analysis of the purposes of the future review: that analysis did not form part of the Defendant's decision and does not detract from his reasoning.

50. Accordingly, judicial review on the first ground is refused.

Ground 2: unlawful policy in the absence of further published guidance

51. The second ground of challenge is rather different and is aimed at paragraph 8.5.3 of the Defendant's policy which enables him to depart from the Parole Board's recommendation if there is not a "wholly persuasive case" for transfer to open conditions.

52. For the Claimant it is argued that that is an unlawful policy because it is opaque; it is therefore entirely subjective and may give rise to arbitrary decisions. Further guidance is needed to say what it means.

53. Mr Buckley relied upon the decision in *R (Lumba) v SSHD [2011] UKSC 12*, where Lord Dyson at paragraph 34 said:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.
> …
> 38. … "what must … be published is that which a person whi ais affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

54. Similarly, albeit in a different context, in *R (Teleos Plc) v Customs and Excise Commissioners* [2005] EWCA Civ 200 Lord Dyson said at paragraph 24:

> "…the Commissioners should make a clear statement of their policy and they should publish the criteria by which they exercise the discretion to make interim payments".

55. Mr Irwin's answer to this argument is that *Lumba* was about the absence of a published policy. In the present case the GPPPF is the policy. There is no foundation for the proposition that a policy could be unlawful because one of the terms used is subjective, or insufficiently explained. In any event it is clear what the term "a wholly persuasive case" means.

56. That is clearly right. Mr Buckley relied in addition upon *R (on the application of MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin), but that decision again demonstrates the correctness of Mr Irwin's argument because it is is about the need for policies to be published. Here the policy is published.

57. Moreover the words in question have an ordinary common-sense meaning. They have, as Mr Irwin observed, been discussed in a number of decisions (for example, in Oakley, and in *R (Kumar) v Secretary of State for* Justice [2019] EWHC 444 (Admin)) without any indication that they might be difficult to understand. For the Claimant it is said that they are "subjective"; a better way to put it is to say, as does Mr Irwin, that they encapsulate a discretion. Certainly they enable the Defendant to reach a different conclusion from the Parole Board on the same facts and on the basis of the same assessment of risk. None of that breaches the requirement upon the Defendant to publish and abide by a policy, as he has done here.

58. I see no substance in this challenge and judicial review on this ground is refused.

Conclusion

59. The application for judicial review fails on both grounds.