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Case No: AC-2022-CDF-000155; CO/4386/2022

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

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: 07/12/2023

**Before** :

**MR JUSTICE EYRE**

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**Between:**

**THE KING**

**On the application of**

**ALLAN OVERTON** — **Claimant**

**- and -**

**SECRETARY OF STATE FOR JUSTICE** — **Defendant**

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**Carl Buckley** (instructed by **Reece Thomas Watson**) for the **Claimant**
**Tom Leary** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 23rd November 2023

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# Approved Judgment

This judgment was handed down remotely at 10.00am on 7th December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

**Mr Justice Eyre:**

## Introduction.

1. On 12th October 2012 the Claimant was sentenced to imprisonment for public protection for two offences of attempted rape, seven offences of sexual activity with a child, and two offences of causing a child to engage in sexual activity. The tariff period was set at four years and expired in September 2016. The Claimant remains in prison. He has consistently denied his guilt in respect of these offences.

2. On 20th June 2022 following an oral hearing four days earlier the Parole Board recommended to the Defendant that the Claimant be transferred to the open prison estate.

3. By his decision of 26th August 2022 ("the Decision") the Defendant declined to accept that recommendation and concluded that the Claimant should remain in a closed prison environment.

4. Pursuant to permission granted by HH Judge Lambert the Defendant seeks judicial review of the Decision on two grounds. The first ground is rationality and there the Claimant contends that the Defendant's failure to accept the recommendation was irrational. In that regard it is said that neither limb of the Defendant's two bases for rejecting the Parole Board's recommendation was rational. As to that the Defendant says that each limb of the reasons for rejecting the recommendation was rational but that the Decision was lawful even if only one was. The second ground is that of procedural fairness. There it is said that the Defendant's approach to the question of whether a transfer of the Claimant to open conditions would undermine public confidence in the criminal justice system was unlawful. This was either because the Defendant was applying an unpublished policy or set of criteria or, if there was in fact no such policy or set of criteria, because the Defendant was exercising his discretion in an arbitrary manner. The Defendant says that he was not applying an unpublished policy and that the criteria which were being applied were adequately articulated in the Generic Parole Process Policy Framework ("the GPPPF") to which I will refer below.

## The Legislative and Policy Framework.

5. Section 12(2) of the Prison Act 1952 provides that prisoners:

> "shall be committed to such prisons as the Secretary of State may from time to time direct …".

6. By rule 7 of the Prison Rules 1999 prisoners:

> "shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment…"

7. Under section 239 of the Criminal Justice Act 2003 the Secretary of State can seek the advice of the Parole Board in respect of various matters including questions of a prisoner's categorisation and of a prisoner's suitability or otherwise for a transfer to open conditions. The section empowers the Secretary of State to give the Board

directions as to the matters it is to take into account when discharging its functions including when giving such advice.

8. The Defendant has published the GPPPF. This sets out the procedures to be followed by the Defendant's staff when involved in the generic parole process. Those staff include those in the Public Protection Casework Section of HM Prison and Probation Service ("the PPCS"). The GPPPF has gone through a number of iterations both before and since the Decision. The version in force at the time of the Decision contained the following passage at 5.8.2 in the section dealing with the transfer to open conditions of prisoners serving indefinite sentences:

> "The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP for open conditions) only where:
>
> • the prisoner is assessed as low risk of abscond; and
>
> • a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and
>
> • a transfer to open conditions would not undermine public confidence in the Criminal Justice System."

## The Decision and the Background to it.

9. In addition to the offences for which he is now imprisoned the Claimant's previous convictions include two separate instances of sexual assaults against boys aged 6 and 7 respectively together with convictions for the possession of indecent images. A Parole Board panel which considered the Claimant's case in 2019 said that his offending history showed "an established pattern of offending against boys and the use of grooming to support [his] access to victims".

10. It is not clear from the papers whether the current offences were actually committed while the Claimant was on licence from a previous sentence for indecent assault on a male under 14 years. However, it is clear that the grooming relationship leading up to the offending began when the Claimant was on that licence and that the Claimant concealed the extent of his contact with the victim from his offender manager.

11. At section 2 of the reasons for its June 2022 recommendation the Parole Board set out its analysis of the Claimant's current psychological condition. The evidence before the panel was agreed. The recommendation noted at 2.14 and 2.15 that the Claimant's stance of denying his offending meant that he was unlikely to be suitable for further treatment including the Healthy Sex Programme designed to explore his sexual interest in children. As a consequence the psychologists concluded that "little further in terms of risk reduction work can be achieved within a closed prison environment". At 2.16 – 2.18 various factors were noted including the Claimant's difficulty in recognising risk situations and his need for support structures. These factors meant that it was necessary for the Claimant to move to an open prison rather than directly into the community. At 2.19 the Parole Board opined that:

> "There is no reason to suggest that a move to open prison would undermine the public confidence in the Criminal Justice System; Mr Overton is now 7 years over tariff and would not benefit further from remaining in a closed prison."

12. Risk was addressed at section 3 of the Parole Board recommendation. A medium probability for further sexual offences was predicted and it was noted that if there were to be further offending by the Claimant against children then there was the potential for significant and long-lasting harm to such children. At paragraph 3.2 this point was made:

> "However, Mr Overton's offending to date has all taken place after he has been able to ingratiate himself into a family as someone who can be relied upon and trusted. Given the length of time that such a process takes, it seems unlikely that risk would become quickly imminent for a contact sexual offence. The panel agree that he should remain managed as a potential high risk of serious harm offender."

13. The Parole Board's conclusion was stated as follows at section 4.

> "4.1. Mr Overton has been a repeat sex offender, offending against young boys who have been placed in his care or trust. Working with him on addressing risk has been hampered by both his continued denial of any wrongdoing and his Autistic traits.
>
> 4.2. Nevertheless he has completed Horizon and TSP and all professionals involved in his care and supervision agree that nothing further is likely to be achieved from remaining in closed prison. He will continue to need very close support and monitoring in the open estate and ongoing re-enforcement of earlier learning with exposure to real world situations to help him avoid risky situations.
>
> 4.3. All professionals in the case, along with the panel consider that a move to open prison is now an essential step in his sentence progression and it would be difficult to consider release in the future without this happening.
>
> 4.4. There are no indications that he presents with any risk of absconding and being so far over tariff, and having completed all offending behaviour work expected of him, confidence in the Criminal Justice System is unlikely to be undermined by such a progression bearing in mind that all professionals support such a move.
>
> 4.5. Mr Overton is not seeking release and that is not recommended by professionals. The panel agree that he still needs to remain confined in prison for the protection of the public.
>
> 4.6. However, for the reasons explained in the preceding paragraphs, Mr Overton's progression to open prison is considered to be essential and the benefits outweigh any risk to the public. Such a move is now being recommended by the panel to the Secretary of State."

14. The Decision was made on behalf of the Secretary of State by a casework team within the PPCS.

15. Having set out the background shortly and having identified the criteria which were to be satisfied the Decision stated that the Defendant had reached a different conclusion from that of the Parole Board and had concluded that the two final criteria in section 5.8.2 of the GPPPF were not satisfied.

16. The Decision then summarised the evidence which was considered to support that conclusion. This evidence was noted under seven bullet points which were in summary:

- Noting the Claimant's completion of HORIZON and the Thinking Skills programme but adding that the Claimant's denial of his offending had meant that it

had been difficult for the professionals working with him to assess the triggers for his offending.

- Noting that the Claimant had difficulty in trusting professionals and that there had been some instability since his last review.

- Noting that there had been concern over the Claimant's ability to cope; that there had been incidents of self-harming; and an adjudication for abusing staff.

- Noting that "both Psychologists agree that whilst sexual deviancy is a risk factor, it is unlikely to be suitable for treatment due to your continuing stance of denial which has been consistent for many years, and is still the same today".

- Noting that the Claimant had been assessed as a very high risk of reconviction for a sexual crime under RM2000s and that this meant that he had "most or all of the characteristics that are associated with raised risk of sexual reconviction in sexual offenders." In addition noting that should the Claimant offend again "then a high risk of serious harm to children is the likely outcome".

- The next bullet point repeated the potential for severe and lasting harm if the Claimant were to offend again against a child adding that the Claimant's lack of internal controls meant that close monitoring by professionals would be needed in respect of the risk of reoffending.

- Then it was said "you are a repeat sex offender, offending against young boys who have been placed in your care or trust. Addressing your risk through necessary offending behaviour work has been hampered by your continued denial of any wrongdoing and your Autistic traits. As such, the Secretary of State assesses that a transfer to open conditions would undermine public confidence in the criminal justice system."

17. Following that summary of the evidence supporting the Defendant's conclusion this was said:

> "The Secretary of State for Justice therefore confirms that it is necessary for you to remain in a closed prison environment and continue to work towards evidencing a reduction in your risk in preparation for your next parole review. You are encouraged to work with staff supervising you to understand what is required of you in the lead up to your next review to assist your progression and to explore the options available to you. There are various ways in which you can continue to demonstrate a reduction in your risk within a closed establishment for example, you may wish to explore the option of a Progression Regime; however, you will need to meet **both the eligibility and suitability criteria** to be accepted onto the Regime. (original emphasis)
>
> For those that meet the eligibility and suitability criteria, participation in a Progression Regime gives prisoners the opportunity to build evidence, in an environment that requires them to take personal responsibility for their lives and their progress, to allow them to evidence to the Parole Board that their risks can be safely managed in the community. It is not however, the most appropriate route of progression for all prisoners but is an option you may wish to explore with your supervising staff."

18. The Decision is to be read as a whole. When that is done and when the two paragraphs following the bullet points are read with the bullet-pointed text (and in particular the last part of that) then the Defendant's reasoning is clear. In essence it was being said that the conclusion that the criteria were not satisfied was based the Defendant's view as to the level of risk posed by the Claimant and combined with the Defendant's assessment that there was further work which could be done in a closed prison setting to address that risk.

## Ground 1: Rationality

19. On behalf of the Claimant Mr Buckley accepted that the Defendant is entitled to reach a different conclusion from that recommended by the Parole Board. He also accepted that in expressing a view on the question of whether to move the Claimant to the open estate would undermine public confidence in the criminal justice system the Board exceeded its remit (that being an issue for the Defendant alone). The Claimant does say that it was nonetheless necessary for the Defendant to engage with the Parole Board's recommendation and to take account of its reasoning. The Defendant had to undertake that exercise and in a case where he disagreed with the recommendation to set out his reasons for such disagreement.

20. The Claimant says that the Defendant failed to do that in his case. He says that the Decision consisted of a recital of sundry facts but that it did not contain a demonstration of why the Defendant had reached the conclusion which he had reached nor of how the matters recited led to that conclusion. Still less, the Claimant says, did the Defendant explain why he disagreed with the view of the Parole Board as to the consequences flowing from the sundry factual matters. That amounted to a failure to engage with the Board's decision. In particular it is said that the Defendant failed to take account of the agreed professional view that further progress was unlikely to be made in the closed estate. Similarly there was a failure properly to consider the circumstances of the previous offending which had involved sexual assaults on younger boys with whom the Claimant had been able to develop a relationship over a period of time by reason of being in a position of trust in relation to them or by reason of some other relationship enabling a period of proximity with those victims. Account should have been taken of the fact that such situations were highly unlikely to be replicated while the Defendant remained detained even if that detention was in the open prison estate.

21. Mr Leary for the Defendant pointed out that in accordance with the GPPPF there could only be a transfer of an indefinitely detained prisoner to the open estate if all three of the criteria set out in section 5.8.2 were satisfied. The Defendant concluded that two of those criteria were not satisfied. It followed, Mr Leary submitted, that the Decision was lawful even if the conclusion on one or other of the two limbs in question was irrational provided that the conclusion on the other was rational. Mr Buckley accepted this analysis subject, however, to the point that it would not save the Decision if the Claimant were to succeed on ground 2. For his part Mr Leary accepted that even if the Decision was rational it would still fall to be quashed if the Claimant were to succeed on ground 2.

22. Returning to ground 1, Mr Leary said that the Defendant's conclusion in respect of each of the elements was rational and adequately reasoned. The Decision was expressed in short terms but that was not a failing provided it was properly reasoned as the Defendant contended it was when read properly and in context. Mr Leary emphasized that the fact

that the Defendant was disagreeing with the Parole Board and reaching a different conclusion on the same material did not mean that his conclusion was irrational even if the Parole Board's recommendation was itself a rational one. It was to be remembered that the Defendant had his own expertise in the assessment and management of risk and in the management of offenders and that he was entitled to have regard to that expertise. Mr Leary pointed out that this was not a case where the Defendant was disputing factual conclusions which had been reached by the Parole Board. Rather the Defendant was accepting those factual conclusions but was making an evaluative assessment based on them and coming to a different overall conclusion from the Board by reason of that evaluative assessment.

23. The Defendant put in evidence a witness statement from Julia Whyte explaining the procedures followed by the PPCS and exhibiting a completed pro forma which had been filled in as part of the process leading to the Decision. The Defendant said that this showed the care which had been taken in reaching the Decision. The Claimant did not object to this document being put before me and Mr Buckley referred to aspects of it in support of ground 2. Although the document may have some limited relevance to ground 2 I have concluded that it does not assist in my consideration of ground 1. I accept that it was not drawn up after the Decision and so it is not an *ex post facto* rationalisation of the conclusion reached. Nonetheless it cannot advance matters other than to the extent of providing information by way of background and context. The rationality of the Decision must be judged by reference to the document in which the Defendant chose to set out his reasons and in which he informed the Claimant of the Decision, namely the letter of 26th August 2022. That letter is to be read realistically and in the way I will describe below. In addition where the letter states that particular material has been read then the court will accept that the material in question has been indeed been read. Nonetheless, the letter cannot be supplemented by the pro forma. In particular the cogency, rationality, and completeness of the Defendant's reasoning and the extent of the exercise in which he engaged are to be determined by reference to the letter. If that does not suffice to establish that the necessary matters were properly considered then reference to a different document which did not accompany the letter cannot be used to fill any gaps.

## The Law.

24. Although there were differences of emphasis there was no dispute as to the principles I am to apply. In those circumstances I will summarise my understanding of the position relatively shortly.

25. The decision on whether a prisoner should be moved from a closed to an open prison is a matter for the Secretary of State. He has to take account of and engage properly with a recommendation from the Parole Board but provided he does that and provided that his conclusion is rational the Secretary of State is not bound by the recommendation and can reach his own contrary conclusion. The point was recently put thus by Dexter Dias KC as a deputy judge in *R (Zenshen) v Secretary of State for Justice* [2023] EWHC 2279 (Admin) at [83]:

> "...What he 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. If not, it is susceptible to public law challenge."

26. Assessment of whether there has been the necessary genuine engagement by the Secretary of State with the recommendation of the Parole Board in a given case and of whether the Secretary of State's decision is rational will require close attention to the circumstances of the particular case and to the terms of the decision in question. In that regard and subject to one qualification I agree with Mr Leary's submission that the approach to reading a letter informing the prisoner of a decision to keep him or her in the closed estate is akin to that taken to reading decision letters in other contexts. The letter is to be read "(1) fairly and in good faith and as a whole; (2) in a straightforward down-to-earth manner without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case" (per Lang J in *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [19]). The qualification is that the court when considering the decision letter must at all times remember the subject matter in question. Even though the Secretary of State will not in cases such as this be differing from the Parole Board on the question of release or detention he is still making a decision determining the degree of the continuing deprivation of liberty of the prisoner. A prisoner in the open estate remains detained and not at liberty but the circumstances of such a person's life will be markedly different from those of a prisoner in the closed estate. In addition such a prisoner has opportunities (such as to apply for temporary release on licence) which are not available to those in the closed estate. This consideration does not require the court to adopt an artificially rigorous approach to the reading of the decision letter. Nor does it require the court to address the question with the degree of anxious scrutiny which is required in cases when the decision relates to a distinction between life at liberty and life in detention. I note that in the case of *Browne v The Parole Board of England and Wales* [2018] EWCA Civ 2024 to which I was referred the court was concerned with a decision as to release. Nonetheless the point is a counterpoise to the benevolence of the reading and reflects the need for the appropriate degree of careful thought to have been applied to the matter by the Secretary of State. What is necessary is for the decision letter when read fairly and realistically to show why the Secretary of State has taken a different view from that of the Parole Board and for it to set out his reasoning in sufficient detail to show that there has been the requisite engagement with the Board's assessment and that the resulting decision is rational.

27. Account is to be taken of the expertise of the Secretary of State's own department (see per Jackson J in *R (Banfield) v the Secretary of State for Justice* [2007] EWHC 2605 (Admin) at [29]). That is an expertise in the assessment of risk but also in the management of risk in the context of the prison estate.

28. In many cases it will be possible for different persons rationally to take different views (sometimes radically different views) as to the same assessments. This will be particularly so in the case of assessments as to the level of future risk; as to the acceptability of a particular level of risk; and as to the appropriate way forward for a particular prisoner. These are matters of judgement and in many cases they will turn on the view taken as to the likelihood of a number of future events: a matter as to which there will very rarely if ever be a single unquestionably correct answer. It follows that in the relation to the same prisoner there can be both a recommendation from the Parole Board which is wholly rational and a decision to the contrary effect made by the Secretary of State which is also wholly rational. It is for that reason that it is necessary for the court to maintain a determined focus on the rationality or otherwise of the

Secretary of State's decision and to avoid being distracted by having regard to the rationality of the Parole Board's recommendation (see per King J in *R (Wilmot) v Secretary of State for Justice* [2012] EWHC 3139 (Admin) at [47]).

29. The nature and quality of the reasoning exercise which the Secretary of State will have to undertake in order properly to engage with a recommendation of the Parole Board will depend on the nature and subject matter of the Parole Board assessment from which he is departing. It will be necessary to consider whether and to what extent the particular issue is one in respect of which the Parole Board is better-placed to make an assessment than the Secretary of State or in respect of which the Board had an opportunity not open to the Secretary of State. Such might be the case if the issue turns on some special expertise available to the Parole Board and not to the Secretary of State or if question is one of fact where the Board's finding is the result of having addressed the matter at a hearing at which there was oral evidence. The point was made thus by Chamberlain J in *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin) at [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."

30. I respectfully agree with that analysis. It follows that there is not a bright line distinction between matters of fact on the one hand and assessments of risk or judgements as to the public interest on the other. Rather there is a continuum. The Secretary of State is free to differ from the Parole Board in relation to a matter at any point on the continuum. However, the more intensely connected with the determination of past matters of fact the issue is then the more cogent and detailed will be the reasoning which will need to be shown to demonstrate that the Secretary of State has properly considered the point and that he has properly taken account of such advantages as the Parole Board had in determining the point. Conversely the more predictive and/or policy/public interest related the issue then the less intense the reasoning required will have to be though reasoning there will still need to be.

31. Engagement with the Parole Board's recommendation does not necessarily require the Secretary of State to set out a critique of such a recommendation. Still less does it require that the statement of the Secretary of State's reasons for disagreeing take the form of a point by point rebuttal of the matters on which the Parole Board has expressed a view. It is sufficient for the Secretary of State to show that he has addressed the relevant issues and has done so with a consciousness of the view which the Parole Board has taken and for him then to explain the reason for the contrary conclusion which he has reached. Where there is a disagreement with particular factual findings made by the Parole Board then express explanation of the reason for this will normally be needed. Conversely where there is disagreement as to the inferences to be drawn from factual

matters which are not contentious or as to the consequences of those matters for the assessment of other factors there will have to be an explanation of the Secretary of State's reasons for his conclusion. However, it will not always be necessary for this to take the form of an express statement of why the view of the Parole Board is thought to have been wrong. In many cases by setting out the reasons for the conclusion he has reached the Secretary of State will also be explaining why he disagrees with the Parole Board. Returning to the point I made at [26] all will depend on the circumstances of the particular case and of the terms of the decision under challenge.

32. Reference was made in passing to the decision of the Court of Appeal in *R ex p Oyston v The Parole Board & another* [2000] Prison LR 45 though I was not taken to it in any detail. Nonetheless I do not understand the approach set out there to be contentious and it is relevant as will become apparent to note that approach. In short the position is that those making decisions about a prisoner (whether the court, the Parole Board, or the Secretary of State) must proceed on the basis that the underlying conviction was correct and accordingly that the prisoner committed the offence or offences in question. A prisoner's maintenance of his denial of guilt can be a relevant consideration when an assessment is being made of the risk posed by the prisoner. The denial of guilt may be a very potent consideration in such an assessment. It cannot, however, be the sole determining one in the sense that a denial of guilt cannot without more be conclusive as to the question of release. Putting the point more generally a prisoner is not to be penalised solely for continuing to deny his guilt post-conviction but such a denial can be relevant when it is necessary to have regard to his state of mind whether for the purpose of the assessment of risk or otherwise. It follows from the position that the denial must be regarded as false that those dealing with the prisoner must proceed on the basis that it is open to the prisoner to abandon the denial and to admit his or her guilt.

## The Decision as to whether a Period in Open Conditions was Essential.

33. If the second of the three elements in section 5.8.2 of the GPPPF were to be read literally it would apply to all or almost all prisoners serving indefinite terms of imprisonment and as a consequence would be satisfied in almost every case. Although it is possible for such a prisoner to be released from the closed prison estate directly into the community that will only be appropriate in a very small number of cases. In the vast majority of cases it will be necessary for the prisoner to spend some time in the open estate before his or her ultimate release. That will be in order for there to be an assessment of the degree of risk, if any, that the prisoner still poses when outside a closed setting and of the measures needed to address that risk. Such time will also normally be necessary to enable the prisoner to adapt to the move from a closed setting and to regain some of the skills needed for life in the community. In this regard Mr Buckley accepted that this criterion was not to be read literally.

34. If the criterion is not to be read literally what is its meaning? It is to be remembered that the criteria are, at least in part, concerned with the assessment of risk and with addressing the risk posed by the prisoner. In light of that I agree with Mr Leary that the criterion is to be read as imposing related requirements of timeliness and of preparedness. Taking account of those there are two aspects of the criterion. First, that time in the open estate is needed before the Secretary of State and/or the Parole Board can be satisfied that the risk posed by the prisoner is such that he or she can safely be released and also that the prisoner will cope with life in the community. As already

noted that aspect will be present in almost all cases. The second aspect addresses the stage in the prisoner's progress and development which has been reached. In that regard it will be necessary to consider whether further work is needed by way of addressing risk reduction or the prisoner's offending behaviour or at least to consider whether such further work as is needed can adequately be undertaken in the open estate. However, it will also be necessary to consider whether the prisoner has reached a stage such that the level of risk which he or she poses can safely be managed in the open estate. The criterion will not be satisfied in respect of a prisoner for whom there is further work which can be done to address his or her offending behaviour at least unless that work can be done as effectively in the open estate as in a closed prison. Similarly, the criterion will not be satisfied in respect of a prisoner who cannot be managed safely in the open estate.

35. The Claimant says that the Defendant failed to engage adequately with the view of all the professionals as reported to the Parole Board that there was little or nothing further which could be achieved in the way of risk reduction work in the closed estate. The assessment that nothing further was likely to be achieved in this respect appears at paragraphs 2.15 and 4.2 of the Parole Board's recommendation. However, it is apparent that this assessment was based on the fact of the Claimant's denial of his guilt and the view that this denial was likely to be maintained. Thus at paragraph 2.14 the psychologists are recorded as agreeing that it was the Claimant's denial of guilt which meant that he was unsuitable for the treatment which would otherwise be appropriate to address the risk of sexual offending. They also agreed that the persistence of the Claimant's denial meant that his stance was unlikely to change. Again at paragraph 4.1 the point is made that work to address risk has been hampered by the Claimant's denial of wrongdoing as well as by his autistic traits.

36. At paragraphs 2.17, 3.9, and 4.2 the Parole Board made it clear that the recommendation was for a move to the open estate rather than release because of the continuing need for support to and monitoring of the Claimant. Indeed, at paragraph 4.2 it is said that there will be a continuing need for "very close support and monitoring".

37. The Parole Board did address the risk posed by the Claimant. It approached the matter on the footing that there was at the lowest a medium probability of the Claimant committing further contact sexual offences. It also concluded that if there were to be such offending then "a high risk of serious harm to children [would be] the likely outcome". The Board recommended that the Claimant continue to be managed as "a potential high risk of sexual harm offender": see at paragraphs 3.1 and 3.2. However, it took account of the circumstances of the Claimant's previous offending which had taken place after he had been able to ingratiate himself into a family as someone who could be trusted and noted that such a process would take a period of time.

38. Did the Secretary of State engage adequately with that assessment and was his conclusion that this criterion was not satisfied a rational one?

39. The principal difference between the approach of the Secretary of State and of the Parole Board in this regard was as to the prospect of further progress in risk reduction work being made in the closed estate. The Decision makes it clear that the Secretary of State was of the view that there was further work which could be done in that setting. The Decision refers to a Progression Regime as one course of action which was open to the Claimant but makes it clear that it is not the only one. It was implicit in the Parole

Board recommendation that there was risk reduction work which could have been undertaken in the closed estate if the Claimant had admitted his guilt so as to be suitable for that work. The assessment of the Parole Board was not that everything which was theoretically possible had been done but rather that nothing further could be achieved because the Claimant's denial of his guilt made him unsuitable for the work which would otherwise have been undertaken. It is implicit in the reasoning underlying the Parole Board's recommendation that if the Claimant's position as to his guilt were to change there would be further work which could be done. The reason for the assessment was the conclusion that because it was so longstanding this stance was unlikely to change. In this regard it is highly significant that the Claimant's denial of his guilt is to be seen as having been voluntary. The court, the Secretary of State, and the Parole Board are to proceed on the basis that the Claimant committed the offences of which he was convicted. It follows that his denial of guilt is to be seen as false and to be a position which the Claimant could choose to change. In the light of that it was open to the Secretary of State to conclude rationally that there remained risk reduction work which could be done in the closed estate if the Claimant chose to avail himself of the opportunities. It is to be noted that far from failing to engage with the Parole Board recommendation in this respect the Secretary of State expressly took account of the views of the psychologists which had influenced the Board. The Defendant derived the proposition that it was the Claimant's denial of his guilt which was hampering further treatment from the views of those psychologists.

40. It was also open to the Defendant to take the view that the risk of sexual offending posed by the Claimant was such that he was not yet ready for a move to the open estate. In part this is an aspect of the point I have just addressed as to the scope for further risk reduction work. It also involves an assessment of the risk posed by the Claimant. As noted above the Parole Board accepted that risk remained and that the Claimant would need to continue to be managed on that footing. The Parole Board had regard to the OSP/C assessment of risk rather than the RM2000/s assessment but even on the former basis the risk was at the medium level. The Board took account of the circumstances of the Claimant's previous offending and noted that because they had involved a period of time during which the Claimant had ingratiated himself into a position of trust the risk of a recurrence would not be imminent. In essence the Parole Board was influenced by the fact that the scope for the Claimant getting himself into such a position would be limited when he was detained even in the open estate. The Defendant referred, albeit in passing, to the circumstances of the previous offending but placed weight on both the degree of risk posed by the Claimant and on the potential for significant long-lasting harm to children if there were to be offending by the Claimant. It cannot be said that the Claimant's past manner of offending (by way of developing a relationship over time) was necessarily the only way in which he might offend particularly if by reason of being detained he was not able readily to employ his former technique. The Defendant's conclusion in that regard was well within the range of conclusions open to him in these circumstances.

41. It follows that the Defendant's decision in this respect was not vitiated either by irrationality or by a failure to engage with the recommendation of the Parole Board.

**The Decision as to the Effect on Public Confidence of Moving the Claimant to the Open Estate.**

42. Mr Buckley accepts that the Parole Board went beyond its remit when it expressed a view on the question of whether for the Claimant to move to the open estate would undermine public confidence in the criminal justice system. It is nonetheless illuminating to consider the two elements in the Parole Board's reasoning in that regard. The culmination of the reasoning appears at paragraph 4.4 of the recommendation. There were two elements. The first was that the Claimant had "completed all offending behaviour work expected of him". However, as explained above it was common ground that there was further work which could have been done but for the Claimant's denial of guilt (a denial which is to be regarded as false and a matter of the Claimant's choice). In those circumstances the characterisation of the Claimant as having done all the work that was expected of him is not a persuasive one. The second element was the fact that the Claimant was substantially past his tariff release date. This is a matter which can carry only minimal weight given that the prospect of detention past the tariff date is inherent in indefinite detention the purpose of which is to ensure that an offender is not released at a time when he or she continues to pose an unacceptable level of risk to the public.

43. The position here was that the Claimant continued to pose a serious risk (whether characterised as medium or high) of sexual offending against children and that it was accepted on all sides that if such offending were to occur there would be the potential for significant harm to the child victim or victims of the offending. Moreover, the Claimant's denial of his guilt had meant that risk reduction work which might otherwise have been undertaken and which might have reduced the risk he posed had not been undertaken. In those circumstances the conclusion that public confidence in the criminal justice system would be undermined if the Claimant were to be moved to an open prison was also one which was well within the range of conclusions rationally open to the Defendant.

## Conclusion on Ground 1.

44. It follows that the challenge on ground 1 fails.

## Ground 2: Procedural Unfairness and/or Unlawfulness

45. The Claimant originally put forward two alternative routes to the conclusion that the assessment that for him to move to the open estate would undermine public confidence in the criminal justice system (or more precisely the conclusion that the decision maker was not satisfied that public confidence would not be undermined) was unlawful. The first route was to say that if in making the Decision the PPCS was applying a policy or set of criteria to determine whether the Claimant's move to the open estate would undermine public confidence then the same had not been published. The unlawfulness would in those circumstances consist in applying an unpublished policy. The alternative route was to say that if the assessment that public confidence would be undermined was being made without reference to such a policy or set of criteria then the Decision was in that regard being made on an unlawfully arbitrary or subjective basis. As the case progressed and with the production of the pro forma it became clear that the assessment of the impact on public confidence had been made without reference to a defined policy or set of criteria. Accordingly, attention focused on the second of those routes.

46. The Defendant contended that the absence of a defined set of criteria for determining when public confidence would be undermined did not mean that this aspect of the

Decision was being made on an arbitrary basis. It was said that the Claimant was seeking to drill down to an inappropriate level of detail. The publication of the GPPPF was itself to be seen as the publication of the criteria being applied. The elements of section 5.8.2 of that document were themselves the criteria which were being used to determine how the Secretary of State's discretionary power would be exercised and there was, the Defendant said, no requirement to break them down further.

## Is the Issue Academic?

47. The Defendant said that if the Decision were to be quashed on ground 1 and the matter remitted for a fresh determination then ground 2 would become academic. That is because a further iteration of the GPPPF has now been published and any redetermination would be by reference to the current form of that policy. The current terms of section 5.8.2 are that:

> "The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP for open conditions) only where:
>
> • the prisoner 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 prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and
>
> • the prisoner is assessed as low risk of abscond; and
>
> • there is a wholly persuasive case for transferring the ISP from closed to open conditions."

48. It follows that any re-determination would be made without reference to the former public confidence requirement. In those circumstances I agree that the question of the lawfulness of that requirement would have been academic if I had upheld the challenge on ground 1 and had quashed the Decision on that basis. Even then, however, as the point has been fully argued and as permission had been granted for it I would have addressed the arguments and set out my conclusion on them. In fact, as has been seen, I have rejected ground 1 and it, therefore, remains necessary to address ground 2.

## The Law.

49. Where a public body applies a policy or a set of criteria when deciding whether and how to exercise a discretionary power then that policy or set of criteria must be published. It is unlawful for such a body to exercise a power on the basis of an unpublished policy save where there are particular considerations of national security or public interest justifying non-publication. See *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] AC 245 at [35] per Lord Dyson and *R (MXK & others) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin) at [74] – [77] per Chamberlain J.

50. In addition the rule of law requires that discretionary powers are not to be exercised arbitrarily or subjectively. The holder of such a power has a discretion but must exercise it by reference to the purposes for which the power was granted and taking account of relevant considerations. Further, as Lord Dyson explained in *Lumba* at [34], "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria [sc for the exercise of a particular power] will be exercised".

51. In applying those principles it is, however, necessary to keep in mind the purposes of the formulation of a policy and of its publication. The purpose of the formulation of a set of criteria governing the way in which a discretion will be exercised is to ensure that the discretion is not exercised arbitrarily or otherwise unlawfully. The publication of the policy serves two functions. First, it enables those affected to make "informed and meaningful representations to the decision-maker before a decision is made" (per Lord Dyson in *Lumba* at [38]). It also enable those affected, and the court if necessary, to determine whether in a particular case the power has been exercised in accordance with the stated criteria (remembering always the requirement that a discretion is to be exercised genuinely and is not to be fettered in advance) and to judge the lawfulness of the criteria and hence of the exercise of the discretion. The detail of the publication required is to be determined against those purposes. In addition it is helpful to keep in mind by way of analogy what is required by way of the publication of reasons when a decision-maker has to give reasons for a decision after it has been made. It is trite law that such a decision-maker does not have to provide sub-reasons or reasons for reasons. Similarly, the requirement that discretion be exercised by reference to a published policy or set of criteria does not require a descent into a listing of reasons for reasons.

**The Lawfulness of the Defendant's Approach.**

52. The Defendant's analysis of the position is correct. As I have just noted It is necessary to remember the reason the relevant criteria need to be identified and published and to guard against some form of infinite regression and against requiring reasons for reasons. Here the Defendant is right to say that section 5.8.2 of the GPPPF itself contains the relevant criteria and that there is no need for the formulation of a further sub-set or sub-sets of criteria. The relevant discretionary power is that provided by section 12(2) of the Prison Act and by rule 7 of the Prison Rules. The GPPPF is itself the document in which the Defendant has identified and published the way in which the relevant power will be exercised in cases where there has been a recommendation from the Parole Board. The three matters set out at section 5.8.2 provide the basis for ensuring that the power to accept or to reject the Board's recommendation is not exercised subjectively or arbitrarily. They also enable those affected to know the basis on which such a recommendation will be either accepted or rejected and enable the court to determine whether the relevant decision was made rationally. Reaching a conclusion on any of the three elements will involve a degree of judgement and will require the assessment of a number of factors. Multiple factors will potentially be relevant to each of the elements and in respect of each it will normally be necessary to weigh competing considerations before coming to a conclusion. It is not necessary either for those potential underlying factors to be listed formally in advance and still less for the weight to be given to the competing considerations identified. It is possible to determine whether the conclusion as to the presence or absence of a particular element was or was not rational by looking to the reasons given in the particular case. The question of whether a prisoner's move to the open estate would undermine public confidence is no more nor less a matter of judgement and assessment than the other elements. It was not suggested that there would need to be a set of criteria in respect of each of the elements spelling out, for example, the matters which were to be taken into account in determining whether there was or was not a low risk of the prisoner absconding or those relevant to deciding whether a period in open conditions was essential for future decisions. If such lists were to be produced would it then be necessary for the Defendant to articulate and to publish the criteria which were to be used to determine if the elements in those lists were or

were not present? Mr Buckley contended that the public confidence criterion was to be distinguished from the other two and that it alone required further clarification. He characterised this element as being "opaque" in the way that the others were not. I do not accept this distinction. Assessment of the effect on public confidence does require the decision-maker to take a wider view and is less narrowly focused on the particular prisoner than the other elements but all involve questions of degree, of judgement, and of assessment. The public confidence criterion is no different in principle from the other elements.

53. It is relevant to note that the Defendant provided a reasoned explanation of why he had concluded that the criteria were not met. It is possible to analyse that explanation to determine whether the conclusion reached was rational. The situation might have been different if the Decision had consisted of a bare assertion that the criteria were not met but that was not the course that was taken.

54. In short the publication of the GPPPF and the listing of the matters contained in section 5.8.2 was sufficient articulation and publication of the criteria which were to govern the decision in respect of a recommendation from the Parole Board and the rule of law did not require any articulation of a further layer of considerations.

**Conclusion on Ground 2.**

55. As a consequence challenge on ground 2 also fails.