



Neutral Citation Number: [2024] EWHC 426 (Admin)

Case No: AC-2023-LON-002112

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2024

Before :

MR JUSTICE CALVER

Between :

The King (on the application of CAIN)
- and -
SECRETARY OF STATE FOR JUSTICE

Claimant

Defendant

Nick Armstrong KC (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Thomas Jones (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: Wednesday 21st February 2024

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Thursday 29th February 2024.

Mr Justice Calver :

Introduction

1. The Claimant (“Mr. Cain”) is a life sentence prisoner at HMP Wayland, having been convicted of two murders. Mr. Cain seeks to challenge the Secretary of State for Justice (“Defendant”)’s decision dated 17 May 2023 (“the Decision”) to refuse to accept the Parole Board’s recommendation dated 31 January 2023 that he be transferred to open conditions (“the Recommendation”). The Parole Board heard evidence from, in particular, two psychologists. Mr. Cain was legally represented at the hearing by Mr. Arnott of Bhatt Murphy, solicitors; the Defendant was not represented at the hearing.
2. Specifically, the Defendant rejected the Parole Board’s conclusion in Mr. Cain’s case that *“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”* (“the essentiality test”).
3. Mr. Cain seeks:
 - a. A quashing of the Decision and an order that the Defendant re-take it.
 - b. Such declaratory relief as is necessary to give rise to the Court’s judgment.
 - c. Costs.

Grounds for Judicial Review

4. Mr. Cain advances four grounds for judicial review.

Ground 1: The Defendant’s Decision was Irrational

5. Mr. Cain alleges that the Defendant could not rationally conclude that it was not essential for Mr. Cain to move to open conditions in order to inform future decisions about release.
6. The following aspects of the Decision are said to establish irrationality:
 - a. First, the Defendant attached too much weight to the statement of Miss Overton (the psychologist instructed by the Defendant) in her report that a Progression Regime *may assist* Mr. Cain. This was a conditional suggestion only, namely that a Progression Regime may assist Mr. Cain if he must remain in closed conditions.
 - b. Second, there was no rational basis for the conclusion that remaining in closed conditions would lead Mr. Cain to not *“be disadvantaged, or [Mr. Cain’s] progress [not to] be halted, by transferring to a Progression Regime”*. The delay caused by not accepting the Parole Board recommendation is necessarily disadvantageous, especially considering Mr. Cain’s age as employment opportunities become fewer. In any event, whether there is a disadvantage to Mr. Cain does not form part of the “essentiality” test.
 - c. Third, the Parole Board had a particular advantage over the Defendant on the issue of essentiality. The advantage comes from the Board hearing oral submissions from the experts, where they were put under pressure and their views tested. If that is accepted, then the Defendant would need a “very good reason” to depart from the Recommendation.

Ground 2: The Defendant failed to take into account relevant considerations.

7. Mr. Cain submits the Defendant failed to take into account relevant considerations, because he did not know that the factual position had moved on since Miss Overton's February 2022 report and he accordingly made the Decision without considering all relevant material.
8. Mr. Cain maintains that this is a case where ascertaining the oral evidence given to the Parole Board was relevant and necessary. The Board probed and questioned the experts and their evidence, it is said, became updated and refined. This was a relevant consideration that the Defendant was not able to consider as he had not attended the hearing nor had he obtained a transcript.

Ground 3: Tameside Duty

9. To like effect, Mr. Cain submits that it was a breach of the Defendant's *Tameside* duty not to obtain a record of the oral evidence or some other indication of it. He argues that it was irrational to depart from the Board's recommendation, which hinged on oral evidence, without seeking to obtain a record of that evidence.

Ground 4: Unfairness

10. Finally, Mr. Cain submits that it was unfair for the Defendant to proceed in the way that he did without first giving Mr. Cain the opportunity to make representations. Had Mr. Cain been able to make representations, he would have made clear that there had been movement in the psychologists' views between the February 2022 report and the Parole Board hearing.

Background to the index offences

11. Mr. Cain is currently serving two life-sentences for murder.
12. Prior to his first offence of murder, Mr. Cain had a single conviction for five instances of residential burglary committed between December 1985 and April 1986 at the age of 17. Mr. Cain spent 18 months in youth custody and was released shortly before his first murder offence.
13. In 1987, at the age of 18, Mr. Cain and another man killed a shopkeeper in the course of a violent robbery. Mr. Cain had met his co-defendant in prison and the trial judge acknowledged that the co-defendant had been the dominant partner in the commission of the offence, with Mr. Cain playing a subordinate role. In respect of this offence, he received a tariff of 12 years (less time spent on remand), with a tariff expiry date of 13 February 1999.
14. In 1993, at the age of 25, whilst in prison Mr. Cain participated in the murder of a man convicted of sex offences against children. The victim was strangled by his co-defendant, it again being found that Mr. Cain did not take the leading role in the offence. He received a tariff of 15 years, with an expiry date of 5 July 2010.
15. As from 1993 Mr. Cain was held in a Category A prison, where he remained for 21 years. In 1996 he was moved to HMP Full Sutton (a category A and B prison) where he remained until 2009. In 2014 Mr. Cain moved out of Category A conditions at the

prison. He moved to HMP Gartree (a category B prison) on 26 January 2016 where he took part in the Psychologically Informed Planned Environment (PIPE) for almost three years.

The statutory and policy framework

16. In *Zenshen v Secretary of State for Justice* [2023] EWHC 2279, Dexter Dias KC, sitting as a Deputy Judge of the High Court, helpfully set out at [25]-[30] the relevant statutory and policy framework concerning the decision of a Parole Board in the present context and I gratefully adopt his summary as follows:

25. *The Parole Board is a statutory body funded by the Ministry of Justice, but operates as an entirely independent and arms-length entity vested with important judicial functions. Its functions arise by virtue of Part 12 of the Criminal Justice Act ("CJA") 2003 and Part 2 of the Crime (Sentences) Act 1997.*

26. *Section 239(2) of the CJA 2003 grants the Secretary of State for Justice a discretionary power to seek the Parole Board's advice about a prisoner's categorisation and whether a prisoner is suitable for transfer to open conditions. The Secretary of State's referral of a prisoner's case to the Parole Board is for the Board's advice only. This is to be contrasted with other Parole Board decisions which are binding on the Secretary of State. An example is when the Parole Board directs that a life prisoner should be released, having served their tariff and the Board determining "that it is no longer necessary for the protection of the public that the prisoner should be confined" (s.28(6), Crime (Sentences) Act 1997).*

27. *Section 239(6) of the CJA 2003 empowers the Secretary of State to give the Board "directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act". That subsection explicitly states that in giving such directions, the Secretary of State must have regard to:*

"the need to protect the public from serious harm from offenders, and the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

28. *The relevant directions to the Parole Board at the time its recommendation [on 31 January 2023] were issued in June 2022. They provide:*

Suitability for Open Conditions Test

1. The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (to 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.*

Directions

2. Before recommending the transfer of an ISP to open conditions, the Parole Board

must consider:

(i) All information before it, including any written or oral evidence obtained by the Board;

(ii) 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;

(iii) Whether the following criteria are met:

- 1. The prisoner is assessed as low risk of abscond; and*
- 2. 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.*
- 3. The Parole Board must only recommend a move to open conditions where it is satisfied that the two criteria (described at 2(iii)) are met.*

29. When the Parole Board "advises" the Secretary of State by way of recommendation to transfer a prisoner to open conditions, the recommendation may nevertheless be rejected in carefully defined circumstances. The Parole Policy Framework is a policy promulgated by the Secretary of State for his staff who are involved in the generic parole process. The policy in place at the time of the defendant's decision in this case came into force on 12 October 2022.

5.8.2 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 2019 Parole Board hearing

17. The Parole Board first considered Mr. Cain's case in 2019 when he was imprisoned at the HMP Gartree Pipe Unit. I consider that in order to consider the evaluative judgment made by the Parole Board in its 2023 decision ("the 2023 Decision") and whether it was irrational for the Defendant to disagree with it, it is necessary to understand the background to and context of the assessment which the Parole Board

was making which includes the 2019 Decision itself. The Board explained at the 2023 hearing that it “*has majored on developments since the 2019 hearing.*”

18. In its Decision letter dated 24 November 2019, in which it made the Recommendation, the Board concluded as follows:

“A decision about whether to recommend transfer to open conditions is based on a balanced assessment of risks and benefits¹, with an emphasis on risk reduction and the need for you to have made significant progress in changing your attitudes and tackling your behaviour problems in closed conditions, without which a move to open conditions will not generally be considered.

...

There was no evidence presented to the Board in support of your release and in fairness to you, you did not seek this. The Board agrees, your risk is not currently manageable in the community and therefore the protection of the public requires that you remain confined. The Board do not therefore direct you[r] release.

...

On the evidence presented to the Board and in particular the lack of insight and emotional detachment shown in your own evidence, the Board could not conclude that you have yet made significant progress that would allow it to recommend a progressive move. The Board concludes that core risk reduction work remains outstanding, and that this should be completed in closed conditions. It follows that the risk to the public remains too high to be managed in open conditions, and that risk outweighs the benefits to you of open conditions, identified as testing and resettlement benefits.

You will remain in closed conditions pending the next generic review of your case.”

19. It follows that the Board considered that it was too early to consider a progressive move for Mr. Cain as core risk reduction work remained outstanding which should be completed in closed conditions. The risk to the public remained too high to transfer Mr. Cain to open conditions. Mr. Cain continued to demonstrate a lack of insight and emotional detachment.

The Parole Board hearing in January 2023

20. In paragraphs 2.4 and 2.5 of the 2023 Decision, the Board explained the crucial feature of the 2019 hearing which led to it refusing to recommend the progressive

¹ This was the test in effect at that time

move to open conditions. It explained that in 2019 it was presented with two very different assessments of Mr. Cain's risk profile:

“2.4. Whereas one psychologist considered that his risks had been addressed sufficiently, ‘predominantly through the completion of accredited programmes but also the passage of time and general maturation which is also known to change risk through altered perceptions and priorities’, the alternative interpretation indicated that there were ‘core risk factors remaining to be addressed including [his] violent and prejudicial attitudes, the origin of these attitudes, and the fact that [he has] not been able to provide any evidence of their warning signs or how [he] would be able to address them’ (page 203). This divergence prompted a stark difference of opinion between the two experts whether Mr Cain should undertake a TC placement or not, a move viewed as without point by the former witness but firmly favoured by the latter. The POM sided against that, favouring a progressive move to Open, while the COM, Mr Gregory, was persuaded by the TC argument.

2.5. The 2019 Board felt unable to conclude that Mr Cain had made sufficient progress to afford a recommendation for Open conditions, citing particularly ‘the lack of insight and emotional detachment shown in [his] evidence.’” (emphasis added)

21. Following the 2019 Decision Mr. Cain was transferred to Category C conditions at HMP Wayland in July 2020 but soon moved to HMP Warren Hill in October 2020, where he was assessed for the T[herapeutic] C[ommunity] course by Ms Overton. He was assessed as not suitable for the course because he refused to participate in it.

22. Ms Overton reinterviewed Mr. Cain in February 2022, almost a year later. In its 2023 Decision, the Board recorded her conclusions as follows:

“2.10 On reinterviewing Mr Cain again nearly a year on (report of February 2022) Ms Overton observed that ‘his overall presentation and approach to the current risk assessment, and the insight he has shown during this assessment period, has been significantly improved’. She observed that as her working relationship with him developed he had ‘seemed willing to disclose more about his past use of or involvement with violence, demonstrating increased insight into the factors which lead to his own involvement’.

2.11. In assessing current risk, Ms Overton reported that –

the majority of risk factors in Mr Cain's case are historical in nature, with the only elevated risk factors being historical problems with violence, other antisocial behaviours, relationships and traumatic experiences relating primarily to his turbulent childhood and experiences of rejection and abandonment. There is no evidence of current problems in these areas ...

Mr Cain has demonstrated for a considerable period of time that he can

comply and does not display negative attitudes, showing a marked improvement from the early part of his sentence. It is evident he has spent time trying to distance himself from any involvement with violence ..

2.12. In consequence Ms Overton no longer retained the view that Mr Cain had outstanding core risk reduction work that needed to be addressed through a TC, or alternative therapeutic intervention. She suggested that if he were required to remain in Closed conditions it could be advantageous for him to experience a Progression Regime, which could serve to promote his experience of trust in working with professionals (page 248 refers), although she did not consider this an essential pathway for him.” (emphasis added)

23. It follows that Ms Overton suggested that if Mr. Cain remained in closed conditions, he was now ready to take the path of moving onto a Progression Regime (“PR”).

24. The Board recorded at paragraph 2.15 of their 2023 Decision that the psychologist instructed on behalf of Mr. Cain, Ms Long, took a more robust view:

“Ms Long firmly concurred with the conclusion that a TC was an unnecessary proposition for Mr Cain. As regards the possibility of his placement in a Progression regime, she expressed confidence that he would comply if so located but found it ‘difficult to see how this would serve to further reduce Mr Cain’s violence risk beyond simply postponing his release which would in itself carry a risk of reducing his opportunities of securing employment’.

25. It is clear that, at least at the time when she compiled her report (February 2022), Ms Overton found the decision a difficult one. Whilst, “*on balance*”, recommending that Mr. Cain progress to open conditions, she stated in terms “*I have not found this an easy decision to make and can also see the benefits of Mr. Cain being given the opportunity to engage on a progression regime*” (p. 3 of her report). She stated that the reason for her difficulty with this decision was primarily because at times in the early part of her interviews with Mr. Cain he remained guarded in how much information he was willing to provide about his previous behaviours, which led her to think he was managing her impression of him, and showed less insight than he evidenced later. She considered, therefore, that “*it will be of vital importance moving forward that professionals tasked with managing Mr. Cain’s future risk, especially his COM [Community Offender Manager], take the time to meet with him and have regular contact. This would help to ensure that, by the time of his release, he has developed some trust and is therefore more likely to report any concerns he has [that he might repeat his previous violent behaviours].*”

26. Ms Overton’s opinion was therefore that whilst Mr. Cain no longer had any core risk reduction work to carry out in closed conditions, there were “*potential high risk scenarios*” which Mr. Cain still needed to learn to manage. These were, in particular, the use of violence especially against sex offenders, other antisocial behaviours (particularly towards minority groups), relationships and traumatic experiences relating primarily to his turbulent childhood (paragraph 6.2). She considered that Mr. Cain’s risk of violence was low whilst in custody but medium if released or having

community access (such as in open conditions), but that this was unlikely to occur unless circumstances changed or he found himself influenced by negative peers or in conflict with a minority group (sex offenders; black or minority ethnic group). Accordingly, she considered (at paragraph 6.2) that:

“Mr Cain would benefit from the opportunity to work closely with those tasked to manage his future risk to enable him to develop trusted working relationships with them so he does not feel the need to use impression management as a way of guarding himself from perceived personal intrusion.”

27. Importantly, at paragraph 6.5 she elaborated on the precise nature of the work from which Mr. Cain would benefit:

“I have considered that it may be useful for Mr Cain to have the opportunity to explore the function of his violence and any violent supportive attitudes he held in the past, especially towards sex offenders, to help him determine his future triggers. However, it is likely he would be most responsive, at this stage in his sentence, to receiving support to develop robust plans to help him manage any potential high risk scenarios. Having the opportunity to explore in supervision sessions any deficits in his management of his risk will be important, as well as to understand his decision-making in becoming involved in a serious offence on, not one, but two occasions. Mr Cain could be given the opportunity to consider his coping and problem solving strategies. In the past, this included becoming involved in the systematic abuse and victimisation of others to ‘fit in’ and seek acceptance (e.g. sex offender). Therefore, moving forward, it will be important for Mr Cain to utilise the skills he has developed to assist him to start and maintain meaningful relationships with pro-social peers and professionals which do not involve him needing to adopt negative attitudes to be accepted. Furthermore, it may be beneficial for Mr Cain and those managing his risk to explore in supervision the role that negative peers had in his life and why he chose to migrate towards them. During our interviews, he continued to deflect responsibility for violence inflicted on others in his presence. Whilst he may not have been culpable for the actual acts of violence, he chose not to do anything to prevent this. It might be helpful for Mr Cain to have the opportunity to consider what impact his behaviour could have on others. In addition, it would be useful for him to look at his suspicious and mistrustful beliefs towards others. Mr Cain is encouraged to have a look at the potential negative impact this could have on future supervision relationships and so it might be beneficial for this to be discussed openly and consideration given by professionals of how they can be responsive to this for Mr Cain.”

28. It can be seen that the “robust plans” to which Ms Overton was referring were essentially reflective supervision sessions with Mr. Cain’s COM and/or POM to understand his decision making in becoming involved in serious violence/high risk scenarios, coupled with coping and problem solving strategies, as well as learning to avoid impression management with the professionals managing his risk. Those plans would, in principle, be capable of being made in closed conditions on a Progression Regime or in open conditions, hence her dilemma as to which was preferable.
29. In paragraph 6.10 of her report, Ms Overton explained the benefits of his remaining in closed conditions but being on a Progression Regime. She referred to the fact that Mr. Cain was able to discuss the high risk situations he may encounter and could recall skills he had learned and insight gained by him on previous offending behaviour programmes. She therefore stated that:

“if Mr Cain were to remain in closed conditions, I would recommend that he be transferred to a Progression Regime. This would provide him with the opportunity to work closely with a key worker with the oversight of psychology staff to enable him to consolidate his previous learning and to offer him the opportunity to identify and develop robust resettlement plans in preparation for him progression to open conditions and his eventual release. Mr Cain has spent a considerable period of time in prison and so as he progresses towards release it would be useful for him to build trust with his peers and staff in order to find new and helpful ways of communicating, accepting help and accepting good support. It is likely to take Mr Cain a significant period of time to be able to trust others, including residents and staff, and as such he should be encouraged to explore why he is so suspicious of others’ intentions. It is likely Mr Cain will display a tendency to appear passive and withdrawn, which may inhibit his ability to initially engage productively with professionals and pro-social peers. During supervision sessions with his POM or COM it may also be useful for Mr Cain to further explore how he relates to others, and collaboratively develop ways for him to make positive changes to the way he relates to others. It is unclear where Mr Cain’s negative attitudes towards sex offenders and any racial attitudes have come from and whether they manifested out of a traumatic event he has been unable to discuss and therefore this might be something he could discuss with his key worker to see what further insight he can gain or evidence. Prisons operating a Progression Regime, such as HMP Warren Hill, usually follow a Category D pattern Monday to Friday and allow longer periods ‘out of cell’ to enable pro-social skills and attitudes to be demonstrated. If Mr Cain were to transfer to a progression regime the prison would likely operate an integrated regime, which would offer him the opportunity to demonstrate that he is able to manage any negative attitudes towards minority groups. Given Mr Cain’s previous difficulties to be completely open and

not to use impression management with staff/professionals, a period on a progression regime may assist him to be consistently less guarded about his life.” (emphasis added)

30. It is clear what Ms Overton is saying here. She is saying that, contrary to Ms Long’s view, in a Progression Regime (*if* Mr. Cain remains in closed conditions) Mr. Cain could both usefully consolidate his previous learning (skills to handle high risk scenarios) as well as developing a robust resettlement plan in preparation for his progression to open conditions. He would do this by supervision sessions with his POM or COM, as well as practically, by interacting with others, particularly minority groups, in the out-of-cell periods on that regime (which is also likely to be an integrated regime). Contrary to Mr. Armstrong KC’s submission, there is nothing conditional about her view of the benefits of this to Mr. Cain. She is saying that these *are* the benefits of the Progression Regime if in fact he remains in closed conditions. Ms Overton summarises her recommendation in this way on page 3 of her report where she states:

“I am not recommending any further risk reduction work, although having the opportunity to discuss his risks in supervision to consolidate his learning and develop his plans for risk management in the future will be of vital importance. Such work would also offer Mr Cain the opportunity to develop a trusted working relationship with those managing his risk, as well as giving professionals the chance to evaluate further his insight.”

31. In paragraph 6.12 of her report, she considered the alternative, namely the immediate progression to open conditions. She considered that professional support and monitoring would be important components for risk management, particularly given Mr. Cain’s difficulty in trusting others. She concludes that *“a decision needs to be made about Mr. Cain’s suitability for open conditions based on whether his risk can be managed.”* Whilst finding it not to be an easy decision to make, on balance she favoured release into open conditions but then it was of *“vital importance moving forward that professionals tasked with managing Mr Cain’s future risk, especially his COM, take the time to meet with him and have regular contact. This would help to ensure by the time of his release he has developed some trust and is therefore more likely to report any concerns he has.”*
32. It is worthy of note that in paragraph 7.1 of her report, Ms Overton recorded Mr. Cain’s response to the contents of her report as follows:

“I think your report was definitely fair and definitely balanced. Whilst I would like to go to an open prison and that would be my first option, I would be prepared to have a deferral for however long is needed to go to a progression regime and to try to clear up any misunderstanding with my violence and in my case.”

It appears therefore that Mr. Cain himself understood the need for him to work on managing his decision making in becoming involved in serious violence/high risk scenarios.

33. Ms Long's view, in contrast, was that since there was no further core risk reduction work required in closed conditions, Mr. Cain should be transferred to open conditions without more (paragraph 14.9 of her report). She did not address the possibility of consolidation and resettlement plan work being undertaken in closed conditions on a Progression Regime so as to address Mr. Cain's vulnerability to high risk scenarios, which was a significant concern of Ms Overton. It is of note, however, that in paragraphs 14.5 and 14.6 of Ms Long's report she refers to four scenarios where Mr. Cain's risk of future violence would be aggravated, which Mr. Armstrong KC, counsel for Mr. Cain, agreed were the "high risk scenarios". These are similar to those identified by Ms Overton. Consistently with Ms Overton's opinion, Ms Long states that she considers that *"Mr. Cain currently presents a medium to high risk of harm in the event that he were to be released to the community immediately... Given his history, the most likely scenario for any future violence would be that resulting from his inability to resist peer influence and would most likely be targeted at an unknown adult male."*
34. This was, then, the nature of the expert psychological evidence which was before the Board.
35. In his submissions before me, Mr. Armstrong KC sought to suggest that "by the time of the hearing before the Parole Board, Ms Overton did not support a move to a Progression Regime". In support of this suggestion, he relied, firstly, upon a brief note of his instructing solicitor, who was present at the hearing, of part of the evidence of the psychologists, which reads as follows:

**"Michael Cain
Solicitor's note of evidence of psychologists on need for open
conditions
18 January 2023**

Lucy Overton (prison psychologist) and Julia Long (independent psychologist) gave evidence together and were asked questions by the Board

Both psychologists agreed that there was no further risk reduction work necessary to carry out in closed conditions.

JL said that there was no need for transfer to a progression regime. In response to the Board she did query whether he might meet the test for release given her assessment of the risk to the public he poses – there was no "unmanageable risk". But she did say open might be the safest route for him to get access to work, community etc

LO considered that open conditions was essential before release and he would be more likely to succeed in the community if transferred to open – might be more about his needs given how

long he had been in prison than risk to the public however. In her evidence she said that issues around impression management did not link to risk.”

36. However, I do not consider that this note demonstrates any change in or abandonment of the evidence of Ms Overton; indeed it is consistent with both experts’ written reports. In their expert reports of February 2022 (page 3 and paragraph 6.2) and June 2022 respectively (paragraph 14.9), Ms Overton and Ms Long both stated that there was no further core risk reduction work to be done in closed conditions. The point that Ms Overton makes in her report, which is not in any way inconsistent with this note, was that further work was required to be done by Mr. Cain in addressing high risk scenarios², which could be carried out either in closed conditions on a Progression Regime or in open conditions.
37. The solicitor’s note also states that Ms Overton considered that open conditions were essential before release (indeed, it is clear that everyone understood that Mr. Cain could not be released directly without first moving to open conditions, as Mr. Armstrong KC rightly stated). But that was also her stated view in her February 2022 report (see paragraphs 6.2 and 6.10 amongst other references). Her issue was whether Mr. Cain could go straight to open conditions or whether he should first go via the Progression Regime.
38. There is certainly no suggestion in this solicitor’s note that Ms Overton had abandoned her analysis in paragraphs 6.2, 6.5 and 6.10 of her report. On the contrary, the Board recites various paragraphs of Ms Overton’s report, including the fact that she only recommended open conditions “*on balance*”: see paragraphs 2.10-2.12; 2.22 and 4.6. Indeed, in paragraph 2.24 of the Board’s Decision, it is expressly stated that “*In oral evidence to the Board and in response to careful and probing questioning, both psychologists explained, sustained and amplified upon their methodology, reasoning and conclusions, summarised above*” (emphasis added). There is no suggestion that Ms Overton abandoned her analysis in paragraphs 6.2, 6.5 and 6.10 of her report concerning the benefits of Mr. Cain moving to the Progression Regime (although considering on balance that open conditions were preferable), rather than moving straight to open conditions.
39. This is further conformed by the fact that in the Board’s directions for the hearing, given on 21 December 2022, it stated that “*[b]oth psychological assessments are also now quite dated and both authors are asked to submit any updates they consider necessary for the Board to properly assess risk by 9th January 2023.*” Ms Overton’s response to this request is recorded as follows: “*I am not entirely sure who I need to inform this, but I have spoken with Mr Cain at length this morning and do not have anything to add to my current psychological risk assessment. I am happy to give any update verbally at the oral hearing on 18th Jan.*” She had nothing to add to her report assessment.
40. Mr. Armstrong KC also sought to rely upon a letter dated 8 June 2023 from his instructing solicitors to the Defendant in which they stated:

² As identified above, Ms Long also recognised the continuing existence of these risks in her report at paragraphs 14.5 and 14.6.

“Firstly, your letter relies on the prison psychologist’s (Ms Overton) written report which was before the Board. As noted in our letter of claim this report was completed on 16 February 2022 and so predated the oral hearing before the Board by nearly 12 months. By the time of the hearing Ms Overton did not support a move to a PU.”

41. But Ms Overton did not support a move to the Progression Unit in her written report, either. She considered that although it was a difficult decision, on balance Mr. Cain should be moved to open conditions. Moreover, as has been seen, when asked, she had nothing to add to her psychological risk assessment in her written report (which included her high risk scenario assessment). So this letter adds nothing.
42. The importance of this analysis is that it fatally undermines Mr. Cain’s submission that it was essential for the Defendant to have obtained a transcript of the proceedings before the Parole Board³ (which I was told lasted some 4 1/2 hours) before reaching his decision in this case, because matters had moved on since the experts compiled their reports and Ms Overton had now changed her position. There is no evidence before me to support that suggestion, indeed the evidence is to the opposite effect. Mr. Armstrong KC rightly did not suggest that there was a duty on the Defendant to obtain a transcript of the evidence before the Parole Board in every case where the Defendant rejected the Board’s recommendation. It depends on the facts.
43. Accordingly, contrary to Grounds 2, 3 and 4 (and that aspect of alleged irrationality referred to in paragraph 6(c) above) I do not consider that it can be said to have been irrational or unfair for the Defendant to have taken his decision upon the basis of (i) the Board’s decision; (ii) the written reports which were before the Board and to which they referred; and (iii) Mr. Cain’s dossier⁴, without also calling for a transcript of the proceedings. The obligation on the decision-maker is only to take such steps to inform himself as are reasonable. It cannot be said, applying *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, para 70, that no reasonable secretary of state possessed of that material could suppose that the inquiries they had made were sufficient. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable secretary of state could have been satisfied on the basis of the inquiries made that they possessed the information necessary for their decision. The Defendant had no reason to believe in this case that he did not have the information necessary for his decision.
44. Indeed, I observe that if a transcript was obviously necessary in order to reach a properly informed decision, it is very surprising that Mr. Cain’s solicitors did not ask the Defendant to obtain one after the hearing. Mr. Armstrong KC conceded when I asked him about this, that at no stage did Mr. Cain’s solicitors request that the Defendant obtain a transcript, until this issue was raised in paragraph 43b of the Detailed Statement of Facts and Grounds dated 5 July 2023. That is not a promising start for a submission that it was irrational not to call for a transcript. It was not.

³ Which I was told would have taken 4 weeks to obtain and would have cost some £600

⁴ The contents of which are explained in Ms Whyte’s witness statement at paragraph 12.

45. Returning to the Board's Recommendation, its conclusions are set out in section 4. In paragraph 4.4, consistently with the reports of both experts, the Board found that Mr. Cain "has no core risk reduction agenda remaining outstanding" and accordingly that "the concerns expressed in one of the PRA risk assessments in 2019 have proved unfounded." The Board then stated that he has maintained positive progress in his behavioural conduct and has convincingly evidenced that he holds pro-social attitudes that he lives out in a wide variety of closed custodial settings. Again, both experts had agreed upon this in their reports.
46. But at this stage the Board then made the first part of its *evaluative judgment* as follows: "*The Board agrees with Ms Long that requiring him to demonstrate this further in a Progression Regime would add little or no value to the understanding of his repertoire of self-management skills*". The Board no doubt refers here only to Ms Long because Ms Overton expressed a different view in her report, as she considered that if Mr. Cain were transferred to a Progression Regime, this would provide him with the opportunity to work closely with a key worker with the oversight of psychology staff usefully to enable him (i) to consolidate his previous learning and (ii) to identify and develop robust resettlement plans in preparation for him progression to open conditions and his eventual release.
47. In paragraph 4.6 the Board then came to the crucial part of its decision/recommendation as follows:

"Turning to whether a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release⁵, in this respect too the evidence is one way, not least the clear view on Mr Cain's part to that effect. As Ms Overton has expressed the issue: 'it is likely he would be most responsive, at this stage in his sentence, to receiving support to develop robust plans to help him manage any potential high risk scenarios'. In the Board's view, that support needs to be offered in conditions of greater freedom/opportunity and reduced custodial oversight." (emphasis added)

48. The first part of this paragraph is unsurprising. Both experts agreed that a period in open conditions is essential to inform future decisions about release and to prepare for possible release. The issue was whether that should take place immediately or whether it should take place via a period first in a Progression Regime. Indeed, the issue in the passage which the Board cites from Ms Overton's report⁶ ("*it is likely he would be most responsive, at this stage in his sentence, to receiving support to develop robust plans to help him manage any potential high risk scenarios*") could, according to Ms Overton, be addressed either in a Progression Regime (see paragraph 6.10 of her report) or in Open Conditions (see paragraph 6.12 of her report). That was what Ms Overton termed "not an easy decision to make". But again, it is an evaluative judgment and the second part of the Parole Board's evaluation was that "*that support*

⁵ The relevant test: see below

⁶ It is contained in paragraph 6.5 of her report

needs to be offered in conditions of greater freedom/opportunity and reduced custodial oversight”, namely in an open prison.

The Defendant’s Decision Letter

49. In her witness statement of 8 December 2023, Ms Julia Whyte who is Head of Parole-Eligible Casework within the Public Protection Group (“PPG”) of His Majesty’s Prison and Probation Service (“HMPPS”), explains how the decision in Mr. Cain’s case was taken after anxious scrutiny by three different experienced members of staff, consisting of a review first by the Public Protection Casework Section Case Manager; then a further review by a Senior Manager (Ms Whyte herself); and finally a review by Gordon Davison, a Deputy Director at HMPPS who is head of the PPG.

50. In the Decision, the Defendant disagreed with the Board’s evaluative judgment in the two respects set out in paragraphs 46 and 48 above. He considered that Mr. Cain should instead first be transferred to a Progression Regime with a view to his progressing on to Open Conditions, in order to address the issues referred to by Ms Overton in paragraph 6.10 of her report. In coming to this conclusion the Defendant applied the relevant law and policy guidance. He identified the relevant question in this case which is that the Defendant will accept a recommendation from the Parole Board only where 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.

51. The Defendant expressly recognised that there was no core risk reduction work for Mr. Cain which was outstanding, as the two experts had assessed, and that Mr. Cain had maintained positive progress, demonstrating consistent good behaviours and pro-social attitudes in prison. However, despite this, the Defendant considered that it was not shown to be essential for Mr. Cain to be transferred to open conditions at this stage, being persuaded of Ms Overton’s analysis concerning the benefits of a transfer to a Progression Regime. He agreed that:

“this would provide you with the opportunity to work closely with a key worker with the oversight of psychology staff to enable you to consolidate your previous learning and to offer you the opportunity to identify and develop robust resettlement plans in preparation for your progression to open conditions and your eventual release. You have spent a considerable period of time in prison and so, as you progress towards release it would be useful for you to build trust with your peers and staff in order to find new and helpful ways of communicating, accepting help and accepting good support.”

52. This could be done, he stated, by following a category D pattern when Mr. Cain was allowed a longer period out of his cell so as to demonstrate pro-social skills and attitudes. An integrated regime would allow him to demonstrate that he was able to manage any negative attitudes towards minority groups. Given Mr. Cain’s previous difficulties to be completely open and not to use impression management with staff/professionals, a period on a Progression Regime may also assist him to be consistently less guarded about his life. This was the approach favoured by Ms Overton if Mr. Cain were not transferred to open conditions.

53. The Defendant expressly adverted to the psychologist (Ms Overton and Ms Long)s' preference for open conditions, as recorded in their reports, and to the fact that the Board agreed with the independent psychologist (Ms Long)'s view (contained in her report) that "*requiring you to demonstrate this further in a Progression Regime would add little or no value to the understanding of your repertoire of self-management skills.*" However, based on the detail within Ms Overton's psychological report, the Defendant's evaluative judgment was that a move to the Progression Regime was preferable at this stage to address the issues identified by Ms Overton, adding that (contrary to Ms Long's and the Board's view) he did not consider, therefore, that Mr. Cain would be disadvantaged or his progress halted, by transferring to a Progression Regime. It was accordingly not essential to transfer to open conditions.
54. Contrary to Mr. Cain's submission, on the basis of the psychologist's evidence to which the Defendant refers, that was a reasonable view to adopt. Ms Overton set out the many advantages, in her opinion, of a transfer to a Progression Regime in Mr. Cain's case in paragraph 6.10 of her report, and there is no suggestion that his progress would be halted as a result; on the contrary, the consolidation of his previous learning and the development of a robust resettlement plan whilst on the Progression Regime would prepare Mr. Cain for transfer to open conditions⁷. The fact that the Defendant may be some two years older after completing this (at least arguably) beneficial work on a Progression Regime, rather than his moving to open conditions shortly after the Board's Recommendation, does not render irrational the Defendant's evaluation that it is not essential that he be moved to open conditions.
55. It follows that, in my judgment, there is nothing irrational in the Defendant's assessment in the Decision that a period in open conditions was *not essential* to inform future decisions about Mr. Cain's release and to prepare for possible release on licence into the community. As the Defendant stated there were alternative routes in which he could continue to evidence his progression, whilst addressing some of the outstanding concerns of the psychologists (particularly Mr. Cain's response in high risk scenarios). It was open to the Defendant so to find.

Law

56. There is nothing in the authorities which were relied upon by Mr. Armstrong KC which compels a contrary conclusion; in determining in a particular case whether the Defendant may lawfully depart from a recommendation of the Parole Board that a prisoner be moved to open conditions, much will depend upon the particular facts of the case before the court.
57. In *R (Oakley) v SSJ* [2022] EWHC 2602 (Admin) Chamberlain J stated 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

⁷ Mr. Cain is plainly wrong to submit that the lack of disadvantage is of no relevance to the essentiality test.

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.”

58. I agree that this accurately states the correct approach in a case such as this, which approach has also been applied by Steyn J in *R (Wynne) v SSJ* [2023] EWHC 1111 (Admin) at [50], by Dexter Dias KC in *Zenshen* (supra) and in substance by Sir Ross Cranston in *R (Green) v SSJ (No 2)* [2023] EWHC 1211 (Admin). In so far as HH Judge Keyser KC in *R (Oakley) v Secretary of State for Justice* [2024] EWHC 292 (Admin) at [17] (“Oakley 2”) was doubting the approach of Chamberlain J in *Oakley* (and it is not clear that he was⁸), then I respectfully disagree with the learned judge.
59. In *Zenshen*, the court was likewise concerned in that case with the Secretary of State’s rejection of the Parole Board’s recommendation that the prisoner should be moved to open conditions. The Claimant in that case, also represented by Mr. Armstrong KC and Bhatt Murphy, made the same submission as before me, namely that it was irrational for the Secretary of State not to obtain an account of the oral evidence at the Parole Board hearing and that the oral evidence provided important clarifications of the assessment of witnesses and the updated risk situation. In failing to take this into account, it was argued that the Secretary of State failed to evaluate a material consideration and that there was no “very good reason” to depart from the Parole Board’s recommendation. The Claimant also alleged a *Tameside* failure to take relevant matters into consideration and/or to make reasonable enquiry by obtaining a transcript of the oral evidence.
60. Whilst the issues in *Zenshen* were similar to those in this case, the facts were very different. In *Zenshen*, the Secretary of State relied upon the expert report of an independent psychologist to the effect that the prisoner could continue to have access to keyworker sessions to explore his index offence in closed conditions. However, it was established in the judicial review proceedings that at the Parole Board hearing the expert (orally) discounted this point saying that such sessions would make no difference. The Secretary of State did not know that that had occurred. Nor did he know that, as was established in the judicial review proceedings, evidence had been given to establish that the Claimant had, over six months, made significant further progress in preparation for open conditions and had improved his insight into his offending. Nor did he know that the psychologist had stated at the hearing that the prisoner had no further core risk reduction work to do because that was not in the Board decision letter. Finally, at the hearing the witnesses went further than they had done in their reports in declaring the necessity for the prisoner to be tested in open conditions.

⁸ Mr. Armstrong KC accepted in argument that it was uncertain whether he was so disagreeing.

61. It follows that this case is very different from *Zenshen*. There is no evidence before me to support the assertion that the oral evidence was materially different from that which was contained in the expert reports, nor that the witnesses added something material at the hearing of which the Defendant was unaware. This is not a case like *Zenshen*, where the Board enjoyed a particular advantage over the Defendant. As the Judge said in *Zenshen* at [58], “*I can readily envisage that in certain cases the lack of hearing evidence will be of no practical consequence. Certainly when pressed, the claimant quite correctly did not advance the case that the lack of a practice or policy of obtaining the hearing evidence was in itself an error of law. Thus, my focus has been on whether the lack of hearing evidence on the particular facts of this case was significant.*”
62. Furthermore, contrary to the submission of Mr. Armstrong KC in respect of Ground 4 of the Statement of Facts and Grounds, this is not a case where fairness required the Defendant to tell Mr. Cain the gist of the Defendant’s preliminary response that he was minded to refuse the recommendation of the Parole Board (applying *R v Secretary of State for the Home Department ex p Draper* [2000] Prison Law Reports 5 at [45] per Sullivan J (as he then was)). This is not a case where fresh material emerged that was not before the Board; or where the Defendant had regard to a matter which he considered the Board failed to consider; or where the Defendant had regard to some new point on which Mr. Cain had not had the opportunity to make representations. It is not a case where the Defendant should first have obtained a transcript of the proceedings before reaching his decision. Rather it is a case of the Defendant reaching a different judgment after his evaluation of the material which was before the Board and upon which the Board relied. It follows that there is nothing in Ground 4 of the Grounds for judicial review.
63. Mr. Armstrong KC also sought to rely upon the decision of Eyre J in *R (Overton) v SSJ* [2023] EWHC 3071 (Admin). Again, this was a challenge to the Secretary of State’s decision to reject the Parole Board’s recommendation that the prisoner be moved to open conditions on the ground of irrationality.

64. In particular at [33]-[34] Eyre J stated:

“33. If the second of the three elements in section 5.8.2 of the GPPPF⁹ 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

⁹ This is the same Policy guidance as in the present case and the second element in section 5.8.2 is “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.”

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”.

65. I agree with Eyre J that this criterion is concerned, in large part at least, with whether the prisoner has reached a stage such that the level of risk that he or she poses can safely be managed in the open estate. However, I disagree that it is sufficient for the prisoner, in order to be entitled to be transferred to the open estate, to show that the further work required to address his offending behaviour can be done as effectively in the open estate as in a closed prison. Rather, it must be shown that 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. If the further work on the prisoner's offending behaviour can be done just as well in closed conditions on a Progression Regime then the test of essentiality may very well not be met, depending always on the particular facts of the case.
66. Eyre J rejected the challenge to the Secretary of State's decision. In doing so he relied upon the following particular features of the case:

- (1) The principal difference between the approach of the Secretary of State and of the Parole Board was as to the prospect of further progress in risk reduction work being made in the closed estate. The Secretary of

State was of the view, which it was open to him to take, that there was further work which could be done in that setting, with one course of action being a transfer to a Progression Regime, had the prisoner admitted his guilt, which he was voluntarily refusing to do.

- (2) It was also open to the Secretary of State to take the view that the risk of sexual offending posed by the prisoner was such that he was not yet ready for a move to the open estate. This was an aspect of need for further risk reduction work. It involved an assessment of the risk posed by the prisoner and it was within the range of conclusions open to the Secretary of State.

67. I take a similar approach to Eyre J in this case. In the present case, I have identified above the key propositions of the Parole Board (in paragraphs 4.4 and 4.6 of the Recommendation) with which the Defendant disagreed, to the effect that the support to develop robust plans to help Mr. Cain manage potential high risk scenarios is better offered in open conditions rather than via a Progression Regime. I consider that on that central question, which consists of the exercise of a judgment, balancing the interests of the prisoner against those of the public, whilst the expertise and experience of the Parole Board requires appropriate respect, the Defendant is entitled to form his own judgment as to where the balance of interests best lies. The exercise of an evaluative judgment to determine that question in the present case was not one in relation to which the Parole Board enjoyed a particular advantage over the Defendant.
68. The Defendant has given his reasons for departing from the Parole Board's view which, based as they are upon Ms Overton's analysis of the benefits of further work which can be done by Mr. Cain within the Progression Regime (particularly in respect of high risk scenarios, with a view to preparing Mr. Cain for release into open conditions), cannot be said to be irrational. The Defendant was entitled to take a different view to the Parole Board on this issue of judgment.
69. Finally, I mention that both parties agreed that Mr. Cain has worked well and made good progress on his Progression Regime. If the timescale set out in the Decision is adhered to, and it was not suggested that it would not be, the target month for the next consideration by the Parole Board of Mr. Cain's case is April of this year.
70. It follows from the foregoing that none of the grounds for judicial review are established and the claim fails.