



Neutral Citation Number: [2024] EWHC 1892 (Admin)

Case No: AC-2023-MAN-000258

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

Manchester Civil Justice Centre,
1, Bridge Street West, Manchester, M60 9DJ

Date: 29/07/2024

Before :

THE HONOURABLE MR JUSTICE TURNER

Between :

THE KING

(on the application of STEVEN LEE DRAPER)

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

Mr David Gardner (instructed by **Bhatia Best Solicitors**) for the **Claimant**
Mr Myles Grandison (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15 May 2024

Further written submissions: 11 July 2024

Judgment Approved by the court
for handing down

This judgment was handed down remotely at 10.30am on 29 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Honourable Mr Justice Turner :

INTRODUCTION

1. The claimant is serving a sentence of life imprisonment for murder. This case concerns his challenge, by way of judicial review, to a decision of the defendant refusing to permit his transfer from closed to open conditions.

THE BACKGROUND

2. On 30 June 2000, the claimant was sentenced to life imprisonment with a minimum tariff of 20 years for murder. His tariff expired on 2 September 2019.
3. On 27 February 2020, he was transferred to open conditions but was subsequently returned to closed conditions on 22 July 2020 after he was found in possession of a mobile phone which he was alleged to have used to harass his former partner. There were other allegations relating to sexual misconduct. The allegations did not lead to any prosecutions or adjudications.
4. In 2022, the issue of the claimant's status was again referred to the Parole Board to consider whether he should be released on licence or, alternatively, whether he should be transferred to category D open conditions.
5. On 13 October 2022, the Panel of the Parole Board ("the Panel"), heard the claimant's case. On 29 October 2022 it decided not to direct release on licence but did recommend that the claimant should thereafter be transferred to open conditions. It concluded, on the basis of all the evidence before it, that the claimant had reached the stage where he needed further testing and monitoring in conditions of less security which would also enable him to develop a viable plan for resettlement in the community and which would inform future decisions.
6. On 24 February 2023, the defendant rejected the recommendation of the Panel. The decision letter determined that:
 - (i) A period in open conditions was not essential to inform future decisions about release and to prepare for possible release on licence into the community; and
 - (ii) A transfer to open conditions would undermine public confidence in the Criminal Justice System.
7. The claimant contends that the decision of the defendant is unlawful because it was inadequately reasoned and he failed to consider relevant considerations and/or made an irrational decision.

THE LEGISLATIVE AND STATUTORY FRAMEWORK

8. It is convenient first to set out the uncontroversial legislative and statutory framework.
9. By s.12(2) of the Prison Act 1952 (“the 1952 Act”), the defendant may determine to which prison a prisoner shall be allocated. By s.47 of the 1952 Act, rules may be made for the classification of persons required to be detained in prison.
10. Rule 7(1) of the Prison Rules 1999 provides that “... *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 as provided by rule 3*”.
11. For indeterminate sentence prisoners such as the claimant, the defendant ordinarily seeks a recommendation from the Parole Board before deciding whether they should be moved to Category D open conditions. The Parole Board provides advice to the defendant pursuant to s.239(2) of the Criminal Justice Act 2003 (“the 2003 Act”).
12. Section 239(6) of the 2003 Act empowers the defendant to give the Parole Board directions as to the matters to be taken into account in discharging its function. At the material time, decisions on open conditions recommendations were made pursuant to the policy set out within the Generic Parole Process Policy Framework (“the GPP Policy Framework”), as substantively revised on 21 July 2022 and last updated 12 October 2022. It provides:

“3.8.18 The Secretary of State (or their delegated official) is responsible for deciding whether to accept or reject the Parole Board’s recommendation for an ISP to move to open conditions in accordance with the policy set out at 5.8.2. The Parole Board should have taken into account the Secretary of State’s directions to the Parole Board which includes the criteria set out at 5.8.2 in Guidance.

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.”*

13. The 2022 version of the Secretary of State’s directions to the Parole Board (“the Secretary of State’s directions”) were in force. The relevant directions were:

“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;

whether the following criteria are met:

- *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.*

3. The Parole Board must only recommend a move to open conditions where it is satisfied that the two criteria (as described at 2(iii)) are met.”

THE RECOMMENDATION

14. The Panel comprised a judicial member, a psychologist and an independent member. Their written decision to recommend a move to open conditions began in template form which included accurate reference to the two criteria set out in paragraph 2(iii) of the Secretary of State's directions. There followed ten pages of reasoning.
15. Their finding that the claimant was of low risk of abscond was uncontroversial.
16. The Panel considered the allegations concerning the claimant's use of mobile phones and contact with his former partner which had led to his return to category C on 22 July 2020 and found, on a balance of probabilities, that the claimant's exculpatory explanations were untrue. There had been no adjudications solely because delays in the police investigation had caused any such proceedings to be timed out.
17. Four witnesses gave oral evidence at the hearing before the Panel.
18. Jonathan Kay, the Claimant's Prison Offender Manager ("POM"), expressed the view that "*Open Conditions would be essential to prepare Mr Draper for release after so long in custody and ROTLs [Releases on Temporary Licence] would be essential*" and that there was no further Core Risk Reduction Work needed.
19. Charlotte Anson, the Prison Psychologist in training, was initially recorded in the Panel's reasons to have concluded that consolidation work could be done in closed conditions with his POM or in a Progressive Regime or also in open conditions with EBM [Enhanced Behaviour Monitoring] recommended a transfer to Open Conditions. The Panel, however, later noted that she felt it was necessary for him to go to open conditions in order for him to progress. She was firmly of the view that open conditions would be essential to him to be monitored and consolidate his learning. But later she confirmed that she was no longer of the same recommendation as in her previous report to remain in closed conditions as Mr Draper had completed the 1-1 work she had then recommended. The Panel was told that there was no further core work for him to complete in closed conditions.
20. Dr Kathleen Green, an independent psychologist, observed that there was a risk of non-compliance in open conditions involving, in particular, the subverting of rules and lack of honesty but, nevertheless, recommended a transfer to Open Conditions stating:

"I believe a further period in open would be necessary to ensure appropriate support is in place in the community to manage risk" and the Panel recorded her view "open conditions would be essential to inform future decisions".
21. Katie Lane, the Claimant's Community Offender Manager ("COM"):

“confirmed the views of the other witnesses, that there was no further core work to be completed in closed conditions” and “she assessed... that open conditions would be essential to inform future decisions”.

22. The Panel concluded that:

“There was clear evidence discussed above that Mr Draper had now reached the stage where he needed further testing and monitoring in conditions of less security, which would also enable him to develop a viable plan for resettlement in the community, and inform future decisions.”

THE DEFENDANT’S DECISION

23. The defendant’s decision letter of 24 February 2023 correctly summarises the evidence before the Panel and the conclusion which the Panel reached.

24. However, the letter goes on to conclude that:

- (i) a period in open conditions was not considered to be essential to inform future decisions about release and to prepare for possible release on licence into the community; and
- (ii) a transfer to open conditions would undermine public confidence in the Criminal Justice System.

25. Under criterion (i) above, the defendant stated:

“The COM is of the view that additional work is required and that this can be completed in closed conditions:

“he finds it difficult to acknowledge his risk factors, and he needed to consolidate his understanding of his internal risk factors and triggers. She said that consolidation work would focus on collaboration between him and professionals to consider his risk and how he could address this and apply his skills. It was her view that he could do this in closed conditions with his POM, or in a Progression Regime, or also in open conditions with EBM which would be less intensive than a progression Regime.””

26. It is to be noted, however, that:

- (i) The defendant wrongly attributed the views of Ms Anson, the Prison Psychologist, to Katie Lane, the Claimant’s Community Offender Manager. The unequivocal conclusion of the COM, contrary to that attributed to her by the defendant, was that open conditions would be essential to inform future decisions. Ms Anson, in contrast, in her second addendum report, dated 29 September 2022, had expressly disavowed the appropriateness of her passing an opinion of the issue of release or a move to open conditions stating at paragraph 1.5:

“Due to the recent changes with the Parole Board legislation, I am not able to make a recommendation regarding Mr Draper’s suitability for release into the community or for a move to open conditions.”

It would appear, therefore, that the oral opinions passed by Ms Anson on this topic were in response to direct questions put to her by the Panel during the course of the hearing upon which they enjoyed a considerable advantage of interpretation compared to a paper review;

- (ii) The defendant made no reference to that part of the evidence of Ms Anson referred to above that she was no longer of the same recommendation as in her previous report to remain in closed conditions;
- (iii) The defendant made no reference to the important opinions of the three other professionals who gave oral evidence all of which were strongly supportive of the need to transfer the claimant to open conditions; and
- (iv) The defendant recorded all of the concerns identified by the Panel concerning the allegations of possessing a mobile phone and harassment together with the security information but did not seek to articulate any basis upon which their importance should be elevated so as to undermine the strongly expressed views of the live witnesses to which no, even passing, reference was made.

27. Under criterion (ii) above the defendant stated:

“The Secretary of State is of the view a transfer in open conditions could have the potential to undermine public confidence in the Criminal Justice system, given the security information, allegations, behaviour in open conditions previously and the COM’s view of outstanding work for him to focus on.

The Panel concluded that “there was clear evidence discussed above that Mr Draper had now reached the stage where he needed further testing and monitoring in conditions of less security.” A transfer to open conditions should not be seen as an opportunity to test a prisoner, especially given the relatively recent (2020 and onwards) security information and concerns regarding Mr Draper’s openness and compliance.”

28. It is to be noted:

- (i) The COM expressed no view of outstanding work for the claimant to focus on. On the contrary, she concluded that open conditions would be essential to inform future decisions;
- (ii) Even, if the defendant had (again) got mixed up between Ms Anson and Ms Lane this is an unfair characterisation of the former’s

evidence which included the observation that the claimant had completed the 1-1 work she had then recommended and that there was no further core work for him to complete in closed conditions; and

- (iii) The observation that “A transfer to open conditions should not be seen as an opportunity to test a prisoner...” is, as a general proposition, simply wrong.

THE AUTHORITIES

29. It would be no exaggeration to say that, over the last few years, there has accumulated a surfeit of first instance authorities all of which have sought to meet the challenge of identifying the correct approach to applications for judicial review of decisions of the Secretary of State which do not follow the recommendations of the Parole Board to provide for transfer to open prison conditions.
30. Clarity has not been best served by the fact that the issue has recently been considered by the High Court in a number of separate cases in such rapid succession that some judgments have been handed down in ignorance of other decisions by courts of parallel jurisdiction decided just days earlier. Indeed, there have been a further two such cases decided since I heard argument in this case. It is to be hoped that some simplification and consolidation of the relevant principles will be provided by the Court of Appeal later this year which is to consider appeals in the cases of ***Oakley (No2) v Secretary of State for Justice*** [2024] EWHC 292 (Admin) and ***Sneddon v Secretary of State for Justice*** [2024] 1 W.L.R. 1894.
31. In the meantime, I will try to resist any temptation to add any further layers of nuanced interpretation to those which have already been laid down by those who have preceded me.
32. Instead, I will try to formulate a non-exhaustive list of relevant and, in my view, uncontroversial judicial observations with limited reference to any decision from which any item on the list has been derived. To this end, I have focussed on the case of ***Hahn v Secretary of State for Justice*** [2024] EWHC 1559 (Admin) because it provides the most recent decision reached with the benefit of argument on most of the other decisions which preceded it and identifies, with particular reference to the earlier case of ***Overton v Secretary of State for Justice*** [2023] EWHC 3071 (Admin), the present state of the law. I also bear in mind that the wording of the GPP Policy Framework has changed over time and so care must be exercised not to import a factor tailored to one version to bear upon cases involving another. These propositions may be distilled:

- (i) The decision about whether a prisoner should be moved from a closed to an open prison is ultimately one for the Secretary of State and not of the Parole Board (***Hahn*** para 22 referencing ***Overton*** para 25);
 - (ii) The Secretary of State must, however, take account of and engage properly with the recommendation of the Parole Board (***Hahn*** para 22 referencing ***Overton*** para 25);
 - (iii) A decision of the Secretary of State which departs from the recommendation of the Parole Board must be rational and properly justified (***Hahn*** para 22 referencing ***Overton*** para 25);
 - (iv) The issue as to whether a decision of the Secretary of State departing from the recommendation of the parole board is rational will involve close attention to the circumstances of the particular case and to the terms of the decision in question (***Hahn*** para 22 referencing ***Overton*** para 26);
 - (v) Whilst bearing in mind the potentially significant impact the decision of the Secretary of State is likely to have, for example on conditions of detention and enhanced opportunities to work towards release, this does not mandate either an artificially rigorous approach to the reading of the decision letter nor the level of anxious scrutiny which would be appropriate in cases involving the difference between a life at liberty and a life in detention. (***Hahn*** para 22 referencing ***Overton*** para 26);
 - (vi) Account must be taken of the expertise of the Secretary of State's own department in the assessment and management of risk in the context of the prison estate (***Hahn*** para 22 referencing ***Overton*** para 27);
 - (vii) In many cases, it will be open to different people to come to different rational conclusions and so a rational recommendation of the Parole Board may be departed from so long as the decision so to do is also rational (***Hahn*** para 22 referencing ***Overton*** para 28);
 - (viii) There is no obligation upon the Secretary of State to embark upon a point by point rebuttal or critique of the Parole Board's recommendation so long as his decision addresses the relevant issues and the reason or reasons for reaching a contrary view have been articulated (***Hahn*** para 22 referencing ***Overton*** para 31); and
 - (ix) Greater explanatory precision is likely to be required to explain a departure from the finding of primary facts than in the reaching of different secondary inferences from uncontroversial primary facts. (***Hahn*** para 27 referencing ***Overton*** para 30).
33. It is now time to consider the decision of the defendant upon the issues raised in each of the two relevant criteria in turn.

CRITERION ONE

34. The defendant's decision under this criterion was that a period in open conditions was not considered to be essential to inform future decisions about release and to prepare for possible release on licence into the community.
35. In Wynne v Secretary of State for Justice [2023] EWHC 1111 (Admin), Steyn J made the following observations:

“65. The Panel had the benefit of the informed views of those responsible for the claimant's management and the forensic psychologists who examined all aspects of the claimant's history, interventions, risk factors and protective factors (Panel recommendation §4.10). The consistent and unanimous view of all six professionals, which was tested by the Panel at the oral hearing, and with which the Panel agreed, was that the risk presented by the claimant could be safely and effectively managed in open conditions. Indeed, the Panel had "no doubt" the claimant met the test for transfer and it is manifest that they considered that was the only rational conclusion open to them on the evidence.

66. Although the Secretary of State expressly identified the test as whether "the risk of harm which the prisoner represents may be safely and effectively managed in open conditions", he did not engage with the views of the professional witnesses, and the Panel, all of whom gave a resoundingly positive answer to that question. The Secretary of State has purported to base his decision, in part, on an acceptance of the Panel's findings as to the risk presented by the claimant, but in doing so he has picked out one aspect of the risk assessment and given no reason for departing from the overall assessment that he can be safely and effectively managed in open conditions, save to the extent that he relies on points (b), (c) and (d)...”

36. I am of the view that the defendant performed a similar flawed exercise on the facts of the instant case. Although Steyn J was dealing with a different version of the GPP Policy Framework, the broad principles and standards to be applied in this regard are the same.
37. In this case, I am satisfied that the defendant not only failed to engage with the prevailing view of the professional witnesses but simply ignored it without explanation.
38. As HHJ Gilbert QC (as he then was) concluded in Adetoro v Secretary of State for Justice [2012] EWHC 2576 (Admin):

“56. However when the Secretary of State considers a Parole Board recommendation, he must do so fairly and properly, and give adequate reasons. If he misinterprets it, or fails to take the Board's reasoning into account, he will have failed to have regard to it in the manner required by law. Depending on the

way in which he deals with it, a decision he makes could also be struck down for irrationality, or for a lack of adequate reasoning.”

39. In the circumstances, of this case, the defendant has simply misinterpreted and/or misrepresented the evidence in favour of a conclusion that a move to open conditions was not essential in those respects set out in paragraph 26 above. The decision reached was based on incoherent reasons and falls to be struck down for irrationality and a lack of adequacy of reasoning.

CRITERION TWO

40. The defendant’s decision under this criterion was that a transfer to open conditions could have the potential to undermine public confidence in the Criminal Justice System.
41. As I have already noted, in this context, the defendant stated: “A transfer to open conditions should not be seen as an opportunity to test a prisoner...”
42. This is to be contrasted with the Parole Board Oral Hearings Guide Annex I which provides:

“PAROLE BOARD POLICY ON OPEN CONDITIONS

1 Background

The Secretary of State's Directions (which apply regardless of Girling) state that most lifers should spend a period in open conditions prior to release.

The point of open conditions is not simply one of rehabilitation or curing possible institutionalism. It offers the only chance to observe a prisoner putting into practice that which he/she has learned in theory. In other words, a prisoner may well make all the right noises on an accredited programme, but the structured and sheltered nature of closed conditions, where all decisions and responsibilities are taken by others, means that prisoners cannot demonstrate that they can fend for themselves in conditions more akin to those they will face on the outside. Open conditions offers this opportunity as far as possible. It is the only true testing ground.” [Emphasis added]

43. As the Divisional Court explained in ***Akbar v The Secretary of State for Justice*** [2019] EWHC 3123 (Admin):

“2. Generally, to obtain release from prison, a life prisoner is required to satisfy the Parole Board of England and Wales ("the Parole Board") that he no longer poses more than an acceptable risk to the public. To assist him to do so, and to test him in conditions more approaching those on release, during the course of his custodial sentence he would normally

progress from high security to lower security prisons until, prior to the expiry of his minimum term or tariff, he would hope to be transferred to an open prison where, for example, he can enjoy release on temporary licence ("ROTL"). The Secretary of State has a power, but not an obligation, to transfer him to open conditions if the Parole Board recommends such a transfer." [Emphasis added]

44. Counsel for the defendant attempted to persuade me that I should interpret the passage of the decision as not meaning what it actually says. However, the wording is unambiguous and wrong.
45. Furthermore, the issue of whether or not public confidence is liable to be undermined is contaminated, at least to an extent, by the irrationality of the decision upon whether or not open conditions were essential to inform future decisions.

CONCLUSION

46. In my view, the decision of the defendant cannot stand. Even assuming it to be correct that the defendant enjoyed a particular advantage over the Panel, by way of expertise in risk assessment on the facts of this case, its decision is irremediably flawed for the reasons I have given. It was neither rationally nor adequately reasoned in the context of the material available. This is the case regardless of any perceived differences of approach in the earlier first instance authorities as to, for example, the interpretation of what is meant by the requirement that a transfer must be "essential". It would not, therefore be appropriate for me to make any obiter observations. There are quite enough of those in the other cases. If, as in this case, the process of reasoning behind the decision simply and inexplicably omits all reference to expert evidence in favour of a contrary conclusion then the decision reached is likely, without more, to be fatally undermined.
47. The decision is therefore quashed. In default of agreement, I invite representations as to the appropriate ancillary orders.