



Neutral Citation Number: [2024] EWHC 2370 (Admin)

Case No: AC-2024-BHM-000048

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 26th September 2024

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

Between:

THE KING (on the application of)
SEAN ALLEN

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

Mr Carl Buckley (instructed by **Reece Thomas Watson Solicitors**) for the **Claimant**
Mr Richard Evans (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 11th September 2024

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ TINDAL:**Introduction**

1. This is another judicial review claim relating to the rejection by the Ministry of Justice of a Parole Board recommendation for an indeterminate prisoner to be transferred from a closed to an open prison. (It raises a quite different issue from the highly publicised recent changes to the scheme for the early release on licence into the community of determinate sentence prisoners to ease prison overcrowding). The Claimant, Sean Allen, was convicted of murder in 2007 and his 18-year tariff expires in November 2024. In 2022, the Parole Board recommended his transfer to open conditions as preparation for release. But on 31st July 2023, the Defendant rejected that recommendation, which the Claimant challenges in this claim.
2. So far, this may seem a typical ‘open conditions’ case, but it is relatively unusual:
 - a. Firstly, it was one of the first decisions by the Defendant under the new policy introduced on 17th July 2023 – indeed, one of only three decisions so far on that new (and still current) policy Counsel or I have found. The key provision in the Defendant’s Generic Parole Process Policy Framework (‘GPPPF’) as amended from July 2023 (‘GPPPF 2023’) is paragraph 5.8.2:

“The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board ([to] approve an [Indeterminate Sentence Prisoner i.e.] ISP for open conditions) only where: [i] the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm...; and [ii] the prisoner is assessed as low risk of abscond; and [iii] there is a wholly persuasive case for transferring the ISP from closed to open conditions.”

(I add Roman numerals for clarity). The statutory Directions to the Parole Board amended on 1st August 2023 only permit it to recommend transfer to open conditions where it is satisfied criteria [i] and [ii] are met, therefore [iii] - the ‘wholly persuasive case criterion’ - is for the Defendant alone.
 - b. Secondly, whilst the Defendant made the challenged decision under GPPPF 2023, the Parole Board’s recommendation had been under its 2022 statutory Directions which had criterion [ii] (the ‘absconding criterion’) with criteria [i] (the ‘sufficient progress criterion’) as a background factor only. The other mandatory criterion in the 2022 Directions was: ‘*a period in open conditions is considered essential to inform future decisions about release...*’ (‘the essential criterion’). The Defendant’s 2022 version of the GPPPF (‘GPPPF 2022’) had the ‘absconding’ and ‘essential’ criteria and a third criterion the Parole Board did not consider, deleted in July 2023: ‘*transfer to open conditions would not undermine public confidence in the Criminal Justice System*’ (the ‘public confidence criterion’). So, this case also considers ‘transitional mismatch’ between the GPPPF and Parole Board Directions.
 - c. Thirdly, this case raises an apparently new point I have only seen in passing in one other case in the many on ‘open conditions’: ‘internal disagreement’: where different Ministry of Justice officials reach different conclusions on transfer and the impact on the rationality of and reasons for the decision.

3. ‘Many’ other cases on open conditions is an under-statement. This judgment was handed down on 26th September 2024. In a judgment handed down only on 30th July 2024, *R(Carrigan) v SSJ* [2024] EWHC 1940 (Admin), Fordham J said at [5]:

“I have in the present case had the following portfolio of cases to consider. *R(Banfield) v SSJ* [2007] EWHC 2605 (Admin) (10.10.07, Jackson J); *R(Hindawi) v SSJ* [2011] EWHC 830 (Admin) (1.4.11, DC); *R(Adetoro) v SSJ* [2012] EWHC 2576 (Admin) (26.9.12, HHJ Gilbert QC); *R(Wilmot) v SSJ* [2012] EWHC 3139 (Admin) (9.11.12, King J); *R(Gilbert) v SSJ* [2015] EWCA Civ 802 (23.7.15, CA); *R(Kumar) v SSJ* [2019] 4 WLR 47 (28.2.19, Andrews J); *R(John) v SSJ* [2021] EWHC 1606 (Admin) (14.6.21, Heather Williams QC); *R(Stephens) v SSJ* [2021] EWHC 3257 (Admin) (2.12.21, Whipple J); *R(Oakley No.1) v SSJ* [2023] 1 WLR 751 (17.10.22, Chamberlain J); *R(Wynne) v SSJ* [2023] EWHC 1111 (Admin) (11.5.23, Steyn J); *R(Green) v SSJ* [2023] EWHC 1211 (Admin) (22.5.23, Sir Ross Cranston); *R(Zenshen) v SSJ* [2023] EWHC 2279 (Admin) (15.9.23, Dexter Dias KC); *R(McKoy) v SSJ* [2023] EWHC 3047 (Admin) (1.12.23, UTJ Elizabeth Cooke); *R(Overton) v SSJ* [2023] EWHC 3071 (Admin) (7.12.23, Eyre J); *R(Sneddon) v SSJ* [2024] 1 WLR 1894 (21.12.23); *R(Oakley No.2) v SSJ* [2024] EWHC 292 (Admin) (14.2.24, HHJ Keyser KC); *R(Cain) v SSJ* [2024] EWHC 426 (Admin) (29.2.24, Calver J); *R(Uddin) v SSJ* [2024] EWHC 696 (Admin) (27.3.24, HHJ Walden-Smith); and *R(McPhee) v SSJ* [2024] EWHC 1247 (Admin) (23.5.24, HHJ Keyser KC). I can also add these two more recent cases: *R(Valentine) v SSJ* [2024] EWHC 1534 (Admin) (20.6.24, HHJ Carmel Wall); and *R(Hahn) v SSJ* [2024] EWHC 1559 (Admin) (24.6.24, Eyre J). In recent cases this Court has been made aware of the fact that appeals in *Sneddon* and *Oakley (No.2)* mean those cases are heading for authoritative resolution at higher judicial altitude.”

4. ‘Open conditions transfer’ is one of the hottest topics in contemporary Public Law, (as discussed in: Gabriel Tan and Lewis Graham: A Quiet Revolution – Rationality and the Parole Board – UK Constitutional Law Association). But even the list in *R(Carrigan)* does not include every case, such as one decided the day before it: *R(Draper) v SSJ* [2024] EWHC 1892 (Admin) where Turner J at [30]-[32] expressed concern that the rapid succession of cases, sometimes only days apart created difficulties. So, he followed *R(Hahn)* as the then-most recent case which had considered all the authorities, in the hope for clarity from the Court of Appeal in *R(Sneddon)* and *R(Oakley No.2)*, which is listed for next month - October 2024, (in which Mr Buckley for the Claimant before me appears). Helpfully, in this case, Mr Evans for the Defendant supplemented the nine propositions Turner J stated in *R(Draper)* (derived from Eyre J’s judgment in *R(Hahn)* in turn quoting extensively from his own judgment in *R(Overton)*) by linking them to the other leading authorities in the field. This is an effective way of bringing together all the key points from all the authorities irrespective of the version of GPPPF applying. After all, I cannot just apply *R(Draper)*, as GPPPF 2023 which applies in this case is markedly different than GPPPF 2022 which applied in *R(Draper)*, *R(Hahn)* and *R(Overton)* amongst other cases; and indeed GPPPF 2021 applying in *R(Sneddon)* and *R(Oakley)* amongst other cases. So, whilst the Court of Appeal judgment in the latter cases will be invaluable, Mr Buckley accepts it may not necessarily address those three unusual features here: the effect of GPPPF 2023, ‘transitional mismatch’ between Parole Board and Defendant; and ‘internal disagreement’ within the latter.

5. Pending Court of Appeal guidance - at ‘higher judicial altitude’ as Fordham J put it in *R(Carrigan)* - given the volume of guidance from him and so many other High Court Public Law luminaries, at my own ‘altitude’ down at the Administrative Court’s ‘base-camp’, in addition to the assistance of Counsel with submissions of the highest quality, I have found it helpful to keep focus on three practical things:
- a. Firstly, as Eyre J said in *R(Hahn)*, which Parole Board Directions apply to its decision and which version of the GPPPF applies to the Defendant’s decision are important. Building on analyses of Eyre J in *R(Hahn)* and Fordham J in *R(Sneddon)*, I will summarise their ‘genealogy’: the crucial changes under Parole Board Directions and the GPPPF and predecessors since 2012 and the cases in Fordham J’s list in *R(Carrigan)* relevant to each. That will guide me to which authorities are of relevance here to the Defendant’s decision under the 2023 GPPPF rejecting the Parole Board’s recommendation (or to use the concept in statute - s.239(2) Criminal Justice Act 2003 - its ‘advice’) decided under the Parole Board’s 2022 Directions.
 - b. Secondly, the difficulty with the sheer volume and pace of the case-law in this field is that inevitably, some get missed. Even Fordham J’s invaluable review of the authorities in *R(Carrigan)* understandably did not include *R(Draper)* the day before, or *R(O’Dell) v SSJ* [2023] EWHC 899, a decision of HHJ Wall from April 2023, which does not appear on *Westlaw* or *BAILII* but was cited to me, as was *R(Swellings) v SSJ* [2024] EWHC 771 (Admin) from HHJ Simon in April 2024 (for fear of parochialism, the latter both Birmingham cases). Indeed, *R(O’Dell)* was not cited in but is relevant to Fordham J’s analysis of *R(Kumar)* in *R(Sneddon)*; itself argued on 7th December 2023: the day Eyre J handed down his judgment in *R(Overton)*, so understandably neither cited the other. This perhaps explains why in other cases, Counsel have cited them as rival authorities when in fact, as Eyre J explained in *R(Hahn)*, they related to different versions of the GPPPF. Furthermore, *R(Hahn)*, *R(Overton)* and indeed *R(Swellings)* illustrate how rationality and reasons challenges can overlap, as they do in the present case.
 - c. Thirdly, as Chamberlain J said in *R(Oakley No.1)* at [51]: ‘*it is important to identify with precision the conclusions or propositions with which the Secretary of State disagrees*’. I have underlined that phrase because this applies not just to individual Parole Board propositions or findings e.g. ‘findings of fact’ and ‘evaluations of risk’. In *R(Oakley No.1)*, in what Tan and Graham in their article call ‘a quiet revolution’, Chamberlain J rejected that binary distinction in the expertise of the Parole Board and Defendant in favour of a general one between issues on which the Parole Board does or does not enjoy a ‘particular advantage’ over the Defendant, which I discuss by reference to Turner J’s summary in *R(Draper)*. I will try to link that to the particular policy criteria being applied, especially under GPPPF 2023 and the ‘wholly persuasive case’ criterion central on which the Parole Board expresses no view. That is the position in this present case, so the ‘wholly persuasive case’ criterion is crucial, as it was in another case on GPPPF 2023, *R(Valentine)* (but it was not in the other case on it *R(Williams)*).

In this judgment, after setting out the factual background and details of the relevant decisions, followed by the law (including the statutory framework,

policy iterations, principles in the authorities, ‘internal disagreement’ and ‘wholly persuasive case’) I will turn to my conclusions and finally a postscript.

Factual Background and Decisions

6. The Claimant was born on 1st June 1987 and is now aged 37. In June 2006, when he had just turned 19 years old, he had only one very minor previous conviction from 2002 (although admitted to the Parole Board he had been involved in other anti-social behaviour when a youth). However, on 18th June 1996, he and two others murdered a man in a revenge attack after what the sentencing judge, HHJ Hawkins QC, called a ‘trivial incident’ between the victim and one of their mothers. The Claimant and the others armed themselves with a knife and a large block of wood and stabbed the victim repeatedly. The Parole Board in November 2022 found that the triggers to that offence were the Claimant’s immaturity, peer group influence, ego and pride; and deficits in thinking due to alcohol. The Claimant told them that he had been ‘very drunk’ and ‘young and stupid’ and expressed remorse. However, at the time, he had a trial and on 23rd October 2007, the Claimant and the other defendants were convicted of murder and all were sentenced to life imprisonment with a tariff of 18 years, which after a year spent on remand, expires on 15th November 2024. HHJ Hawkins QC quite rightly told the Claimant that:

“This does not mean you will be released [*probably*: at that time]. You would only be released if the Parole Board thought it safe to release you.”

7. The Claimant has had a chequered history in prison. Because of his age, he was initially in custody in the Young Offender Institution HMPYOI Feltham before moving to HMP Swaleside and then HMP Coldingley. He has accumulated about 30 proven adjudications, including disruptive, disobedient and abusive behaviour to officers, possession of prohibited items (from games consoles to mobile phones and tobacco and he also took drugs). He admitted to the Parole Board that he had illicitly kept mobiles to speak to his family. In 2017 and again in 2019, he assaulted prison officers and after the latter incident at HMP Coldingley, he was placed in solitary confinement. That incident also prompted his move to his current location HMP Onley, by which time he was a Category C prisoner – the lowest closed category. In 2020 he was aggressive and in July 2021 his last adjudication was for cutting speaker wires. He was also accused of threatening a prison officer in August 2022, but the Parole Board in November 2022 made no finding about that and attached little weight to it. The Defendant has not relied on it and I say no more about it. On the other hand, the Claimant successfully undertook a range of courses related to his offending, including Enhanced Thinking Skills, victim awareness and conflict management. He was also elevated to ‘Enhanced’ status at HMP Onley in 2020 (albeit not long after the aggression incident and before he cut the speaker wires). The Claimant undertook further one-to-one work on his attitude to prison staff with his Prison Offender Manager (‘POM’) during 2021 which he completed. The Parole Board noted wing staff had since noted a positive change in behaviour.
8. In 2022, the Defendant referred the Claimant’s case to the Parole Board for a pre-tariff review. Under paragraph 5.4.1 GPPPF, the Defendant will only do so ‘where there is a reasonable prospect of the Board making a positive recommendation’ of transfer to open conditions in preparation for potential release by the Parole Board. This doubtless reflected it was an evenly-balanced question, as indeed the decision-

maker, Ms Julia Whyte, the Head of Parole-Eligible Casework, later acknowledged in declining the Parole Board's recommendation, disagreeing with a colleague.

9. Indeed, the Claimant's transfer appears to have been evenly-balanced for the Parole Board as well, at least initially. On 23rd May 2022, at a remote hearing, the panel heard from the Claimant, his lawyer and his Prison Offender Manager ('POM'), who supported open conditions. However, the panel adjourned the hearing, noting the POM had only conducted limited analysis of the Claimant's motivations for the offence or risk factors and directed an updated report from the POM; the attendance of a Community Offender Manager ('COM') even though not strictly required as the Claimant was pre-tariff; and a risk assessment and report from a psychologist.
10. In his risk assessment report dated 30th August 2022, the psychologist specifically addressed the then-new criteria in the Parole Board's Directions 2022:

"7.7 When considering Mr Allen's abscond risk, I have reviewed the push and pull factors associated with absconds from open conditions and conclude [he] is not at an increased risk of absconding in open conditions.

7.8. With the new open test, I have reviewed whether a progressive move to open conditions would be essential for Mr Allen. Whilst not making a comment on whether it is essential for Mr Allen to progress to open conditions I note that progression to open conditions is his sole progression route given he is pre-tariff. Mr Allen has completed all his core risk reduction work and has appropriately engaged in further treatment work throughout his sentence. Further treatment is unlikely to see a measurable reduction in his future risk of violence. He is an Enhanced IEP status prisoner and progression to open conditions could allow professionals to strengthen aspects of his risk management plan, through RoTLs [release on temporary leave], ahead of his eventual release into the community. The RoTL scheme could help to mitigate future risk whilst allowing Mr Allen to test his communication skills, perspective taking, and emotional control, in new situations whilst maintaining the support of professionals in a custodial environment.

[And in the Executive Summary] In my opinion the treatment Mr Allen has completed to date has been sufficient in addressing the risk factors, and it is unlikely that additional programme work would result in any further risk reduction. He should continue to seek support from professionals to consolidate his learning from the Enhanced Thinking Skills (ETS) programme through engagement with his Prison Offender Manager (POM), chaplain, and the Belong charity [his mentor]."

11. The POM still supported transfer in her report dated 22nd September 2022, which assessed the statistical risk as low of violent and non-violent re-offending:

"It is my assessment as noted within my previous reports that Mr Allen is ready for a move to open conditions. In my assessment there is no further core risk reduction work for him to complete in closed conditions. I have discussed open prisons with Mr Allen, and he would like to be close to family to work on rebuilding family ties after a long time in custody and access an establishment he can achieve the education, training and employment (ETE) goals he has set for himself...Regarding abscond risk I

assess this to be low. Mr Allen has attended various hospital appointments and no behavioural concerns have been raised. I have no evidence at this time to suggest he is at risk of abscond....

In my assessment given..Mr Allen has been in custody from a young age a move to open conditions is necessary prior to release for him to be tested in a less restrictive environment and for Mr Allen to further evidence use of learning and skills to effectively manage his risk. Time in open conditions will provide an opportunity to monitor Mr Allen in an environment where he can test and evidence his internal and external protective factors....”

The Claimant’s mentor also strongly supported his transfer to open conditions:

“Sean has made such noticeable progress, he’s clearly matured a lot and has a real and true understanding of the impact of his index offence. Sean has clear focus and knows the consequences of his actions which helps him manage his emotions well under some very testing circumstances.”

12. The Parole Board, under the same Chair, convened at another remote hearing on 20th October 2022, with the POM, a COM and the Psychologist, along with the Claimant and lawyer. Having discussed the index offence as related to immaturity, peer pressure, ego and alcohol, the Panel noted the professionals’ support for open conditions, both in analysis of his present evidence of change and of his future risk:

“2.10 The POM had worked with Mr Allen from November 2020, and she identified some changes, including a more positive attitude, development of good insight into his thinking, behaviours, and the impact of them; no longer being easily influenced and led, but being more mature and assertive; improved engagement with the regime; good reports from work; and behavioural compliance. She noted he can still struggle when he perceives staff inconsistency, or... does not believe the rules or procedures are being properly applied and whilst he can still express frustrations, he is better able to address his concerns through appropriately assertive communication.

2.11 The psychologist noted that there had been a stepping-down of anti-authority behaviours (with much less frequent ‘push-backs’); increasing maturity; and that he had become more assertive.

2.12 Having been in custody for around 16 years...Mr Allen is somewhat institutionalised..[F]ollowing the death of his grandfather [h]e had utilised support from his keyworker, POM, and the Chaplaincy; and his behaviour had not deteriorated during that difficult period.

2.13 Professionals identify a reduction in risk through the completion of interventions; evidence of pro-social engagement in the regime; positive peer, and increasingly positive and more mature professional relationships; no recent aggressive or violent conduct; and no substantiated indications of involvement with alcohol; or recent misuse of drugs (he admits he has misused cannabis [in prison], but last did so more than 12 months [ago]...

3.2 Professionals recognise that he has come to view himself as increasingly prosocial, and professionals now identify him as behaviourally compliant.

3.3 From their reports...and evidence at the hearing...the psychologist and both the prison and community offender managers identified that a gradual

approach to release should be taken through open conditions. This was to enable testing, consolidation of skills, manageability and compliance, the development of a resettlement plan and re-establishing family/pro-social relationships, and to test the risk management plan.”

13. In its report of 1st November 2022, the panel agreed with the professionals’ assessments and addressed not the 2022 Directions ‘absconding’ and essential’ criteria, but also the ‘sufficient progress’ factor and reached these conclusions:

“3.5 Mr Allen has support in the community from family members. He is keen to demonstrate to his mother and other family members that he has changed....[A]side from his grandparents Mr Allen has no cause to return to the London area and risk meeting criminal associates from his past....

3.8 Because of the nature of the index offending, and the lack of testing of the associated relevant risk factors, the panel identifies that Mr Allen poses a risk. The panel also accepts that serious offending could occur, but was unlikely to be imminent. The panel was persuaded by the evidence of the need for testing outside closed prison conditions.

3.9...[Mr Allen] is assessed by Probation as a low risk of serious recidivism (RSR) [and] medium risk of serious harm to the public. The panel considers these assessments reflect his (very limited) offending history, and his identified risk factors. Consequently the panel accepted these assessments..

4.2 Mr Allen is still pre-tariff, and will not be eligible to be released before 15 November 2024. The panel carefully considered the evidence offered by Mr Allen, and the evidence from the psychologist, the POM, and the COM. The panel was persuaded by the progress made, and the need for Mr Allen to undertake some testing, in custody, in less secure conditions.

4.3 The panel recognises Mr Allen’s improved general behavioural compliance, but is concerned that he needs to be tested; and to ensure that the identified risk factors are known and understood; and that other risk factors do not emerge.....

4.4.3.1 Each of the professional witnesses gave evidence...that, a period in open conditions was essential....to inform future decisions about release. All were of the opinion release...could not be supported until Mr Allen had provided evidence from testing within an environment of lesser security and greater responsibility and freedom including periods within the community, showing he could apply learning and skills, in a less restricted environment.

4.4.3.3.....[I]f Mr Allen was directly released without a period within open prison conditions he could be overwhelmed, and experience difficulties in coping. The professional witnesses agreed from his perspective, a successful period in open conditions was essential as precursor to release.

4.4.3.4 The panel reached the clear conclusion from the evidence of the professionals and Mr Allen that, a period in open conditions was essential to enable the professionals to develop a sustainable risk management plan capable of supporting his release. The panel also concluded that a period in open was essential to provide Mr Allen with the experience of being in the

community, with the safety and support of open prison conditions, in order for him to build a sound and sustainable plan for release.

4.4.3.5 After careful analysis the panel reached the clear conclusion that Mr Allen has made sufficient progress in addressing his risk and reducing it sufficiently to protect the public from harm in circumstances where he may be released into the community unsupervised on temporary licence.....

The panel further concluded from the clear evidence in the case that a period in open conditions was essential both in order to provide the professionals with evidence that they need to best inform the risk management plan before he can be released, and to enable Mr Allen to prepare himself for release. The panel was satisfied that Mr Allen presents a minimal risk of absconding if he were transferred into open conditions....

4.5 The panel identified that by his behavioural compliance and the completion of appropriate accredited and non-accredited interventions, Mr Allen had demonstrated sufficient reduction in risk; and that he was likely to comply in conditions of lesser security. The panel identified that there were clear needs and benefits from a public protection perspective of him being tested in open prison conditions. This would enable risk factors to be confirmed and tested; and would enable any concerns around alcohol or drugs, behaviours and thinking skills to be tested in conditions of lesser security and lower supervision. There are also personal benefits from such testing, a gradual transition to the community, and the building of family ties and a pro-social network.

4.6 Consequently, the panel now assess that Mr Allen's risks are such that a progressive move to open prison conditions is appropriate. This will enable him to develop pro-social networks, build and test family relationships, test temptation from alcohol (and drugs), test compliance and manageability, and the effectiveness of the risk management plan. **The panel recommends to the Secretary of State that Mr Allen progresses to open prison conditions.**" (Original bold).

14. After the Parole Board's recommendation, the COM (whom I need not name and who had been present but not quoted at the panel hearing) on 15th November 2022 answered the Defendant's additional questions on its 'proforma' document. She stated the only further offending behaviour work would take place with the Claimant's mentor and could be provided in closed or open conditions, that no work or assessment remained that required closed conditions, nor any other outstanding targets. She suggested that if it was decided the Claimant remain in closed conditions, he should be reviewed after 12 months. But if the Claimant did progress to open conditions, his mentor should remain the same.
15. In accordance with the Defendant's practice, a Ministry of Justice case manager (whom I need not name) on 30th November 2022 (at a time when the GPPPF 2022 was still in force with its 'absconding', 'essential' and 'public confidence' criteria) summarised the Parole Board's recommendation and summarised the evidence before it and its conclusion in the 'proforma'. She also noted under 'public confidence' (which the Parole Board correctly did not consider) that an internet search revealed only coverage at the time and the POM noted no media concerns. The case manager encapsulated the professionals' joint view on open conditions:

“From their reports prior to the hearing and their evidence at [it]. it was evident that the witnesses identified that a gradual approach to release should be taken through open conditions. This was to enable testing, consolidation of skills, manageability and compliance, the development of a resettlement plan and re-establishing family/pro-social relationships, and to test the risk management plan.”

16. According to the statement of Ms Julia Whyte, the Defendant’s now Head of Parole-Eligible Casework and then Head of Reconsideration and Specialist Casework whose decision is under challenge, a backlog of cases caused a delay of several months before the proforma was considered by a more senior manager, Daniel Bainbridge on 20th July 2023. In a comprehensive analysis, he agreed with the Parole Board’s recommendation for the Claimant’s transfer to open conditions. Having set out the background, he applied the new GPPPF 2023 test: the ‘sufficient progress’, ‘absconding’ and ‘wholly persuasive case’ criteria and found them all satisfied. I need only quote his reasons for the third (original bold):

“Criteria 3: there is a wholly persuasive case for transferring the ISP from closed to open conditions.

Mr Allen has been in custody since the age of 19 and has done most of his growing up and emotional development in custody. He has completed all core risk reduction work that is considered necessary to manage his risk. There are no behavioural concerns, and he is enhanced on the IEP scheme. Mr Allen has support in the community from family members. He is keen to demonstrate to his mother and other family members that he has changed.

All professionals feel that a period in open is essential to inform future decision on release. It would also allow development of a robust risk management plan and work towards release. The panel considered that were Mr Allen to be released without a period within open prison conditions he could be overwhelmed and experience difficulties in coping. The professional witnesses agreed that a successful period in open conditions was essential as a precursor to release.

Mr Allen’s tariff expires in November 2024, meaning that should he transfer to open conditions, he would have approximately 16 months to demonstrate continued compliance with the regime, evidence the skills he has learned in a less secure environment, develop relationships with professionals and test personal relationships under temporary licence. He has been in custody for a significant period of his life and a gradual integration would be of benefit to him. From the information available to me, I am content that there is a wholly persuasive case for transferring Mr Allen to open conditions at this stage.

Summary

Having reviewed the information available to me, for the reasons set out above, I am satisfied that the test for open conditions has been met. Therefore, I recommend that the Parole Board’s recommendation to transfer Mr Allen is accepted.”

17. However, on 24th July 2023, Mr Bainbridge’s own senior manager, Ms Whyte, disagreed. Having noted that the new GPPPF 2023 test applied (the same test as

applied by Mr Bainbridge), Ms Whyte accepted that the ‘sufficient progress’ and ‘absconding’ criteria were satisfied. In doing so, she noted that:

“Mr Allen has worked positively with a mentor and will continue to do so throughout his sentence. He has evidenced developing maturity and has been increasingly settled and compliant over recent years.

Despite having completed interventions, in 2017 Mr Allen assaulted an instructor by ‘pushing him back’ and in 2019 he was adjudicated for assaulting a prison officer. The one-to-one work completed in 2021 was aimed at addressing this behaviour and reports state that he has evidenced developing maturity and has been increasingly settled and compliant over recent years. Report writers evidence a reduction in risk through ‘the completion of interventions, evidence of pro-social engagement in the regime, positive peer and increasingly positive more mature professional relationships, no recent aggressive or violent conduct and no substantiated indications of involvement with alcohol or recent misuse of drugs.

I agree that the [‘sufficient progress’] criteria has been met, as Mr Allen has evidenced progress in addressing and reducing risk, specifically, in the last couple of years. However, it is noted that there were still risk-related concerns after he had completed the majority of interventions.

There is no information to suggest that Mr Allen poses a risk of abscond and therefore, I agree that this criteria has been met.”

However, Ms Whyte went on to disagree with Mr Bainbridge on the ‘wholly persuasive case’ criterion, in this analysis repeated in full in the decision-letter:

“The decision details that throughout Mr Allen’s sentence, he has accrued 30 proven adjudications and a significant volume of concerning intelligence, particularly relating to involvement with drugs and negative attitude to prison staff. His last adjudication was in July 2021 for cutting his television speaker wires. He admitted to the panel that he has had three mobile phones throughout his sentence. Positively, he achieved Enhanced Status on the IEP scheme in May 2020.

The COM noted that he can still struggle when he perceives staff inconsistency, or when he does not believe the rules or procedures are being properly applied and, whilst he can still express frustrations, he is better able to address his concerns through appropriately assertive communication. The psychologist noted that there had been a stepping-down of anti-authority behaviours (with much less frequent ‘push-backs’); increasing maturity; and that he had become more assertive. This demonstrates positive progress and would indicate that the engagement with his mentor continues to help him.

Mr Allen is pre-tariff, with his tariff expiring in November 2024. He has been in custody since he was 19 years old and there is the potential that he has become institutionalised. In my assessment, whilst he is pre-tariff, he can continue to develop his emotional management and coping skills whilst in the security of closed conditions. He should evidence a further period whereby he can comply with the prison regime and rules, instances of emotional management, asking for support and positive custodial behaviour.

I agree that given the length of time Mr Allen has spent in custody, a gradual reintegration into the community would be beneficial to him. However, based on the rationale above, I do not conclude that there is a wholly persuasive case for transferring Mr Allen to open conditions at this stage.”

18. Nevertheless, Ms Whyte preferred to canvas the view of an even more senior civil servant, Gordon Davison, the Defendant’s Public Protection Group Director (who in the GPPPF is the responsible decision-maker for recategorisation of Category A prisoners). In an email dated 24th July 2023, Ms Whyte noted that she and Mr Bainbridge were applying the brand-new GPPPF 2023 criteria and said this:

“Ordinarily, a rejection would not be sent to you as I have been delegated to make that decision. However, as we are early into the process, I wanted to run this case by you as, having discussed it with Ian [Ian York, the Head of Public Protection Casework Section], I have disagreed with Daniel’s recommendation and have concluded that we should reject the Parole Board’s recommendation for the reasons outlined in the proforma. I would like to check you are content with this decision before the letter is issued.”

In response to that apparently clear email, Mr Davison asked for a copy of the proforma and then at 9.11am on 26th July, he gave an apparently clear answer:

“Thank you, Julia. This is one of the more clearcut cases, with strong evidence that Mr Allen’s risk has reduced to a level commensurate with being held in open conditions and that his risk of abscond is low. I see nothing which might lead me to question whether there is a wholly persuasive case for transferring Mr Allen to open conditions. I approve the Board’s recommendations. Regards, Gordon.”

However, Ms Whyte did not take no for an answer and responded at 9.21 am:

“Apologies, I just want to double check so I can advise the case manager in drafting the decision letter. Having discussed this case with Ian, I had recommended it was rejected based on there not being a wholly persuasive case, whereas Daniel had recommended it was accepted. I found this to be finely-balanced case but based my decision on the number of adjudications (last one in 2021), him being pre-tariff and the COM confirming he still struggles with boundaries and managing frustrations. Apologies if you had considered all of this already, I just wanted to make sure. Thanks, Julia.”

Just over half-an-hour later at 9.57 am, Mr Davison performed a *volte-face*:

“I think I must have replied to the wrong case ! Sorry, I have just re-read the analysis and I can see that his passage has been difficult and he is pre-tariff. I agree that we should reject the Board’s recommendation....”

19. On 31st July 2023, the decision letter (‘the Decision’) was sent out, which I quote in part in my conclusions. It was prepared by the case manager using Ms Whyte’s reasoning. The Decision summarised the background facts and the Parole Board’s recommendation and the law (to which I turn in a moment) and noted the positive progress by the Claimant completing courses and in recent years showing greater maturity and compliance and achieving Enhanced status. However, the Decision stated the ‘wholly persuasive case’ criterion was not met, for Ms Whyte’s reasons on that criterion in the proforma I have quoted above and concluded by informing

the Claimant that it was necessary for him to remain in closed conditions and work towards evidencing a reduction in risk in preparation for a parole review in 2024, with a view to a hearing in November 2024 when his tariff actually expires. (I am told that his case was referred to the Parole Board in April 2024, who made directions in July 2024, but a decision as to hearing is currently awaited).

20. After the decision in July 2023, the Claimant's solicitors sent a letter before claim in October 2023 (pre-dating the decisions in *R(Sneddon)* and *R(Overton)*, let alone the 2024 cases, whether on GPPPF 2022 or GPPPF 2023). It set out the (then) legal principles in cases like *R(Banfield)* and *R(Oakley No.1)* etc and stated:

“In terms of the decision in principle, issues of re-categorisation are for the Defendant, and therefore, the decision is one that is open to it to make. However, simply because the decision is one that can be made, that decision must still be justified and reasoned so that it is reasonable. The position in my opinion is a clear ‘unreasonable departure’ from the decision of the Parole Board and is therefore irrational.”

As the three-month deadline in CPR 54.4 was close, the Claimant's solicitors issued this claim on 20th October 2023. In the Statement of Facts and Grounds drafted by Mr Buckley who appears for the Claimant, the only ground of challenge is irrationality, but in terms overlapping with insufficient reasons:

“The established line of authority is clear....the Defendant does not have to follow the recommendation, it can take any decision it wants to take, but that does not mean that [it] is not obligated to justify why it is departing from the recommendation. It is on this point that the Defendant has failed in that no justification has been provided, the Defendant has entirely failed to engage with the decision of the Parole Board and say why there is a divergence of position, over and above listing certain facts and certain findings made. For the impugned decision to stand, it is submitted that there must be a relevant level of justification given as to why that different conclusion has been reached, and justification as to why the findings of the Parole Board have been rejected. It is submitted to not be enough to simply find that they have been so rejected, particularly where the Defendant accepts, seemingly in principle that “*given the length of time you have spent in custody, a gradual reintegration into the community would be beneficial to you.*” Further...the Defendant has not rejected the recommendation on the basis of the first criterion and therefore, this is deemed to have been satisfied: ‘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’. Accordingly, the impugned decision is not one that has been taken on the basis of risk and its manageability within the Open Estate..... In sum, the Defendant has failed to articulate why, with sufficient clarity, the decision of the Parole Board has been rejected.”

The Summary Grounds of Defence of 15th November 2023 are in similar terms to its Detailed Grounds of 24th May 2024, neither drafted by Mr Evans, (the latter with a statement from Ms Whyte). Each Defence made three points. Firstly, the Decision accepted the Parole Board's findings of fact but disagreed on the ‘wholly persuasive case’ criterion the Board correctly did not consider. Secondly,

the Decision adequately justified any departure from the Parole Board's decision. Thirdly, the Claimant's criticisms of the Decision were simply disagreement with it. Despite that, on 23rd April 2024 HHJ Rawlings granted permission on the basis: 'It is arguable the Defendant has given insufficient reasons for departing from the Parole Board's recommendation'. Counsel agree that there is a substantial overlap between rationality and reasons in the law in this field, to which I now turn.

Law

Stable Statute: The Legislative Framework

21. For Life Sentence prisoners like the Claimant, Parliament has differentiated responsibility between the decision on release on licence and transfer to open conditions, even though the Parole Board is involved in both. After the tariff set by the sentencing judge has expired, whether to release a Life Sentence prisoner on licence lies with the Parole Board under s.28(5) Crime (Sentences) Act 1997:

“As soon as— (a) a life prisoner to whom this section applies has served the relevant part of his sentence [i.e. the tariff]; and (b) **the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.**” (my bold)

By contrast, the respective roles of Parole Board and Secretary of State with re-categorisation of Life Sentence prisoners is quite different, as illustrated by s.239 Criminal Justice Act 2003 ('CJA') (my bold):

“(1) The Parole Board is...a body corporate and as such is...(b) to have the functions conferred on it by this Chapter in respect of fixed-term prisoners and by [s.28] of the [1997 Act] in respect of life prisoners....

(2) It is the duty of the Board to **advise** the Secretary of State with respect to any matter referred to it by him which is **to do with the early release or recall of prisoners...**

(6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under [s.28] 1997 Act; and in giving any such directions the Secretary of State must have regard to— (a) the need to protect the public from serious harm from offenders, and (b) the desirability of preventing the commission by them of further offences and securing their rehabilitation.”

So, whilst the Defendant under s.28 of the 1997 Act *must* release a Life Prisoner if the Parole Board directs it, under s.239(2) CJA 2003, the Parole Board only *advises* the Defendant on 'matters to do with early release of Life Prisoners', which includes re-categorisation from closed to open prison conditions before release.

22. It has always been the Secretary of State, now the Justice Secretary and their officials, who *decides* in which 'category' any prisoner is placed. s.12(2) Prison Act 1952 states prisoners: 'shall be committed to such prisons as the Secretary of State may from time to time direct' and Rule 7 of the Prison Rules 1999 states:

“[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 [for] convicted prisoners, furthering the purpose of their training and treatment.”

As Ms Whyte explains in her statement, there are four categories of prison for adult male prisoners in descending order of security: A, B, C and D. Categories A-C are ‘closed’ prisons without (at least supervised) access to the community. By contrast, Category D ‘open prisons’ enable prisoners, subject to proof of suitably sufficient reduction of risk, to be eligible for time in the community (Release on Temporary Licence or ‘ROTL’) in preparation for release on licence.

Changing Policy: Secretary of State Policies and Directions 2012-2023

23. Rule 7 Prison Rules only sets out a broad discretion with specific considerations the Secretary of State should take into account in making categorisation decisions. Therefore, successive Ministers have promulgated different policies. There is no ‘duty to have a policy’ in respect of a statutory discretion, as Lewis LJ explained at [58]-[65] of *R(Northumbrian Water Ltd) v Water Services Regulation Authority* [2024] EWCA Civ 842. However, if a public authority does choose to have a policy, it can give rise to challenges to individual decisions (e.g. for failing to follow policy without good reason), or to the policy itself as unlawful, as Lords Sales and Burnett said in *R(A) v SSHD* [2021] 1 WLR 393 (SC) at [2]-[4]. As they explained, policies give guidance to decision-makers to ensure consistency and to provide standards against which decisions can be judged.

24. *R(Gilbert)* is as yet the only Court of Appeal decision on transfer to open conditions. It also addressed ‘transitional mismatch’. The Defendant’s parole policy (‘PSI 36/2012’) changed in 2012, replacing those considered in *R(Banfield)* in 2007, *R(Hindawi)* in 2011 and *R(Adetoro)* and *R(Wilmot)* in 2012. The Defendant’s 2004 statutory Directions to the Parole Board under s.239(6) CJA set out a list of factors Parole Board had to take into account in making its recommendation, including ‘*the extent to which the prisoner has made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where in open conditions he may be in the community unsupervised*’ (the genesis of the current ‘sufficient progress’ criterion in GPPPF 2023). The ancestor of the Defendant’s current policy was PSI 36/2012 para 6.5:

“The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are: [either] the panel's decision is inaccurate [or] the panel have acted irrationally, for example by recommending transfer to open conditions when most of the reports and especially the offender manager’s report and psychologist report favour retention in closed conditions.”

25. However, in 2014, the Defendant introduced another policy stating that prisoners who had absconded during their sentence whilst on open conditions were only eligible to return from closed to open conditions ‘in exceptional circumstances’. The Court of Appeal in *R(Gilbert)* held that policy was lawful and consistent with the 2004 Directions. As Sales LJ (as he then was) explained at [52]-[62], the Defendant has the statutory discretion to categorise prisoners, whose only legitimate expectation is that their cases would be decided under whatever (lawful) policy the Defendant applied at the time: (See *Re Findlay* [1985] AC 318 and similarly *R(Odelola) v SSHD* [2009] 1 WLR 1230). Sales LJ said at [62] it was better for the Defendant’s own policy and Directions to ‘march together’, but added at [63]:

“As a general matter, it is not irrational or unfair to expect the Board to comply with Directions issued to it while at the same time the Secretary of State promulgates and follows his own distinct policy as to how he will exercise his own statutory discretion whether to transfer a prisoner to open conditions, taking due account of whatever the Board might say.”

Therefore, if there is a ‘transitional mismatch’ between the iteration of the Directions which the Parole Board applies in recommending open conditions and the version of the policy in force at the time of the Defendant’s decision, it is entirely lawful to apply the latter. That was the approach taken recently on a mismatch between 2022 Parole Board Directions and GPPPF 2023 in *R(Valentine)* and *R(Williams)*. Mr Buckley accepted – indeed submitted - it was correct and I agree.

26. Indeed, since *R(Gilbert)*, the Defendant Secretaries of State have repeatedly changed their own policies and the statutory Directions to the Parole Board. This developing process was traced up to 2021 by Fordham J in *R(Sneddon)* at [6]-[9] and updated to the GPPPF 2022 by Eyre J in *R(Hahn)*, which I very respectfully update.

27. In April 2015, the Defendant issued new Directions to the Parole Board on open conditions that Andrews J (as she then was) summarised in *R(Kumar)* at [39]-[40], in materially similar terms to the 2004 Directions discussed in *R(Gilbert)*. But they did not have the same criteria as the Defendant applied in para. 6.5 PSI 36/2012, which were what might be called ‘threshold failings in the Parole Board’s decision (such as irrationality or inaccuracy)’. In July 2015, the same time as *R(Gilbert)* was decided, the Defendant replaced PSI 36/2012 with PSI 22/2015 that was challenged in *R(Kumar)*. As Andrews J said at [14], the key provision was para 6.4:

“The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are that the panel’s recommendation: *either* goes against the clear recommendations of report writers without providing a sufficient explanation as to why; *or* is based on inaccurate information. The Secretary of State may also reject a Parole Board Recommendation where he does not consider there is a wholly persuasive case for transferring the prisoner to open conditions at this time.”

As Fordham J explained in *R(Sneddon)* at [8] (as augmented by his analysis in *R(Carrigan)* at [46]), para 6.4 PSI 22/2015 did three relevant things. Firstly, it kept the structure of PSI 36/2012 in that the ‘default position’ was that the Defendant would follow the Parole Board’s recommendation except within ‘very limited parameters’. Secondly, it re-wrote the two exceptions in para 6.5 PSI 36/2012: one turned from ‘the panel’s decision is inaccurate’ to ‘the recommendation is based on inaccurate information’; the other turned from ‘the panel have acted irrationally’ ‘for example’ by going against the recommendation of ‘most of the report writers and especially the POM and psychologist’ to the Parole Board went ‘against clear recommendation of the report writers without sufficient explanation why’. Thirdly, this slight tightening of the two existing exceptions was counter-balanced by a new third exception if the Defendant did ‘not consider that there is a wholly persuasive case for transfer to open conditions at this time’. This was the genesis of the criterion in issue in this case and I return to the analysis of it in *R(Kumar)* in February 2019 as it is relevant to interpretation of the ‘wholly persuasive case’ criterion here.

28. In January 2020, PSI 22/2015 was replaced in January 2020 by the first iteration of the Defendant's 'Generic Parole Process Policy Framework' ('GPPPF'), namely 'GPPPF 2020'. However, whilst this may seem like a more significant change than PSI 22/2015 had been to PSI 36/2012 (and doubtless in other respects it was), for present purposes, it changed little. The statutory Directions to the Parole Board applying at this time summarised in *R(Oakley No.1)* at [20]-[21] remained similar to those from 2004 in *R(Gilbert)*. In *R(Stephens)* at [6] and *R(Sneddon)* at [12] they were summarised as 'four tests': 'sufficient progress', likelihood of compliance with temporary release, risk of absconding and benefit of open conditions. The exclusions to the Defendant's requirement to follow a recommendation of the Parole Board at paras.5.8.1 and 5.8.2 GPPPF 2020 were also similar to para. 6.4 PSI 22/2015, save for the deletion of the expression 'very limited parameters'. Materially, it provided as follows:

"5.8.2 PPCS may consider rejecting the Parole Board's recommendation if the following criteria are met: The panel's recommendation goes against the clear recommendation of report writers without providing a sufficient explanation as to why; or, the panel's recommendation is based on inaccurate information.

5.8.3 The Secretary of State may also reject a Parole Board recommendation if it is considered there is not a wholly persuasive case for transferring the prisoner to open conditions at this time."

Cases decided under GPPPF 2020 include *R(Stephens)* decided by Whipple J (as she then was) and *R(John)* decided by Ms Williams QC (as she then was). Deletion of 'very limited parameters', which Fordham J in *R(Sneddon)* at [9] later suggested had not made any difference, was not discussed in *R(Stephens)* or *R(John)* and not suggested to change the test by the Defendant before Steyn J in *R(Wynne)* ([46])

29. In September 2021, a minor change was made in 'GPPPF 2021'. This added a new paragraph 5.8.5 requiring the transfer to open conditions of a Category A prisoner to be decided by the Head of Public Protection Group (following discussion with the Director of the Long-Term High Security Estate). That has not made any difference in any of the relevant cases (nor in this case - but I will return to it in passing on the 'material disagreement' point below). However, as Fordham J confirmed in *R(Sneddon)*, paragraphs 5.8.2 and 5.8.3. of GPPPF 2021 were the same as in GPPPF 2020. So, the position until GPPPF 2021 was amended in July 2022 was broadly the same as it had been since July 2015 under PSI 22/2015. This explains why GPPPF 2021 and indeed *R(Kumar)* featured in many cases on Defendant decisions up to June 2022, including *R(O'Dell)*, *R(Swellings)*, *R(Green)* and *R(Oakley No.1)* (where Chamberlain J quashed the decision which explains why even though the decision was re-made in April 2023, in *R(Oakley No.2)*, HHJ Keyser QC applied GPPPF 2021, not GPPPF 2022). Whilst *R(Sneddon)* itself related to a decision in December 2022, as explained at [5], that itself was a re-made decision from one originally from June 2022 so GPPPF 2021 applied. (It is less clear why it did in *R(McKoy)* for a decision in September 2022, still less *R(McPhee)* for a decision in March 2023). In any event, the most important decisions in this field: *R(Oakley)* and *R(Sneddon)*, under appeal to the Court of Appeal next month, were cases applying a now-superseded policy: GPPPF 2021.

30. From 21st July 2022, the introduction of the amended para. 5.8.2 of ‘GPPPF 2022’ heralded a much more significant change even than the then-new ‘wholly persuasive case’ exception back in 2015. It stated:

“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: [i] the prisoner is assessed as low risk of abscond; **and** [ii] 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** [iii] a transfer to open conditions would not undermine public confidence in the Criminal Justice System.” (my bold).

A month earlier (I take the dates from *R(Draper)* at [12]-[13]), the Defendant issued new statutory Directions to the Parole Board, which innovated by first setting out the test which the Defendant would apply then this test for this Board (applied here):

“2. Before recommending the transfer of an [Indeterminate Sentence Prisoner i.e.] 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 [two] 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.”

31. The Secretary of State’s objective for the June/July 2022 changes was substantially to tighten the criteria for transfers of ISPs to open conditions. Indeed, according to Freedom of Information requests obtained from the Defendant by the Prison Reform Trust (see [Alex Chalk reverses Dominic Raab’s damaging changes to open conditions transfers | Prison Reform Trust](#)), in the first quarter of 2022 under GPPPF 2021, 91% of Parole Board recommendations were accepted by the Defendant, but in the first quarter of 2023 under GPPPF 2022, only 16 % were accepted. This may have reflected three significant changes in the 2022 policies:

- a. Firstly, what Eyre J in *R(Hahn)* at [30] called ‘the default position’ changed - from GPPPF 2021 where the Defendant could only *reject* a Parole Board recommendation for transfer if certain conditions were satisfied; to one in GPPPF 2022 where it could only *accept* it if certain conditions were satisfied - what Fordham J in *R(Carrigan)* at [46] called ‘policy-reorientation’.
- b. Secondly - and due to that - the Defendant’s conditions for rejection changed substantially from what I have called ‘threshold failings’ in the Parole Board decision (inaccurate information, contrary to recommendations, ‘not wholly persuasive’) in GPPPF 2021 to what may be called ‘threshold requirements’ for transfer for both the Parole Board under its 2022 Directions and then the Defendant under GPPPF 2022: the ‘absconding’ and ‘essential’ criteria.
 - i. ‘The absconding criterion’ derives from ‘the absconder policy’ in *R(Gilbert)* which is reflected in the continuing need for ‘exceptional

circumstances’ if there is a previous absconding as there. But the 2022 ‘absconding criterion’ is wider, including evidence of escape attempts and risk of escape as in *R(Zenshen)* under GPPPF 2022.

- ii. ‘The essential criterion’ was explained by Eyre J in *R(Overton)* at [33]-[34] as not simply meaning it would be ‘essential’ for the ISP to be in open conditions at some point, as it was rare for ISPs to be released from closed conditions, so the need for further work was also relevant. In *R(Cain)* at [65], Calver J suggested ‘the essential criterion’ could not be met if the further work could be done just as easily in closed as open conditions. In *R(Carrigan)* at [14]-[30], Fordham J analysed ‘the essential criterion’ as meaning a move to open conditions is essential ‘at this time’. ‘The essential criterion’ was also considered in *R(Draper)* and linked to the approach of Steyn J to ‘no wholly persuasive case’ in *R(Wynne)* - I return to that.
- c. Thirdly, para. 5.8.2 GPPPF 2022 added a third cumulative ‘threshold requirement’ that only the Defendant considered, not the Parole Board – ‘the public confidence’ criterion. The suggestion in *R(Zenshen)* at [79] that ‘it added nothing’ (albeit made after GPPPF 2023 was in force and removed the criterion) has not found favour. In *R(Uddin)* at [52]-[54], HHJ Walden-Smith suggested that ‘public confidence’ was an issue of judgment for the Defendant alone. That is also how Eyre J in *R(Overton)* at [42]-[43] approached it - indeed Mr Buckley (also for the Claimant there) accepted the Parole Board went beyond its remit in even expressing a view about it.

32. From 17th July 2023, para.5.8.3 GPPF 2023 came into force and was applied in this case:

“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: [i] the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm...; and [ii] the prisoner is assessed as low risk of abscond; and [iii] there is a wholly persuasive case for transferring the ISP from closed to open conditions.” (my numerals).

As noted above, the decision in this case on 31st July 2023 was one of the first open condition decisions by the Defendant under GPPPF 2023, between it coming into force on 17th July and the day before the implementation on 1st August 2023 of new statutory Directions to the Parole Board, which stated para 5.8.2 GPPPF 2023 then:

“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. whether the following criteria are met: - 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 presenting a low risk of abscond.

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

In the present case, even though the Parole Board had made its recommendation under the 2022 Directions on the ‘absconding’ and ‘essential’ criteria and so there was what I have called a ‘transitional mismatch’ between its decision criteria and the new policy the Defendant applied, that is perfectly lawful given *R(Gilbert)*. Indeed, Mr Buckley candidly accepted (consistent with the Prison Reform Trust blog) that the 2023 criteria are rather less strict than the 2022 ones. The ‘absconding criteria’ is the same and in *R(Williams)*, Mr Mercer KC went back to *R(Gilbert)* in analysing it, albeit not concerned with ‘exceptional circumstances’. *R(Valentine)* is closer to this case and considers the return of the ‘wholly persuasive case’ criterion I consider below. Those seem to be the only other two cases so far on GPPPF 2023.

33. The shifting sands of Defendant policy on rejecting Parole Board recommendations on transfer of ISPs to open conditions bring into particularly sharp focus the volume and pace of first-instance decisions in this field, with one case taking one approach and another case another day taking another, as Turner J said in *R(Draper)* at [29]-[30] (as indeed he did from Fordham J in *R(Carrigan)* the following day). Indeed, analysing the change from GPPPF 2022 to 2023 in *R(Hahn)* at [30], Eyre J observed

“There has not simply been a reversal of the default position but rather the criteria to be considered are different. In light of that, it is not surprising that the approach to be taken by the court to those different considerations has been expressed in different terms. Moreover, judgments articulating the approach to be taken when considering the rationality of decisions taken under one version of the GPPPF are of no more than limited assistance in determining the approach to be taken to assessing the rationality of decisions taken under a different version.”

Perhaps inevitably, there is not even judicial unanimity on this question, as Fordham J expressed a different – although not irreconcilable – view in *R(Carrigan)* at [58]:

“I accept of course that the SSJ enjoys a latitude in the shaping of statutory directions and policy guidance. I would not, however, accept that the public law significance – for the SSJ’s duty to act reasonably – of the Board’s assessments is no more and no less than whatever policy or statutory directions have been promulgated by the SSJ. If policy guidance said the SSJ could ‘disagree’ with the Board, public law would I think read-in ‘provided that the SSJ acts reasonably’.... I do not think, in conferring the statutory power to make statutory directions, Parliament is to be taken as permitting abrogation of the basic common law duties of reasonableness and legally adequate reasons. None of the changes in the statutory directions or policy guidance have, moreover, purported to abrogate those duties.”

34. The reconciliation, in my very respectful judgment, lies in the difference in what has been changing and what has been staying the same. What has unquestionably been changing is *the Defendants Directions and policy criteria*. So, as Eyre J says in *R(Hahn)*, observations in other cases *about the content of different policies* where the criteria and even the default positions are different ‘are no more than limited assistance’. Judges in other cases on GPPPF 2022 have made that point about the *R(Sneddon)* criteria Fordham J set out at [28]. However, some of what he said was not about the *content* of GPPPF 2021, but *the approach of the Administrative Court to rationality challenges in this field*. In essentials, this has not changed, even if different judges have expressed the principles differently, often without all

authorities cited, simply because of their sheer pace. However, Fordham J in *R(Carrigan)* and Eyre J in *R(Hahn)* have reviewed the principles the Administrative Court applies, which are still invaluable reviews of principle, although they were cases on GPPPF 2022, even now we have now moved on to GPPPF 2023. They show that there has been broad continuity and consensus in those key principles.

Stable Principles: Authorities on rationality and reasons in ‘open conditions’ cases

35. Turning to the recurring themes in the authorities, in my respectful view, they were most helpfully distilled in Turner J’s summary in *R(Draper)* at [32], derived from Eyre J in *R(Hahn)* and *R(Overton)*, but actually reflecting the whole range of authorities, including Fordham J’s analyses in *R(Sneddon)* and *R(Carrigan)*. I will develop Mr Evans’ annotation of Turner J’s nine principles referring to most of the cases listed in *R(Carrigan)*. This shows whilst there are differences of expression and emphasis, especially between cases on different policy iterations, there are not truly inconsistent lines of case-law as sometimes said, but rather a classic ‘Common Law conversation’ between judges, reflecting settled and stable principles. I have myself modestly tinkered with Turner J’s list order, since whilst he derived his principles from *R(Overton)*, I am blending in other cases, in particular *R(Gilbert)*.

36. “(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).* In *R(John)*, Ms Williams QC rejected an analogy with *R(Evans) v Attorney-General* [2015] 1 AC 1787 (SC) on the executive’s limited power in statutory decision-making to disagree with a court. As Mr Evans’ colleague Ms Earis put it, ‘the Board advises, the Defendant decides’. That encapsulates Sales LJ’s summary of the statutory scheme in *R(Gilbert)* at [73]:

“The Secretary of State has the relevant discretion whether to transfer a prisoner to open conditions...[H]e has a discretion whether to seek advice from the Board... [E]ven if he seeks its advice, he is not bound to follow that advice provided there is sufficient good reason not to do so.”

37. “(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). I have moved this principle up the ‘batting order’ because it is so central to the legal scheme. The Defendant does not seek advice from the Parole Board because its officials lack expertise, but rather to inform that expertise. Indeed, in *R(Gilbert)* Sales LJ emphasised at [71] that:

“The Secretary of State, department and agencies are also experts in management of prisoners in the prison estate, including assessing prisoner risk when...relevant to the wide range of decisions which such management may involve. The statutory regime recognises this. They do not require input from the Board for every decision they have to make, including those in relation to which prisoner risk may be a significant factor.”

In *R(Kumar)* at [10], Andrews LJ referred to another decision of Sales LJ as he was in *R(Hassett) v SSJ* [2017] 1 WLR 4750 (CA) also emphasising this expertise of the Defendant on re-categorisation within the closed prison estate, where the Parole Board are not involved at all. (*R(Hassett)* was followed in a case this summer: *R(Clarke) v SSJ* [2024] EWCA Civ 861). In short, the Secretary of State routinely

makes decisions about re-categorisation with or without the Parole Board. The key reason advice is obtained in ISP cases is because under s.28 of the 1997 Act, it will be the Parole Board who will eventually decide on release and transfer to open conditions is preparation for that: see *R(Overton)* at [33]. As Fordham J pointed out in *R(Carrigan)* at [50], this was consistent in the authorities even before *R(Gilbert)*.

38. “(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). I deal with this principle next as it is reflected in the later ones. As Eyre J said in *R(Overton)* at [28], this reflected King J’s point back in *R(Wilmot)* at [47], the Court’s focus should be on rationality of the Defendant’s decision not of the Parole Board’s decision. In *R(Gilbert)* at [92], Sales LJ agreed:

“The [Defendant] is entitled not to accept [the Board’s] recommendation provided he acts rationally in doing so...*R (Wilmot)*...[But] in some cases where the Parole Board has reached a view on some point which is the same as a point which the Secretary of State has to consider and the Board is better placed to make an assessment (e.g. it finds a relevant fact after hearing oral evidence from witnesses), it might well be difficult for the Secretary of State to show that it is rational for him to take a different view.”

39. “(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). Picking up that last point in returning to Turner J’s ordering, despite the Defendant’s expertise in risk and the truism that different experts can rationally disagree, the Defendant must still ‘engage properly’ with the Parole Board’s advice. This was a feature in *R(Draper)* itself, as discussed later. This has also been a long-standing theme in the cases. In 2007 in *R(Banfield)*, Jackson J (as he was) stressed at [28(1)] that the Defendant’s decision would be unlawful if it failed to ‘take account’ of the Parole Board’s recommendation. More recently, in an observation quoted by Eyre J in *R(Overton)* at [25], Mr Dias KC said in *R(Zenshen)* at [83]:

“...What [the Defendant] 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.”

40. “(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). The most comprehensive description of that concept which references earlier authorities was by Fordham J in *R(Sneddon)* at [28(4)]:

“Common law reasonableness is the controlling legal standard for deciding in the context and circumstances of the case whether the SSJ has accorded the required weight to the panel’s recommendation and assessment...The SSJ may reject the Parole Board’s reasoned recommendation, provided only that doing so has a reasonable [or] rational basis...There can be no substitution of the views of a civil servant for the views of the Parole Board without reasonable justification.”

41. “(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). Again, this is a long-standing point. Back in *R(Hindawi)*, Thomas LJ (as he then was) observed at [52]:

“It is self-evident [the Defendant] should and would accord weight to the recommendation of the Parole Board. However, the weight...must depend on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make.”

42. “(v) *Whilst bearing in mind the potentially significant impact the decision of the Secretary of State is likely to have, for example on 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). Indeed, this was a point made by Sales LJ in *R(Hassett)*, summarised by Andrews J in *R(Kumar)* at [10]. The Parole Board deciding whether to *release* an ISP under s.28 1997 Act is determining deprivation of liberty: exercising a *judicial* function: *R(Osborn) v Parole Board* [2014] AC 1115 (SC). By contrast, when determining *categorisation*, the Defendant is essentially performing an *administrative* function in deciding the allocation of prisoners around its estate (including open conditions).

43. “(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...reasons for reaching a contrary view have been articulated.*” (Hahn para 22 referencing *Overton* para 31). This reflects two points. Firstly, there is no need for the Defendant to ‘critique’ the Board’s analysis as flawed or unjustified (see *R(O’Dell)* as they may simply rationally disagree: *R(Gilbert)*). Secondly, while rational disagreement must be reasoned, a challenge to reasons generally has a ‘high bar’ as HHJ Simon said in *R(Swellings)* at [49]. This reflects that pure reasons challenges are ‘discouraged’, as Lord Brown said in *South Bucks DC v Porter (No.2)* [2004] 1 WLR 1953 (HL) at [36], a planning case applied in this field by HHJ Gilbert QC (as he was) in *R(Adetoro)* at [59]-[63] and at [105] emphasising Lord Brown’s core observation at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved."

However, in this field, reasons and rationality entwine, as shown in the last point.

44. “(ix) *Greater explanatory precision is likely to be required to explain a departure from the finding of primary facts than in reaching of different secondary inferences from uncontroversial primary facts*” (Hahn para 27 referencing *Overton* para 30). In *R(Hahn)*, Eyre J was quoting HHJ Walden-Smith in *R(Uddin)* at [40], who was referring to the debate about Chamberlain J’s guidance in *R(Oakley No.1)* at [51]. As noted above, he rejected the differentiation between the Defendant departing from the Parole Board’s ‘findings of fact’ and their ‘evaluation of risk’ (in cases like *R(Hindawi)* and *R(Stephens)*) given the distinction between fact and risk is

blurred (See *R(McKoy)* at [46]). He suggested differentiation between a finding on which the Parole Board ‘enjoys particular advantage’ over the Defendant when ‘very good reason’ was needed to depart from it, as opposed to ‘the exercise of judgment requiring the balancing of private and public interests’ where the Defendant ‘having accorded appropriate respect to the Board’s view is entitled to take a different view’. HHJ Keyser KC in *R(Oakley No.2)* at [17] suggested the latter should be where the Board had no ‘particular advantage’. Whilst Calver J in *R(Cain)* and HHJ Walden-Smith in *R(Uddin)* disagreed, Sir Ross Cranston’s similar statement in *R(Green)* has been regularly cited and Counsel accepted it was clearer than a distinction between ‘very good’ and ‘good’ reasons: (e.g. in *McPhee* at [23]).

- “i. the Secretary of State must accord weight to the Parole Board’s recommendations, although the weight to be given depends on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make;
- ii. on matters in respect of which the Parole Board enjoys a particular advantage over the Secretary of State (such as fact finding), he must give clear, cogent, and convincing reasons for departing from these;
- iii. with other matters (such as assessment of risk), where the Secretary of State is exercising an evaluative judgment, he must accord appropriate respect to the view of the Parole Board and still give reasons for departing from it, but he can only be challenged on conventional public law grounds.”

Indeed, when discussing *R(Oakley No.1)* in *R(Overton)* at [30], Eyre J went further:

“[T]here is not a bright line distinction between matters of fact on the one hand and assessments of risk or judgements as to 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 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.”

I very respectfully wholeheartedly agree with this analysis, which also leads back to a point Fordham J raised in *R(Sneddon)*: whether ‘reasoned disagreement’ is enough for the Defendant to depart from the Parole Board’s recommendation. In *R(Sneddon)* at [30]-[31] and *R(Carrigan)* at [48]-[49], Fordham J suggested that ‘reasoned disagreement’ would ignore that *R(Oakley No.1)* showed for some issues disagreement required ‘very good reasons’ rather than just ‘adequate reasons’. That would certainly be true of ‘barely reasoned disagreement’. However, as Fordham J went on to note in *R(Carrigan)* at [55]-[56], Sales LJ in *R(Gilbert)* at [73] (quoted above) had adopted a test of ‘sufficiently good reason’ not to follow the Board’s advice. If one applies *R(Gilbert)* to Eyre J’s ‘continuum’ in *R(Overton)*, any binary distinction in the principle resolves into one of ‘sufficiently reasoned disagreement’ - which will, as ever, depend on the particular facts and point of disagreement.

Changing Minds: ‘Internal Disagreement’ within the ‘Secretary of State’

45. Whilst there is an abundance of authority on ‘open conditions’ cases generally, there is barely any authority on one aspect of this case: the ‘internal disagreement’ between the decision-maker Ms Whyte and Mr Bainbridge on one hand and the confusion in the email exchange between Ms Whyte and Mr Davison on the other. Very fairly, Mr Buckley accepted he could not go behind Mr Davison’s eventual agreement with Ms Whyte’s view, but understandably described the confusion as ‘concerning’. However, Mr Buckley did rely on Mr Bainbridge’s disagreement with Ms Whyte.
46. Whilst in argument Counsel and I were unaware of any case in which such ‘internal disagreement’ had arisen, in reviewing the cases I found one I had actually been referred to: *R(Wynne)*. It concerned GPPPF 2021 and the (then, ‘not’) ‘wholly persuasive case’ criterion. Mr Wynne as a young man committed even more serious offences than the Claimant, but unlike him, had a largely trouble-free sentence. He was recommended for open conditions 18 months before his 18-year tariff expired by all the professionals then the Parole Board. The Defendant’s Case Manager, then the Team Leader agreed, but the decision-maker decided there was no ‘wholly persuasive case’ owing to the seriousness of the offences and Mr Wynne’s minimisation of them, even dishonesty. Steyn J quashed that decision as it had not engaged with the unanimous views of the professionals and panel and had ‘picked out’ one aspect, but had given no reason for departing from the overall recommendation. Moreover, the decision had misunderstood the Board’s assessment of Mr Wynne’s credibility on which it had ‘particular advantage’ and was irrational on both minimisation and abscond risk. But in her conclusions, Steyn J did not rely on ‘internal disagreement’.
47. In fairness to the Defendant, I do bear in mind the absence of reliance on ‘internal disagreement’ in *R(Wynne)* as bolstering Mr Evans’ submissions on it. He submitted that Ms Whyte’s disagreement with Mr Bainbridge does not change the fact that she was the relevant decision-maker whose decision must be scrutinised; that whilst she needed to explain her disagreement with the Parole Board, she did not need to explain her disagreement with Mr Bainbridge; (as his submission developed) that Ms Whyte’s decision must be scrutinised in the light of the whole proforma; and ‘internal disagreement’ just reflected *R(Draper)* principle (vii) that different people can rationally take different views. In short, Mr Evans said Mr Bainbridge’s view was irrelevant. It was Ms Whyte’s actual decision that mattered.
48. In law, the concept of ‘internal disagreement’ raises the question as to *who is* ‘the ‘Secretary of State’ for the purposes of decision-making in ‘open conditions’ cases. This engages ‘the *Carltona* principle’, recently applied in the prison context in *R(Bourgass) v SSJ* [2015] 3 WLR 457 (SC). At [48]-[52], Lord Reed explained that when a statute provides for a duty or power on ‘the Secretary of State’, reality requires those provisions to be exercised by officials acting on behalf of the actual Cabinet Minister, who are not strictly legal agents or delegates, but whose actions are constitutionally attributable to the Secretary of State, so seen as ‘done by them’: *Carltona v Comrs Works* [1943] 2 All ER 560. However, in *R(Bourgass)*, Lord Reed recognised limits to this ‘*Carltona* principle’. Firstly, it excluded officials with an independent statutory office, such as the Prison Governors in that case who had wrongly exercised Secretary of State powers to extend segregation of prisoners. Secondly, only particular officials may be assigned specific statutory roles, such as

formal Immigration Officers in *R v SSHD exp Oladehinde* [1991] 1 AC 254 (HL). Thirdly, as Lord Reed discussed in *R(Bourgass)* at [52], it is possible that the exercise of particular statutory functions by particular officials may be inconsistent with statutory provisions, or indeed with Common Law rationality and fairness.

49. I go a long way with Mr Evans, but I do not accept either ‘internal disagreement’ in principle in open conditions cases, or Mr Bainbridge’s view here, is irrelevant:

- a. Firstly, whilst it does not arise in the present case, para.5.8.4 GPPPF 2023 assigns the Head of Public Protection Group (currently Mr Davison) as ‘the decision-maker’ for re-categorisation of a Category A prisoner whom the Parole Board has recommended for open conditions (and requires him to consult another official). So, if the decision-maker were someone else, that could offend ‘the *Carltona* principle’ and without good reasons an unlawful breach of policy (see *R(Lumba) v SSHD* [2012] 1 AC 245 (SC) at [26]).
- b. Secondly though, I accept Mr Evans’ submission that para.5.8.2 GPPPF 2023 simply states ‘*The Secretary of State (or an official with delegated responsibility)*’ will make the decision. Outside of Category A prisoners in para 5.8.4, a particular post-holder is not required to do so. Provided the decision maker has internal ‘delegated responsibility’, ‘the *Carltona* principle’ applies. (On her evidence, Ms Whyte did and indeed, she described herself to Mr Davison at the time as ‘the delegate’). Moreover, whilst a decision-maker must justify disagreement with the Parole Board as discussed above, I accept that they do not have to justify their disagreement with their colleagues, nor should the Court be dragged into weighing the respective personal expertise or seniority of any disagreeing officials.
- c. Thirdly, I accept *the mere fact* of ‘internal disagreement’ does not in itself vitiate or even necessarily weaken a final decision. After all, as noted above with *R(Draper)* point (vii) in *R(Overton)* at [28], Eyre J said:

“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.”

As Mr Evans said, if true of differences of opinion between the Defendant and the Parole Board, there is no reason why it should not apply to differences of opinion between officials within the Ministry of Justice.

- d. Fourthly though, in analysing ‘the decision’ under challenge, it is legitimate not only for the Defendant, but also the Claimant, to rely on the proforma. Whilst Eyre J in *R(Overton)* at [23] was wary of allowing the Defendant to rely on the proforma to bolster the reasoning in the decision letter, he accepted it pre-dated the decision, so it was not inadmissible retrospective justification (see *R v Westminster CC exp Ermakov* [1996] 2 All ER 302, noted by Steyn J in *R(Wynne)* at [55]). Moreover, in *R(Valentine)* at [98], HHJ Wall pointed out that in *R(Overton)*, Eyre J was not referred to

R(Electronic Collars Manufacturers Association) v Secretary of State for the Environment, Food and Rural Affairs [2021] EWCA Civ 666, where the Court of Appeal held at [95] it is perfectly permissible to construe a decision letter in the light of internal preparatory material to it (see also *R(Williams)* at [34]-[35]). However, that is a double-edged sword. A proforma may not only bolster the Defendant's reasons in the decision under challenge, it may reveal inconsistencies or omissions in it, and/or 'internal disagreement'.

- e. Finally, whilst a decision-maker does not have to justify *the fact of* 'internal disagreement', nor does it *intrinsically* weaken the decision, there may be some cases where the *subject* of the internal disagreement is relevant and might require more detailed reasoning in the decision. In *R(Wynne)*, whilst 'internal disagreement' was not relied on by Steyn J as relevant to rationality or reasons, nor did she see it as in principle irrelevant. She found the decision failed to give sufficient rational reasons to depart not only from the Parole Board's recommendation, but also from the unanimous views of the report-writers. I agree with Mr Buckley's submission that where there is unanimity among the report writers for open conditions that is recommended by the Parole Board and an expert official within the Defendant agrees, if the decision-maker disagrees, then their ordinary duty to give reasons as explained above (as opposed to anything like 'very good reasons' in a 'particular advantage' case on the *R(Oakley)/R(Sneddon)* approach) may require them to go into more detail. This is not more detail about *the fact* that a colleague disagrees, but more detail on *the point* on which they disagree with their colleague, the Parole Board *and* unanimous report writers. In other words, if a decision-maker knows they 'stand alone' on an issue, they may need to give more detailed reasons for their view about that issue.

'The Same, But Different': The Return of 'Wholly Persuasive Case' in GPPPF 2023

50. Finally on the law before turning to my conclusions, it is helpful to analyse the meaning of the 'wholly persuasive case' criterion which is pivotal in this case. Naturally, I am not intending to give an 'authoritative interpretation' which must be applied (see *R(Sneddon)* at [21]-[26] discussing [53] of Andrews J's judgment in *R(Kumar)*). I am simply making some observations which I consider relevant in this case.
51. The interpretation of a Secretary of State's policy is a matter of law for the Court to decide: *R(Northumbrian Water Ltd)* at [36], which is how Andrews J in *R(Kumar)* and Sales LJ in *R(Gilbert)* approached it. Consistently with other legal instruments like statutes and contracts, the Court can consider not just the actual text of the policy, but also its context of past or background documents, as Sales LJ did so in *R(Gilbert)* at [82]-[85] in examining consistency between the 2014 'absconder policy' and the general policy in PSI 36/2012. Indeed, as discussed above, so did Fordham J in *R(Sneddon)* and Eyre J in *R(Hahn)* on the changes to the GPPPF.
52. Nevertheless, the appropriate starting point is the wording of para. 5.8.2 GPPF 2023 (numerals added):

"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: [i] 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 [ii] the prisoner is assessed as low risk of abscond; and [iii] there is a wholly persuasive case for transferring the ISP from closed to open conditions.”

53. Whilst the ‘absconding’ and ‘sufficient progress’ criteria are not in as all accepted they were met - report-writers, Parole Board and all the Defendant’s officials, including Ms Whyte, - it is helpful briefly to consider them:

- a. ‘Low risk of abscond’ is perhaps the most self-explanatory of the criteria. However, it does not just apply to ISPs with ‘a history or recent or repeated absconding’. As in *R(Gilbert)*, there are bespoke ‘exceptional circumstance’ criteria for them to be only eligible for transfer to open conditions under para 5.8.5 and 5.8.6 GPPPF 2023 with ‘compelling circumstances beyond control’ ‘absolute necessity’ or ‘manifest unfairness’. So, when the Parole Board and Defendant assess whether there is a ‘low risk of abscond’, the issue is not just whether there is an absconding history, but abscond risk more generally. Ultimately, on this issue, Mr Mercer KC concluded in *R(Williams)* on GPPPF 2023 at [26] that given *R(Gilbert)*, the Parole Board does not generally have ‘particular advantage’ in assessing absconding risk.
- b. ‘Sufficient Progress’, as is clear from its full statement, is not simply a comment on the ISP’s progress in general, but specifically relates to the risk to the public from him being in the community on temporary release. As noted above, this has long been one of the factors the Parole Board had to consider in statutory Directions (but was not previously a ‘threshold requirement’). In the Directions applying in *R(Oakley)* and *R(Sneddon)*, its near-equivalent was para.7(a) and indeed both considered it specifically:
 - i. In *R(Oakley)* at [50]/[55], Chamberlain J said ‘sufficient progress’ was ‘an evaluative question’ linked to whether the prisoner ‘could be safely managed in open conditions’. It was not just an evidential dispute, but a judgment about risk, balancing interests of the prisoner against the public. So, the Defendant only had to show ‘appropriate respect’ not ‘very good reasons’ to depart from the Parole Board.
 - ii. Likewise, in *R(Sneddon)* at [28(7)], following *R(Oakley)*, Fordham J gave Direction 7(a) (i.e. the ‘sufficient progress’ factor as opposed to criterion as it was then) as an example of a question on which the Parole Board did not have ‘particular advantage’ over the Defendant.

In short, both the ‘absconding’ and ‘sufficient progress’ criteria are ‘evaluative questions’ which relate to the *risks* a prisoner poses in open conditions, especially on temporary release – i.e. the *risk* of absconding or the *risk* of harm to the public. So, unless those risk thresholds are met, a prisoner will *not* be eligible for open conditions, *even if* there is no more work that can be done in closed conditions (as in *R(Oakley)*), or *even if* open conditions would be ‘essential’ to inform future decisions about release, although those factors are *relevant* to ‘sufficient progress’.

54. I turn to the literal wording of the ‘wholly persuasive criterion’, expressed as the third precondition in para 5.8.2 GPPPF 2023 that: *‘there is a wholly persuasive case for transferring the ISP from closed to open conditions’*. As discussed with Counsel, in isolation, this criterion seems to work rather differently than the others. Rather than a ‘threshold’ – whether of ‘risk’ or otherwise – it is more like a standard of proof, or strictly persuasion – whether there is a ‘wholly persuasive’ rather than ‘moderately persuasive’ case for transfer to open conditions. As Mr Evans observed this criterion is not considered by the Parole Board and so on the face of it does not necessarily require ‘disagreement’ with any particular finding of the Board, rather with its overall recommendation. Therefore, the Parole Board enjoys no ‘particular advantage’ on this issue as such (as opposed to for example individual findings of fact relevant to it). Indeed, the Board has a distinct *disadvantage* as it will not have considered this criterion. After all, going back to the wording of the statute – s.239(2) CJA - the Board has *advised* the Defendant, who must then decide, but also follow their policy (unless there are good reasons: c.f. *R(Lumba)* and *Mandalia*). As Mr Evans submitted, in applying that policy, the Defendant must decide whether to agree with the Parole Board on the ‘absconding’ and ‘sufficient progress’ criteria, but then stand back to consider whether there is a ‘wholly persuasive case’ for transfer in the light of *all* relevant circumstances, not just those previous two criteria. If rejecting the recommendation, the Defendant does not have to show ‘very good reasons’ (except in rejecting specific findings on which the Board has particular advantage e.g. of fact), but it must ‘engage properly’ with the Board’s recommendation and show it ‘appropriate respect’ by explaining its disagreement.
55. I am fortified in that view by the fact this approach is consistent with that of my Birmingham colleague HHJ Wall earlier this year in *R(Valentine)*, also on para.5.8.2 GPPPF 2023. HHJ Wall accepted the Defendant’s decision was rational and sufficiently reasoned in finding unmet the ‘sufficient progress’ criterion (as the risk of non-compliance outweighed the ‘sufficiency’ of the ‘progress’) and open conditions ‘not wholly persuasive’ (because the further work needed to address this risk could be provided in closed conditions, which the Parole Board overlooked).
56. However, I am conscious that seems rather different from Andrews J’s approach to the ‘not wholly persuasive’ criterion in PSI 22/2015 in *R(Kumar)* at [53]:

“Bearing in mind [the ‘not wholly persuasive case’ criterion] follows an express acknowledgment of the ‘very limited parameters’ for departure from the recommendation of the Board, it is clear [its] purpose...is not to widen those parameters, but to preserve the ability of the Secretary of State...to exercise his discretion to reject a recommendation which does not strictly fall within either of the preceding grounds, but which appears to him (for good reason) to be unjustified or inadequately reasoned.”

Yet it is important to point out that Andrews J was there not taking a literal interpretation to ‘not wholly persuasive case’, but a *restrictive* interpretation of that phrase given its then restrictive contextual setting within that policy with ‘very limited parameters’. Nevertheless, even there, as HHJ Wall pointed out in *O’Dell* at [54]-[65], in *R(Kumar)* at [54], Andrews J expressly rejected the submission that the criterion as she had interpreted it was limited to cases where the Parole Board had committed Public Law error, indeed Andrews J added:

“The [Defendant] may lawfully disagree with the..Board’s view ascrib[ing] different weight to material factors in the risk/benefit balancing exercise.”

In *R(Sneddon)* at [26]-[27], Fordham J suggested that in [53] of *R(Kumar)*, Andrews J had tried to steer a ‘middle way’ between the Parole Board’s view being binding (it was not) and the Defendant being free to substitute its own judgment (which it could not). This and para.5.8.2 GPPPF 2021, then focussing on inaccurate information and insufficient explanations by the Parole Board, led Fordham J at [28(5)] of *R(Sneddon)* to focus on ‘deficiencies’ in the Board’s decision falling short of Public Law error. It will be for the Court of Appeal to consider the meaning of GPPPF 2021. But, following the ‘policy-reorientation’ in GPPPF 2022 discussed above and the re-writing of the criteria again in para 5.8.2 GPPPF 2023, the focus is now clearly not ‘deficiencies’ in the Parole Board’s decision (but they would obviously remain a ‘good reason’ to depart from it: as HHJ Wall found in *R(Valentine)*). Now the Defendant will only accept a recommendation for open conditions if the threshold requirements of ‘low abscond risk’ and ‘sufficient progress’ are met *and* there is a ‘wholly persuasive case’ for open conditions. In my judgement, para 5.8.2 of GPPPF 2023, can now be interpreted naturally in the sense I have tried to describe at paragraph 54 of this judgment, rather than more restrictively as Andrews J did in *R(Kumar)* in its very different policy setting of PSI 22/2015. That very different setting of the phrase in the policy excludes anything like the ‘*Barras*’ principle in statutory interpretation that a particular judicial interpretation has been adopted in a new rule (see *R(N) v Lewisham LBC* [2015] AC 1259 (SC)) Having said that, if applying this new approach, the Defendant disagrees with the Parole Board’s recommendation, it will find it ‘unjustified’ in a sense, even without a ‘deficiency’.

57. However, Mr Buckley submitted instead that ‘wholly persuasive case’ could be read synonymously with the ‘essential’ criterion in GPPPF 2023 in the situation discussed by Fordham J in *R(Carrigan)* at [29], namely: (a) where open conditions is a practical precondition to release, (b) testing in open conditions would be immediately beneficial; (c) necessary work could either be done in open or closed conditions; and (d) the prisoner can be safely managed in the open estate. However, even if that is the correct approach to ‘the essential criterion’ in GPPPF 2022 (which is quite different than the approach in *R(Overton)* and *R(Cain)* discussed above, although both also stressed it must be ‘essential’ ‘at this time’), that does not transpose to the very different ‘wholly persuasive case’ criterion in GPPPF 2023, now interpreted naturally, not restrictively in its restrictive setting as in *R(Kumar)*.
58. Nevertheless, although the Defendant does not necessarily have to disagree with any specific finding of the Parole Board if it is decided (as here) the ‘absconding’ and ‘sufficient progress’ criteria are met, but there is not a ‘wholly persuasive case’ for open conditions, it does have to ‘engage properly’ with the Board’s recommendation and ‘articulate its reasons for reaching a contrary view’ (*R(Draper)* points (ii) and (viii)). The Defendant must show that recommendation ‘appropriate respect’ (*R(Draper)* point (ix) and reach ‘rational and *properly justified*’ decision (*R(Draper)* point (iii)). The Defendant need not seek out a ‘deficiency’ in the Board’s decision, nor exercise ‘anxious scrutiny’ (*R(Draper)* point (v)) or present a point-by-point rebuttal or critique, but it must address the relevant issues and explain its ‘contrary view’ (*R(Draper)* point (viii)). In *R(Hahn)* at [32], Eyre J said a decision has to be read as a whole realistically and in context,

but he quashed the decision in that case as it ‘did not demonstrate an adequate engagement with the recommendation of the Parole Board’, or ‘set out an adequate explanation of how the Defendant came to a different conclusion from the Board despite such engagement’. In short, all this means the Defendant’s decision does not simply have to give adequate reasons *for its decision not to transfer to open conditions on the merits*, but for *its disagreement with the Board’s recommendation* in order to show it ‘appropriate respect’, i.e. ‘sufficiently reasoned disagreement’. As Mr Buckley put it in the Statement of Facts/Grounds, the Defendant ‘does not have to follow the recommendation, but it must justify why it is departing from it’. The Defendant does not do that by simply listing reasons against open conditions without explaining why it disagrees with the Parole Board’s recommendation.

Submissions and Conclusions

59. Before addressing the submissions and my conclusions in this case, it is helpful to set out Ms Whyte’s key conclusions, as set out by the case manager in the decision of 31st July 2023. It summarised the background facts of the Claimant’s offence, then quoted at length the Parole Board’s conclusions on the ‘sufficient progress’, ‘absconding’ and ‘essential’ criteria (including on the latter paras. 4.4.3.1, 4.4.3.3, 4.4.3.4, 4.4.3.5, 4.5 and 4.6 of the Board’s decision as partly quoted above). Then it summarised the law (that I need not quote and about which there is no complaint). Then the letter set out Ms Whyte’s conclusions, in similar terms to the proforma:

“...As is his right, the Secretary of State has reached a different conclusion to that of the Parole Board panel. The Secretary of State had in mind when reaching this conclusion his published criteria and found the following criteria was **not** met: • ***There is a wholly persuasive case for transferring the ISP from closed to open conditions.***

The Secretary of State notes you have demonstrated the following positive progress: • You have completed Enhanced Thinking Skills (ETS), the Sycamore Tree (victim awareness), and facing up to conflict, to address your risk and engaged well within these interventions.

• In recent years, you have evidenced developing maturity, and have been increasingly settled and compliant. You achieved the Enhanced level of the IEP in May 2020.

The following evidence is considered to support the conclusion that the criteria in the Open Conditions Test is not met: ***There is a wholly persuasive case for transferring the ISP from closed to open conditions.***

• The decision details that throughout your sentence, you have accrued 30 proven adjudications and a significant volume of concerning intelligence, particularly relating to involvement with drugs and negative attitude to prison staff. Your last adjudication was in July 2021 for cutting your television speaker wires. You admitted to the panel that you have had three mobile phones throughout your sentence. Positively, you achieved Enhanced Status on the IEP scheme in May 2020.

• The COM [sic – see below] noted that you can still struggle when you perceive staff inconsistency, or when you do not believe the rules or procedures are being properly applied and, whilst you can still express frustrations, you are better able to address your concerns through

appropriately assertive communication. The psychologist noted that there had been a stepping-down of anti-authority behaviours (with much less frequent ‘push-backs’); increasing maturity; and that you had become more assertive. This demonstrates positive progress and would indicate that the engagement with your mentor continues to help you.

- You are pre-tariff, with your tariff expiring in November 2024. You have been in custody since you were 19 years old and there is the potential that you have become institutionalised. The [Defendant] assesses that whilst you are pre-tariff, you can continue to develop your emotional management and coping skills whilst in the security of closed conditions. You should evidence a further period whereby you can comply with the prison regime and rules, instances of emotional management, asking for support and positive custodial behaviour.

- The [Defendant] agrees given the length of time you have spent in custody, a gradual reintegration into the community would be beneficial to you. However, based on the rationale above...does not conclude there is a wholly persuasive case for transferring you to open conditions at this stage.

The [Defendant] 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.”

The rest of the decision-letter explained the arrangements for the next parole review with the target for consideration by the Parole Board in November 2024.

60. Mr Evans had three overarching points (which he split into four). Firstly, Ms Whyte had not actually *disagreed* with any finding by the Parole Board, as she had agreed on the ‘sufficient progress’ and ‘absconding’ criteria, but found there was ‘not a wholly persuasive case’ for open conditions, which the Board had correctly not considered. Secondly, Ms Whyte’s conclusion was rational and appropriately: (i) took into account the Claimant’s poor compliance history in prison; (ii) his pre-tariff status (which was not the sole reason for her conclusion); (iii) she appropriately engaged with the Board’s conclusions; and (iv) with the views of all the report-writers (which I discuss below); Thirdly, he contended that the decision was sufficiently reasoned and ‘showed due deference to the Board’s recommendation’. Fourthly, he submitted that ‘internal disagreement’ made no difference to the result.
61. On behalf of the Claimant, Mr Buckley’s submissions developed five distinct criticisms of Ms Whyte’s decision. Firstly, that she placed irrational weight on the fact the Claimant was ‘pre-tariff’ given the Claimant had been referred to the Parole Board by the Defendant as a pre-tariff prisoner. Secondly, that Ms Whyte ‘cherry-picked’ the Board decision. Thirdly, she failed to ‘properly engage with’ the Parole Board decision. Fourthly, that Ms Whyte failed to engage with the unanimous views of the report writers, as endorsed by her own colleague Mr Bainbridge. Finally, that she also failed to engage with *herself*, as she failed to explain why ‘there was not a wholly persuasive case’ for transfer to open conditions, despite the fact that she was satisfied both the ‘absconding’ and ‘sufficient progress’ criteria were met.

62. Firstly, I do not accept that Ms Whyte placed irrational weight on the Claimant's pre-tariff status. I accept that if she had rejected the Parole Board's recommendation based solely or predominantly on the fact the Claimant was pre-tariff, as that would have been irrational and indeed inconsistent with para.5.4.1 GPPPF 2023, stating:

“[T]o target Parole Board and HMPPS resources effectively, the Secretary of State only refers those pre-tariff cases to the Parole Board where there is a reasonable prospect of the Board making a positive recommendation.”

A decision-maker's refusal to transfer a prisoner to open conditions based solely or predominantly on his pre-tariff status would be problematic as he would only have been referred to the Parole Board in the first place if the Defendant considered there was a 'reasonable prospect' of a positive recommendation despite pre-tariff status. However, in the present case, it is clear Ms Whyte's decision was not based solely or predominantly on the Claimant's 'pre-tariff' status. Not only is that only one of the factors she explicitly took into account in the decision, even in her own private email to Mr Davison on 26th July 2023 querying his apparent disagreement with her (which she quoted in her witness statement), Ms Whyte said she *'found this to be finely-balanced case, but based her decision on the number of adjudications, him being pre-tariff and the COM confirming he still struggles with boundaries and managing frustrations'*. So, pre-tariff status was plainly only *one* of three key points.

63. Secondly, I do not accept Ms Whyte irrationally 'cherry-picked' generally in the sense of only listing factors against transfer. Large sections of the Board's reasoning were quoted in the letter and whilst I return to how far she 'properly engaged' with it, her conclusion on the 'wholly persuasive case' criterion did articulate factors in favour of the Claimant's transfer to open conditions as well as against it. For example, she acknowledged positive progress with the courses the Claimant completed, his 'developing maturity' and 'enhanced' status since May 2020. Ms Whyte also acknowledged his positive progress recognised by the psychologist, such as his 'stepping-down of anti-authority behaviours', 'increasing maturity'; and increased (appropriate) assertiveness, which 'indicated the engagement with the mentor continues to help'. It is true Ms Whyte said the Community Offender Manager ('COM') said the Claimant *'could still struggle'* with what he perceived as *'staff inconsistency'*, or when he felt *'rules or procedures were not being properly applied'* and *'expressed frustrations'*, but she also stated the COM had observed he was *'better able to address concerns through appropriately assertive communication'*. (However, I will return to whether Ms Whyte 'cherry-picked' that professional's view and the fact that those views were actually those of the Prison Offender Manager or 'POM', as is clear from para.2.10 of the Board decision).
64. Thirdly however, I do agree with Mr Buckley that Ms Whyte's decision was irrational and inadequately reasoned since (as he put it in the Statement of Facts/Grounds) she 'entirely failed to engage with the decision of the Parole Board and say why there is a divergence of position, over and above listing certain findings made'. In other words, whilst Ms Whyte was not disagreeing with a particular finding the Board made and did not have to show 'very good reasons' for that, only 'appropriate respect' for the Board's overall recommendation in deciding there was not a 'wholly persuasive case' for transfer, she did not explain why she disagreed with the Board, but simply gave in isolation her own reasons to refuse transfer. The

only time Ms Whyte’s conclusions even *mention* the Board at all is in recording that the Claimant ‘admitted *to the panel* you have had three mobile phones’. If the words I have emphasised were deleted, it would make no difference at all (similarly, her reference to its ‘decision’ detailing the 30 proven adjudications...). To all intents and purposes, Ms Whyte made her own decision without reference to the Board’s.

65. So, in paying ‘close attention to the circumstances of the case and the terms of the decision in question (*R(Draper)* point (iv)), in my judgment, Ms Whyte made no attempt ‘to engage properly’ with the Board’s conclusions (see *R(Draper)* point (ii)), nor did she justify at all, let alone ‘properly’ why she was departing from the Board’s conclusion (*R(Draper)* point (iii)). I recognise the decision was for Ms Whyte and the Board was only ‘advising’ (*R(Draper)* point (i)) and that rational decision-makers could rationally disagree (*R(Draper)* point (vii)). Furthermore, I recognise Ms Whyte’s expertise in making this decision (*R(Draper)* point (vi)) and that she did not have to exercise ‘anxious scrutiny’, nor should I in my reading of her decision (nor an ‘artificially rigorous approach’ to it: *R(Draper)* point (v)). I accept that Ms Whyte did not have to set out a point-by-point rebuttal or critique of the Board’s decision (*R(Draper)* point (viii)). However, Ms Whyte’s conclusions hardly showed the Board’s overall recommendation ‘appropriate respect’ (let alone a ‘good reason’ to depart from it: see *R(Draper)* point (ix)) when she effectively *ignored* it in her conclusions. This was not ‘sufficiently’ (or even ‘barely’) ‘reasoned disagreement’ with the Board, still less ‘due deference’ as Mr Evans suggested. As he says, an inadequate reasons challenge is a ‘high bar’, but it is cleanly crossed in this case.

66. Of course, substance matters, not form. If Ms Whyte had engaged with the *substance* of the Board’s recommendation rather than explicitly acknowledging it in formal terms, that would suffice. However, it is clear she did not do that either. Whilst Ms Whyte was not applying the ‘essential criterion’ which was removed from GPPPF 2023, the Board’s reasoning on that was still relevant to whether there was a ‘wholly persuasive case’ for transfer to open conditions. As she was satisfied of the ‘absconding’ and ‘sufficient progress’ criteria, Ms Whyte needed to step back and consider all the relevant circumstances to decide whether there was a wholly persuasive case. If the Board’s reasoning on the ‘essential criterion’ was irrelevant to that or she disagreed with it, Ms Whyte should have said why, but she did not. Even leaving aside the Board’s reasoning on the ‘essential criterion’, she did not engage properly even with the Board’s overall conclusion in para 4.6 of its decision:

“Consequently, the panel *now* assess that Mr Allen’s risks are such that a progressive move to open prison conditions *is* appropriate. This will enable him to develop pro-social networks, build and test family relationships, test temptation from alcohol (and drugs), test compliance and manageability, and the effectiveness of the risk management plan.” (My emphasis)

67. Ms Whyte’s conclusions made no attempt to engage with this reasoning at all. The Board said here and throughout that the Claimant needed to be tested in open conditions *now* (I emphasise the present tense in para. 4.6), to test ‘the effectiveness of the risk management plan’, i.e. of his risk *to others*. The closest Ms Whyte’s conclusions came to addressing this was her rather throwaway comment that ‘given the length of time you have spent in custody, a gradual reintegration into the community would be *beneficial to you*’. I emphasise the last words, as she simply

did not engage at all with the Board's point that a period in open conditions would test *risk management*, so would be beneficial *to others*. Ms Whyte herself concluded the 'sufficient progress criterion' was satisfied (which relates to risk, as discussed). While Mr Evans suggested the 'beneficial to you' remark was Ms Whyte acknowledging the report writers, as the Case Manager rightly summarised their views in the proforma, they actually said open conditions would test the Claimant's *risk management*. Ms Whyte was instead answering *Mr Bainbridge's* view: "He has been in custody for a significant period of his life and a gradual integration would be of benefit to him."

68. Whilst that is enough for Ms Whyte's decision to be quashed, this discussion of the report writers (and Mr Bainbridge) raises another problem with it. Even if Ms Whyte was entitled not to mention the Board's reasoning and recommendation and make her decision on the merits without 'sufficiently reasoned disagreement', she still had to address the opinions of the report-writers. But, as noted the views she attributed to the Community Offender Manager ('COM') were actually those of the Prison Offender Manager ('POM'). This was not just a minor point – after all, she told Ms Davison, as I noted, '*the COM confirming he still struggles with boundaries and managing frustrations*' was one of her three key reasons for her decision:

- a. If Ms Whyte did indeed intend to refer to the opinion of the COM not the POM, then it follows that, just as with the Board's reasoning, she did not address *at all* the POM's opinion, indeed consistent support for open conditions. As in *R(Draper)* itself, the decision-maker's misattribution of an opinion to one professional rather than another weakens the rationality of the decision if it means that opinion is not properly considered. As Turner J said in *R(Draper)*, a similar failure to address the report writers' opinions led to the decision in *R(Wynne)* being quashed by Steyn J - and the fact she was dealing with GPPPF 2021, not GPPPF 2022 as he was, did not alter that. I very respectfully agree: this point applies whatever the policy criteria.
- b. Alternatively, Mr Buckley fairly suggested that Ms Whyte may well have just made a typo and meant the POM. However, if so she did 'cherry-pick' the POM's view in that whilst the POM said the Claimant 'still struggles with boundaries and managing frustrations', she still supported his move to open conditions, which Ms Whyte did not mention. Moreover, she then did not engage with what Mr Buckley suggested were the answers of the COM to questions asked by the Case Manager back in November 2022. The COM had said the only work that remained was with the mentor that did not have to be done in closed conditions and that 'it was consolidation work only' and there were no assessments required before open conditions. Ms Whyte did not address the COM's observations when making her point that whilst the Claimant was 'pre-tariff he could continue to develop emotional management and coping skills whilst in the security of closed conditions'.

In any event, on this point, even leaving aside the 'COM/POM' error, whilst unlike them, Ms Whyte did not misattribute the psychologist's opinions, in reaching that particular conclusion on the value of continued work in closed conditions, Ms Whyte failed to address the psychologist's conclusion that: "In my opinion the treatment...completed to date has been sufficient in addressing the risk factors and it is unlikely that additional programme work would result in any further risk reduction." Therefore, Ms Whyte's

conclusion that a further period in closed conditions would enable the Claimant to ‘continue to develop emotional management and coping skills’ did not acknowledge the professional opinion of the psychologist that this was unlikely further to reduce risk. If she believed that was irrelevant or wrong, then Ms Whyte should have explained why. This would be an entirely separate ground to quash her decision aside from her effectively non-engagement with the Board’s reasoning. Therefore, whilst Mr Evans submitted that Ms Whyte had not disagreed with the findings or opinions of the report writers, simply reached a different rational view, in fact she did not properly engage with their unanimous opinions.

Moreover, whilst it is now unnecessary to rely on it, Ms Whyte’s failure to address properly the report writers’ unanimous support of the Claimant’s transfer to open conditions is aggravated by the fact her colleague Mr Bainbridge had specifically flagged up this unanimity. He said ‘The professional witnesses agreed a successful period in open conditions was essential as a precursor to release’ and suggested a transfer to open conditions now would give 16 months before the Claimant was eligible for release to test the Claimant and plan properly for that. Whilst I have accepted Mr Evans’ submission that Ms Whyte did not have to explain why she disagreed with Mr Bainbridge, the fact that he endorsed the unanimous view of the report writers *highlighted* that unanimity and *underlined* the importance of her giving sufficient reasons to explain her disagreement with their unanimity. But, as I have explained, Ms Whyte did not give sufficient explanation of her disagreement.

69. Finally, whilst that is already enough to quash Ms Whyte’s decision, I am driven to conclude that in some ways she did not even engage with her own reasoning. On one hand she found that despite the Claimant’s 30 adjudications, that he had made sufficient progress to reduce risk consistent with protecting the public harm whilst on temporary release and was a low risk of absconding, but on the other that there was not a ‘wholly persuasive case’ for open conditions in part because of those same 30 adjudications: which was one of her three main reasons for refusal. That was not necessarily rationally inconsistent (since as Mr Evans submitted, the ‘wholly persuasive case’ criterion is separate from the other two). I also accept that it will not always be necessary for a decision-maker to explain explicitly why they conclude there was not a ‘wholly persuasive case’ for open conditions despite being satisfied of the ‘absconding criterion’ (unlike in *R(Williams)*) or the ‘sufficient progress criterion’ (unlike in *R(Valentine)*). But, in the particular circumstances of this case, Ms Whyte needed to explain why the 30 adjudications up to 2021 did not prevent there being ‘sufficient progress’ for open conditions but were nevertheless one of three key factors in deciding there was no ‘wholly persuasive case’ for it. She failed to do so and so her decision was internally inconsistent and inadequately reasoned, quite aside from her failure to engage with the recommendation of the Board or of the report writers. For that reason as well, I would quash her decision.

Postscript

70. Therefore, Ms Whyte’s decision must be quashed and taken again. Mr Evans did not rely on s.31(2A) Senior Court Act 1981 to argue that ‘it was highly likely that the outcome would not have been substantially different had the conduct not occurred’. As in *R(Hahn)* where that argument for the Defendant was rejected, the non-engagement by Ms Whyte with the Board’s reasoning and recommendation in

this case makes it impossible to be satisfied of that test, which is a ‘high hurdle’. Conversely, Mr Buckley did not argue that the only rational outcome was transfer to open conditions. In re-taking the decision, it will be open to the Defendant (including Ms Whyte if she remains the decision-maker) to maintain her disagreement with the Board’s recommendation for the Claimant provided her decision is consistent with the legal principles I have discussed in this judgment. I am conscious of course that the Defendant may wish to re-make that decision before the Claimant is due his Parole Board review in November and is post-tariff. In any event, it will be open to the Defendant’s decision-maker to take into account the position as it currently stands given the intervening period – for better or worse.