



Neutral Citation Number: [2024] EWHC 2463 (Admin)

Case No: AC-2023-CDF-000130

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF64 2UA

Date: 09/10/2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

MARK MESSENGER

- and -

SECRETARY OF STATE FOR JUSTICE

Claimant

Defendant

Mr Michael Bimmler (instructed by **Bhatia Best Solicitors**) for the **claimant**
Ms Rachel Sullivan (instructed by **Government Legal Department**) for the **defendant**

Hearing dates: 12 September 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 9/10/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The claimant, who is serving a term of imprisonment for public protection (IPP), currently in HMP Erlestoke, challenges by way of judicial review the decision of the defendant, the Secretary of State, dated 4 August 2023. In that decision, the Secretary of State concluded that the claimant had not made sufficient progress during his sentence in addressing and reducing risk to a level consistent with protecting the public from harm, and there was not a wholly persuasive case for transferring the claimant from closed to open conditions. In such conditions the claimant may be in the community and unsupervised under licenced temporary release. Permission to proceed with judicial review was given by HHJ Lambert sitting as a judge of the High Court.
2. The index offence is one of attempted murder to which the claimant pleaded guilty and for which he was sentenced on 5 February 2010 to an IPP with a tariff of 7 years. Such a sentence means that he will not be released unless and until the Parole Board is satisfied that it is no longer necessary for the protection of the public that he should be confined. Although that tariff expired on 22 September 2016, the Parole Board is yet to be so satisfied. The claimant was 41 years old at the time of sentencing and is 54 now.
3. The victim of the offence was the claimant's former partner, with whom he had a relationship over 16 years and three children. The breakdown of the relationship led to the imposition of a non-molestation order on the claimant, and a bail condition that he should not go to the road where his former partner lived with their children. That condition was imposed after he was charged with offences of making threats to kill and false imprisonment in respect of his former partner.
4. In breach of that order and of that condition, he attended his former partner's home. The sentencing judge accepted that he did so with the intention of committing suicide and believing that his former partner was staying with her parents. However, on discovering her in bed, he woke her up, took her to the bathroom and forced her to write a suicide note which she believed related to her. He cut her wrists deeply and sprayed water over the wounds thereby exacerbating the bleeding. He then tried to strangle her with the light cord switch. Their children, who had also been sleeping, awoke to witness the immediate aftermath of their father's conduct.
5. The claimant had previous convictions, mostly for road traffic or drug offences, but also three for assault. In 1994 he was given a four month prison sentence for assault occasioning actual body harm to his former partner's cousin and in 2006 he received a community rehabilitation order after an incident involving his former partner's sister.
6. The claimant's custodial behaviour has been good and he has achieved super enhanced status. He completed several courses including a victim awareness course. He also completed one to one schema work with the prison psychologist, the focus of which was managing life's problems and the non-acceptability of violence. He was assessed as having a good theoretic understanding of schemas and was able to identify his own schemas and core beliefs.

The Parole Board's recommendation

7. The Secretary of State referred the claimant to the Parole Board on five occasions. The latest hearing, which was an oral hearing before a panel comprised of a judicial member, a psychiatrist and an independent member, resulted in a recommendation dated 5 April 2022. The referral was to consider release or a move to open conditions. The claimant, who had legal representation at the hearing, was seeking release. He gave evidence, as did two prison psychologists, his community offender manager and his prison offender manager.
8. In its recommendation, the panel the adopted the analysis by a previous panel in 2020 of the claimant's offending and risk factors and the facts of the index offence and the claimant's conduct in custody as summarised above. However, at [1.5] the panel said this:

“Mr Messenger has continued to minimise the index offence, stating that the victim lied and exaggerated events. He has told professionals that he could not understand why she did not seek medical attention for her arm when he had advised her to do so. However he does accept that he caused her distress and harm. At the oral hearing, Mr Messenger acknowledged that he could be seen to minimise the index offence but said that was because he found it difficult to talk about what he did and would use ‘little words.’ However his language did show both minimisation and victim blaming. He said that he had not left the victim's home once he knew she was there, despite being in breach of the non-molestation order, as he knew he was ‘going for 5 years.’”
9. In the following paragraphs, the panel set out the previous panel's assessment of the risk factors which included histrionic narcissistic and compulsive personality traits, propensity to use violence to a life-threatening degree, relationships with intimate partners and more generally, recklessness and grievance thinking. The present panel added to those factors sexual jealousy, attitudes towards women and high levels of anger. The panel noted that as a teenage he had threatened or been violent to his father, and had been violent to his mother. The claimant said that he could feel very insecure in relationships. He admitted previous violence and controlling behaviour towards the victim. He had a history of substance misuse prior to the current sentence and had been under the influence of LSD, which he said had been spiked, when he grabbed a previous girlfriend so tightly that he nearly killed her.
10. In section 2 of its decision, the panel dealt with evidence of change and progress since the last review. The one-to-one schema work was noted, but it was considered that he may have difficulty seeing the whole picture and find it hard to extrapolate his learning in new contexts. It was recommended that he engage in mentalisation based therapy once he progresses in order to consolidate his learning. The panel noted that the community offender manager considered that while he had an intellectual understanding of the risk factors, he had not internalised this. The psychological assessment noted his significant efforts to address the risk factors and the positive progress. However, it was also noted that he continues to minimise aspects of his offending behaviour and there remained concerns about the possible escalation of risk in future relationships. A recent offender assessment system (OASys) assessed him as

having a low risk of general reoffending, a medium risk of violent reoffending, a medium risk of serious harm to children, and a high risk of serious harm to the public and known adult. All witnesses, and the claimant, agreed that the biggest risk lay in relationships. The risk was not imminent as he was not then in a relationship, but were he to be in a relationship he could present a risk of harm. The panel agreed with that.

11. At section 3, the panel dealt with the manageability of risk. It was noted that the claimant has very limited community support. He hoped to have contact with his adult children, but they remain vulnerable and do not want contact with him. He told the panel that his father had wondered whether this was because his children had been 'poisoned' against him, but he accepted that they may not like what he had done to their mother. He said at the oral hearing that he was not in a relationship and did not intend to seek one. He had concerns about an exclusion zone which was proposed if moved to open conditions as that would prevent him visiting family graves, but the community offender manager explained that he could have permission for such visits.
12. That manager and one of the psychologists recommended release, although the former accepted that the recommendation was not straightforward because of inconsistencies in the claimant's evidence at the oral hearing. The manager and psychologist recognised that there would be benefits from a period in open conditions but did not regard that as essential. However, the panel was not satisfied that the proposed risk management plan was likely to be effective over the longer term as there was a lack of clarity in the resettlement plan. The panel noted that "He has spent 13 years in custody and is yet to test his progress in less secure conditions."
13. In its conclusion, the panel held that the index offence was very serious and part of a pattern of abusive and controlling behaviour towards the victim and to other significant people in the claimant's life. He continued to minimize the impact on the victim and his children. He had made progress in addressing risk factors, but the panel was not confident that he had internalised his understanding and this was yet to be tested in less secure conditions. The proposed risk management plan lacks robustness beyond approved premises and the claimant would need close management for the risks to be managed. The panel concluded that he needed to remain confined for the protection of the public.
14. However, the panel then went on to consider a move to open conditions, and in the concluding paragraph said this.

"Having considered all the information before it, the panel recommended that Mr Messenger is progressed to open conditions. He 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 he may be in the community, unsupervised, under licensed temporary release. The panel did not consider that Mr Messenger presented a risk of absconding. It concluded that a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on license into the community, particularly in terms of evidencing that he is using the skills that he has learnt, spending overnight leaves at

the approved premises where he can build relationships with staff there and developing his longer term resettlement plan.”

The Secretary of State’s decision

15. The Secretary of State considered the recommendation and issued an initial decision in March 2023, but following a legal challenge that was withdrawn and another decision, by a different decision maker was issued on 4 August 2023. The decision maker was the then head in the parole eligible casework team of the public protection casework section.
16. The Secretary of State’s decision set out the background and indicated that in making the decision, the Secretary of State carefully considered the Parole Board’s recommendation as well as the report writers’ assessment of risk. He noted that the claimant had made good progress in nine bullet points, including the work he had undertaken, his excellent prison record, that the psychologists recommended no further offence focused work, that his managers had seen an improvement in his communication style, and that the psychologist assessed him as likely to comply with rules and conditions.
17. However, the recommendation was not followed, and the Secretary of State gave reasons why it was not considered that the criteria for a move to open conditions had been met, as follows:

- “• When reflecting on the most recent one-one schema work, while you are reported to have engaged well with this, it was considered that you may still have difficulties seeing the "whole picture" and to "extrapolate his learning to new contexts" (page 7, Decision).

- Your COM expressed that while you have an "intellectual understanding of his risk factors, he had not internalised this" (page 7, Decision).

- The psychologist asserted that you continue to "minimise aspects of his offending behaviour' and there "remains concerns around the possible escalation of risk in future relationships" (page 7, Decision).

- When discussing future relationships with your now adult children, who have indicated they do not wish to have contact, you wondered whether "they had been poisoned against him" before accepting they may not have liked what you did to their mother (victim of index offence). In the decision makers view, this perspective shows a significant lack of understanding of the impact that your behaviour has on others (page 9, Decision).

- You have expressed concerns at the proposed exclusion zone which would be in place at any time that you would be in the community (page 9, Decision). Again, this is considered to demonstrate a lack of awareness and understanding of the impact

your behaviour has had on others and in turn a lack of insight into your offending.

- In their conclusion the panel noted that you, "continues to minimise the extent of his behaviour and the impact that it would have had on his victim and his children. Whilst Mr Messenger has made progress in addressing his risk factors, the panel was not confident that he had internalised his understanding and skills" (page 10, Decision)."

18. The decision continued:

"The Secretary of State notes that the Panel were not confident that you have internalised your understanding and skills and so whilst the interventions you have engaged with is most positive, the impact remains questionable at this juncture."

19. It was noted that there is a consensus that the claimant continues to minimise his behaviour, shows some lack of understanding as to the impact his offending has had on others, including his children, and that he is yet to demonstrate that he had internalised the learning from the interventions completed, and this was then said:

"Accounting for the fact that within open conditions you would have access to both the victim, her family and/or members of the public who you could quickly form a relationship with, the Secretary of State does not, at this stage, assess that your risk has been reduced to a level consistent with protecting the public from harm, in circumstances whereby in open conditions, you may be in the community, unsupervised, under licensed temporary release."

20. The concluding paragraph of the panel recommendation, set out in paragraph 14 above, was also noted and commented upon as follows:

"The Secretary of State acknowledges that these latter points will be beneficial and necessary in order to prepare you fully for any future release and does not disagree with the panel. However, given the concerns identified above, the decision maker was not confident that you have reached a position, with regards to your insight and attitudes, whereby risk is reduced sufficiently to justify a move to open conditions whereby you could begin to access such opportunities."

21. The Secretary of State then went on to consider whether there was a wholly persuasive case for transferring to open conditions and concluded as follows:

"The Secretary of State recognises that you have engaged positively with the interventions outlined above and has reviewed various evidence that is both positive and evidences your progress. However, the Secretary of State has found, in light

of the above criteria not being met, that there is not a wholly persuasive case to transfer you to open conditions at this time.”

22. The claimant seeks to challenge the Secretary of State’s decision on the basis that it is irrational in light of the panel’s findings and recommendation. No issue is taken as to the factual findings by the panel. The challenge relates to the assessment of risk.

The statutory framework and legal principles

23. By section 12(2) of the Prison Act 1952, the Secretary of State may determine to which prison a prisoner shall be allocated. By section 47, rules may be made for the classification of persons required to be detained in prison, and the Prison Rules 1999 have been made under that power. Rule 7 is entitled 'Classification of Prisoners' and provides:

“(1) Subject to paragraphs (1A) to (1D), prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3.

24. The Secretary of State usually seeks a recommendation from the Parole Board before deciding whether prisoners serving indeterminate sentences should be moved to open conditions. The Parole Board provides recommendation pursuant to section 239(2) of the Criminal Justice Act 2003, and it is for the Secretary of State to decide whether to accept the recommendation.

25. Such decisions are made having regard to policy set out within the Generic Parole Process Policy Framework (the GPP Policy Framework). The policy in force at the time of Secretary of State’s decision in the present case provided as follows:

“3.8.18 The Secretary of State (or their delegated official) is responsible for deciding whether to accept or reject the Parole Board’s recommendation for an ISP [indeterminate sentence prisoner] to move to open conditions in accordance with the policy set out at 5.8.2. The Parole Board should have taken into account the Secretary of State’s directions to the Parole Board which includes the criteria set out at 5.8.2 in Guidance. This decision must take place within 28 calendar days of receipt of the Parole Board decision.

...

5.8.2 The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (approve an ISP for open conditions) only where:

- the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the

prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and

- the prisoner is assessed as low risk of absconding; and
- there is a wholly persuasive case for transferring the ISP from closed to open conditions.”

26. There have been a large number of previous cases where a decision of the Secretary of State in relation to release or a move to open conditions has been the subject of challenge. Since this claim was filed, there have been two first instance decisions which are due to be considered by the Court of Appeal next month in joined appeals. One such decision is that of Fordham J in *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin), [2024] 1 WLR 1894. The other is a decision of His Honour Judge Keyser KC sitting as a judge of the High Court in *R (Oakley) v Secretary of State for Justice (No2)* [2024] EWHC 292 (Admin).
27. In the former decision, Fordham J quashed a decision where he found that the Secretary of State had misunderstood what the Parole Board meant by intensive monitoring and why it would work in that case. At [28] he set out key principles which may be summarised as follows so far as material:
- i) The primary decision maker is the Secretary of State.
 - ii) In giving advice the Parole Board has the advantage of expertise in assessing risk.
 - iii) The Secretary of State must give due weight to the recommendation of the Parole Board.
 - iv) The Secretary of State must have a reasonable basis for rejecting a recommendation.
 - v) Examples of such a basis includes where something has gone wrong or come to light.
 - vi) In respect of recommendations where the Parole Board has a significant advantage of expertise, such as evaluative assessments about the nature and level of risk and of managing the same, the Secretary of State should have very good reason for rejecting a recommendation.
 - vii) In other cases, there will still need to be a good reason for rejection.
28. In *Oakley*, HHJ Keyser KC upheld the decision of the Secretary of State in rejecting the recommendation of the Parole Board, because the Secretary of State was entitled to conclude that assessments in that case were needed before and not after the move to open conditions where the Parole Board had not identified the need for such assessments.
29. In *R (Dobson) v Secretary of State for Justice* [2023] EWHC 50 (Admin), another decision of Fordham J, it was held that the court should give anxious scrutiny to the decision of the Secretary of State.

30. In the present case, Mr Bimmler for the claimant and Ms Sullivan for the Secretary of State each agreed that the forthcoming appeals are unlikely to impact upon the decision in the present case, which involves different views about the assessment of risk. I am grateful to both counsel for their clear and focussed submissions.

The parties' cases

31. Mr Bimmler submits that the first main area of difference relates to the claimant's limited internalisation of risk factors and that the Secretary of State failed to acknowledge and engage with the panel's finding that this was why the claimant requires to be tested in open conditions, so that he can apply his understanding in such conditions and show that he has internalised risk factors. There was no good, or very good, reason for differing from the recommendation.
32. Mr Bimmler submits that the second area of difference is the Secretary of State's concern that the claimant would, within open conditions, have access to both the victim, her family and/or members of the public with whom he could quickly form a relationship with and that this risk was not manageable. He submits that the Secretary of State failed to explain why the claimant might access such persons when he was psychologically assessed to be likely to abide by rules and conditions imposed on him due to his compulsive personality, that he had shown exemplary compliance with prison rules and conditions; that any release on temporary licence could include non-contact conditions and notifying probation of any developing relationships; that the prison offender manager's report confirmed that he had not expressed any intention to re-establish contact with his victim or showed any animosity towards her, and the psychological assessment found no evidence of his wishing to form a new relationship.
33. Mr Bimmler also submits that it was irrational for the Secretary of State to rely upon the claimant's oral evidence about the attitude of his children towards him and about the proposed exclusion zone as showing that his understanding and insight were too little developed even for progression to open conditions. None of the professional witnesses, nor the panel, found that these matters gave rise to concern about progression to open conditions.
34. Mr Bimmler's overarching submission is that the Secretary of State irrationally failed to give adequate respect and weight to the decision of the panel, when two professional witnesses were of the view that the test for release into the community was met, and unlawfully substituted his own view that risk was not manageable in open conditions, without giving good reason for disagreeing with the panel overall support for progression.
35. Ms Sullivan submits that the Secretary of State's decision clearly gave weight to the findings of the Parole Board and was based on its findings that the claimant continues to minimise the extent of his behaviour and the impact it would have had on his victim and his children and that whilst he had made progress addressing his risk factors, the panel was not confident that he had internalised his understanding and skills. There was a consensus in relation to these issues. The Secretary of State rationally reached a different conclusion on the question of risk, which is a question about which reasonable people may reasonably differ.

Discussion

36. In my judgment it is clear that the Secretary of State did give due weight to the recommendation of the Parole Board. He did not disagree with any of its findings, but rather relied upon them in making his own assessment of the risk. He acknowledged that a transfer to open conditions would provide the claimant with the opportunity to demonstrate that he is able to apply what he has learned in the community, and to build relationships with staff at approved premises and develop a longer-term resettlement plan. He also acknowledged that these points would be beneficial and necessary in order to prepare fully for any future release. In my judgment this shows that the Secretary of State engaged fully with the panel's decision.
37. However, given the concerns identified by him, which were also identified by the panel, he was not confident that the claimant had reached a position, with regards to insight and attitudes, whereby risk is reduced sufficiently to justify a move to open conditions whereby the claimant could begin to access such opportunities. The claimant's attitude to his children and to a possible exclusion zone were set out in the panel decision, although the panel did not say that those impacted the claimant's insight. In my judgment the Secretary of State, with his expertise, was entitled to find that they did.
38. The Secretary of State expressly acknowledged that the psychological assessment was that the claimant was "likely" to abide by rules and conditions, but also noted that the very serious index offence was committed in breach of a non- molestation order and of bail conditions.
39. The Secretary of State found that the risk had not reduced sufficiently to justify a move to open conditions. That amounts to a very good reason for not accepting the panel's recommendation that the claimant's understanding should be "tested" in open conditions. It is clear that the panel found that the claimant's internalisation could be tested in open conditions, but the community offending manager's view was that the claimant had not internalised his understanding and skills and that was one of the reasons given by the Secretary of State for coming to the conclusion that the criteria for a move to open conditions are not yet met. In my judgment, it was not irrational for the Secretary of State to determine that the risks identified by the panel had not reduced sufficiently to justify the move to open conditions. As Ms Sullivan submits, the test of irrationality is a high one, and in my judgment it is not met on the particular facts of this case.
40. I would be grateful if counsel could submit a draft agreed order within 14 days of hand down of this judgment, together with written submissions on any consequential matter which cannot be agreed, which will then be determined on those submissions.