

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

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 14 November 2024

Before :

HIS HONOUR JUDGE SIMON
sitting as a Judge of the High Court

Between :

THE KING

Claimant

on the application of

DEAN HALLAM

- and -

THE SECRETARY OF STATE FOR JUSTICE

Defendant

MS S SEKHON (instructed by **BHATIA BEST SOLICITORS**) for the **Claimant**

MR M HOWARTH (instructed by **TREASURY SOLICITOR**) for the **Defendant**

Hearing date: 20 August 2024

JUDGMENT

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His Honour Judge Simon:

Introduction

1. This Claim challenges the lawfulness of a decision by the Defendant, the Secretary of State for Justice, not to accept the recommendation of the Parole Board for England and Wales (the Parole Board) that the Claimant, Dean Hallam, should be returned to open conditions. The Defendant’s decision was communicated to the Claimant in a letter dated 15 May 2023.
2. At the time of the decision the Claimant was a post-tariff prisoner, serving a sentence of imprisonment for public protection (IPP). He was sentenced to the IPP on 9 August 2010 following his pleas of guilty to a number of sexual offences against female children under 16 years. The Claimant was 34 years old at the date of sentence. The sentencing judge set the tariff as six years less time spent on remand. The tariff expired on 3 May 2016.
3. In December 2018, the Claimant was transferred to open conditions at HMP North Sea Camp. In November 2021, he was returned to closed conditions. This was due to the Claimant’s breaches of ‘Person Posing Risk to Children’ (PPRC) restrictions in place. The breaches comprised the Claimant having

contact with a child under 18. It was considered by professionals that this demonstrated a breach of trust and a lack of self-awareness into established areas of risk. A cell search in July 2020 had earlier found that the Claimant possessed diaries which contained images of children as well as DVDs depicting young females on the covers. The offence-paralleling behaviour was assessed as potentially having continued over a number of months.

4. Following his return to closed conditions, the Claimant was assessed by the prison psychologist and by an independent psychologist. Both assessments took place in December 2021. The psychologists were requested to prepare a joint expert report identifying areas of agreement and disagreement. This was done and a joint report was prepared and dated January 2022.
5. The Parole Board considered the Claimant's position at an oral hearing on 4 August 2022. The Parole Board's first assessment within that hearing was whether to direct the Claimant's release. Given the events that transpired to cause a return to closed conditions, none of the professionals advocated for release and it seems that, adopting a realistic position, the Claimant's advocate did not seek to persuade the Parole Board. The Parole Board had available to it, in addition to the joint psychological report, reports from the Claimant's Prison Offender Management (POM) and Community Offender Manager (COM). The Parole Board heard evidence from the Claimant and the professionals, the evidence of the psychologists notably following, and doubtless being informed by, the oral evidence of the Claimant. With the exception of prison psychologist, who did not make a recommendation, the other professionals supported a move to open conditions. By way of oral hearing decision, dated 9 August 2022, the Parole Board recommended such a move. The reasoning of the Parole Board is set out in more detail below.
6. The recommendation was sent to the Defendant for consideration. A file including the Parole Board's report was prepared by officials in the department of the Defendant and the file was then submitted to the decision-maker for consideration. The decision-maker, acting under delegated authority from the Defendant, determined that the Parole Board's recommendation should not be followed. The reasoning appears in the letter of 15 May 2023.

7. The Claimant sought judicial review of the decision on two grounds, as described below. HHJ Williams granted permission on the papers.
8. The full hearing of the Claim took place before me with both parties represented by counsel. At the conclusion of the hearing, I reserved judgment and this is what now follows.

The offending for which the IPP sentence was imposed

9. The Parole Board decision records the relevant offending as a number of sexual offences committed between 2002 and 2008. They involved sexual activity with two female victims, aged 13 and 14; indecent assault on a third victim, aged 16; and, having been released on bail for those matters, the Claimant committed an offence of making (which covers the downloading of) indecent images of female children, described as being of an extreme nature.
10. A particular feature of the offending in respect of one of the victims was that she was the younger sister of the person with whom the Claimant was in an intimate relationship and who was carrying his baby. The victim had been groomed by the Claimant and the sentencing judge referred to the Claimant as a “predatory paedophile”.
11. The Claimant had no previous convictions prior to these offences.

The return to closed conditions

12. Following an earlier Parole Board review, the Claimant was progressed to open conditions on 13 December 2018. He remained at HMP North Sea Camp for almost three years. On 5 November 2021, an Immediate Suitability Review (ISR) meeting took place, due to public protection concerns raised, namely that the Claimant had breached his PPRC restrictions by having contact with a child under the age of 18 and in doing so had demonstrated a breach of trust and a lack of self-awareness into his established areas of risk.
13. In addition, in July 2020 the Claimant was found in possession of some diaries which contained images of children. He was adjudicated after a room search found diaries containing a number of cut-out images of females of a similar age

to his victims and DVDs with covers containing images of children. The Claimant told staff he had brought them with him from his previous location and was initially dismissive of any concerns, but later accepted that they were inappropriate and admitted he had been looking at the images to make him feel better. As a result, his release on temporary licence process was suspended at that time. In February 2021 a cell search found a further set of DVDs relating to 1980s films.

14. The ISR was arranged in November 2021 in response to specific concerns that the Claimant had been overheard through pin phone monitoring having a ten-minute conversation with his twelve-year old niece. It was noted to be of concern that, during the conversation, the Claimant had asked his niece to write to him. This would have placed him in breach of his PPRC restrictions and it was considered troubling that the Claimant would think that this was an appropriate suggestion to make. There was clear evidence that the Claimant had unapproved contact and the suggestion that his niece write to him indicated to his POM that the Claimant was prepared to continue to try having contact with her without support from professionals. The Claimant had never mentioned his wish for contact with his niece in conversations with his POM.

15. In October 2021 the Claimant applied to have contact with another niece, who was over-18. As this was intended to occur when on local day release his COM and the police were contacted to seek their views and assess the appropriateness of this contact. The police records highlighted that, when she was a child, this niece had made an allegation of sexual assault by the Claimant. This had been investigated at the time, but it seems not to have resulted in any charge. However, as a result of this background information, the police contacted relevant family members to discuss the previous allegation and the suitability of the Claimant's request for contact with his adult niece in the future. The POM subsequently spoke to the Claimant and was concerned that he had not highlighted the previous allegation when applying to have the contact. When challenged about this the Claimant said that he was not aware of the allegation and could not recall having been spoken to about it. This again raised some concern for the POM, given that the Claimant would be expected to recall such

a serious allegation. Secondly, in the Claimant's account to the POM he reported never having spoken to his sister or family about the allegation until most recently following the police contacting them, which added to the POM's concerns.

16. The ISR concluded that there had been unapproved telephone contact between the Claimant and his under-age niece and a request for her to write to him. There was also a conclusion that the Claimant and his father may well not adhere to a condition that the Claimant should not have contact with his older niece.

The Parole Board's decision

17. On 4 August 2022 the Parole Board considered the Claimant's case at an oral hearing. This was a post-tariff review, the first following his return to closed conditions (albeit the fourth review overall). The Claimant was 46 years of age at the review. The Parole Board was clear about its remit, being consideration of release, but if not directing release then it should consider whether to recommend transfer to open conditions. The test being applied is set out at the beginning of the Parole Board's decision. The following paragraphs of what witnesses said at the hearing is taken from the decision itself, as this is a central document from the Defendant's perspective.
18. The Parole Board did not have a Victim Personal Statement. There was oral evidence from the Claimant's Prison Offender Manager (POM), Ms Kathryn Cross, she having known the Claimant since his return to closed conditions in November 2021. Her most recent report was dated 29 June 2022. She acknowledged that the Claimant is enhanced on the prison IEP scheme and employed in a trusted position in the textile workshops. He also was acting as a mentor to other prisoners. The POM reported on the Claimant's tensions with his POM in open conditions, but his return to closed conditions had reinforced his belief that he wanted to return to open conditions. Initial minimisation of the reasons for return to closed conditions gave way to a realisation that the Claimant was at fault. Having considered the family dynamics, the POM did not view the Claimant's family as a protective factor as they did not appear fully

to appreciate the restrictions he would be under if released. The POM was unsure about the family's reliability in reporting any regression by the Claimant.

19. The POM addressed the extent of the Claimant's progress with thought diaries, which did not refer to sexual activity. She assessed him as still needing to develop his internal responsibility for his actions rather than to be dependent on external factors. Despite positive engagement and good insight into risk, motivation could fluctuate. Risk reduction work required consolidation, although there was no further core risk reduction work identified to be done in closed conditions. The POM assessed the Claimant as ready to return to open conditions and was necessary to test compliance, given concerns regarding his nieces.
20. The Claimant gave evidence, describing his move to open conditions and his progress. He spoke of the images of children on DVD cases, initially dismissive of their importance, but agreeing it was poor self-management. Further DVDs found in February 2021 were connected with the loss of his mother and sister during Covid, he not having time to cry at their passing and not knowing how to manage his emotions. He addressed speaking to his younger niece, whilst on speaker phone, appreciating by the time of the hearing that he should not have done it and the reason for the POM's concerns. He said he knew it was wrong, "but was a risky thought process which he didn't manage well". He spoke of his request to have contact with his older niece, and could see why his POM was concerned. He denied knowledge or memory of the allegation involving his older niece.
21. The Claimant gave evidence about other incidents and said he understood, looking back, why he was returned to closed conditions. He said the POM was telling him "things" in the months leading to his return but he was not being heedful of them as he did not think he was doing anything wrong. He said that when he committed his index offences life was not enough for him and he was always wanting more. In open conditions he said the same "old me" thoughts were coming back as wanting more but not in the same way and he said he was not using sex as a coping strategy. He spoke of his difficulties with Dr Wood and his fluctuating motivation when doing consolidation work, as well as mental

health issues. He struggled with sexual thought diaries as this was not how he thought about things. Whilst in the community he had not had sexual thoughts and any thoughts were easy to ignore and control. He spoke about his past relationship issues and his aspirations in this regard for the future. He also spoke about his family relationships, saying he wanted to work with professionals to ensure that he achieved the correct level and type of contact with his nieces.

22. The Claimant mentioned his family struggling with disclosures about his offending and their condoning his relationship with a 13-year old girl when he was 19. This was in the context of whether they would inform his COM if he were released and his risk increased. He said he was not yet ready for release but was ready to return to open conditions for a slow reintegration into society. The Claimant expressed confidence that he would not reoffend as he was more aware of struggling and of whom to approach for help, adding that professionals would notice his body language changing, among other things. He said he was more aware of the risk of non-contact sexual offending.
23. The two psychologists, Laura Millership (prison psychologist) and Matthew Nicholl (independent psychologist), had completed assessments in December 2021 and produced a joint report in January 2022 summarising areas of agreement and disagreement. This had been updated by Ms Millership to reflect the autism assessment. Their joint view at the time of their individual assessments and joint report was that the Claimant should remain in closed conditions.
24. Seven months on, Dr Nicholl considered the Claimant suitable to return to open conditions. Areas of concern remained the family dynamics, the Claimant's insight into risk, his self-reporting not always being reliable and a remaining concern that he did not fully understand why professionals were concerned about his risk while in open conditions. There were some parallels between contact with his younger niece together with the pictures and DVDs with the index offending. This did increase risk. The Claimant needed to be more open and transparent about his thoughts and feelings. Dr Nicholl assessed the Claimant to have shown greater concession and understanding, during the hearing, that his actions were risky. Dr Nicholl noted continued issues of

minimisation, feelings of shame, vulnerability and a negative self-evaluation. Problem-solving and communication with professionals in open conditions had not been good, with little change in closed conditions. The allegations in relation to the Claimant's nieces remained a concern.

25. Dr Nicholl opined that the Claimant met the criteria for a label of sexual deviance, although this was ameliorated a little by his awareness and thinking process. His attraction to young girls was enduring and under stress, he was drawn to congruence with children and his risk increased in this area when he was struggling. He described the Claimant as sexually preoccupied and discussed his use of sex as "self-soothing", linked to his offending. Ms Millership agreed with this. Both agreed that supervisory problems mentioned in their initial reports were no longer a concern, although the allegations in respect of the Claimant's nieces remained so as did the degree of his openness about them, what the family knew and the family dynamics more generally. Neither considered there to be a risk of absconding in open conditions.
26. Ms Millership considered the Claimant's presentation to have been similar to when she carried out her assessment. She referred to unresolved childhood issues and the absence of emotional, psychological support. He was not managing stressful situations well as his needs were not being met. Anxiety and depression were also relevant, as was the Claimant's being slow to seek support for his mental health in closed conditions. He seemed more aware of his mental health difficulties and the relationship with his POM was positive, more so than when in open conditions. His attraction to young girls would not go away and what was key was how he managed this in the future. The Claimant's not being as open as he could be made assessment of increasing warning signs difficult to ascertain. The autism assessment provided insight into how the Claimant worked best with professionals. There was no further work to be done in closed conditions. Ms Millership felt unable to give a definitive recommendation in relation to a move, but said that open conditions would be suitable to manage the Claimant's risk.
27. Ms Richardson, the Community Offender Manager (COM) assessed the Claimant as being open, taking on board the concerns of professionals, although

she also said that she did not know him that well. She detailed issues about the family and that she had advised against the Claimant seeking contact with his older niece, until the COM had a greater understanding of the family dynamics and the allegations. She considered that a return to open conditions would allow the Claimant to move forward, having been forced to do a reset upon his return to closed conditions. Whilst his risk could be managed in open conditions, she did not consider that it could yet be managed in the community.

28. The Parole Board had available the results of OASys assessments recorded in July 2022, which they considered reasonable in the context of past offending and conduct in closed conditions, since return. The only high risk identified was serious harm to children if he reoffended.
29. The Parole Board's report addressed its analysis of past offending behaviour, of current evidence of change and of the manageability of future risk. Release was not supported by any professional. The COM outlined a risk management plan, involving approved premises, the conditions of the Sexual Harm Prevention Order and licence restrictions. GPS tagging and polygraph testing were also proposed. This would not presently be effective, but might be at a point following work on a resettlement plan and work on managing sexual thoughts.
30. The Parole Board considered that there remained a high risk of serious harm to children from the Claimant and a medium risk of sexual reconviction. It was noted that a return to open conditions would allow the interrupted sentence plan to be completed. The Claimant had been initially dismissive of the reasons for his return to closed conditions, but by the hearing he was much clearer and accepting of them and of professionals' concerns as to his increased risk. There was reference to the autism assessment and the need to engage with the Claimant in the ways recommended. It was noted that no core risk reduction work had been identified for completion in closed conditions and the focus would be upon supporting him to consolidate and apply his learning consistently.

31. The Parole Board referred to the Claimant’s progress since return to closed conditions and what would be different if he were returned to open conditions. The decision stated:

“4.10... The main drivers on this occasion appeared to be the desire to be fully tested in the community via RORs at an AP, his increased motivation for managing his future, being aware of his need for internal control of managing his risks, the input of SOLAR via the OPD pathway, the involvement of IIRMS and a greater understanding of his risks and motivation from the professionals involved in his care and supervision.

4.11. There are warning signs for the professionals involved to notice if Mr Hallam is struggling and he has confirmed that he now has more understanding of what those warning signs are and when he is starting to go downhill with his mood. He understands what support is available and what it is there for and that he only has to ask. These warning signs would be more easily evident to professionals than they were previously but the panel noted there was still an element of reliance on self reporting.”

32. The outstanding risk factors and lack of testing meant that there was no sufficiently robust risk management plan to support release into the community. The Parole Board concluded that the risk to the public could be managed in open conditions and that a period in open conditions was essential to inform future decisions about release and to prepare for possible release on licence into the community. The decision stated that the professionals support a progressive move to open conditions. The decision concluded by stating:

“4.16. The Panel had concerns about the recent increase in his risk as demonstrated by his admitted return to “old me” and the reasons as stated for his return to closed conditions. However, since his return to closed conditions that increased risk is currently being managed and the panel recommended that it was appropriate for Mr Hallam to be transferred to open conditions.”

33. It is of note that the Parole Board did not in the decision section address Ms Millership’s silence on a recommendation, presenting the recommendation as supported by all professionals.

The Defendant’s decision

34. The Defendant’s decision letter, set out various introductory paragraphs to provide the context for the decision in line with the applicable Generic Parole Process Policy Framework. This provided that:

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

- The prisoner is assessed as low risk of abscond; and*
- A period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and*
- A transfer to open conditions would not undermine public confidence in the Criminal Justice System.”*

35. The decision letter then highlighted that the Defendant had found two criteria not to be met, being the second and third bullet points in paragraph 5.8.2 (essentiality and public confidence).

36. The Defendant listed the positive progress made by the Claimant, thereafter detailing the evidence relied on in support of the conclusion that the criteria were not met. This section of the decision letter highlighted the contents of the joint psychological report, dated January 2022, which recommended a delay in transferring to open conditions to allow for work with the Claimant’s family in respect of the dynamics with his niece. The letter acknowledged Dr Nicholl’s support for a move, but identified Ms Millership’s inability to provide a recommendation and her observation at the hearing that the Claimant’s presentation had not appeared to change since her last assessment. There was further reference to Ms Millership’s evidence as recorded in the Parole Board

decision. Reliance was placed on Ms Millership's "hesitation" to provide a recommendation as supporting the conclusion against the essential criterion.

37. In relation to the undermining of public confidence, the Defendant's letter noted the serious nature of the circumstances leading to the return to closed conditions, the assessment that the Claimant still posed a high risk of serious harm to identified groups in the community, whether or not the Claimant is actively correcting his mistrust of professionals, and the risk of grooming and/or lack of consistent openness with professionals.
38. The Defendant's letter identified areas of progress made by the Claimant, followed by suggested routes by which to enhance his position by the next date of consideration by the Parole Board.

The Grounds advanced

39. The grounds advanced before me were:
 - [1] The decision that a period in open conditions was not essential was irrational and/or inadequately reasoned; and
 - [2] The decision that a transfer to open conditions would undermine public confidence in the criminal justice system was irrational and/or inadequately reasoned.

Relevant legislation and guidance

40. By s.12(2) of the Prison Act 1952 ("the 1952 Act"), the Defendant may determine to which prison a prisoner shall be allocated. By s.47 of the 1952 Act, rules may be made for the classification of persons required to be detained in prison.
41. Rule 7(1) of the Prison Rules 1999 provides that "... *prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3*".

42. For indeterminate sentence prisoners such as the Claimant, the Defendant ordinarily seeks a recommendation from the Parole Board before deciding whether they should be moved to Category D open conditions. The Parole Board provides advice to the Defendant pursuant to s.239(2) of the Criminal Justice Act 2003 ("the 2003 Act").
43. Section 239(6) of the 2003 Act empowers the Defendant to give the Parole Board directions as to the matters to be taken into account in discharging its function. At the material time, decisions on open conditions recommendations were made pursuant to the policy set out within the Generic Parole Process Policy Framework (GPPPF), as substantively revised on 21 July 2022 and last updated 12 October 2022. It provides:

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

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

- 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."*

44. The 2022 version of the Secretary of State's directions to the Parole Board ("the Secretary of State's directions") were in force. The relevant directions were:

"Suitability for Open Conditions Test

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

- the prisoner is assessed as low risk of abscond; and*
- a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and*
- a transfer to open conditions would not undermine public confidence in the Criminal Justice System.*

Directions

2. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-

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

(ii) the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release;

whether the following criteria are met:

- the prisoner is assessed as low risk of abscond; and*
- a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community.*

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

45. In exercising this function, the Parole Board cannot direct transfer of a prisoner to open conditions, only provide advice and a recommendation to the Defendant. The corollary is that the Defendant is not bound to accept the advice of the Parole Board, though he must take it into consideration and give due weight to it.

The case law

46. The applicable law to challenges by way of judicial review of the Defendant's rejection of the Parole Board's recommendation, in circumstances such as arise in this claim, is a well-trodden path and continues to be subject to many first instance judgments. There have been a number of reported cases over recent years addressing and refining the correct approach to consideration of grounds of illegality or irrationality against decisions of the Defendant. Both counsel made submissions, drawing on the same body of case law and tracing its development. Almost without exception the decisions are at first instance, but there is little divergence as to the central principles.
47. For the Claimant, emphasis was placed on the test as enunciated by Fordham J in ***R (Sneddon) v Secretary of State for Justice*** [2023] EWHC 3303 (Admin), although Ms Sekhon submitted that it mattered not in the end which approach from the case law was adopted. In the end all roads, so to speak, would lead to both of the grounds being made out. Conversely, Mr Howarth placed much emphasis on the test as set out by in the very recent case of ***R (Draper) v Secretary of State for Justice*** [2024] EWHC 1892 (Admin), which itself draws on ***Hahn v Secretary of State for Justice*** [2024] EWHC 1559 (Admin), a recent decision of Eyre J.
48. It seems to me that much is to be said for the principles very helpfully and concisely laid out in the relatively recent judgment of Sir Ross Cranston in ***R (Green) v Secretary of State for Justice (No 2)*** [2023] EWHC 1211 (Admin):

“42. In drawing the threads together, it seems to me that the following applies if the Secretary of State is to disagree with the recommendations of the Parole Board for a prisoner's move to open conditions:

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 the 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 he must still give reasons for departing from it, but he can only be challenged on conventional public law grounds such as irrationality, unfairness, failure to apply policy, and not taking material considerations into account."

49. I gratefully adopt this summary of the approach to apply to this claim.

Ground 1: The Defendant's decision was irrational that a move to open conditions was not essential

50. In broad terms, Ms Sekhon submitted that the Defendant had adopted an irrational and speculative approach to the fact that Ms Millership did not make a firm recommendation. It was wrong to describe it as "hesitation" and to equate it with her not considering a move to open conditions to be essential. The Parole Board had undertaken an expert evaluation of risk and the Defendant had failed to give reasons for disagreeing with that assessment. Further, it was irrational to place reliance on the joint report of January 2022, rather than updated position adopted at the oral hearing. Ms Sekhon pointed to the expert evidence coming after that of the Claimant at the hearing and therefore superseding the earlier report. Even Ms Millership had expressed the view that the Claimant could be managed in open conditions. The Defendant had not approached the exercise of considering the recommendation in accordance with the existing case law. The reasons given by the Defendant did not explain why any of the work referred to was either needed or, if indeed needed, could not be achieved within open conditions. Beyond assertion, the Defendant had not adequately

articulated reasons as to why a transfer was not essential and could not do so because the position adopted was irrational.

51. In response, Mr Howarth pointed to the Defendant's assessed view of the evidence presented when considering the recommendation. The process of evaluation of the evidence, piece by piece, undertaken by the Defendant undermines an argument of irrationality. The obvious evaluation of the Parole Board hearing, the OASys assessment, Ms Millership's position and the joint psychological report is further evidence of a rational approach, giving due weight to the positives and the negatives as set out in the decision letter. However, the weighing of risk and essentiality remains a matter for the Defendant. The Defendant had made direct reference to factors that pointed away from essentiality and potential work that needed to be done, which could be done in closed conditions. The Defendant had provided adequate reasons for differing from the Parole Board's overall view.

Ground 1 - Analysis

52. I reject the Claimant's criticism of the Defendant's approach to consideration of the Parole Board's recommendation.
53. The Defendant has, in my judgment, approached the task by way of assessment of risk and essentiality based on the evidence available and paying due deference to the findings of the Parole Board. That is, on the authorities, a legitimate approach in the absence of binding authority to the contrary. The decision letter read as a whole supports this conclusion.
54. Superficially, it may appear troubling that the Defendant placed reliance on the January 2022 joint expert report, when both experts gave evidence at the oral hearing. However, this was a case in which only the independent psychiatrist recommended the Claimant's transfer, having heard his evidence. The prison psychiatrist, Ms Millership, expressed her views but did not make a recommendation. It is difficult to understand how that is not capable of being considered significant by the Defendant and, in the circumstances, would justify account being taken of the continuum of psychological opinion from assessment, following the Claimant's return to closed conditions, through the

production of the joint report to the Parole Board hearing. It matters less how the Defendant characterises Ms Millership's adopted position at the hearing, and more as to whether it raises a legitimate line of further enquiry and consideration. In my judgment, it does. The Defendant was entitled to look beyond the views expressed at the hearing (and the Parole Board's treatment of them) and consider the wider psychological evidence in detail.

55. The Defendant is also entitled to reach a different conclusion from the Parole Board on the question of essentiality, especially when one of the experts does not (to use a neutral description) make a positive recommendation. A logical extension of the Claimant's argument is that Ms Millership was acting irrationally in not making a positive recommendation for transfer to open conditions. That is not an argument that is – or could be – raised. The decision letter provides sufficient detail as to the identified positives and the areas of concern with adequate reasoning as to the decision reached.
56. In all the circumstances, my conclusion is that Ground 1 is not made out.

Ground 2 – The conclusion that public confidence would be undermined was irrational

57. Ms Sekhon's submission, in short, was that the Defendant's conclusion that public confidence would be undermined was irrational, because there had been no further contact attempts with the Claimant's nieces since returning to closed conditions (or other offence-paralleling behaviour) and the Defendant had failed to justify concerns about a lack of openness with professionals. The Parole Board had noted the professionals' concerns but concluded that these could be managed in open conditions. Moreover, the COM's evidence was that the Claimant was open. The Defendant's approach to the evidence on the point was therefore cherry-picking and a failure to provide proper reasons that did not suffer from a number of omissions. The Defendant's reasoning overall was therefore inadequate to justify not following the Parole Board's recommendation.
58. In response, Mr Howarth emphasised that the Defendant is more expert in this area and entitled to disagree with the Parole Board's view. Concerns were

indeed expressed around the family unit and the degree of protective element this would afford. There had been issues of mistrust with professionals and this was a key consideration. The Defendant adequately reasoned the conclusion reached on public confidence.

Ground 2 - Analysis

59. The submission that the Defendant is more expert in this area of consideration of the test for transfer was not challenged by the Claimant. In my judgment it is a submission well made. The decision-makers to whom the Defendant delegates consideration of Parole Board recommendations are particularly well placed to assess this aspect of the test, given their broader overview of a wide cohort of offenders, rather than the individual case before the Parole Board.

60. The history of the Claimant's period of incarceration is significant in this case. The offences for which he was originally imprisoned were serious sexual offences against children. Having been transferred to open conditions, on the basis of a risk assessment and a recommendation from the Parole Board, he did not progress to a point at which his release was directed, but rather concerning, non-contact offence-paralleling material was found in his cell and much later contact offence-paralleling behaviour was discovered that led to his being returned to closed conditions. At this point, experts assessed that the Claimant had clearly not progressed in open conditions as it may have appeared to professionals during his time there. References in the Parole Board hearing to the Claimant's complacency and his shock at being returned to closed conditions triggering his motivation. All this at a point only nine months after his return to closed conditions when the Claimant had been in open conditions for almost three years.

61. That is the context within which the Defendant was to assess the potential undermining of public confidence. Risk assessment of the Claimant remained high for serious harm to identified groups in the community, the family dynamics continued to be an area of professional concern and the conduct giving rise to the return to closed conditions was serious. With that in mind, I am quite unpersuaded that there is any basis to challenge the Defendant's

conclusions about public confidence. The reasons given in the decision letter dated 15 May 2023 are intelligible, engage sufficiently with the Parole Board's report, demonstrate due deference to the Parole Board's considerations and recommendation, including by acknowledging the positives in the Claimant's case and explain in sufficient detail the basis for reaching a different conclusion.

62. For this reason, I find that Ground 2 is also not made out.
63. I would add, for the sake of completeness, that even if I were wrong about Ground 1, the refusal in respect of Ground 2 would in my judgment be such as to invoke section 31 Senior Courts Act 1981. The overall outcome would not have been different and I would have refused to grant relief.

Conclusion

64. For the reasons set out above, I reject the Claimant's grounds of challenge to the Defendant's decision in response to the recommendation of the Parole Board. The claim for judicial review fails.

Postscript

65. Prior to circulation of the draft judgment, the Court of Appeal issued its judgment in the joined cases of Sneddon and Oakley. I did not invite further submissions from counsel as the outcome of the appeal did not impact my approach to this claim.