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Case No: CO/554/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 September 2023

Before :

Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between :

Reginald Zenshen	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

Mr Nick Armstrong KC (instructed by **Bhatt Murphy**) for the **Claimant**
Ms Scarlett Milligan (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 18 July 2023

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 15th September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DEXTER DIAS KC

Dexter Dias KC :

(sitting as a Deputy High Court Judge)

1. This is the judgment of the court.

2. I divide the text into 10 sections to assist parties and the public follow the court's line of reasoning.

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B123 (hearing bundle page). AB456 (authority bundle page).
CS §12 (claimant skeleton paragraph number). DS §12 (defendant skeleton paragraph number).

§I. Introduction

3. In this application for judicial review, the sole question for the court is whether the decision of the Secretary of State for Justice to reject the recommendation of the Parole Board that the claimant be transferred to open prison conditions was lawful. Nothing more, nothing less.

4. The claimant now calls himself Reginald Zenshen and is presently incarcerated at HMP Warren Hill. At the time of his murder conviction in July 1991, he called himself Reginald James Wilson. He has therefore served 32 years' imprisonment following the imposition of a life sentence with a minimum term of 30 years. He is thus "post-tariff". That means that he has completed the punishment part of the sentence and the question that remains before any release is one of risk to the public. His severe sentence was richly deserved. The crime he committed was of the utmost gravity. The word "appalling" is used too frequently. However, this is certainly a case in which it was justified. The question before the court is not whether he should be released from his sentence, but a markedly narrower one: whether the refusal of the Secretary of State to accept the recommendation of the Parole Board that the time was right for the claimant to be transferred to open prison conditions with a view to monitoring and testing him prior to any final release was a decision that can stand in light of the settled principles of public law. The fact is that the claimant is not serving a whole life term, and thus the prospect remains of his being released into the community at some point.

5. The claimant is represented by Mr Armstrong KC of counsel. The defendant is the Secretary of State for Justice and is represented by Ms Milligan of counsel. The court is indebted to both counsel for the valuable assistance provided.

§II. Facts

6. Much of the hearing before me focused, understandably, on the claimant and the progress he has made in his life. But there is a victim here. Out of respect to the deceased and his family, it is important that I set out the true facts, distressing as they are, and not gloss over them. This also serves as the proper context for the difficult risk assessments that professionals and public officials have been tasked to make.

7. On 3 February 1990 the claimant was 25 years old. His chosen victim was Dr David Birkett, who lived alone in Middlesborough. Dr Birkett was a highly respected consultant dermatologist and consultant palaeopathologist. One reason for the claimant selecting Dr Birkett was that the Doctor lived on his own. On 3 February the offender posted a hand-written note through Dr Birkett's letterbox purporting to come from dispatch motorcycle couriers. It was to induce Dr Birkett to arrange a time for delivery of a parcel. The number given on the note was the number of a nearby telephone kiosk.

8. Dr Birkett almost certainly telephoned the number. Reginald Wilson was waiting for the call. Dr Birkett invited him into the house. The claimant was armed when he entered, most likely with something like a hammer. It was a heavy, blunt instrument wrapped and held inside a plastic carrier bag. He was also carrying a rope.

9. Once Dr Birkett had answered the door he was struck down with a blow. That blow was then followed by further heavy blows with the blunt instrument which was still inside the carrier bag. These blows were aimed at Dr Birkett's head. The assailant then dragged the Doctor into the study using a rope tied around Dr Birkett's arms. This was deliberately done to avoid any forensic link between him and Dr Birkett. In the study further blows were inflicted on Dr Birkett's head with the weapon. In all something like 17 blows were struck to the back, sides and front of his head. The blows fractured the vault of his skull. The resultant brain injury proved fatal.

10. After killing Dr Birkett, the claimant scoured the house and stole a wallet and pocket watch. Dr Birkett kept a medieval skull in the house that had sustained violent damage to the frontal area. After the murder the skull was missing. One of the features of the case which the trial judge, Potts J, noted was the coincidence of injury between that skull and the injuries inflicted on Dr Birkett.

11. In subsequent legal representations from the claimant's solicitors (May 2006), the claimant apparently agreed that when the offence was committed he was "preoccupied with a hatred of authority and that he had some form of loose and relatively unformed idea that by committing this murder he would be brought into direct and physical conflict with the police. It was this conflict that he was

seeking to precipitate by committing the murder." In other words, the claimant killed Dr Birkett as a device to achieve his greater aim, which was to kill members of the police force.

12. Reginald James Wilson was convicted of murdering Dr Birkett. He also fell to be sentenced for a series of other offences, having pleaded guilty to possession of a firearm, a sawn-off shotgun and 73 cartridges found during a police search of his home. The police also found hammers, a crossbow, knives and knuckledusters, together with survival gear. There was also evidence that he read and wrote poetry about death and killing. He had drawn up a list of people in authority, largely police officers, and had a radio scanner that was tuned into police frequencies. He told his girlfriend he intended to kill a policeman.

13. On 25 July 1991, the claimant was sentenced to life imprisonment by Potts J. The judge stated that the claimant was guilty of an "appalling" murder. On 16th December 1994 he was notified in writing that the Secretary of State of the day had decided that the requirements of retribution and deterrence could be satisfied only by the claimant remaining in prison for the whole of his life. On appeal, Lord Lane CJ agreed, adding:

> "This man should remain in prison for the remains of his natural life by way of punishment and deterrence quite apart from any question of risk."

14. When the Criminal Justice Act 2003 changed the law, the claimant applied for a review of the whole life order pursuant to paragraphs 2(b) and 3 of Schedule 22. The case came before Tugendhat J. He revised the sentence. By a written judgment dated 16 May 2008, the judge substituted a minimum term of 18 years' imprisonment. This sentence was itself subject to challenge by way of Attorney-General reference under s.36 of the Criminal Justice Act 1988 (*Attorney-General Reference No. 38 of 2008*). Giving the judgment of the Court of Appeal, Sir Igor Judge PQBD, echoed the strong condemnation of previous courts. He stated at [36]:

> "… this offender chose the victim (and we are sorry for the deceased's family but we have to say it) as a sacrificial pawn in his battle with authority and the police in particular. He was deliberately chosen because he lived alone and he was known to the offender to be vulnerable. After entering his home and rendering him defenceless the offender subjected him to a vicious and prolonged attack. We have no doubt that from the very outset the offender intended to kill his victim and that every one of the blows he inflicted was struck with that intent. … The horrific scene which greeted the victim's 16-year-old daughter (which we shall deliberately not describe) has blighted the rest of her life and the continuing impact on each member of this family is movingly, but so far as possible, objectively described in the statements which we have read."

15. The court proceeded to reassess the sentence significantly [38]:

> "We are quite satisfied that the decision on the review was manifestly lenient. It will be quashed. In the light of the information before us, which was not before Tugendhat J, in our view the minimum term to be served

by this offender before he may be released should be re-assessed at a period of 30 years' imprisonment. The life sentence will of course remain unchanged."

16. Thus it was that the claimant was serving a life sentence with a minimum term of 30 years and came before the Parole Board at the end of 2022 for review of his prison categorisation.

§III. Parole Board recommendation

17. A hearing of the Parole Board was convened on 14 November 2022. The witnesses who gave evidence included the following:

- Ms Johnson, Prison Offender Manager ("POM")
- Ms Daniels, Forensic psychologist
- Mr Taylor, Community Offender Manger ("COM")
- Reginald Zenshen (as he now was)

18. By way of a decision letter dated 23 November, the Panel recommended that the claimant be transferred to open conditions. It explained its conclusion in this way (B607/§§4.6-4.8):

"4.6 The panel then turned to the question of a progressive move to open prison conditions. It was persuaded by the evidence of the professionals, in identifying the merits, benefits, and need for this. The panel identified that Mr Zenshen 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 substance misuse which may emerge, behaviours and thinking skills, and his attitudes, to be monitored and tested in conditions of lesser security and lower supervision. There are also personal benefits from such testing, a gradual transition to the community, the development of independent living skills, and the building of a pro-social network.

…

4.7 The panel also assessed that Mr Zenshen:

- Was a low risk of abscond; all the professional witnesses adopted that view;
- Had made sufficient progress during this sentence 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, under licensed temporary release; and that

> - For testing, reassurance about manageability and compliance, and the development of a resettlement, and risk management plan, and to inform future decisions about release and to prepare for possible release on licence into the community, a move to open conditions was essential for testing, and as preparation for future release.
>
> 4.8 Consequently, the panel now assess that Mr Zenshen's risks are such that a progressive move to return to open prison conditions is appropriate. This will enable him to develop pro-social networks, test temptation from substances, test compliance and manageability, develop a resettlement plan, and test the effectiveness of the risk management plan. **The panel recommends to the Secretary of State that Mr Zenshen progresses to open conditions."**
>
> (original emphasis)

§IV. Defendant's decision

19. The decision by the defendant to depart from the Panel's recommendation was made on 7 December 2022. It was in fact made by Mr Gordon Davison, Director of HM Prison and Probation Service's ("HMPPS") Public Protection Group, to whom the Secretary of State had delegated decision-making (B716). The letter setting out the reasoning for the refusal of the recommendation was sent out on 9 December (B609-12). The letter came from the HMPPS's Public Protection Group of the Public Protection Casework Section in Croydon, Surrey.

20. In its most essential respects, it stated that there was "insufficient" evidence that the claimant was now a low risk of absconding, and in particular because the claimant had "attempted to escape from prison custody on several occasions in the past. The SSJ is therefore not currently satisfied…[of risk reduction]." There was insufficient evidence that transfer to open conditions was "essential to inform future decisions about… release" because further consolidation in Category C conditions was necessary. Reliance was placed on a comment by the psychologist that "there is less evidence of there being much focus on your risk, which would be helpful if you remained on the Progression Regime." The claimant had shown, relatively recently, impulsive or aggressive/irritation, during an "incident" in the gym. It was said that closed conditions might be moderating the claimant's risk and that the claimant only showed "some" understanding of his offending. Finally, it was said that "the SSJ considers that your transfer to open conditions would undermine public confidence in the criminal justice system at this stage. In coming to this view, the SSJ considered the nature of your offending, your custodial behaviour and the risk reduction work outstanding."

21. The decision letter continued:

> "Your custodial behaviour was of significant concern during the earlier part of your time in prison. This is evidenced by your further violent offending within prison, the very large number of adjudications you have been subject to, your time spent within the Exceptional Risk Centre at HMP Wakefield (15 years and up until 2011), and your time spent within a Close Supervision Centre."

22. And concluded:

> "The panel states within its decision letter that it "…identifies that Mr Zenshen continues to pose a risk of causing serious harm. The panel also accepts that serious offending could occur at any time, though may not be imminent" (paragraph 3.9 of their decision). The panel also agreed with the assessment that you pose a high risk of serious harm to the public and medium risk of serious harm to staff (paragraph 3.10 of their decision). The SSJ firmly believes that the benefits of a transfer to open conditions should not outweigh the risk posed to the public and, in any event, the criteria for a transfer to open conditions has not been met. The prison psychologist assesses that "Imminence of violence… would increase to moderate in open conditions" and that "There is some evidence that the environment could be moderating your risk" (page 393 of the dossier). Given this assessment, the Secretary of State for Justice considers that the public's confidence would be undermined if, in spite of this, the SSJ agreed to your transfer to a less secure environment.
>
> The SSJ 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 Board review."

§V. Permission and grounds

23. By an application notice (N244) dated 1 February 2023, the claimant sought permission to apply for judicial review. There were originally two decisions challenged. First, the refusal to transfer to open conditions. Second, the time period for the next sentence review which the defendant had set at 18 months. This latter challenge fell away when the defendant modified his position to a 15-month review. The claimant, purely pragmatically, did not pursue the point further. Given the invariable delays, he believed that he could no longer seek a "meaningful remedy" (CS §2).

24. On 23 May 2023, Kate Grange KC, sitting as a Deputy High Court Judge, granted permission to bring the claim to challenge the refusal to transfer to open conditions decision on what were essentially rationality grounds.

§VI. Law

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

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

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

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

28. The relevant directions to the Parole Board at the time its recommendation in November 2022 were issued in June 2022. They provide:

> **Suitability for Open Conditions Test**
>
> 1. The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (to approve an ISP for open conditions) only where:
>
> - the prisoner is assessed as low risk of abscond; and
> - a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and
> - a transfer to open conditions would not undermine public confidence in the Criminal Justice System.
>
> **Directions**
>
> 2. Before recommending the transfer of an ISP to open conditions, the Parole Board
>
> must consider:

(i) All information before it, including any written or oral evidence obtained by the Board;
(ii) The extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release;
(iii) Whether the following criteria are met:

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

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

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

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

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

30. Although the policy has developed over time, the essential criteria for rejection and departing from Parole Board recommendations have been considered by the courts on numerous occasions (*R (Kumar) v Secretary of State for Justice* [2019] 4 WLR 47; *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830; *R (Adetoro) v Secretary of State for Justice* [2012] EWHC 2576 (Admin); *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 802; *R (John) v Secretary of State for Justice* [2021] EWHC 1606 (Admin); *R (Oakley) v Secretary of State for Justice* [2022] EWHC 2602 (Admin)).

31. All these authorities were cited to me and contained in the bundle of authorities. I reviewed the main features of each of them, but found it unnecessary and disproportionate to read the entirety of each judgment, being largely fact-specific. However, I found the judgment of Chamberlain J in *Oakley* of particular value in this case. I set out its material respects in the Discussion

section, more proximate to the arguments around it and my ensuing analysis. For now, it is enough to record that Chamberlain J's approach has also been applied by Steyn J in *R (Wynne) v SSJ* [2023] EWHC 1111 (Admin) at [50], and substantially by Sir Ross Cranston in *R (Green) v SSJ (No 2)* [2023] EWHC 1211 (Admin). *Wynne* was the last of the 25 authorities provided in the authorities bundle, and I considered *Green* separately.

32. For the purposes of the instant case, it is unnecessary to rehearse this forensically well traversed ground. It is sufficient to say that unless the Panel has made a clear error by applying the wrong test or operating under an important factual misapprehension, the Secretary of State will usually require "very good reason" to depart from the Parole Board's recommendation where the Panel enjoys a significant advantage over the defendant. In other words, while the recommendation of the Panel is not binding on the Secretary of State for Justice, it carries weight and will ordinarily require cogent justification to be departed from.

§VII. Claimant submissions

33. The claimant challenged the transfer refusal in several ways. It was irrational for the defendant not to obtain some account of the oral evidence at the Parole Board hearing. The oral evidence provided important clarifications of the assessments of witnesses and the updated risk situation. In failing to take this into account, the defendant had failed to evaluate a material consideration. The need for the oral evidence was particularly heightened due to the prevailing circumstances: the defendant's policy of "suppressing" (as the Divisional Court put it in *R (Bailey) v Secretary of State for Justice* [2023] EWHC 555 (Admin) at [4]) views being advanced by witnesses that ran contrary to his own. The policy criterion of "public confidence" adds nothing beyond risk and is inadequate, lacking definition and guidance as to its meaning. Further, the refusal decision was taken in great haste. There was no "very good reason" for the defendant to depart from the Parole Board's recommendation. Overall, then, the flaws in the decision-making process and its intrinsic weaknesses reached the high standard of irrationality. The Secretary of State's impugned decision should be quashed.

§VIII. Defendant submissions

34. The short formulation of the defendant's case is set out at §46 of his skeleton. It is submitted that "This is a paradigm case of the SSJ reaching a different conclusion on the assessment of the risk posed by the claimant, and on how that risk ought to be managed by the SSJ (noting in particular that the claimant has been assessed as requiring a high level of intervention and monitoring in the community … which it would be the SSJ's responsibility to manage). The court is not charged with identifying which party has reached the 'correct' or 'reasonable' decision - nor to re-make either that decision or

decisions as to the underlying facts - but with ruling whether or not the defendant's conduct reached the high bar of public law irrationality."

35. As to the claimed *Tameside* failure (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014) to take relevant matters into consideration and/or make reasonable enquiry (obtaining the oral evidence), the defendant put it this way in his skeleton:

> "53. In reaching his decision, the Defendant had regard to the Parole Board's decision letter, which contained its evaluation of the pertinent factors of the case based on its assessment of the evidence. The Defendant properly relied upon that letter, as it represented the Parole Board's assessments which, as per the case law referenced above and in the DGR, should be respected unless it is an area on which the SSJ is entitled to reach an alternative conclusion.
>
> 54. Evidence before the Parole Board can be contradictory, and dismissed or disregarded by the Board. It would not be appropriate for the SSJ, when making a decision on a transfer to open conditions, to seek to rely on individual witnesses in preference to the Parole Board, which has the ultimate statutory responsibility and is an equal to the SSJ in its assessment of risk."

36. Such were the arguments before the court. I now turn to the court's analysis of the prime issues.

§IX. Discussion

37. As mentioned, I have found the approach of Chamberlain J in *Oakley* of great analytical value in this case. A vital question in assessing the lawfulness of the defendant's decision is whether the Panel had a "significant advantage", to use the *Oakley* terminology, over the Secretary of State in any relevant and important respect. This case evidently did not turn on the credibility of witnesses before the Panel. But that is not the end of the matter. As said in *Oakley*:

> "48. There may be other questions which do not turn on the credibility of oral evidence, where, for other reasons, the panel has an advantage over the Secretary of State. Contested questions of diagnosis are likely to fall into this category. For example, if a Parole Board panel found that particular behaviours were best explained by a prisoner's personality disorder (rather than, say, mental illness), or that a particular treatment was likely to be effective in substantially reducing risk, the Secretary of State would no doubt need a very good reason to depart from such a finding. This is because the Parole Board's process (in which experts are questioned by representatives for the prisoner and the Secretary of State and by tribunal members who are themselves experts) is well-suited to resolving issues of this kind, even ones where reasonable experts differ. On questions such as these, the Secretary of State could depart from

> Parole Board decisions if the Parole Board has overlooked or misunderstood some key piece of evidence or failed to give adequate reasons for its view, but not simply because he would have resolved the dispute differently.
>
> 49. Disputes about the level of risk posed by a prisoner will often turn on precisely these kinds of questions on disputed issues of fact or prediction. Where they do, the Secretary of State will need to show a very good reason for taking a view that differs from the Parole Board on the disputed question. But, as the reasoning in *Hindawi* shows, "risk assessment" will generally involve a further and qualitatively different exercise that falls to be undertaken against the background of the facts as found and the predictions as made by the Parole Board. This is the evaluative assessment required when reaching the ultimate decision whether to recommend transfer to open conditions."

38. It must be emphasised that the Panel does not direct or prescribe what the Secretary of State should do. The Panel completely lacks, as Chamberlain J succinctly puts it, "presumptive priority" (*Oakley* [50]). The Parole Board "advises"; the Secretary of State decides. But the structure of the arrangements devised to evaluate these important and complex questions around the management of serious offenders requires that the recommendation of the Panel should be granted, as Thomas LJ put it in *Hindawi*, "appropriate respect" (see also *Oakley*, ibid.). The critical question then becomes, as *Oakley* makes plain at [51]:

> "whether the conclusion or proposition is one in relation to which the Parole Board enjoys a particular advantage over the Secretary of State (in which case very good reason would have to be shown for departing from it) or one involving the exercise of a judgment requiring the balancing of private and public interests (in which case the Secretary of State, having accorded appropriate respect to the Parole Board's view, is entitled to take a different view)."

39. I must therefore examine in turn the areas of potential advantage relied on by the claimant.

a. Absconding risk

40. During the hearing, Ms Johnson (POM) was asked in detail about the level of absconding risk that the claimant now presented. She gave evidence that the risk was now low. What is of particular significance is that she drew a distinction between the previous phase in the claimant's incarceration at the very start of his sentence and the current presentation. She concluded that risk was now "very reduced". Ms Daniels the independent psychologist concluded that the claimant posed a low risk of absconding from open conditions. Mr Taylor (COM) concluded in his oral evidence that the risk of absconding was "low". He pointed out that concerns about the claimant's behaviour were from many years ago and the claimant had made significant changes since. The defendant did not have this oral evidence. I will say more about the significance of this when I deal with the presumption against open conditions for absconders.

b. Gym incident

41. One of the factors relied upon by the defendant in arriving at his decision was what was called the "gym incident". What had happened was that the claimant had felt frustrated and angry when another incarcerated person had taken his gym mat from him. This incident was mentioned in Ms Daniels's report and thus featured in the dossier. The defendant placed weight on it (B611):

> "The prison psychologist also provides examples of your relatively recent risk-related behaviour, namely, "During your time at Warren Hill, when your expectations have been challenged (such as with the IPDE [International Personality Disorder Examination] assessment and the incident in the gym) this is when you have shown some impulsivity, aggression/irritation" (page 391 of the dossier)."

42. The account in the psychology report was as follows (B398/§5.17):

> "A recent example of violent ideation was within the gym, where another prisoner started using the mat he was using. He recalled that he wanted to "boot him" and thinking about the consequences of this prevented him. He stated he carried on with his workout, turning his back to the other prisoner, and hoped that when he turned round the other prisoner would not be there. This was the case, although Mr Zenshen stated he would not have acted violently had the prisoner not moved."

43. However, at the oral hearing, Ms Daniels discounted this incident as having any real significance. She agreed that it was a "minor incident". Ms Johnson the POM stated that the other person involved was a notoriously difficult individual. She agreed that the claimant handled himself well in the challenging circumstances of the incident. Indeed, the incident had only come up as the claimant had been asked to find examples of incidents he could discuss as part of the "EBM" process (Enhanced Behavioural Monitoring). The Panel put to Ms Johnson that the incident was "over-inflated". Ms Johnson agreed. She added that it demonstrated the claimant's honesty in bringing up the incident in the first place. She was asked if she agreed that in fact there was not much else to discuss in that area. She did.

44. The defendant, lacking the hearing evidence, was unable to weigh the further evidence that Ms Daniels and Ms Johnson provided on the matter, which was at odds with the characterisation contained in the defendant's decision. He proceeded under a factually unsound basis – the claimant in fact showed no impulsivity or aggression and controlled his irritation. One of the important matters the defendant relied upon in his decision, in fact came to nothing of substance against the claimant.

c. Key worker

45. The defendant relies on the need for the claimant to undertake further work about his index offence with his keyworker in closed conditions. The decision letter states:

> "You may continue to progress through your sentence at HMP Warren Hill and evidently, there is much opportunity for you to do so in closed conditions. The prison psychologist notes that "…you would continue to have access to Keyworker sessions. There could be further exploration of your index offence to explore other hypotheses. This could be done with your Key worker/POM with support from psychology services. A diary continuing to monitor any violent thoughts/fantasies you have and situations you are facing where you have to implement skills you have developed would be useful…Your Keyworker/POM are likely to ask you about times you are experiences grievances, violent thoughts and how you are managing in your interactions with others" (page 386 of the dossier)."
>
> (emphasis provided)

46. The underlined sentences are derived almost verbatim from Ms Daniels's report (B418). Thus one of the reasons for remaining in closed conditions is that the claimant could explore his index offence further there. However, at the hearing, Ms Daniels discounted this point. Ms Daniels reflected during the testimony on whether further work was needed on the offence account. The psychologist's judgement was that such work would not make any difference at this point, especially since the claimant had undertaken substantial therapeutic work. The defendant did not know this. This latter assessment arising following questioning by the Panel runs importantly contrary to the extracted passage in Ms Daniels' report that the defendant relies upon.

d. Further consolidation

47. The defendant concluded that it was necessary for the claimant to consolidate the progress he had made for a further period of time following reaching EBM Level 3, the highest level of monitoring. Indeed, in the defendant's skeleton, it is submitted that the defendant's decision was made in circumstances where the claimant had "recently progressed to the Progression Regime" (DS §51). This, therefore, was a point of significance relied upon by the defendant.

48. In her evidence to the Panel, the POM Ms Johnson stated that the claimant had previously done "exceptionally well" at the Grendon therapeutic community (prison). She was asked by the Panel if EBM concludes at any stage, and she stated that "it concludes at Stage 3. He has concluded." She stated that Level 3 was reached in April 2022. At the hearing Ms Johnson provided evidence that the claimant in fact had made further progress from April 2022 to the November hearing. This involved the claimant having increased autonomy in preparation for open conditions. The defendant did not know this and thus could not take into account the further consolidation, stability and thus progress that the Panel heard that the claimant had made. There is no indication in the defendant's decision that a further six months' consolidation and progression would be insufficient. There is no evidential foundation to suggest it would be. But the defendant was unable to weigh the matter as he did not know of the updating evidence.

e. Insight

49. Allied to the question of progress was the question of insight. The Panel's letter states at §3.11:

> "Mr Zenshen has undertaken accredited interventions, spent time within a PIPE, a TC, and a PR, shows a some understanding of his offending, and has developed insights into his risk factors. These steps should serve to reduce the risk of re-offending, and consequent serious harm."

50. In his decision, the defendant stated that:

> "The panel acknowledge that you only show "some understanding of his offending" (paragraph 3.11 of their decision). This assessment indicates you have yet to demonstrate full understanding of you offending behaviour and, given the significant harm caused by the commission of your index offence, the SSJ considers that it is not essential for you to progress to open conditions, until further progression in this area has been achieved."

51. Thus, the Panel's letter is construed by the defendant as the word "some" indicating a reservation about the extent and significance of the insight that the claimant displayed. However, the evidence given at the hearing cast an importantly different light. At the hearing Ms Johnson stated that the claimant took full accountability for his behaviour and has insight into his offence and remorse for what he had done. Therefore, it was clear that the Panel was informed that the claimant's insight was far from being trivial or negligible. It was not either a neutral point or one counting against him. It is clear that the uncontested hearing evidence was that the claimant's improvement in insight into his offending was positive and constituted another factor in his favour, insight being closely connected to risk reduction.

f. Core risk

52. In his decision letter, another factor the defendant relied upon in refusing open transfer was that the defendant had "risk reduction work outstanding." However, in response to a direct question at the hearing, Ms Daniels stated was that there was no further core risk reduction work that the claimant needed to do. This important evidence was not in the Panel decision letter and thus the Secretary of State did not have the evidence.

g. Testing in open conditions

53. The evidence in the reports about the necessity for testing in open conditions was strengthened in the hearing. It was, as Mr Armstrong put it, "firmed up orally". This is a fair characterisation. Ms Daniels, for example, stated that open conditions are now "extremely important" given the length of time the claimant has been in prison. Mr Taylor stated that a move to open conditions was "essential" after in excess of 30 years in custody.

54. It was clear reading the hearing evidence that the witnesses spoke with one voice about the necessity for the claimant to be tested in open conditions. The full strength and extent of this consensus is not evident in the same way in the

reports that the defendant considered, tempered as they were by the prevailing policy of evidential suppression. This was not a matter of nuance but strong emphasis. Not having the hearing evidence, the defendant was deprived of an understanding of the full force of the witness consensus.

Advantage evaluation

55. The Panel concluded that the claimant should be transferred to open conditions so that he could be tested in anticipation of ultimate release. The Panel did not conclude that it was preferable that he was located in the open estate to test his responsiveness to increasing freedom, but concluded that it was "essential" that this happen (emboldened for emphasis in the Panel recommendation letter). The defendant makes the point that the claimant is on standard regime at HMP Warren Hill and thus in a position to be tested without enhanced monitoring. This gives him the opportunity for further progression. As the defendant submitted, the question is "whether it is irrational for there to be further time beyond the end of the EBM regime to test the claimant in the alternative to open conditions".

56. Yet the Panel heard evidence that there had been no further incidents in the last six months and thus here was evidence of further stability and progress that was not available to the defendant. The defendant submitted to the court that "it is rational to have a period of stability absent the enhanced monitoring". But the further time in the present institution beyond the EBM that the defendant seeks had in fact happened for six months successfully - as the Secretary of State would have known if he had had the hearing evidence.

57. What is of significance is that no witness attending the Panel hearing expressed a view contrary to the need for the testing to be now in open conditions and all endorsed that the time was now right. Having heard all the evidence, including the updating evidence about the continuing period of progress by the claimant, the Panel had a significant advantage over the defendant on this topic. The Panel plainly took into account the very specific facts of the claimant's case. Further, the Panel reached the entirely unsurprising conclusion that it was essential for open conditions to now be tried. The Panel concluded that with the appropriate support and supervision, the claimant's risk could now be managed in open conditions. There is no doubt that when the Panel decision is read as a whole, its conclusion was that the claimant had made very significant progress in risk reduction. It noted his change of attitude towards his offending and his insight. The defendant misunderstood the reference to "some" insight in the Panel decision letter. This was not a cautionary note about the limited extent of his improved insight. That was obvious from the evidence given at the Panel hearing, evidence that the defendant did not have and thus misconstrued.

58. Mr Davison states in his second statement that "it is not the defendant's practice to re-evaluate all of the oral evidence heard by the Parole Board and this would not be appropriate" (§5). I can readily envisage that in certain cases, the lack of hearing evidence will be of no practical consequence. Certainly, when pressed, the claimant quite correctly did not advance the case that the lack of a practice or policy of obtaining the hearing evidence was in itself an error of law. Thus, my focus has been on whether the lack of hearing evidence on the particular

facts of this case was significant. I judge that it was. I conclude that it was highly significant. This is because it resulted in the defendant taking into account matters that were wrong and failing to take into account matters that were important. His lack of forensic accuracy stemmed from the fact that he did not have the hearing evidence.

59. I find that in several key areas the Panel did enjoy an advantage over the defendant that was significant. They are all relevant to the prime question of whether the time has come for the claimant to be transferred to open conditions. I judge that this is highly material to the lawfulness of the defendant's decision. I find that there is no sufficient basis for the defendant to depart from the Panel's conclusion – certainly not a "very good reason". Indeed, the fundamental difficulty in defending the Secretary of State's decision is that he lacked the very material to make an informed decision about transfer in the particular circumstances of this case. Highly relevant evidence was not before the Secretary of State when he made his decision. Further, if the Secretary of State was aware of the evidence that the Panel heard, there is at the very least a realistic prospect that his decision would have been different about transfer to open conditions. The reasons advanced by the defendant do not to my mind engage with the substance of the Panel's conclusion, particularly since the Panel's position was reached having heard all the relevant expert and other clarifying and updating evidence, which spoke with one voice – all in favour of open transfer.

Absconder policy

60. Another way to examine the rationality of the defendant's decision is to consider his approach to the presumption against transfer in cases where the individual has a history of absconding or escape attempts. This policy-based presumption is found in the Parole Policy Framework. It provides:

> 5.8.6 There is a very strong presumption that an ISP with a history of recent or repeated absconding will not be suitable to transfer to open conditions. However, exceptionally, the prisoner might be assessed as to their suitability for open conditions at the next, and each successive, parole review. It is for PPCS to make the assessment as to whether the test of exceptional circumstances is met in each given case following the GPP. The exceptional circumstance criteria are as follows:
>
> You have made significant progress in reducing your risk of harm and risk of abscond such that a further abscond is judged very unlikely to occur;
>
> AND that you meet one or more of the following exceptions:
>
> 1) there are compelling circumstances beyond your control which make a placement in open conditions necessary;
> 2) a placement in open conditions is absolutely necessary, in that your need to provide evidence of reduced risk for your parole reviews and your need for resettlement work cannot be met in a progressive regime in closed conditions;

3) preventing your return to open conditions would in all the circumstances be manifestly unjust/unfair.

61. In his decision, the defendant was not satisfied that the risk of absconding was indeed low as the Panel and the witnesses who attended its hearing agreed. In the defendant's summary grounds of defence, the defendant relies upon the policy presumption (B660/DS §42):

> "The Defendant analysed the Claimant's risk of absconding in accordance with his published policies, which identify offenders "with a history of recent or repeated escape". There is a "very strong presumption" that ISP offenders with such a history will not be eligible to transfer to open conditions."

62. This claimant certainly has a track record of escape attempts. However, his last escape attempt was in 1999, that is, over 22 years prior to the Panel hearing. A properly reasoned decision is bound to assess the significance of that passage of time in evaluating the exceptionality criterion in the policy. A sound decision would examine the relevance of the specific context of the claimant's behaviour, being in the early phase of his incarceration when he was still labouring under a whole life term, which was later revoked, and following which his behaviour improved markedly. It would analyse whether and to what extent his risk has changed in light of his subsequent history in prison and the extensive remedial work he has done. In the claimant's case there was substantial evidence of significant personal change. Here was the need for a balanced and careful analysis of the competing factors to assess whether one or more of the exceptions to the presumption policy were made out. I find that the defendant's decision lacks any or any sufficient reasoned analysis of the obvious competing factors. There is a case that the presumption against open conditions for absconders has been rebutted and the counterbalancing factors in favour of the claimant establish one or more of the exceptions. While there is no question about the lawfulness of the policy itself, it is the application here (if it was in fact applied) that is in issue. The policy, of course, applies to the defendant and not the Panel. Thus, I accept Ms Milligan's submission that the Secretary of State must consider the recommendation "in the context of the absconder policy". But if the policy and its presumption were relied upon to depart from the Panel's recommendation, this should have been made clear in the defendant's decision. Even if one reads into his decision as a whole that the presumption was relied upon, nevertheless the exceptions should have been properly considered and discounted as irrelevant or not established. But the analysis is not undertaken. This further erodes the court's confidence in the rigorousness of the defendant's analysis.

Bailey

63. There is a further relevant context to the failure to obtain the hearing evidence. Around the time of the hearing there was very significant confusion about what witnesses could or could not include in their reports to Parole Boards. Indeed, Ms Milligan responsibly and candidly accepts on behalf of the defendant that "there was confusion" at that point. The context is that on 28 June 2022, the Secretary of State exercised his statutory powers to make the Parole Board

(Amendment) Rules (SI 2022/717). These amend the rules governing proceedings before the Board. Rule 2(22) of the Amendment Rules came into force on 21 July 2022. It prohibited staff employed or engaged by HM Prison and Probation Service from including in their initial dossier a view or recommendation on the question whether a prisoner is suitable for release or – crucially for the purposes of this case - transfer to open conditions. Thus, the policy was that report writers should provide factual information to the Parole Board, but not express a view about release or transfer to open conditions. The policy was challenged. The essential basis of challenge was that the rules and accompanying guidance documentation amounted to an unlawful interference with the independent judicial determination of the legality of detention.

64. Three decisions of the Divisional Court (Macur LJ and Chamberlain J) followed in what has come to be known as the *Bailey* litigation. The cases are *R (Bailey) v SSJ* [2023] EWHC 555 (Admin), handed down on 15 March 2023; [2023] EWHC 821 (Admin), handed down on 5 April 2023; [2023] EWHC 438 (KB), handed down on 13 June 2023.

65. It is no exaggeration to say that this policy move was a matter of considerable controversy. In the first judgment, the policy was found to be unlawful. The court held at [118]:

> "The decision to make rule 2(22) was made as part of an attempt by a party to judicial proceedings to influence to his own advantage the substance of the evidence given by witnesses employed or engaged by him. By exercising his powers for that purpose, the Secretary of State was attempting to interfere with the way in which the Board exercises its judicial functions. The rule change was "aimed at procuring that the Board, contrary to its wishes, refrains from or reduces an aspect of its procedure" (see *Brooke*, [80]). The fact that the attempt did not succeed, because the drafters did not achieve the Secretary of State's aim, does not save the decision from being unlawful."

66. The subsequent judgments indicated that the operation of the policy may result in a contempt of court by preventing witnesses from assisting the Parole Board in its performance of its judicial functions. The defendant explained his policy in a long statement from the official in this case Gordon Davison, from which some material aspects are set out below. In *Bailey No. 3*, the court took the unusual step of appending Mr Davison's statement (Annex B/AB 139). The statement was dated 12 May 2022. The background was as stated at §7 of the statement:

> "The SSJ was deeply concerned that views which were not his about release and risk had been advanced in his name in the reports and then at the Parole Board's oral hearing."

67. The statement continues at §36:

> "Following the July 2022 Guidance being issued on 11 July 2022, it quickly became clear that there remained a high level of uncertainty and concern

> from HMPPS staff about how they could or should now approach an oral Parole Board hearing.
>
> …
>
> "A particular concern emerging from the sessions was that staff sought guidance on examples of how they might respond to specific questions at the hearing from Panel Members seeking to elicit a view or recommendation on the statutory release test."

68. The guidance issued to staff at the time envisaged precisely this possibility. Thus Mr Davison's statement explained the guidance that was given to staff in October 2022:

> 56. On 5 October 2022, an MoJ legal adviser sought urgent advice from Junior Counsel by telephone: she emailed Myles Grandison (junior counsel) a further updated version of the FAQ document which accompanied the October Guidance and asked, inter alia, the following question:
>
> "'Is it the intention that, if the Board push very hard on a view on release, this guidance is intended to permit staff to answer the question, noting the release test itself is not for them? Not to do so would likely put us back in the position we were in pre-Bailey, but it is not entirely clear from the drafting that this is the intended outcome. If we are right in our interpretation of what the words 'legal and professional obligation to assist the Board' are supposed to achieve (to corralle [sic] staff into avoiding the question and attempting to uphold the spirit of the Rules as far as possible, but not precluding them actively from answering a question if Board push them), are we able to adjust this in the Guidance for clarity (ie, state yes, you can answer any question to the best of your ability if the Board are insistent they want your personal opinion?"
>
> 57. Ms Milligan confirmed that the October Guidance was intended to permit witnesses to answer questions."

69. The claimant submits that this litigation background is relevant to the "nebulous" public confidence criterion (examined below). Further, it is submitted (CS §9) that:

> "It shows that at the time the decision in this case was taken the Defendant was doing all he could to prevent prisoners like the Claimant being advanced. The Court in *Bailey* explicitly found that with his policy the Secretary of State was acting to "suppress… relevant opinion evidence which differed from his own view" of cases (*Bailey No 1* at §4(c)(i))."

70. Against this, the defendant's case is that "*Bailey* is of no relevance to this claim and appears to have been misunderstood" (DS §33).

71. I find it unnecessary to rehearse this litigation history in any further detail here. However, the cloud of uncertainty about what witnesses could or could not say

in their reports – confusion that is accepted by the defendant – in my judgment plainly increased the need to obtain the hearing evidence. This is the true significance of *Bailey* for this case. I reject the defendant's submission that *Bailey* is a "red herring" and should be "put to one side". The Parole Board hearing took place at a time when it was entirely foreseeable that witnesses may be circumspect and confused, saying one thing in their reports and then being (or being forced to be) more forthcoming under questioning during the Parole Board hearing. The Divisional Court chose its word carefully about the effect of the defendant's unlawful policy – suppression. This is a very serious matter.

72. In the instant case, there was important evidence given at the hearing that was not contained in the reports that formed the dossier and was not sufficiently set out in the Panel's decision letter. It is unnecessary to decide whether those differences were the result of the unlawful policy or not. The fact is that the temperature of the times indicated that there may well be evidence given at the hearing that was not in the reports. It was a risk-laden course to assume that the evidence would be adequately rehearsed in the Parole Board letter. In this case, it was not.

73. As indicated, this fraught litigation and policy history cannot have been unknown to the defendant since his delegated decision-maker in the Reginald Zenshen case was once more Mr Davison.

Speed of decision

74. A further factor relied upon by the claimant is the sheer speed of the defendant's decision. Once the papers were provided to Mr Davison, he made the decision in a little over two hours. The correspondence contained in the bundle (B716-17) is revealing:

> **Email from Julia Whyte [HMPPS] to Gordon Davison:**
> 7 December 2022, 14.49 hours
> Attaching
> - Ms Whyte's proforma analysis
> - Panel decision letter
> - Secretary of State submission
> - COM report
> - POM report
> - Psychologist report
>
> **Email from Gordon Davison to Julia Whyte:**
> 7 December 2022, 17.06 hours
> "I agree with your analysis in full. I am rejecting the Parole Board's recommendation, as the criteria in the test are not met."

75. In her forceful submissions, Ms Milligan argues that it is "certainly possible to read the decision letter and reports in three hours". In fact the decision came more swiftly than that. I am bound to say that it is difficult to grasp how these complex matters could have been fairly and properly considered and decided upon in 2 hours and 17 minutes, even by someone familiar with making such

decisions. Ms Whyte's proforma itself extends to 11 pages of mostly dense factual material. The psychological report of Ms Daniels alone runs to 41 pages and is once more a detailed and demanding read. These and the other reports must be considered with great care. Some passages require re-reading. Crucially, the proforma does not mention the evidence provided to the Panel at the oral hearing save for a passing reference amounting to a single line. Thus, on the question of what actually transpired at the oral hearing evidentially, the defendant (more precisely his delegated decision-maker) was in the dark.

76. I emphasise that I do not find that the decision is unlawful because of the breakneck speed of the decision-making. However, the sheer rapidity of the decision creates a distinct sense of cursory consideration and adds to the court's unease about the way this decision was made.

Public confidence criterion

77. I do not need to examine in detail the question of the "public confidence" criterion. It is to be found in the Secretary of State's "Directions to the Parole Board 2022, Transfer of indeterminate sentence prisoners (ISPs) to open conditions". At the third bullet-point in paragraph 1, it states that the Secretary of State will only accept a recommendation from the Parole Board if:

> "a transfer to open conditions would not undermine public confidence in the Criminal Justice System."

78. In his decision letter, the defendant states:

> "Finally, the SSJ considers that your transfer to open conditions would undermine public confidence in the Criminal Justice System at this stage. In coming to this view, the Secretary of State for Justice considered the nature of your offending, your custodial behaviour and the risk reduction work outstanding.
>
> Your custodial behaviour was of significant concern during the earlier part of your time in prison. This is evidenced by your further violent offending within prison, the very large number of adjudications you have been subject to, your time spent within the Exceptional Risk Centre."

79. It is for the Secretary of State to construct policy as he deems fit. It is for the court to construe its meaning, always in context. During the course of argument, it became increasing difficult for the defendant to explain to the court what the criterion meant or added distinct from the question of risk. All the matters mentioned in the defendant's decision were aspects of the claimant's risk and Ms Milligan accepted that the meaning was "whether to release a prisoner who has been assessed as a risk to the public". Thus, no public confidence factor distinct from risk was identified in the decision letter or indeed in oral submissions to the court. It is entirely unsurprising that this policy criterion has now been withdrawn. It adds nothing.

Conclusion

80. I step back and draw the threads together. I entirely accept the point made by the defendant, relying on the comments of Sales LJ in *R (Gilbert) v Secretary of State for Justice* [2015] EWHC 802 (Admin) at [71] about the risk-expertise of the defendant and his department:

> "The Secretary of State and his department and its agencies are also experts in management of prisoners in the prison estate, including assessing prisoner risk when it is 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."

81. In this claimant's case, the Secretary of State sought the advice ("input") of the Parole Board. Further, Ms Milligan must be right that the defendant's decision is a discretionary one about which he has particular expertise (*R (Banfield) v Secretary of State for Justice* [2007] 2605 Admin). The approach of Jackson J in *Banfield* is commended to the court by the defendant:

> "In my view, it cannot possibly be said that the Secretary of State's decision was irrational. The case was a difficult one and two views were possible as to whether the time had arrived to transfer the claimant to open conditions. The Parole Board took one view, the Secretary of State took a different view. In my judgment, it cannot be said that the Secretary of State's decision was irrational." [44]

82. In other words, it is entirely open to the defendant to differ from the conclusion of the Panel without being irrational. Counsel for the Secretary of State further submitted that his decision "was not a departure from the findings of the Parole Board, but instead he took their findings and advice into account and ascribed them weight and then made his own decision". He had not thrown the Panel's advice "in the bin". Ms Milligan's prime point is that "there is no reason why the Parole Board enjoys the advantage in the holistic assessment of risk". This analysis would hold water if the defendant and the Panel were assessing risk on an equal evidential footing. They were not. I find that the Panel enjoyed a significant advantage over the defendant because of the oral evidence.

83. As such, in the specific evidential circumstances of this case, the defendant needs to have very good reasons to depart from the Panel's recommendation. He cannot do so capriciously or arbitrarily. He cannot do so because of concerns about wider political consequences or optics unconnected to the concrete facts of the case. What he 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. If not, it is susceptible to public law challenge.

84. By the defendant choosing not to obtain the hearing evidence, as he very simply could have done, he deprived himself of a body of relevant evidence. He was represented at the Parole Board hearing; his advocate participated in the proceedings and asked questions. Here the evidence provided orally was highly

significant. Ms Milligan is precisely right that obtaining the notes being a "sensible or desirable course" (as she put it) is insufficient. It must be irrational not to have regard to it. But irrationality must be viewed as a whole and in context. It is the circumstances in which the hearing notes were not obtained that is critical, along with the substance of the additional evidence they would have supplied the defendant. By the Panel hearing the oral evidence and understanding what the various witnesses were actually saying about their assessments and the updated situation, the Panel enjoyed a significant advantage over the defendant, placing it in an evidentially superior and more informed position than he was. Further, the defendant consigned himself to proceed on an incomplete and in certain material respects factually false footing. He not only lacked the best evidence, but the most up-to-date and accurate evidence. He lacked a proper basis to depart from the Panel's firm conclusion. The relevance of the most up-to-date information is undeniable because risk is dynamic as a general principle. But here the defendant acknowledged in oral submissions to the court that the decision of the Secretary of State "has a heavy temporal element" and the question is "what is the risk today?". Yet the defendant lacked the most pertinent updated evidence that was provided at the oral hearing.

85. The lack of notes placed the defendant in a materially different to that in the case of *Banfield*, relied upon by the defendant. There:

> "Although the Secretary of State was not present at the two oral hearings, he had the benefit of a clear summary of the evidence given. He had the benefit of the Parole Board's conclusions and the reasons for those conclusions." [33]

86. Here, the Parole Board's decision letter did not provide a clear summary of the evidence given at the hearing in several vital material particulars and he had no other summary. In this case, it would not have been arduous or taxing to obtain the necessary evidence. My answer to the question Lord Diplock posed in *Tameside*, "Did the Secretary of State take reasonable steps to acquaint himself with the relevant information?" is no.

87. I find myself in a position similar to the one this court found itself in in R (*Cort) v London Borough of Lambeth* [2022] EWHC 1085 (Admin). There the court stated at [105] that the circumstances surrounding the decision remove "any confidence which this court can have that the decision was made on the correct basis, and thus renders the decision flawed in public law terms." The difficulty with the defendant's position is that it fails to recognise or recognise sufficiently that on the facts of this case, the Panel enjoyed a significant advantage over the Secretary of State. On an *Oakley* analysis, there needed to be very good reason to depart from the Panel's recommendation in these circumstances. There was not. Indeed, nothing I have seen supplies a coherent or adequate reason to depart from the Panel's conclusion. There is indeed no legitimate expectation about how the Secretary of State will exercise his discretion following a positive recommendation from the Parole Board (see *Gilbert* at [60]), save that he will assess it in accordance with the law.

88. I fully recognise that irrationality is a high forensic threshold in the *Wednesbury* sense. Using the modern formulation of whether the decision was "beyond the range of responses open to a reasonable decision-maker" (*R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 per Sir Thomas Bingham MR), for all the above-mentioned reasons, I have no hesitation in concluding that the defendant's decision was both irrational and unlawful.

§X. Relief

89. The Parole Board's recommendation to test the claimant in open conditions was not a routine procedural step. Instead, it was a decision deeply informed by the need to protect the public. Once a person is post-tariff, release reduces to a question of risk. The hearing bundle includes a report from the Prison Reform Trust. It is entitled "The long view – The changing face of parole". In the introduction (B625), Peter Dawson, the Trust's director, writes that as a result of the defendant's policy changes in the summer of 2022, made "without parliamentary scrutiny":

> "almost all opportunity for indeterminate sentenced prisoners to move to an open prison has disappeared. Overnight, a 94% acceptance rate has turned into 87% rejected."

90. The Parole Board's chief executive Martin Jones emphasised (B627) that:

> "The published evidence is strong: when a prisoner is afforded a successful period in open conditions it makes the public safer, and increases the chance the individual can succeed on release."

91. He then adds (B628):

> "It is hard not to be concerned that since June 2022 the secretary of state has chosen not even to seek the board's advice in a much higher proportion of cases, and his officials have chosen not to take our advice in nearly nine out of 10 cases where we have recommended a progressive move to open conditions."

92. Transfer to open conditions allows the testing of compliance and the efficacy of relapse prevention strategies, along with an informed assessment of how best to manage the individual in the community. Thus, the Parole Board recommendation in this case was nothing to do with "being soft" on a person convicted of murder. It was a difficult and responsible decision made by a properly constituted statutory body based on the unanimous evidence of experts and professionals with a view to maximally protecting the public going forward.

93. For those individuals who are not destined to spend the rest of their life in prison, the law mandates an obligation of reasonable progression (*Kaiyam v Secretary of State for Justice* [2014] UKSC 66) or at least no arbitrary block (*Brown* [2018] AC 1). An incarcerated person sentenced for murder will remain high risk until he or she is tested in open conditions. Thus, there must be reasonable

routes available for progress. While the HMP Warren Hill regime has been created as an equivalent of open conditions within a secure setting, this is also why being tested in open conditions is so important in appropriate cases.

94. However, the court must emphasise that there is no question that Reginald Zenshen can be released altogether from his murder sentence at this point. Moreover, this court is not deciding whether he should be transferred to open conditions. It strictly and exclusively examines whether the decision of the Secretary of State for Justice to refuse such a transfer was lawful. It was not; it was unlawful. The defendant's decision was not made in accordance with accepted public law standards. As such, it must be quashed. That is the ordinary – and here inescapable - relief in this case. Indeed, the defendant has not suggested any other should judgment go against him. It has.

95. Thus, the matter must be remitted to the Secretary of State for Justice. He must retake his decision in accordance with the law.

96. That is my judgment.