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Case No: CA-2024-000111
CA-2024-000494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Fordham
AC-2023-MAN-000042
HHJ Keyser KC
AC-2023-CDF-000087

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2024

Before:

THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
(Baroness Carr of Walton-on-the-Hill)
PRESIDENT OF THE KING'S BENCH DIVISION
(Dame Victoria Sharp)
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

The Secretary of State for Justice	**Appellant**
- and -	
Robert Sneddon	**Respondent**

(First Appeal)

Karl Oakley	**Appellant**
- and -	
The Secretary of State for Justice	**Respondent**

(Second Appeal)

- -

Sir James Eadie KC, Myles Grandison and Tom Leary (instructed by **The Treasury Solicitor**) for **The Secretary of State for Justice**
Jude Bunting KC and Michael Bimmler (instructed by **Bhatia Best Limited**) for **Robert Sneddon**
Jude Bunting KC and Carl Buckley (instructed by **Bhatia Best Limited**) for **Karl Oakley**

Hearing date: 16 October 2024

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Approved Judgment

This judgment was handed down at 10.00am on 28 October 2024 in Court 4 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Baroness Carr of Walton-on-the-Hill, LCJ:

Introduction

1. These two conjoined appeals concern the power of the Secretary of State for Justice (SoS) to transfer prisoners to open prison conditions under s. 12(2) of the Prison Act 1952. In exercising that power, the SoS can call for "advice" from the Parole Board (the Board). If the SoS does so, "*it is the duty of the Board to advise the [SoS] with respect to any matter referred to it by [her] which is to do with the early release or recall of prisoners*" (see s. 239(2) of the Criminal Justice Act 2003).

2. The appeals raise important questions of principle as to the correct approach to be adopted by the SoS to advice from the Board so provided. In the case of each of Robert Sneddon, the Respondent in the first appeal (Mr Sneddon), and Karl Oakley, the Appellant in the second appeal (Mr Oakley), the SoS (who will be referred to in the masculine for present purposes) decided not to accept the Board's advice. There has been an accretion of first instance decisions applying potentially very different approaches to the circumstances in which the SoS is entitled to reject the Board's recommendations.

3. In the first appeal, *R (on the application of Sneddon) v The Secretary of State for Justice* [2023] EWHC 3303 (Admin); [2024] 1 WLR 1894 (*Sneddon*), Fordham J considered that the question of whether or not the SoS's decision was rational engaged a number of "key principles". Those principles included that, in respect of evaluative conclusions on questions where the Board had a significant advantage over the SoS, the SoS would need to have "very good reason" for departure from the Board's advice. For all other questions, including the ultimate evaluative judgment, a "good reason" would still always be required. The SoS challenges that analysis, submitting that there is no warrant under the statutory scheme or in principle for such a restrictive approach.

4. In the second appeal, *R (on the application of Oakley v The Secretary of State for Justice* [2024] EWHC 292 (Admin) (*Oakley 2)* HHJ Keyser KC (sitting as a Judge of the High Court) upheld the SoS's decision to depart from the Board's recommendation that Mr Oakley be transferred to open conditions. Mr Oakley challenges that decision. He contends that, in line with *Sneddon*, the SoS should not be permitted to depart from the Board's recommendation without good (or very good) reasons, including by analogy with the approach taken to court or tribunal decisions as set out in *R (on the application of Evans) v Attorney General* [2015] UKSC 21; [2015] 1 AC 1787 (*Evans*).

The relevant legal framework

5. Section 12(2) of the Prison Act 1952 provides that prisoners "*shall be committed to such prisons as the [SoS] may from time to time direct"*. Section 47(1) empowers the SoS to make provision for the classification and treatment of prisoners. Under that power, adult male prisoners are classified into four categories, A to D. Category A to C prisoners are held in closed prisons; only category D prisoners can be held in open conditions.

6. Open prisons are designed for individuals who have progressed to a stage where they are trusted to be able to manage more independently and with less supervision than in closed conditions. The levels of staffing in open prisons are much lower; there is often

minimal physical and procedural security. The emphasis is on creating a pro-social prisoner population, in preparation for release. Prisoners may be released on temporary licence to take part in paid placements, community work and resettlement activities, including time with family, potentially unsupervised.

7. In exercising the power to transfer, the SoS may seek the Board's advice on the potential transfer of a prisoner: see s. 239(2) of the Criminal Justice Act 2003):

> "*It is the duty of the Board to advise the [SoS] with respect to any matter referred to it by him which is to do with the early release or recall of prisoners.*"

8. Since a transfer to open conditions is a matter relevant to early release, advice on the matter falls within the Board's remit. But the SoS is not obliged to seek such advice. (See *R (on the application of Gilbert v The Secretary of State for Justice* [2015] EWCA Civ 802 (*Gilbert*) at [7] and [70]). The situation is thus to be contrasted, for example, with the position under s. 28 of the Crime (Sentences) Act 1997 where the SoS is obliged to refer certain life prisoners to the Board and is bound to release the prisoner when the Board has directed release (see s. 28(5)).

9. Under s. 239(6) of the Criminal Justice Act 2003, the SoS may give directions to the Board as to the matters to be taken into account when exercising its functions. The directions issued under that power relevant for present purposes (though now superseded) are Directions dated April 2015 (the Directions). Paragraph 7 of the Directions provides:

> "*The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:*
>
> *a) 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;*
>
> *b) the extent to which the ISP is likely to comply with the conditions of any such form of temporary release (should the authorities in the open prison assess him as suitable for temporary release);*
>
> *c) the extent to which the ISP is considered trustworthy enough not to abscond; and*
>
> *d) the extent to which the ISP is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage."*

10. The Generic Parole Process Policy Framework (GPPPF) in force at the material time (issued on 27 January 2020 and re-issued on 30 August 2021) addressed the circumstances in which the SoS could reject the Board's recommendation as follows:

> "*5.8.2 PPCS may consider rejecting the Parole Board's recommendation if the following criteria are met:*

- *The panel's recommendation goes against the clear recommendation of report writers without providing a sufficient explanation as to why;*

- *Or, the panel's recommendation is based on inaccurate information*

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

11. For the sake of completeness, it should be noted that the GPPPF has since been amended (as of 6 June 2022) (the 2022 Policy) in the context of a Root and Branch Review published on 30 March 2022. The Review identified a need to rebalance the process, such that Board decision making should have a consideration of the maintenance of public protection at its core. A top tier cohort of offenders, into which both Mr Sneddon and Mr Oakley fell, was identified. It was noted that some offenders presented a heightened risk to the public due to the seriousness of their crime(s), and that the release of these offenders, and/or their management in the open prison estate, needed to be approached with even greater caution and scrutiny. Decisions on the cases of top tier offenders would require direct ministerial oversight.

12. Between publication of the Review and the issue of the 2022 Policy, those within the Public Protection Casework Section (PPCS) of His Majesty's Prison and Probation Service (HMPPS) were required to work to the present policy (ie GPPPF as in force at the time), whilst taking a precautionary approach in line with the Review.

13. There have also been subsequent amendments to the 2022 Policy, including the criteria by which Indeterminate Sentence Prisoners (ISPs) are assessed for suitability for open conditions. As of 17 July 2023, the SoS will approve an ISP for transfer to open conditions only where the following criteria are met:

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

    ii) The prisoner is assessed as a low risk of abscond; and

    iii) There is a wholly persuasive case for transferring the ISP from closed to open conditions.

14. As of 1 August 2023, the Board may recommend a transfer where it assesses that the first and second criteria are met; the third criterion is a matter for the SoS.

Previous first instance authorities

15. The approach to rejection of the Board's advice by the SoS has been considered in a number of first instance decisions, including (in chronological order) as follows:

    i) *R (on the application of Hindawi) v The Secretary of State for Justice* [2011] EWHC 830 (QB) (*Hindawi*) at [60] and [61]: when deciding whether or not to reject the recommendation, the SoS should distinguish between the Board's findings of fact and assessment of risk. Where there has been an oral hearing,

the SoS would require "*very good reason*" to depart from findings of fact. But, having accorded appropriate respect to the Board's expertise, the SoS was entitled to reach his own view on assessment of risk;

ii) *R (on the application of Kumar) v The Secretary of State for Justice* [2019] EWHC 444 (Admin); [2019] 4 WLR 47 at [53]:

"*…it is clear that the purpose of [5.8.3] is not to widen [the very limited] parameters [for departure from the recommendation of the Board], but to preserve the ability of the Secretary of State…to exercise his discretion to reject a recommendation which does not strictly fall within either of the preceding grounds, but which appears to him (for good reason) to be unjustified or inadequately reasoned…"*;

iii) *R (on the application of John) v The Secretary of State for Justice* [2021] EWHC 1606 (Admin); [2021] 4 WLR 98 at [47]:

"*…generally in this context a finding of fact will concern a conclusion as to past events, whereas an evaluative assessment will entail a prediction as to future eventualities including risk of violence, risk of absconding and ability to manage the same…*";

iv) *R (on the application of Oakley) v The Secretary of State for Justice* [2022] EWHC 2602 (Admin); [2023] 1 WLR 751 (*Oakley 1*) at [51]:

"…the correct approach is therefore as follows. When considering the lawfulness of a decision to depart from a recommendation of the Parole Board, it is important to identify with precision the conclusions or propositions with which the [SoS] disagrees. It is not helpful to seek to classify these conclusions or propositions as "questions of fact" or "questions of assessment of risk". The more pertinent question is whether the conclusion or proposition is one in relation to which the Parole Board enjoys a particular advantage over the [SoS] (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 [SoS], having accorded appropriate respect to the Parole Board's view, is entitled to take a different view). In both cases, the [SoS] must give reasons for departing from the Parole Board's view, but the nature and quality of the reasons required may differ.";

v) *R (on the application of McKoy) v The Secretary of State for Justice* [2023] EWHC 3047 (Admin) at [57]:

"*…the words in question have an ordinary common-sense meaning…they encapsulate a discretion. Certainly they enable the [SoS] to reach a different conclusion from the Parole Board on the same facts and on the basis of the same assessment of risk…*".

The approach adopted in *Sneddon* and *Oakley 2*

Sneddon

16. In *Sneddon*, Fordham J stated (at [27]) that the answers to questions of the lawfulness of a decision to reject the evaluative conclusion of the Board are provided by "conventional, contextual public law standards". He went on to set out what he regarded as the key principles from the case law as follows (at [28]):

> *"(1) Decision-Maker. The primary decision-maker is the SSJ (Hindawi §63; Stephens §22; Prison Act 1952 s.12(2)). The Parole Board, in recommending transfer to open conditions, is giving advice (2003 Act s.239(2)).*
>
> *(2) Legally Significant Advantage. The Parole Board, in giving advice to the SSJ, has legally significant institutional and due process advantages over the SSJ. These include expertise in assessing the risk posed by individual prisoners (Banfield §28(1); Kumar §6; Stephens §20); and the due process of an expert assessment, immunised from external pressures, operating like a court, sifting and analysing the evidence, with an oral hearing to make relevant findings (Hindawi §50; Green §32). These advantages can make it difficult for the SSJ to show that it is reasonable to take a different view (Gilbert §92).*
>
> *(3) Required Weight. The SSJ is required to accord weight to the recommendation of the Parole Board and the weight required to be accorded depends on the matters in issue, the type of hearing before the Panel, the Panel's findings and the nature of the Panel's assessment (Hindawi §52; Kumar §7; Green §42i).*
>
> *(4) Reasonable Basis. Common law reasonableness is the controlling legal standard for deciding – in the context and circumstances of the case – whether the SSJ has accorded the required weight to the Panel's recommendation and assessment, by reference to the matters in issue, the type of hearing before the Panel, the Panel's findings and the nature of the Panel's assessment. The SSJ may reject the Parole Board's reasoned recommendation, provided only that doing so has a reasonable basis ("a rational basis") (Hindawi §§51-52, 73, 81; Gilbert §92; Kumar §7). There can be no substitution of the views of a civil servant for the views of the Parole Board without reasonable "justification" (Kumar §57).*
>
> *(5) Deficiency. The reasonable basis for rejection may lie in something having 'gone wrong' or 'come to light' which undermines the Panel's reasoned assessment. This idea of deficiency is not limited to a public law error (Kumar §54); nor to errors of law or fact or additional evidence having come to light (Hindawi §§49, 51; John 76). Examples of deficiencies would be a Panel assessment: (a) running counter to professional views without a sufficient explanation (Kumar §56; Stephens §24; 2021 GPP Policy Framework §5.8.2[i]: §6 above); (b) based on demonstrably inaccurate information (GPP Policy Framework §5.8.2[ii]: §6 above); (c) failing to apply the correct test or address the correct criteria (Gilbert §§73-74; Stephens §§29, 32-36; Oakley §25); or (d) appearing to fly in the face of the evidence or the nature of the risks found by the Panel (Kumar §59).*
>
> *(6) Questions of Significant Advantage. The reasonable basis for rejection will require "very good reason" (Oakley §49, 52) – or "clear, cogent and convincing reasons" (Green §42ii) – in respect of evaluative conclusions on questions where the Panel has a significant advantage over the SSJ. Examples of*

> *questions of significant advantage are a Panel assessment: (a) of credibility after oral evidence at a hearing (Hindawi §§96, 111; Oakley §47); (b) of any question of fact from evidence at a hearing (Oakley §52); or (c) of questions of expert evaluation of risk, such as professional diagnosis or professional prediction (Oakley §§48-49). There is no bright-line distinction excluding questions of evaluative assessment, about the nature and level of the risk and its manageability from falling within this category (see Oakley §§48-49, revisiting the discussion in John at §47).*
>
> *(7) Other Questions. For questions other than those of significant advantage, the reasonable basis for rejection will still always require "good reason", because the SSJ must always afford to the Parole Board's evaluative assessments "appropriate respect" (Hindawi §60; Oakley §50; Green §42iii). An example is the ultimate evaluative judgment, "undertaken against the background of the facts as found and the predictions as made by the Parole Board", which balances the interests of the prisoner against those of the public (Oakley §§49-50), as part of the question in Direction §7(a) (§12 above)."*

17. Fordham J went on (at [29]) to state that it was right, in principle, to speak of "very limited parameters" for rejection. The question was whether the SoS could "reasonably" reject the recommendation. That question, in his judgment, "engage[d] the key principles" which he had listed at [28].

18. At [31], Fordham J rejected the SoS's submission that he was permitted to disagree with the Board's *"…evaluation of risk, provided that legally adequate reasons are given"* and that the SoS could *"ascribe different weight to material factors in the risk/benefit balancing exercise",* stating:

> *"I cannot accept that analysis. It is materially incomplete. It does not go far enough in recognising the way in which the standard of reasonableness and legally adequate reasons apply. Whether disagreement is "reasonable", whether there is a reasonable basis to reject a Parole Board recommendation, and what constitutes the sort of good or very good reason which can justify rejection, is a context-specific question to which the key principles (§28 above) apply."*

19. Fordham J concluded that the SoS's departure from the Board's advice did not have a reasonable basis. There was insufficient engagement with the Board's finding that there existed little evidence that past risk-taking behaviour currently remained a concern, an assessment which the Board was in an advantageous position to make. On the concern as to the need for intense monitoring, the SoS failed to consider reasonably that the Board had made recommendations as to how this could be achieved in open conditions. The Board had taken into account the fact that Mr Sneddon's partner was not a protective factor. The recommendation for transfer had been unanimous.

Oakley 2

20. In *Oakley 2*, HHJ Keyser KC broadly agreed with the approach in *Oakley 1,* as follows (at [17]):

> *"I respectfully agree with Chamberlain J's basic approach. However, I have some misgivings about his exposition of it. To my mind, the fundamental distinction*

is between matters in relation to which the Parole Board enjoys a particular advantage over the Secretary of State (in which case, a very good reason would have to be shown for departing from the Parole Board's conclusion on such a matter) and matters in relation to which the Parole Board does not enjoy a particular advantage (in which case, the Secretary of State must accord appropriate respect to the Parole Board's view but is entitled to take a different view provided he justifies it). Between the poles of that distinction, there will be a range, and the strength of justification required of the Secretary of State will surely depend on the facts and, in particular, on the nature and extent of any advantage enjoyed by the Parole Board in respect of the specific point in issue. However, it is important to have firmly in mind that the decision is that of the Secretary of State, not of the Parole Board; consequently, the relevant question for this court will always be whether the Secretary of State's decision is impeachable on public law grounds, not whether the Parole Board's recommendation is open to criticism on similar grounds. That being so, I have difficulty with paragraph 48 of Chamberlain J's judgment (apart from the first sentence) and, in that context, with the formulation of the alternatives in the sentence beginning "The more pertinent question ..." in paragraph 51. The fact/assessment distinction used in the cases and explained by Thomas LJ in Hindawi is directed to the case where the fact-finding in question is significantly informed by oral evidence. The typical case is where the matter turns on "the estimate of the man", as Viscount Sumner put it in The Hontestroom . Not every finding of fact is of that sort. To take the example of diagnosis, used by Chamberlain J in paragraph 48: those who heard oral evidence from opposing experts may or may not have a significant advantage over the Secretary of State. It is by no means obvious, at least to me, that an issue of that sort will always (or even usually) better be decided by those who heard the evidence (whose assessment of it may or may not be faulty, and who may or may not have been overly influenced by the manner of the opposing witnesses) than by those who assess the evidence on paper, including transcripts. Now, in paragraph 48 Chamberlain J is ostensibly dealing with cases where the Parole Board has an advantage over the Secretary of State, and he only says that matters of diagnosis are "likely" to be such cases. However, if the issue of diagnosis is one on which reasonable experts could disagree I cannot, I fear, see why the Secretary of State should not be entitled to prefer his own view to that of the Parole Board, provided of course that he justifies it, or why he should be restricted to public law review grounds (such as are mentioned in the final sentence of paragraph 48) if he wishes to depart from the Parole Board's view. It seems to me that the difficulty plays out in the dichotomy in paragraph 51 between matters on which the Parole Board has a particular advantage and matters "involving the exercise of a judgment requiring the balancing of private and public interests". Those alternatives do not exhaust the possibilities. There may well be matters of judgement that do not involve the balance of private and public interests—for example, how to assess differing expert opinions—on which the Parole Board does not necessarily have any substantial advantage over the Secretary of State or on which the Secretary of State's freedom to disagree with the Parole Board should not be limited to analogy with public law grounds for judicial review. In my view, although Chamberlain J's basic approach is (in my respectful view) sound, paragraphs 48 and 51 of his judgment might tend to encourage an undue limitation of the scope of the Secretary of State's freedom in his decision-making.

> *The issue, as I have said, is whether the conclusion of the Secretary of State on a particular matter is rational and sufficiently justified, not whether the same can be said of that of the Parole Board. In some cases, sufficient justification will require a "very good reason" for departing from the Parole Board's view, in others it will not; but even in the former case I should not myself think it right to stipulate that some form of public law error by the Parole Board must necessarily be identified".*

21. HHJ Keyser KC concluded that the SoS's decision not to send Mr Oakley to open conditions was rational. An assessment that Mr Oakley needed to undergo further work was fundamentally a matter concerning risk, and not one in which the Board held a special advantage over the SoS. Further, the SoS was entitled to form the view that a Stalking Risk Profile was necessary before transfer should be permitted.

22. In two subsequent first instance decisions (*R (on the application of Cain) v The Secretary of State for Justice* [2024] EWHC 426 (Admin) at [58]; *R (on the application of Uddin) v The Secretary of State for Justice* [2024] EWHC 696 (Admin) at [39]), disagreement has been expressed with the comments of HHJ Keyser KC, in so far as he was doubting the approach of Chamberlain J in *Oakley 1*.

Analysis

23. As is apparent from the above, there has been a large number of first instance decisions on the correct approach to be taken by the SoS to advice from the Board, not all of which have spoken with the same voice. I do not consider there to be any significant benefit in an analysis of their differences, or the reasons given for those differences. It is for this court to approach the question afresh at appellate level, alongside the decision of this court in *Gilbert*, and as simply as possible. It is important not to over-complicate.

The SoS is the sole decision maker

24. The obvious starting point is the fact that the SoS is the decision maker (see s. 12(2) Prison Act 1952), and not merely the primary but the sole decision-maker. Parliament could have removed the decision-making power from the SoS, or shared it between the SoS and the Board, but it chose not to. Further, as set out above, the SoS is not obliged to consult the Board. He can make decisions on transfer without any advice from the Board whatsoever. He has a two-tier discretion: a discretion whether to seek the Board's advice in the first place; if advice is sought, a discretion whether to accept it.

25. By contrast, the Board is obliged to advise the SoS when called upon to do so (see s. 239(2) of the Criminal Justice Act 2003), and the SoS dictates what matters the Board must take into account when exercising its functions (see s. 239(6) of the Criminal Justice Act 2003).

26. There is no doubt that the Board has relevant expertise, as Mr Bunting KC emphasised for Mr Sneddon and Mr Oakley, including in the assessment of risk posed by prisoners (see for example *R (on the application of Banfield) v The Secretary of State for Justice* [2007] EWHC 2605 (Admin) (*Banfield)* at [28]; *Hindawi* at [50]). The Board has been recognised as a judicial body carrying out a judicial function, comprising specialist members who consider often very large volumes of material and hear evidence, all subject to procedural rules of fairness (see for example *R (Pearce) v Parole Board*

[2023] UKSC 13; [2023] AC 807 at [6]; *R (Gourlay) v Parole Board* [2017] EWCA Civ 1003; [2017] 1 WLR 4107 at [65(v)]).

27. The SoS, his department and agencies are also recognised as experts in the management of prisoners in the prison estate, including in the assessment of prisoner risk. In *Gilbert* (at [71]) Sales LJ stated:

> "*…The [SoS] 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...*".

28. As it was put in *Banfield* (at [29]), in reaching his decisions on categorisation, the SoS has the benefit of the expertise of his department, in addition to the benefit of any advice given by the Board. The expertise of his department, for example in relation to the prison estate as a whole, may be highly relevant.

The Board provides advice

29. If the SoS does seek advice from the Board, the Board provides just that: advice. The SoS is entitled to reject it if he (reasonably) concludes that the advice is not "wholly persuasive". The SoS is entitled to reject even a reasonable recommendation on the basis of his own (reasonable though different) assessment. The words used in the SoS's policy, at 5.8.3 of the GPPPF, underscore the fact that it is the SoS's view that matters: it is for the SoS to be "wholly persua[ded]" (or not). There is no presumption that the Board's views are correct, let alone the only possible (reasonable) views. As it was put in *R (on the application of Overton v. The Secretary of State for Justice* [2023] EWHC 3071 (Admin) *(Overton)* at [28], there may be issues arising as to which "*there will very rarely if ever be a single unquestionably correct answer*". It is necessary to avoid being distracted by having regard to the rationality of the Board's recommendation (rather than the SoS's decision).

30. Thus, the SoS does not need to identify a deficiency in the Board's reasoning in order lawfully to reject the Board's recommendation. It is the decision of the SoS that is under scrutiny, not that of the Board.

31. The authorities relied upon by Mr Sneddon and Mr Oakley - *R (on the application of Bradley and others) v Secretary of State for Work and Pensions v The Parliamentary Commissioner for Administration, HM Attorney General on behalf of The Speaker of the House of Commons* [2008] EWCA Civ 36; 2008 WL 45666 (*Bradley*), *R v Warwickshire County Council, ex parte Powergen Plc* [1997] EWCA Civ 2280; (1997) 96 LGR 617 (*Powergen*), and *R v Secretary of State for the Home Department, ex parte Danaei* [1997] EWCA Civ 2704; [1997] 11 WLUK 215 - do not assist them in this regard. They do not establish any general rule that the executive is not entitled simply to prefer its own view to that of an expert investigatory body; rather they establish that whether or not that is the case will depend on the relevant primary legislation (see for example *Bradley* at [37]). *Powergen* emphasises the importance of the identity of the ultimate decision-maker (see [94]). The statutory scheme here above, makes clear that the SoS is entitled to prefer his own view (provided that his decision is rational).

32. Nor does *Evans* support the proposition that advice from the Board is to be treated as if it were a court or tribunal decision. Dove J correctly dismissed this argument with clear reasons in *R (on the application of Harris) v The Secretary of State for Justice* [2014] EWHC 3752 (Admin) (at [36] to [41]); as did Heather Williams QC (sitting as a Deputy High Court Judge) in *R (on the application of John) v The Secretary of State for Justice* [2021] EWHC 1606 (Admin); [2021] 4 WLR 98 at [67] to [86]. *Evans* concerned the (constitutional) question of whether the executive could overrule a judicial decision by the Upper Tribunal. The Board may be a judicial body, but when providing advice under s.239 of the Criminal Justice Act 2003, it is not delivering a decision. Constitutional considerations do not arise. Unlike the Upper Tribunal, the Board was not giving judgment: it was giving advice. The Supreme Court in *Evans* confirmed (for example at [66] and [127]) that the approach to a previous decision must always be context-specific. The legislation here makes clear that it is for the SoS alone to decide on transfer.

Irrationality is the test

33. The decision of the SoS is amenable to challenge by way of judicial review on the ground of irrationality. The relevant question is whether the SoS's decision to reject the Board's advice on the basis that it is not "wholly persuasive" is impeachable on public law grounds, not whether the Board's recommendation is open to criticism on similar or analogous grounds.

34. The test of rationality or, as it is more accurately described, unreasonableness, is whether or not the SoS has acted in a way which was not reasonably open to him. Reasonableness in this context has two aspects: i) whether the decision was outside the range of reasonable decisions open to the decision-maker; and ii) whether there is a demonstrable flaw in the reasoning which led to the decision (see the helpful analysis in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 at [98]).

35. The reasonableness of the SoS's decision must be assessed in context, for rationality is not determined in the abstract. The central context is the legislative scheme identified above. The assessment of reasonableness will of course involve scrutiny of the SoS's approach to the Board's advice, and whether that advice was given due consideration and weight. But it is important not to be prescriptive as to the precise approach that will be reasonable in every case.

36. Attempts to draw together "key principles" on a concept as broad and elastic as reasonableness are unlikely to be helpful. I agree with the SoS that it is not appropriate to draw a bright line between findings of fact and evaluative findings. In general, the weight that the SoS ought reasonably to give to the findings or assessments of the Board is likely to vary according to whether or not the finding or assessment was one in respect of which the Board held a particular advantage over the SoS. Thus, disagreement by the SoS with a finding of credibility made by the Board after a hearing involving oral evidence may be difficult to defend as reasonable. By contrast, disagreement with the Board's assessment of risk associated with a transfer to open conditions may readily fall within the range of reasonable decisions open to the SoS. Put very simply, the greater the advantage enjoyed by the Board over the SoS on any particular issue, the less likely a decision of the SoS to depart from that finding or assessment will be rational. But what is and is not reasonable will turn on the facts of each case.

37. To approach rationality in this open way, and not by reference to a critique of the Board's advice and a need to show "good" or "very good" reason to depart from any or all of it, is the approach identified in *Gilbert*, a Court of Appeal authority on point. It is an unreported decision which does not appear to have featured as strongly as perhaps it should have done in the first instance decisions that came after it.

38. *Gilbert* involved a case where the SoS had asked the Board for advice on the potential transfer to open conditions of a prisoner covered by the SoS's absconder policy. Sales LJ rejected the argument that the SoS ought to ask the Board in general terms whether it would recommend a transfer to open conditions in all such cases, and then ought to abide by the Board's recommendation (at any rate, absent "very good" reason not to). He stated (at [73]):

> "*However, this submission ignores the distribution of responsibility between the [SoS] and the Board as contemplated by the statute. The [SoS] has the relevant discretion whether to transfer a prisoner to open conditions; he can therefore promulgate his own policy as to how that discretion should be exercised…; he has a discretion whether to seek advice from the Board; and even if he seeks its advice, he is not bound to follow that advice provided there is sufficient good reason not to (see eg [Banfield]). The SoS is not obliged to seek the advice of the Board. Further if the advice given by the Board fails for whatever reason to take into account the relevant policy of the [SoS] governing the question of transfer to open conditions, that is likely to constitute a good reason for the [SoS] to decline to follow the advice."*

39. Thus, Sales LJ expressly rejected the attempt to impose a threshold higher than rationality. And at [92] he went on:

> "*In so far as Mr Hirst sought to suggest that it was irrational for the [SoS] to decline to accept the recommendation of the Board that Mr Gilbert be transferred to open conditions, I do not regard that as a sustainable contention. The [SoS] is entitled not to accept a recommendation, provided he acts rationally in doing so: see Banfield, above at [22] and [28] and R (Wilmot) v Secretary of State for Justice [2012] EWHC 3139 (Admin),[47]. In some cases where the [Board] has reached a view on some point which is the same as a point which the [SoS] has to consider and the Board is better placed to make an assessment (eg it finds a relevant fact after hearing oral evidence from witnesses), it might well be difficult for the [SoS] to show that it is rational for him to take a different view; and para. 6.5 of PSI 36/2012 appears to reflect the [SoS's] recognition of this…"*

40. I do not accept the submission for Mr Sneddon and Mr Oakley that the approach identified in *Sneddon* is in line with *Gilbert* at [73] and [92]. The references in [73] to "sufficient reason" or "good reason" do no more than reflect the fact that the public law rationality test will inevitably involve taking account of the Board's findings and views, and according them due respect.

41. This is confirmed by reference to the authorities relied upon by Sales LJ: *Banfield* at [22] and [28], and *R (Wilmot) v Secretary of State for Justice* [2012] EWHC 3139 (Admin) (*Wilmot*) at [47]. In *Banfield*, Jackson J had stated at [22] that "*the advice which the…Board gives…is not binding upon the [SoS], but it is obviously an important factor in his decision".* He went on (at [28]):

> "*(1) The decision of the [SoS] is not lawful if he fails to take into account the recommendation of the [Board] and the fact that the [Board] has particular expertise in assessing the risk posed by individual prisoners. Nevertheless, it is a matter for the [SoS] what weight he assigns to those factors in any given case…*"

42. In *Wilmot*, King J stated (at [47]), having recognised the expertise of the Board (at [46]),:

> "*However, this said, subject to the public law constraints of fairness and rationality, the courts have long held that it is open to the [SoS] to disagree with any…Board recommendation and to reject that recommendation and the only basis upon which a court on a judicial review will interfere with any such decision of the SoS is on application of those public law constraints. Hence to date the guiding principle in the authorities has been that it is not for the court itself to assess the reasonableness of the …Board to determine whether it can be characterised as irrational in the Wednesbury sense. The court must rather direct itself to the rationality of the [SoS's] decision; it will not interfere with that decision, unless his decision is to be adjudged irrational in the Wednesbury sense or reached by an unfair process. On this see the formulation of principle by Jackson J in [Banfield] at …[28]."*

43. Nothing in either of these judgments suggests that there is a requirement to show "very good" or "good" reason for departure from the Board's finding or recommendation in the sense advocated for by the prisoners.

44. Thus, to repeat, in assessing the lawfulness of the SoS's decision, the exercise is not to identify whether the SoS has relied on a "good" (or "very good") reason for departing from the Board's finding or assessment. Rather, the question is simply whether or not the SoS's decision was rational.

45. This may be a narrow distinction, but it is an important one. Otherwise, the SoS's discretion is fettered in a manner not contemplated by Parliament. As the President put it during the course of the hearing, if the analysis in [28(6)] of *Sneddon* is taken at face value, the SoS will effectively be bound in all cases to follow the Board's advice. The examples given in *Sneddon* of issues on which the SoS could only disagree with "very good" reason were: i) of credibility after oral evidence at a hearing; ii) of any question of fact from evidence at a hearing; or iii) of questions of expert evaluation of risk, such as professional diagnosis or professional prediction. It is difficult to identify any material aspect of the Board's likely considerations that would not fall into one or more of these categories (and none was identified by Mr Bunting). Such a position runs entirely counter to the legislative scheme.

46. There are then the additional practical difficulties in applying the approach advanced in *Sneddon.* When is a reason a "good", but not a "very good", reason? Mr Bunting confirmed that his position was that, if there was only a "good" (but not a "very good") reason to depart from the Board's finding on a "question of significant advantage" (per [28(6)] of *Sneddon*), a decision by the SoS to disagree would be unlawful. This position produces an unreal and artificial result, far removed from a requirement of reasonableness.

47. Adopting the above analysis, I turn to the decisions in the individual cases. It should be recorded at the outset that, following Fordham J's judgment, the SoS reconsidered the decision not to transfer Mr Sneddon to open conditions and on 22 February 2024 accepted the recommendation to transfer. In practical terms, then, his appeal is academic.

The decision in the case of Mr Sneddon

48. The relevant history and facts of the case of Mr Sneddon are set out in helpful detail in Fordham J's clear judgment, in particular at [2] to [4] and [13] to [19]. I gratefully adopt those paragraphs.

49. In short, Mr Sneddon is now 71 years old. He has spent the last 41 years in custody. In 1982 he was sentenced to life imprisonment with a tariff of 10 years for two offences of rape. He was also sentenced to determinate sentences of imprisonment on five counts of indecency and four counts of robbery. Between 2006 and 2014 he was transferred to open prison on four different occasions for periods totalling some four and a half years, with transfer being curtailed on each occasion. In 2015 he was sentenced to life imprisonment with a tariff of eight years, following his guilty pleas to two historic offences of child rape. In July 2022, the SoS rejected the Board's recommendation of February 2022 (following an oral hearing) that Mr Sneddon be transferred to open conditions. Following challenge, the SoS agreed to reconsider that decision. On reconsideration, the rejection was maintained (in December 2022). That is the decision under present scrutiny.

50. It will be apparent from the analysis above that Fordham J set the bar too high in [28] when identifying the circumstances in which the SoS's decision to reject the Board's advice would be lawful. In particular, he:

    i) overemphasised the Board's comparative advantages over the SoS, describing them as "legally significant", and underemphasised the SoS's own independent institutional expertise. No reference was in fact made to the SoS's expertise in the assessment of risk or advantage in the field of the management of and allocation of resources to the prison estate; and,

    ii) fundamentally, wrongly identified "deficiency" as a key principle, concluding that rational disagreement by the SoS required either "very good" or "good reason". I accept the SoS's submission that in doing so he incorrectly "shrank" the space for rational disagreement by the SoS, for the reasons set out above.

51. Applying the correct approach, it can be seen that the SoS's conclusion that the Board's recommendation that Mr Sneddon be transferred to open conditions was not "wholly persuasive" was not irrational.

52. The SoS considered the Board's advice with care, engaging with the substance of its conclusion. In his judgement, greater weight was to be placed on the evidence of "impression management", the minimising of several key risk factors, and on the materiality of Mr Sneddon's past behaviour. The Board had not stated that there was no current concern as to risk-taking, rather only that there was "little evidence" of current concern. The SoS was entitled to place greater reliance on Mr Sneddon's identified risk factor of a willingness to engage in risk-taking behaviour than on his

behaviour in open conditions a decade ago. Risk evaluation was firmly within the sphere of the SoS's expertise.

53. Additionally, the SoS identified that the need for intense monitoring was not conducive for open conditions. This was a perfectly tenable concern. Though Fordham J rejected the validity of this reasoning (at [45] and [46]), this criticism disregarded the SoS's expertise in the allocation of resources to, and management of prisoners within, the prison estate. Relatedly, the SoS did not depart from the Board's finding that Mr Sneddon's partner was not a protective factor. However, the SoS (reasonably) placed more weight on this fact in the specific context of whether there would be sufficient support available within open conditions in order to effectively manage Mr Sneddon's risk.

The decision in the case of Mr Oakley

54. The relevant history and facts of the case of Mr Oakley are again set out in helpful detail in HHJ Keyser KC's clear judgment, in particular at [1] to [4] and [22] to [29]. I gratefully adopt those paragraphs.

55. In short, Mr Oakley is now in his late 30s. He has a diagnosis of emotionally unstable personality disorder and autism spectrum disorder. In 2009 he was sentenced to life imprisonment with a minimum term of 15 years, reduced on appeal to 12 years, for an offence of manslaughter on the grounds of diminished responsibility. He had killed his former partner, towards whom he had exhibited controlling and violent behaviour, and whom he had stalked following their separation. He had a history of harassment and assault, including of close family members and other former partners.

56. In 2019 the Board decided not to recommend transfer to open conditions. Mr Oakley's tariff expired in February 2021. In May 2021, the Board recommended transfer to open conditions. The SoS rejected that recommendation. In *Oakley 1* that decision was quashed, on the basis that inadequate reasons were given. In April 2023, the SoS issued a fresh decision, again rejecting the recommendation. That is the decision under present scrutiny.

57. The SoS's conclusion in that decision, that the Board's recommendation was not wholly persuasive, was entirely rational. The SoS considered the Board's advice in detail and with care. As highlighted in HHJ Keyser KC's impressive analysis at [38], the key difference between the conclusions of the SoS and the Board was the SoS's rejection of the Board's view that "there [was] no further work for [Mr Oakley] to undertake in closed conditions." Specifically, the SoS decided that Mr Oakley must undertake the Stalking Risk Profile (SRP) in closed conditions and before he could be transferred to open conditions.

58. The SoS's view was grounded in the evidence of Mr Martin Fisher, the regional lead psychologist for HMP Erlestoke as part of the Prisons in the South Central Group. Mr Fisher had worked as a forensic psychologist for HMPPS since 1988, and had been a regional lead psychologist since 1999. Mr Fisher explained that expert advice had been sought from his team of 27 psychology staff across five prison sites and from the wider HM Prisons and Probation Psychology Services Group. This evidence was not available to the Board when it made its recommendations. In this sense, it was the SoS who had the distinct advantage over the Board, not vice versa.

59. Mr Fisher's key conclusions were:

    i) The team considered that Mr Oakley's offending involved stalking former partners, as well as coercive and controlling behaviour within relationships (including familial). Mr Fisher addressed how this should be reflected in any core risk reduction work to address his ability to manage his emotions. The risk still posed by Mr Oakley needed to be examined and assessed against the risk reduction work already completed and responsivity assessments available to see what, if anything, was outstanding;

    ii) It seemed that after a relationship had ended, Mr Oakley had been fixated on re-establishing contact, which related to his rigidity of thought. Learning to effectively manage his emotions at these times would be beneficial, as this fixation led to his proximity seeking and then impulsive action when his version of how things will/should go, did not go that way. Developing this hypothesis in the context of specific assessments such as the SRP and functional analysis would act as an extension to the work already completed and enable a progression plan to be agreed with Mr Oakley, within normal business and operational processes within HMPPS and its partner agencies;

    iii) The SRP was proposed to identify all areas of risk and need and to separate those that have already been addressed (through previous programmes that Mr Oakley had completed) from those that may still require further input. The assessment would identify relevant options for Mr Oakley which would support him to develop coping strategies and address his emotional instability.

60. The view that Mr Oakley should undertake the SRP was eminently reasonable, not least since Mr Oakley's criminal history involved stalking former partners.

61. It was also reasonable for the SoS to decide that this assessment must take place before Mr Oakley can be deemed suitable for open conditions. In his decision letter, the SoS acknowledged that Mr Oakley had undertaken Offender Behaviour Programmes. However, the SoS also highlighted correctly that, according to Mr Fisher, Mr Oakley had had difficulties applying his learning and that "the [SRP] is key to identifying the additional support required to enable Mr Oakley to demonstrate learnings from behavioural programmes". The decision letter further explained that "such work at this stage requires completion in closed conditions, where it can be tested without implications for public safety". Given the importance of public safety protection, the SoS's decision that the work needed to be completed in closed conditions was (at the very least) rational.

62. Of interest, though not direct relevance, is the Board's assessment of Mr Oakley after the SoS's decision. In its Directions of 8 November 2023 regarding its next review of Mr Oakley's case, the Board wrote:

> "As detailed in the July 2023 adjournment note, there are several references in the dossier to stalking behaviour. Mr Oakley admitted to the last Parole Board panel that he had stalked a former partner, particularly by visiting her workplace uninvited. He had denied stalking the victim of the index offence. The panel has reviewed the dossier and continues to believe that an assessment of this behaviour is essential to fully understand the risk presented by Mr Oakley and how to manage

> this risk particularly given the offending of the index offence when he attended a residential property uninvited."

63. As HHJ Keyser KC put it at [43], "[t]he belief of the panel stated in the final sentence of that passage is unsurprising and is precisely the same as the Secretary of State's belief that underlay the Index Decision. [The SoS] was entitled to hold that belief and to consider that it was necessary to understand the risk presented by [Mr Oakley] and how that risk should be managed before deciding whether or not to transfer [Mr Oakley] to open conditions."

64. In conclusion, the SoS gave sound reasons for the decision not to transfer, having given proper weight and consideration to the Board's advice.

Conclusion

65. For these reasons,:

    i) The appeal in *Sneddon* will be allowed; and

    ii) The appeal in *Oakley 2* will be dismissed.

66. None of this is to undermine the importance or value of the work of the Board as an expert adviser to the SoS on the question of prisoner transfer to open conditions, when called upon. The SoS must consider the advice of the Board with care and accord it such weight as is appropriate, given the nature, extent and context of the Board's findings and recommendations. But the statutory scheme is clear: the SoS is the sole decision maker, and the Board acts as adviser. The Board's advice is not binding on the SoS, who has his own independent expertise; nor does the SoS have to identify error or deficiency in the Board's findings or reasoning in order to disagree with the Board's recommendation. What is required of the SoS on the ultimate question of whether to transfer a prisoner into open conditions is a rational, that is to say reasonable, decision in all the circumstances.

Dame Victoria Sharp, P.:

67. I agree.

Lord Justice William Davis:

68. I also agree.