Neutral Citation Number: [2019] EWHC 444 (Admin)

Case No: CO/2050/2018

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

Birmingham Civil Justice Centre
Bull Street, Birmingham

Date: 28/02/2019

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

R (on the application of SUNIL KUMAR)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Philip Rule (instructed by **Hine Solicitors**) for the **Claimant**
Claire Palmer (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 13 February 2019

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Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. On 9 September 2008, the Claimant, then aged 20, was sentenced to an indeterminate sentence of detention for public protection. His tariff was set at three years, less time spent on remand. He seeks judicial review of the decision of the Secretary of State, conveyed in a letter dated 21 February 2018, not to implement the recommendation of the Parole Board of 28 November 2017, following an oral hearing on 16 November 2017, that he be transferred to open conditions.

2. It is not contended that the decision was *Wednesbury* unreasonable, or that the Secretary of State failed to apply his own policy, or that there was any other material error of law. On the contrary, it is accepted that the Secretary of State had a discretion not to follow the Parole Board's recommendation, and that the published policy and guidance on the exercise of that discretion was followed. This claim for judicial review is based on a root and branch challenge to the lawfulness of that policy, and alleged procedural unfairness.

3. It is contended by Mr Rule on behalf of the Claimant that the policy sets too low a threshold for departure from the recommendation of the Parole Board, and that fairness demands that if the Secretary of State is not going to accept the recommendation, he should convene an oral hearing at which the prisoner is able to be present and make further representations, or at the very least give him an opportunity to make written representations before reaching his decision. In the absence of a further hearing, Mr Rule submitted that the Secretary of State should only refuse to accept a recommendation of the Parole Board if that recommendation is irrational or based on materially inaccurate information.

The roles of the Parole Board and the Secretary of State in this context

4. Section 12 of the Prison Act 1952 confers a wide discretion upon the Secretary of State as to which prison a prisoner is to be held in. This is overlaid by the provision in the Prison Rules 1999 for classification of prisoners according to their "*age, temperament and record with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment*."

5. The Parole Board has a statutory role in controlling the length of detention of all prisoners, and it has a recognized expertise in that field. However, whereas the Board has the power to "direct" the release of a prisoner serving an indeterminate sentence, its power in relation to that prisoner's progression towards release is more limited. The role of the Parole Board in this context is to *advise* the Secretary of State (Criminal Justice Act 2003, section 239(2)). He is not bound to accept its advice, though he must take it into consideration and give it appropriate weight.

6. In *R(Banfield) v Secretary of State for Justice* [2007] EWHC 2605 (Admin), a case which concerned an irrationality challenge to the Secretary of State's refusal to accept a Parole Board recommendation that a life prisoner be transferred to open conditions, Jackson J examined previous authorities and at [28] distilled five principles from them. The first, and most pertinent in this case, is that the decision of the Secretary of

State is not lawful if he fails to take into account the recommendation of the Parole Board and the fact that the Parole Board has particular expertise in assessing the risk posed by individual prisoners. Nevertheless, it is a matter for the Secretary of State what weight he assigns to those factors in any given case. At [29] Jackson J added that the categorisation of prisoners remains a matter for the Secretary of State's decision, and that in reaching his decisions on categorisation the Secretary of State has the benefit of the expertise of his department, in addition to the benefit of any advice given by the Parole Board.

7. Jackson J's summary of the relevant principles in *Banfield* was considered and endorsed by the Divisional Court in *R(Hindawi) v Secretary of State for Justice* [2011] EWHC 830, a case in which the assessment of the future risks posed by the prisoner turned upon an assessment of his credibility which had been made by the Parole Board after seeing and hearing his evidence. The Divisional Court (comprising Thomas LJ and Nicola Davies J) quashed the decision of the Secretary of State to reject the recommendation of the Parole Board, because it had been reached by a patently unfair process. Thomas LJ said at [52] that the weight the Secretary of State should accord to the recommendation of the Board:

"*must depend on the matters in issue, the type of hearing before the panel, its findings and the nature of the assessment of risk it had to make. The grounds for impugning the decision he makes which does not follow the recommendation must depend on the fairness of the way in which he approached his decision making in the light of the foregoing and whether the decision has a rational basis."*

8. He went on to draw a distinction between the panel's findings of fact and its assessment of risk, stating that the findings of fact were the basis on which the Secretary of State was entitled to reach his own view, using the relevant criteria, to determine risk, according appropriate respect to the panel's views on their assessment of risk. However, if there has been an oral hearing, very good reasons would be needed to justify a departure from the panel's fact findings, particularly if they depended on an assessment of the witnesses.

9. In *R(Adetoro) v Secretary of State for Justice* [2012] EWHC 2576, HH Judge Gilbart QC (as he then was) considered the observations made by Thomas LJ in *Hindawi* and concluded at [55] and [56] that nothing in that judgment should be understood as suggesting that the Secretary of State is prevented from disagreeing with the Parole Board should he choose to do so, provided of course that he approaches his decision along proper lines. He said:

"I do not consider that Hindawi prevents the Secretary of State from rejecting a Parole Board recommendation if he disagrees with a conclusion reached by it from the factual material before it. However, when the Secretary of State considers a Parole Board recommendation, he must do so fairly and properly, and give adequate reasons."

10. As Lord Reed JSC expressly acknowledged in *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, at [80] what fairness requires depends on the circumstances, and they can vary greatly from one case to another. In *R (Hassett and Price) v Secretary of State for Justice* [2017 EWCA Civ 331, [2017] 1 WLR 4750, the Court of Appeal reinforced that message by drawing a distinction between cases in

which the Parole Board is the decision maker, and cases concerning the internal review of the security categorisation of prisoners. They held that the guidance of the Supreme Court in *Osborn* was specific to the former context, and that the Secretary of State's policy giving guidance on procedural requirements for decisions taken on the review of Category A (high risk) prisoners, which set out the factors which would favour an oral hearing before a review decision was taken, was lawful. Sales LJ (with whom the other members of the court agreed) stated at [61] that in the latter context the circumstances in which fairness would require an oral hearing by the Category A review team or Deputy Director of High Security and his advisory panel were "comparatively rare". He gave the example of a case in which the panel was left in doubt, after reading all the reports, about a matter on which the prisoner's own attitude might make a critical difference.

11. In the present context, at the stage at which the Secretary of State makes the decision, the prisoner has already had an oral hearing at which he has been able to give his account of his behaviour in prison, the work he has done to address his offending, and his motivation to progress; the Board has evaluated that evidence and made its findings on it, and it will have received and considered any representations made on his behalf. The contention that procedural fairness requires that he must be given a further opportunity to make representations (written or oral) if the Secretary of State is considering rejecting the Board's recommendation, must be considered against that background.

THE POLICY

12. The respect to be afforded to the role and expertise of the Parole Board is reflected in the Secretary of State's applicable policy, Prison Service Instruction (PSI) 22/2015, ("the Policy") which expressly accepts that the discretion not to follow its recommendation to transfer the prisoner to open conditions should be exercised within "very limited" parameters. The relevant parts of the Policy are section 6 and Annex Y.

13. The process where, as in the present case, the Parole Board has made a positive recommendation for transfer to open conditions is that the prisoner will be informed of the Board's recommendation but told that the final decision will be made by the Public Protection Casework Section (PPCS) Team Manager on behalf of the Secretary of State. The Team Manager should make that decision within 28 days, taking into account the Secretary of State's directions to the Parole Board and the guidance given in Annex Y. In this case, the decision was made outside the 28-day timeframe, but nothing turns on that. The Team Manager must ensure that all of the papers considered by the Parole Board when reaching its decision are considered when deciding whether to accept the Board's recommendation. Thus, the ultimate decision is taken on precisely the same material, plus the findings made by the Board, and taking into account the Board's assessment of the risks and benefits.

14. The key provision of the Policy is paragraph 6.4 which requires a Team Manager who is considering rejecting a recommendation to discuss the case with the Head/Deputy of Casework immediately, and if necessary, to seek legal advice. A recommendation can only be rejected with the approval of the Head of the Public Protection Group. The paragraph continues:

"*The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are that the panel's recommendation*

- *either goes against the clear recommendations of report writers without providing a sufficient explanation as to why;*
- *or is based on inaccurate information.*

The Secretary of State may also reject a Parole Board Recommendation where he does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at this time."

15. Annex Y sets out the process for considering the recommendations and the criteria to be used as "*an initial guide*". Where the Parole Board recommendation is at odds with the recommendation of some or all reports the guide states that where most of the available evidence contained in the key reports points towards open conditions, the recommendation should be accepted; but where most of the available evidence contained in the reports points towards closed conditions, then a completed pro-forma must be referred to the Head of Casework for further scrutiny "*as it is likely that the recommendation will be rejected"*. Where there is a conflict between report writers then, if the Parole Board has addressed the conflicts, the case should be accepted, but discussed with the Head of Casework first to ensure that a consistent approach has been taken. If the conflicting views have not been addressed, then the case will require further scrutiny, as it is likely that the recommendation should be rejected.

FACTUAL BACKGROUND

16. The Claimant pleaded guilty at the earliest opportunity to what the sentencing judge aptly described as "*a catalogue of serious and disturbing offences*": two counts of street robbery, two counts of night-time/early morning dwelling house burglary when the occupants were at home, one count of affray (which was associated with the second burglary) two counts of theft, and one count of common assault. Most of the offences were committed in October 2007. Whilst on bail for those offences, he committed further offences of possession of a prohibited item (a CS gas canister), criminal damage and resisting arrest, for which he was dealt with by the Magistrates' Court. Six further offences of dwelling house burglary or attempted burglary and theft were taken into consideration, and a further count of assault occasioning actual bodily harm was ordered to lie on the file.

17. Although he had previous convictions before the Youth and Magistrates' Courts, the Claimant had never previously served a custodial sentence. However, the pre-sentence report noted that at the time when he committed most of these offences, he had been subject to a Community Order with supervision and unpaid work requirements imposed on 8 August 2007 for an offence of possessing an offensive weapon. Prior to the revocation of that order, when he was remanded in custody after breaching his bail conditions, his compliance with it had been extremely poor.

18. The Claimant targeted vulnerable victims – either elderly people in their own homes, or young people who he could intimidate into handing over their mobile phones. The offending was to obtain money to feed a gambling habit and to pay off drug debts (he

had a cannabis and cocaine habit) and at least some of the offences were committed under the influence of alcohol. The author of the pre-sentence report described him as an "*immature individual who may have some issues with temper control and authority figures*". At that time, he minimised his responsibility for his offending and displayed little victim empathy. She identified risk factors as including gambling, alcohol misuse and drugs, and assessed him as posing a high risk of harm to the public and a high risk of reconviction.

19. The Claimant's initial behaviour in custody was poor. He received a high number of adjudications for threatening words and behaviour, disobeying a lawful order, fighting, and assaulting a prison officer. He was also placed on a violence reduction strategy. However, despite being deselected from a thinking skills programme because of his lack of motivation and disruptive behaviour, he went on to complete it in 2011. His tariff expired in May that year. In 2012 he completed "CALM" (an anger management programme) and an Alcohol and Offending Programme. In December 2012 a psychological assessment was carried out. The author of the report noted evidence of some improvement in the Claimant's behaviour but said that there were still occasions where his underlying attitudes affected it.

20. The Claimant's case was first considered by the Parole Board on 29 April 2013, by which time he had made good progress and achieved enhanced status. Both his Offender Manager and Offender Supervisor supported a progressive move to open conditions so that he could be tested in a new environment. The Parole Board concluded that his risk had reduced to a level that was manageable in open conditions and recommended his transfer to an open prison. That recommendation was accepted by the Secretary of State. However, within a short time he was returned to closed conditions after being overheard on the telephone having a heated conversation with his mother in which he demanded money from her to pay off a debt that he had accrued to other prisoners, failing which he threatened to abscond.

21. The Claimant's case was next considered by the Parole Board on 18 November 2014. His behaviour since his return to closed conditions was a cause for concern. The Board were also concerned about what they described as a "*complete lack of insight*" into the parallels between the situation in which he got into trouble with other prisoners after incurring "debts" in open conditions, and his index offences. He took limited responsibility for his behaviour and relied on his family to "*bail him out of trouble*". The Board refused to accept that he was naïve. They concluded that he had outstanding core risk reduction work to complete, and that his risks had not reduced to a level whereby they could be managed in open conditions or in the community.

22. On 22 March 2016 the Claimant completed the RESOLVE programme. The report on that programme was broadly positive and noted that he appeared to have developed some insight. He also completed an EDP Alcohol Action Programme on 12 July 2016. The substance abuse team felt he needed no further work in that regard. A psychologist who assessed him prior to the next Parole Board hearing in July 2016 concluded that the Claimant posed a low risk of violence in closed and open conditions. Both his Offender Supervisor (Ms Johnson) and his Offender Manager (Mr Bell) supported a transfer to open conditions. The Parole Board agreed, and on 18 August 2016 the Secretary of State accepted the Board's recommendation. In the period leading up to the transfer there was a marked improvement in the Claimant's

behaviour, and there was real cause for optimism that this time he would make progress towards being released on license.

23. The Claimant was transferred to open conditions on 18 October 2016, but once again the placement was short-lived. He was found to be using the psychoactive synthetic cannabinoid known as "Spice". He was transferred back to closed conditions on 15 November 2016 after failing a mandatory drugs test. On his return, his behaviour worsened. There were intelligence reports suggesting that he may have been bullied by other prisoners, but there were also reports of his bullying others. On 3 December 2016 he was given an Incentives and Earned Privileges warning for being verbally abusive to staff.

24. From February 2017 onwards his behaviour deteriorated further, with numerous attempts at self-harm coupled with verbal threats and abuse. He claimed to be under threat from other prisoners and was moved to the Care and Separation Unit ("CSU") for his own well-being, but his behaviour thereafter was described as "*chaotic, disruptive and manipulative*" with active threats to continue to disrupt the CSU regime and cause nuisance to staff.

25. On 2 May 2017 the Claimant's then Offender Supervisor, Ms Johnson, wrote a detailed report about him in which she expressed concerns about the recent deterioration in his behaviour despite the progress previously thought to have been made. She said it was not clear why he repeatedly found himself under threat and at risk from others in every establishment he went to, and what his role in this was; the likelihood was that this factor could have relevance for risk in the community. She expressed the opinion that the current indications were that risk to self and others was high (his updated OASyS assessment concluded that he posed a high risk of harm to children and members of the public through violence or threats of violence, use of weapons and physical injury, and a medium risk to known adults).

26. Ms Johnson said:

"*In the light of the foregoing I am unable to make any recommendation for progression or release. I would want to see a profound and lasting change in Mr Kumar's attitude and manner of engaging with others before I would feel confident to make a renewed proposal for progression to open conditions or, indeed, release. Such change I believe would need to be tested over time in an appropriate custodial environment*".

She recommended that the Claimant be detained in closed conditions and engage in further one-to-one work with a psychologist.

27. Those views were shared by his Offender Manager, Mr Bell, in his report of 26 May 2017. Mr Bell stated that the Claimant appeared to have a relatively good insight into his offending behaviour, stating that the causal factors were drug and alcohol misuse and the fact that alongside this, he had a gambling problem. He also said he was aware of the impact of his offending behaviour on others, and displayed remorse at the feelings of fear and intimidation his victims experienced. Mr Bell referred to all the positive factors leading up to the Claimant's previous move into open conditions, including his completion of the alcohol action programme and proactive engagement with the substance misuse service. He went on to describe how the Claimant's attitude

had changed on his return, his referral to Psychological Services for 1:1 work to address his triggers for increased emotional arousal and hostility towards others, concentrating specifically on "*why he reacts so negatively when he does not get his own way",* and his refusal to engage with the Psychologist.

28. Mr Bell identified it as positive that the Claimant had completed all core offending behaviour work but identified concerns about his associations and peripheral activities in custody, which had impacted on his ability to comply with the prison regime. Mr Bell stated that whilst the Claimant's psychological assessment in July 2016 indicated a low risk of violence in custody, it was likely that if the assessment were updated it would find the risk had increased, given the evidence of poor emotional management and decision-making in open conditions, and the very marked deterioration in attitude and behaviour when he returned to closed. Mr Bell considered that a PIPE (Psychologically Informed Planned Environment) placement at some future stage would be beneficial, but the Claimant was "*highly resistant*" to this. He concurred with the Offender Supervisor's comments and repeated her conclusions.

29. Similar views were expressed by Joy Dalkin, Head of Offender Management, in her report of 3 May 2017. In her opinion, the current indicators were that risk to self and others was high. Her recommendations were as follows:

"*For the moment … Mr Kumar should be detained in closed conditions and engage in further one-to-one work, as indicated with a psychologist. I would expect that the Parole Board would require up-dated assessments from his current establishment when such work had been completed."*

30. On 21 July 2017 the Parole Board directed an oral hearing of an application for the Claimant's release on licence, partly because it felt there was insufficient information in the dossier to deal with the application on the papers. A panel member directed the oral hearing to enable that information to be obtained and "s*o that the Panel can hear from Mr Kumar about his experience in open conditions and his explanation for his return to closed and for his subsequent challenging and disruptive behaviour. The Panel may also wish to hear his views on proposed treatment options, his plans for the future, and his willingness to comply with supervision*." A direction was made for addendum reports to be produced.

31. Mr Bell's addendum report is dated 24 October 2017. By then, the Claimant had a new Offender Supervisor, Mr Sodha, who had discussed his case with Mr Bell. The feedback from Mr Sodha was described by Mr Bell as "poor." Mr Bell gave an example of the Claimant being verbally abusive to Mr Sodha on the telephone and refusing to calm down when staff intervened. Mr Bell had also discussed the Claimant's case with a clinical psychologist, Dr Eggleton, on 14 September 2017. He said they thought it unlikely that there would be much progress or change if he were to remain on normal location. A PIPE in prison was something that could be considered. The PIPE unit is designed to help individuals to interact with other residents and staff in a safe, friendly and productive way. This was described by Mr Bell as "*a progressive move and would provide a psychologically informed, testing environment as an alternative to open conditions*." He would also look into the option of PIPE units in the community.

32. Mr Bell made it clear that he had not changed his views or recommendations since May. He said that the Claimant would need to demonstrate a further significant period of compliance with the prison regime and positive behaviour to give any assurance that he would comply with Licence conditions when in the community. He suggested a review in six months' time.

33. Thus, in their written reports, all the professionals who had engaged with the Claimant were unanimous in their position that the Claimant *should not yet progress to open conditions* and that he needed to demonstrate a significant change in his attitudes and behaviour before he could do so.

34. Report writers can change their minds and their recommendations at an oral hearing, but that did not happen in the present case. The Board heard oral evidence from Mr Bell, Mr Sodha, and a Ms Ellis who was the Claimant's offender supervisor between April and August 2017 when he was at HMP Ranby. Their evidence is summarised in the Board's decision letter. Ms Ellis said the Claimant struggled in prison with the rules and this was now a learned behaviour. He engaged positively in meetings and indicated that he agreed with and intended to change behaviours but quickly, sometimes the same day, after the meeting, continued to act inappropriately. Whilst there was no evidence of threats or violence towards others, her view was that he was "*very difficult to manage*", and this could lead to an increased risk to others if he misused drugs or disengaged with professionals. She believed there may be very little time to intervene before risk emerged and that it was necessary for him to remain confined. She did not support release or progression.

35. Mr Sodha said that if the Claimant could not see that there was progress, he became frustrated, and he thought this would still be a problem in open conditions. He thought the Claimant would be most suited to an environment that could manage his personality traits with intensive support, such as a PIPE unit or hostel, but there had been no referral made for a PIPE because the Claimant had said he had no interest in such a transfer. Mr Sodha had discussed with the Claimant what had happened in open conditions and concluded that he made poor decisions to be involved with negative associates, demonstrating a child-like personality and finding it difficult to say "no" to people, being easily influenced and manipulated. He concluded that whilst the Claimant had insight into his behaviour and how it impacted on risk, he struggled to conform and comply with the regime. He was not suited to open conditions and would struggle.

36. Mr Bell's oral evidence, as summarised in the Board's decision, appears to have been largely directed to the question whether the Claimant was suitable for release on licence. He said that what he thought the Claimant needed was stability and motivation and until this was evident, he could not be managed in the community. Once compliance and stability were established, Mr Bell would consider release to PIPE approved premises. He did not think his risk of serious harm was imminent, as long as he was not using drugs and alcohol and was being compliant. He was concerned that if he was in the community, the Claimant might lose his self-control in frustration, or if in fear of violence. He recommended some refresher work on what he had learnt on the TSP and RESOLVE programmes; this could be done in open conditions, but Mr Bell confirmed that he did not recommend his progression to open conditions at that time. The Board accepted that Mr Bell was the professional who knew the Claimant best (and had known him for a long time).

37. The Claimant gave evidence to the Board which is also summarised in their decision. He told them that when he was in open conditions, he was under threat from other offenders who believed him to have been an informer in the past. He reported the threats, but no action was taken. He said that he told staff he could not cope and asked to return to closed conditions. He provided explanations for his poor behaviour since his return, blaming the attitude displayed towards him by some members of prison staff. He accepted that some of his behaviour had been unacceptable, but gave examples of positive behaviour, including not reacting to provocation. He denied using drugs in custody, apart from the lapse whilst in open conditions. He said that he had not used violence in custody and did not want to go to a PIPE unit, as it just meant longer in prison. He spoke of wanting to see his family and reintegrating back with them in Bradford.

THE DECISION OF THE PAROLE BOARD

38. In its decision letter, the Parole Board stated that:

> "*a decision about whether to recommend a transfer to open conditions is based on a balanced assessment of risks and benefits, with an emphasis on risk reduction and the need for you to have made significant progress in changing your attitudes and tackling your behaviour problems in closed conditions, without which a move to open conditions will not generally be considered."*
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> That is a direct quotation from paragraph 5 of the Secretary of State's Directions to the Parole Board under s.239(6) of the Criminal Justice Act 2003 relating to the transfer of indeterminate sentence prisoners to open conditions which were issued in April 2015. The Board is legally bound to follow those directions, which form Annex O to the Policy. Paragraph 5 makes it clear that whilst a move to open conditions should be based on a balanced assessment of risk and benefits, the Board's emphasis should be on the risk reduction aspect.

39. Those directions also set out in paragraph 7 the main factors that the Parole Board must consider when evaluating the risks of transfer against the benefits. These include, at (a), the extent to which the prisoner has made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where in open conditions he may be in the community unsupervised, under licensed temporary release; (b), the extent to which the prisoner is likely to comply with the conditions of any form of temporary release (should he be assessed as suitable for temporary release) and (d), the extent to which the prisoner 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.

40. Paragraph 9 of the Directions sets out information that (where available and relevant) the Parole Board must consider in assessing risk, before recommending a transfer to open conditions, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case. These include whether the prisoner has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence(s); his attitude and behaviour to other prisoners and staff; and any psychological considerations.

41. The Board stated that the Claimant's oral evidence at the hearing and the evidence from professionals indicated that he struggles to manage his emotions when feeling frustrated or if he feels he is not receiving appropriate support. They considered this in the context of the fact he was many years over tariff. He continued to display immaturity and poor problem-solving capabilities that needed to be developed and tested but said: "*this is unlikely to be achieved in closed conditions or by an offending behaviour programme*". He spoke of his need to feel he was making progress, and for support. Given the clear link between not coping and the risk of further offending, the Board concluded it was necessary for the protection of the public that he be confined. However, his negative behaviour, although inappropriate, had not indicated an imminent risk of violence or serious harm and could be managed in less secure conditions. The Board did not direct his release but recommended to the Secretary of State that he be progressed to open conditions.

42. Thus, the recommendation that was made contradicted the unanimous views of all the professionals involved in the management of the Claimant that he should not progress to open conditions at that stage, but should spend a further period of time in closed conditions, and engage in 1:1 sessions with a psychologist or move to a PIPE unit within the prison estate which would provide him with the support he needed in managing the personality traits that gave rise to the risks that had been identified (and which the Board acknowledged). The problem, as the Board accepted, was not that the Claimant had failed to learn anything from the courses he had completed, it was that he was struggling with the practical application of those lessons. The decision does not address the concerns expressed by those professionals that he would (once again) struggle to cope in open conditions. There is no suggestion in the decision that the Board considered any of the professionals concerned were giving anything other than impartial, properly-informed evidence.

43. The Board concluded that the Claimant could not make progress in closed conditions, without addressing the suggestion of a move to a PIPE unit or explaining why it thought that moving directly to open conditions was a better idea in terms of providing him with the support he needed. The fact that the Claimant was refusing to co-operate with the suggestion of his Offender Manager because it meant staying longer in closed conditions would not have been a good reason for dismissing that suggestion, and the Board did not suggest that it was: but on the face of it, that was the only obstacle to its implementation.

44. Mr Rule suggested that the Board had addressed the idea of PIPE in prison by recognizing that Mr Bell had suggested it. However, a recital of Mr Bell's evidence is not the same thing as engaging with his proposals (which were supported by Mr Sodha) or giving cogent reasons for disagreeing with them. The Board also failed to explain why the Claimant would be in any better position to make progress with managing his emotional triggers in open conditions when he had twice failed to do so previously, despite showing far more positive behaviour and motivation prior to his previous move. Nor did it explain why it either felt that he had made significant progress in changing his attitudes and tackling his behaviour problems, or, if he had not made significant progress, why this was an exceptional case for recommending a move to open conditions despite its absence.

THE DECISION OF THE SECRETARY OF STATE

45. The proforma in the Claimant's case was initially filled in by a caseworker who provided an accurate summary of the Parole Board's decision and reasoning, and then completed by Ms Helen Flay, the Deputy Head of pre-release casework, who took the relevant decision on behalf of the Secretary of State. In her entry on the proforma, Ms Flay described this as a difficult case. She characterised it as one in which the panel (of the Board) had rejected the clear recommendations from the risk professionals (offender supervisors and offender manager) without setting out a clear case as to why they had gone against these assessments. I regard this as a fair and accurate characterisation. She added "*further, the Secretary of State is not wholly persuaded that there is a case for transferring Mr Kumar to open conditions*". It is entirely understandable why Ms Flay reached that view.

46. Ms Flay stated she had fully considered the Parole Board recommendation, but then listed a number of factors that she said outweighed it. These included the Claimant's history of multiple failures to comply in open conditions; the recommendation that work should be undertaken via PIPE; his lack of ability to put into practice learning from offending behaviour work; and his failure to use appropriate coping mechanisms to manage emotional challenges. She said that to move the Claimant to open [conditions] now, without further attempts at interventions to help with thinking skills and/or emotional control and evidence that he is applying his learning, could lead to another failure and move back to closed, which was arguably not in his interest and is not conducive to public protection.

47. Mr Rule criticised that approach on the basis that Ms Flay did not also list the benefits to be gained by moving the Claimant to open conditions, in terms of his motivation, the opportunity to test his ability to meet emotional challenges, and progress towards release; but that criticism was misplaced. Having fully considered the recommendation, she must necessarily have considered the benefits identified in that recommendation. There were no benefits identified other than those normally associated with a move to open conditions. Ms Flay was the decision-maker; she was not putting a document together for the consideration of a decision-maker who might not have the time to read and digest the Parole Board decision as she had done.

48. Having reached the view that she was going to reject the recommendation of the Board, Ms Flay followed the Policy by referring the matter to Gordon Davison, the Head of the Public Protection Group, who approved her conclusions.

49. The decision letter which was sent to the Claimant stated that the Secretary of State was of the view that the Parole Board's panel had failed to give sufficient weight to the concerns of the report writers about his risk of re-offending. The Secretary of State was concerned about his breaches of prison rules, poor thinking and emotional control as well as poor compliance with boundaries. These reflected critical features in his risk factors. Going forward, the Secretary of State would expect to see further evidence of work undertaken in closed, in respect of emotional management and working on relapse prevention strategies. He would also want to see further evidence of improved consequential thinking.

THE CHALLENGE TO THE POLICY

50. Mr Rule challenged the lawfulness of the Policy on three grounds:

    i) It failed to give proper and adequate weight to the oral hearing process before the Parole Board and to accord sufficient respect to the benefits and expertise of the panel;

    ii) The "rigidity" of the approach of "requiring" universal or majority support from report writers, because the risks and benefits are better assessed in an oral review;

    iii) The Policy fails to allow for the proper engagement with the prisoner or his representative to allow effective participation in the decision-making process.

    The last of these complaints overlapped to such an extent with a separate ground of challenge on the basis of an alleged breach of the common law requirement of procedural unfairness, that it makes sense to deal with them together.

51. Mr Rule contrasted the current Policy with its predecessor, which had only specified two criteria for rejection of a Parole Board recommendation, namely, that the decision was "inaccurate" or "the panel [of the Board] have acted irrationally, for example by recommending transfer to open conditions when most of the reports and especially the offender manager's report and psychologist report favour retention in closed conditions". Mr Rule did not accept that the specific example of irrationality given in the previous policy was in fact an example of an irrational decision, because he said there might be cogent reasons for rejecting the views of the report writers; but he did accept that the restricted circumstances in which the discretion could be exercised under the previous policy paid proper regard to the expertise of the Board and the advantages that an oral hearing conferred on it.

52. The Secretary of State is entitled to prescribe both the procedure and the policy to be followed when exercising a discretion that Parliament has conferred upon him as the ultimate decision maker. He is also entitled to make changes to his policy from time to time. The language of the previous policy was imprecise and, as Miss Palmer on behalf of the Secretary of State pointed out, the current Policy expressly recognizes the very criticism that Mr Rule made of the previous example of irrationality, by acknowledging that the Board can rationally deviate from the recommendations of the responsible professionals. The Policy now contemplates that if the Board give adequate and cogent reasons for doing so – for example, if, having questioned the offender supervisor, they found that there was insufficient interaction with the prisoner for the supervisor to be sufficiently well-placed to make an adverse assessment - their recommendation is likely to be followed.

53. The current Policy has added a third ground, namely, that the Secretary of State does not consider that there is a wholly persuasive case for transferring the prisoner to open conditions at the relevant time. This was the target for much of Mr Rule's criticism. Bearing in mind that this follows an express acknowledgment of the "*very limited parameters*" for departure from the recommendation of the Board, it is clear that the purpose of that ground is not to widen those parameters, but to preserve the ability of the Secretary of State (or the person to whom he has delegated the power to make the decision on his behalf) 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.

54. Whilst the Secretary of State's discretion to reject a recommendation by an expert panel which has had the advantage of seeing and hearing witnesses at an oral review must be exercised in a manner that pays due regard to those advantages and to the particular expertise of that body, it does not follow that fairness demands that the discretion should only be exercised in circumstances in which the recommendation of that body would be liable to successful challenge in the courts by way of judicial review. To do so would be to unduly fetter the discretion of the Secretary of State. Cases such as *Banfield* (above) make it plain that the Secretary of State may lawfully disagree with the Parole Board's view that the time has arrived to transfer a prisoner to open conditions, and that he may ascribe different weight to material factors in the risk/benefit balancing exercise. If he makes his decision on the same material and the same facts, there is no unfairness in a procedure which does not cater for further submissions from the prisoner.

55. In my judgment, the Secretary of State is entitled to adopt a Policy which enables the ultimate decision maker to explore the question whether the Board's recommendation was reached after a proper evaluation of the evidence and application of the Secretary of State's Directions. The Secretary of State must have due regard to the justification given for the Board's recommendation, but he is entitled to adopt a Policy which enables the decision maker to explore that justification and to form a view as to whether it, and the reasoning behind it, is cogent. This does not undermine or fail to pay sufficient regard to the advantages that an oral review may confer on the Board in its assessment of the relevant risks and benefits. The decision maker is not proceeding on the basis of the written reports alone. He or she is bound to take into account any aspects of a report writer's oral evidence that the Board has referred to in its decision, and the fact-findings it has made, including any relevant findings on credibility. As *Hindawi* makes clear, the decision maker cannot depart from those findings without good reason and nothing in the Policy would enable that to happen.

56. The Secretary of State has rationally decided that careful scrutiny of the Board's reasoning is called for in a case where the recommendation appears on its face to run counter to the views of the professionals who have had direct experience of and contact with the prisoner over a far longer term than the members of the panel, and whose function in this context is to bring that experience and knowledge of the individual to bear in assisting the Board in advising the Secretary of State. If the views of the professionals differ, and the Board accepts the majority view, its decision to do so may not require further explanation, but if it accepts the minority view, then save in obvious cases it would normally be incumbent on it to provide sufficient reasons to enable the ultimate decision-maker to understand why it has done so.

57. I do not accept that a Policy which requires consideration and assessment of whether the Board have given an adequate explanation for departing from the views of the professionals who are best placed to inform them about the risks presented by the prisoner, and how they might be addressed, or for preferring the views of some professionals over others, is even arguably unlawful or unfair to the prisoner. That is not a Policy which enables the substitution of the views of a civil servant for the views of an expert body without justification. Nor does it involve challenging the

Board's findings on credibility or any other findings in respect of which an oral hearing would give it an advantage over the ultimate decision-maker.

58. Mr Rule's description of the Policy as "rigid" is a mischaracterisation. Annex Y makes it clear that the decision maker is not engaged in a mechanical or mathematical exercise, but rather, that the Board's departure from the views of all or most of the professionals is just a starting point for subjecting the recommendation to greater scrutiny and at a more senior level. When the senior official considers the matter, his or her consideration will be guided by the provisions of paragraph 6.4 of the Policy, whose focus is on the sufficiency of any explanation for departing from those views. The escalation of the matter to a more senior decision-maker illustrates how seriously a potential decision to depart from the recommendation of the Board is treated.

59. As for the third basis on which the Secretary of State may reject a recommendation, a Policy which enables the ultimate decision maker to exercise his discretion to reject advice which appears to him to be inadequately reasoned, or to provide insufficient justification for the recommendation, or to fly in the face of the evidence or the assessment of the nature of the risks found by the panel, is not procedurally unfair. Provided that the view taken by the decision maker is legitimately open to him or her, the Policy provides a clear objective justification for rejecting the advice which does not involve a lack of deference to the Board's expertise or its advisory role. Affording the prisoner an opportunity to make further submissions would confer no advantage in such a case, given that he would be unable to fill in gaps in the Board's reasoning or provide a justification which the Board itself has failed to provide. The prisoner has adequate safeguards in the form of an ability to seek judicial review of the decision of the Secretary of State.

60. It would be superfluous for the Secretary of State to be required to give prisoners an opportunity to make further submissions, whether written or oral, in such circumstances. In *Banfield* (above) Jackson J rejected a very similar argument. That case had a number of similarities to the present, including the fact that the prisoner had been transferred to open conditions on previous occasions and failed, leading to his return to closed conditions. The recommendation by the Board had been made after two oral hearings at which evidence had been given and the Secretary of State had not been represented. However, the Secretary of State had the benefit of the Parole Board's clear summary of the evidence. He was not relying upon any new material that had not been before the Parole Board. The fact that he drew different conclusions from the same material did not make the procedure unfair. It is noteworthy that the Claimant has not pointed to any particular piece of evidence given at the oral hearing that was said not to have been considered.

61. In my judgment, far from lending support to Mr Rule's contentions, the authorities, including *Banfield* and *Hindawi,* contradict them. The Policy is lawful and the process by which the decision was reached was not unfair.

THE ALLEGED LACK OF SAFEGUARDS REQUIRED BY THE ECHR

62. It follows from the above that this additional ground of challenge must fail. Mr Rule correctly submitted that the procedural obligations required by Article 8 of the European Convention on Human Rights (and echoed in Articles 5 and 6) include affording the individual concerned an opportunity to be involved in the decision-

making process sufficiently to provide him with the requisite protection of his interests. The question whether due weight has been afforded to the interests of the individual is a matter for the Court to assess.

63. It is obvious that those safeguards were adequately provided in this context. The prisoner has been given plenty of opportunity for involvement in the process. He was able to (and did) give evidence to the Board in person before it made its recommendation, and his legal representatives put in written representations even after the hearing took place. All the material that was before the Board was considered by Ms Flay. The Policy accords appropriate respect to the Board's fact-findings as well as to its role and expertise and its assessment of the risks. It is not procedurally unfair. A rational decision was taken, in accordance with the Policy, not to accept the recommendation, and sufficient cogent reasons for the decision were provided. There was no unfairness to the Claimant in the rejection of the Board's recommendation in this case, which was clearly explained and objectively justified.

64. For all the above reasons, this claim for judicial review is dismissed.