Neutral Citation Number: [2022] EWHC 2319 (Admin)

Case No: CO/21/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 September 2022

Before :

MR BENJAMIN DOUGLAS-JONES KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

THE KING (on the application of X)	**Claimant**
- and –	
THE PAROLE BOARD FOR ENGLAND AND WALES	**Defendant**
– and –	
THE SECRETARY OF STATE FOR JUSTICE	**Interested Party**

- -
- -

Becket Bedford (instructed by **Bhatia Best Solicitors**) for the **Claimant**

Hearing date: 28 July 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 13 September 2022.

Benjamin Douglas-Jones KC, sitting as a Deputy Judge of the High Court :

Introduction

1. The Claimant is a prisoner. He is serving seven life sentences. His minimum term expired in 2008. He is held at HM Prison Warren Hill ("Warren Hill"). An oral hearing before a panel of the Parole Board ("the Panel") took place on 27 September 2021. The Claimant did not suggest before the Panel that he should be released on licence. He contended that he should be transferred to an open prison. By a decision letter dated 9 October 2021 ("the Decision") the Panel concluded that it was "… not convinced that any open prison would be able to provide [him] with the support which [he] will need if [he is] to progress to release on permanent licence". The Claimant sought permission to challenge that decision on two grounds by way of judicial review. Mr Clive Sheldon QC, sitting as a deputy judge of the High Court refused permission on the papers on 14 February 2022. The Claimant proceeds before me with permission granted at an oral hearing before Upper Tribunal Judge Church, sitting as a deputy judge on 23 March 2022.

Reporting restriction and anonymity

2. Nothing may be reported which could, during their lifetimes, tend to identify the Claimant's victims as the victims of sexual offences; see section 1(2), Sexual Offences (Amendment) Act 1992. In this judgment it is necessary to refer to the Claimant's victims by their relationship to him, thus potentially rendering them identifiable. That requires that the Claimant be anonymised pursuant to CPR 39.2(4) (as amended in April 2022 to permit anonymisation to protect the interests of "any person" rather than just those of parties or witnesses).

Grounds

3. Through Ground 1 the Claimant submits that the Panel failed to give adequate reasons for preferring the opinion of the prison psychologist, who recommended against a transfer to open conditions, over the opinion of three other witnesses who favoured such a transfer. Through Ground 2 it is said that Panel failed to comply with Directions given by the Secretary of State for Justice ("SSJ") to the Board pursuant to statute.

The sentence

4. In February 1999, after a trial before His Honour Judge Thorpe and a jury at the Crown Court at Chichester, the Claimant was convicted of 17 sexual offences. He was then aged 43. He was sentenced to life imprisonment for five offences of rape of a female child under the age of 16 and two offences of buggery of a female child under the age of 16. His minimum term (i.e. the "specified" period, under s.28, Crime (Sentences) Act 1997) was set at nine years and six months (ten years from which six months spent on remand was deducted). The Claimant was also convicted of four offences of buggery of a male child under the age of 16, five offences of indecent assault on a female child under 16 and one offence of gross indecency. For those offences the Judge imposed concurrent determinate sentences ranging from five to eight years. The specified period ended in 2008. The Claimant was subject to notification requirements as a sex offender for life.

The offences

5. The Claimant's offending involved six victims. It took place over several decades. One series of offences took place between 1969 and 1974. The victims of those offences included relatives who have been described as half-siblings of the Claimant in the parole dossier. In this judgment I simply refer to them as brother and sister. They included the Claimant's brother, sister, sister's friend and his cousin. The second series of offences took place between 1978 and 1995. The victims were the Claimant's son and daughter.

6. Most offences took place in the family home when the Claimant's partners were at work. The Judge described the rapes of the Claimant's sister as "appalling". He said that they clearly involved force and other violent acts. The Claimant raped his cousin repeatedly and anally raped (it was then the offence of buggery) both his brother and son. He attempted to make his son have sexual intercourse with his daughter and thrived on dominating young and vulnerable individuals. The Judge said that the Claimant's "catalogue of crimes [was] so horrific that all right-thinking people would be appalled to hear that one man can cause so much misery and betray trust so cruelly". He described the Claimant as a "sexual predator".

7. 12 years after the Claimant's convictions, he admitted raping his sister on one occasion. He continues to deny all other offences and suggests that the victims made the allegations up in pursuit of financial compensation.

8. The rape which the Claimant admits took place when the Claimant was approximately 18 and the victim 13. The Claimant described being in the army at the time. He had returned home for a period of home leave. The Claimant said that he recalled that his fiancée had ended their engagement while he had been away; his sister had goaded him about that. The Claimant described telling her to "shut up" and "losing [his] rag" with her. He said that he felt like strangling her to silence her, but he had raped her as it was the "lesser of two evils". Despite spending approximately 20 years in custody and undertaking offence-focussed interventions, the Claimant still maintained that he did not understand why he had used sex against her. The Claimant claimed he "just did it". It was "to teach her a lesson". He denied being sexually attracted to her or enjoying the offence. The Claimant struggled to describe the possible impact of the abuse on his sister but suggested that she may have had difficulties forming and maintaining relationships as she has been married several times.

9. The dossier contains a victim personal statement of the Claimant's daughter, who described the devastating impact that the abuse had had upon her brother, who died by suicide in 2004. The Claimant's daughter described the brother as having been wracked with guilt at his being unable to protect her. He could not cope with the thought of the Claimant being released. The daughter said that she lived in fear of the Claimant being released.

The Decision

10. The Panel considered the dossier provided by the SSJ, which comprised 461 pages. At the hearing the Panel heard the oral evidence of Steve Pryke, the Claimant's Prison Offender Manager ("POM"), the Claimant himself, Lorna Gray, a Chartered and Registered Psychologist instructed by Warren Hill on behalf of the SSJ, Emma John, a Chartered and Registered Psychologist instructed by the Claimant's solicitors, and Emma Milton, the Community Offender Manager ("COM"). It noted that the hearing

had initially been listed on 22 July 2021 but had been adjourned and that the Claimant sought a recommendation for a move to open conditions. The Panel considered the Claimant's childhood, background and offending behaviour including the Claimant's summary of his account of the rape of his sister as related to Miss Gray, which was followed by her observations:

> *"He did not appear to appreciate that a similar level of harm could be caused by an adult raping a 13-year old nor did he appear [to appreciate] the long-term psychological impacts of rape to someone's psychosexual or interpersonal functioning.*
>
> *When (briefly) discussing the impact to her he stated "I wish I could turn the clock back… things would be different… but I can't". When attempting to explore what specifically motivated his sexual violence, he stated he did not wish to talk any more about this, as 'it had all been asked before' and that if the discussion continued, he would leave the interview."*

11. The Panel proceeded to analyse "risk factors", finding that while risk assessment was not an exact science and while the "RSVP" (Risk for Sexual Violence Protocol) method of identifying risk factors was not definitive, there was nevertheless a striking level of agreement between Ms Harriet Campana, the psychologist who gave evidence in the 2019 review, and Miss Gray and Ms John who gave evidence before the Panel. The Panel found that there was "… very limited evidence of a change or reduction in assessed risk between the 2019 assessment and those completed more recently". It found:

> *"Risk factors which do not appear in the RSVP list but which the panel believes apply in your case are sexual pre-occupation, a sexual interest in children, lack of intimacy in sexual relationships and using children to satisfy your sexual needs without the complications of intimate relationships with adults. Rigid thinking and grievance thinking would appear to be other risk factors, as does willingness to use rape as a punishment or to exert authority (in the case of your half-sister)."*

12. The Panel noted that while extreme minimisation or denial of offences appears in the list of RSVP items, it is now generally recognised by psychologists that denial should not in itself be regarded as a risk factor.

13. Before hearing evidence, the Panel set out ground rules whereby they would not ask the Claimant about the offences he denies: they would proceed on the basis that those convictions were safe; they would not treat denial of those offences as a risk factor; and the focus of the review would be on the present and future, rather than the past.

14. The Panel proceeded to consider the Claimant's progress up to his last review in September 2019, noting that the Claimant's conduct in prison had been consistently good, with no proven adjudications. It noted that the most likely reason for the Claimant's having admitted the rape of his sister was because he had become "stuck in the system" by not having completed any risk reduction work to address his sexual offending. The Panel found that he must have realised that the completion of "SOTP" (the prison-based core Sex Offender Treatment Programme) would significantly

improve his chances of progression but to be eligible for the course he would have to admit at least one sexual offence. They found that he chose the one to which the least opprobrium would attach because the Claimant would be able to place part of the blame on the victim.

15. The Panel noted that the Claimant had proceeded to complete "ETS" (Enhanced Thinking Skills) and the Core SOTP programme in 2012, and "CALM" (Controlling Anger and Learning to Manage it) in 2013. After that he spent two and a half years in the "PIPE" (Psychologically Informed Planned Environment) at HM Prison Hull before being moved in 2017 to HM Prison Littlehey ("Littlehey"), where the Claimant was located at the point of the 2019 review. There, he completed three or four one to one sessions with his POM concerning control of emotions.

16. The Claimant was not eligible for the Horizon programme (an intervention delivered to men who have a sexual conviction as part of an antisocial criminal orientation and are considered to be at a medium, high or very high risk of reconviction) because of the other programmes he had completed. Completion of the Horizon programme on top of the other work he had done might amount to "over-treatment".

17. The Panel considered the 2019 review, noting that Ms Campana had given evidence and recommended that the Claimant remain in closed conditions to complete further structured risk assessment work. She had suggested that "HSP" (Healthy Sex Programme) would meet the Claimant's needs but his denial meant that he was not yet ready for it. There was no evidence at that review from an independent psychologist. The Claimant's POM had recommended a move to open conditions. The Claimant's previous COM had had originally recommended such a move but had changed her mind after having read Ms Campana's report. The Claimant's new COM recommended a move to open conditions but agreed in evidence, when pressed by the Panel, that she was not confident about that recommendation.

18. The 2019 panel acknowledged that the Claimant was likely to comply with periods of temporary release and that he was a low risk of absconding. However, that panel was not satisfied that the Claimant had made enough progress in addressing and reducing risk to a level consistent with protecting the public from harm. This was because of the Claimant's "extremely limited" insight into the risk he posed and his identification of any risk factors. That panel found he had limited internal risk management strategies in place and that future risk management would be solely dependent on external factors.

19. The Panel (in 2021) observed that it was noteworthy that neither Ms Campana nor the 2019 panel appeared to have considered that his denial might have been a protective factor or that there might have been explanations for the denial which accounted for his inability to demonstrate insight into his risk factors.

20. In terms of progress since 2019 the Panel noted that the Claimant had remained at Littlehey until 2 July 2020. He was then transferred to the Progression Regime at Warren Hill. At both prisons the Claimant's behaviour had continued to be of its "usual high standard". The Claimant had taken pride in his job at Littlehey. His POM there, in a report soon after his transfer to Warren Hill, had recommended that the Claimant was suitable for a move to open conditions. Mr Pryke had explained to the

Panel that the Progression Regime was essentially a "finishing school" for staff to observe the Claimant's character and conduct to make sure that his learning from courses was "enhanced and consolidated". The regime was "… not really designed for prisoners believed to require engagement in further risk reduction courses". The Panel noted that the Claimant had reached stage 2 of the three stages of the regime but it "seem[ed] to be agreed that [the Claimant's] continued denial of all but one of [his] offences and [his] lack of insight into [his] risk factors [would] prevent [him] from reaching stage 3." Mr Pryke had frankly told the Panel that Warren Hill had been looking for residents and the Claimant had been offered a place despite "… not, perhaps, meeting the normal criteria". The Claimant had been pleased to accept the place because, whereas he had been previously active at Littlehey, COVID-19 had prevented that from continuing.

21. The Panel noted that Mr Pryke was the professional witness who knew the Claimant best. He gave the Panel a picture of the Claimant's progress at Warren Hill, setting out that the Claimant had maintained his enhanced privilege level. There had been no adjudications, no security information and no adverse comments concerning the Claimant. There had never been any issue with the Claimant's engagement with staff. He had been working well in the workshop where his skills were much appreciated. Whilst the Claimant could become frustrated, his frustration never developed into "anything serious". He had a clear and obvious sense of humour and was passionate about wanting a good relationship with his COM. He was frustrated that his COMs change too often to be able to build a relationship with any of them. The Claimant has no other contacts in the community. Mr Pryke described how it had not been possible to have any discussion with the Claimant about his offences but that he had looked ahead asking the Claimant what he would do if he found himself in a relationship with someone who had young children. Mr Pryke noted that the Claimant was fully aware of everything that would be required of him, in particular, the need to disclose the totality of his convictions in the community and all his notification requirements. A relationship was not at the forefront of the Claimant's mind because he knew how difficult it would be. Mr Pryke said that he had not detected anything in the Claimant's attitude which gave him cause for concern. He had formed the impression that the Claimant had a degree of integrity and honesty.

22. The Panel considered Miss Gray's evidence. She had interviewed the Claimant in June 2021. She had found him initially hesitant to take part in the assessment. He had said at the start he did not like psychologists due to the outcome of his last psychological risk assessment in 2019. Miss Gray found the Claimant somewhat "hopeless" in outlook and noted that he became "observably upset" when she tried to discuss the offence for which the Claimant had taken responsibility. Miss Gray was quite surprised that in the Claimant's evidence to the Panel he appeared to be more open than he had been in his interview with her in discussing the rape of his sister. He appeared in her view to be genuine in his expression of remorse for that offence.

23. Ms John interviewed the Claimant in July 2021. She found him to be polite and cooperative. She found no indication of any mental health issues that impacted on his ability to engage. She found that he appeared to carry a lot of shame regarding his convictions and distanced himself from these by avoiding questions about them.

24. Ms Milton was allocated the Claimant's case in July 2021. She expressed regret that she had only had one video interview with the Claimant at the end of August. She had been pleasantly surprised to find the Claimant a lot easier to deal with than she had expected.

25. The Claimant gave evidence before the Panel. The Panel found that he showed good insight into the reasons why he was not ready for release on licence into the community and was only asking for a move to open conditions. The Panel noted he had said:

> *"I need to go to D Cat to get me back into the community gradually. If I was released to AP* [approved premises (approved under s.13, Offender Management Act 2007)] *I wouldn't be there long enough. I need to find out what's going on in the area I'm going to be going to. It will give me a chance to make plans for the future - a bit more freedom, if I can go round and find out what's going on."*

26. The Panel found the Claimant reticent when he was asked about the rape he admitted. Nevertheless, they found "… noticeably more remorse and less victim blaming."

27. The Panel considered the Claimant's "current risk". It noted that statistical risk assessment tools used by probation are based on the Claimant's record of convictions. OGRS3 assessment tools are based on the number of occasions on which an offender has been convicted, as opposed to the number of offences he has committed. The Panel found that that meant that they were of limited value in the case of an offender like the Claimant who has committed many serious offences but has only been convicted on one occasion. RM2000 (a "risk matrix" statistically-derived risk classification process intended for males aged at least 18 who have been convicted of a sex offence) was specifically designed to assess the risk of sexual violence. It indicated a medium risk of further sexual violence. The Panel found that to give a more accurate prediction of risk.

28. Considering the Offender Assessment System (OASys), the Panel saw fit to adopt the Probation Service's assessment of the Claimant to find that he presented a high risk to children in the community (as the Probation Service had found), a low risk to the public and staff (as the Probation Service had found) but a medium risk to known adults given his stance of denial and the evidence of grievance thinking directed at his victims (greater than the risk found by the Probation Service).

29. At pages 13 to 16 of the Decision the Panel weighed the "[o]pinions of the professionals" under the principal heading "Panel's assessment of current risk", setting out:

> *The real question on which the hearing was focused was therefore whether your risk requires your continued confinement in closed conditions or whether a recommendation for a move to open conditions would be appropriate. It would not be appropriate if (1) your risk would not be manageable in open conditions or (2)* ***whilst it would be manageable in open conditions, it is necessary for you to remain in closed conditions to improve the skills needed for your risk to be safely managed in due course in the community*** [emphasis added].

30. It noted that Mr Pryke was very clear in his view that the Claimant "… simply [was not] ready for life in the community." The Panel was "… impressed by the quality and sensitivity of [Miss Gray's] report and evidence." She was the first professional to recognise that the Claimant would continue to maintain his denial of the offences; that it might be regarded as a protective factor; and that it was inappropriate to expect the Claimant to undertake any further risk reduction courses. She assessed the Claimant's risk to the public in the community as being "at the medium level" although she believed it might increase in certain circumstances. She recommended that the Claimant should remain at Warren Hill:

> *"*[T]*he progression regime … is a means of consolidating any prior treatment gains and can be helpful in increasing* [the Claimant's] *responsibility in managing some of the areas connected to his risk (e.g. interpersonal functioning, emotional management, strengthening protective factors). This, in the absence of HSP, could provide evidence of self-management that could allow professionals to appraise in more detail whether he can manage his own risk if progressed to open conditions through the Enhanced Behavioural Monitoring process."*

31. Miss Gray had set out that a further period of at least 12 months in the progression regime in Warren Hill would afford the Claimant the opportunity of working on interpersonal skills relevant to risk and would allow him to complete "… generalised work as to the impact of sexual offending on children, in order to ascertain his insight into this as a concept as opposed to directly [into] his own offending …". Such a period "… could be sufficient to provide evidence of improvements to future panels … ."

32. The Panel noted that Ms John agreed with Miss Gray's recommendations, save that Ms John thought that work recommended by Miss Gray could be undertaken in open conditions. The Panel listed in full suggestions for steps which Miss Gray and Ms John agreed in a second joint report that the Claimant could be encouraged to take if he were to remain at Warren Hill. These included "psychology services within the prison [which] would support the POM and key worker as to how to broach discussions with [the Claimant] around his areas of risk that is [*sic*] supportive, respectful and creates a sense of emotional safety"; consultancy support which would include monitoring around areas such as the Claimant's interpersonal skills, emotional management and managing stress; tasking the Claimant with setting out his own personal resettlement plan for the future; completing worksheets / skills practices around real world scenarios; practising having difficult conversations around disclosure to reduce the Claimant's anxiety and possible avoidance behaviour; completing worksheets and engaging with sessions around identifying and strengthening protective factors; maintaining a "self-monitoring diary", with focus on frustration and conflict; engagement with the Claimant's key worker and / or POM around interpersonal skills, which would be reinforced in his EBM (Enhanced Behaviour Monitoring) boards; completing worksheets and engaging in sessions to understand professionals' concerns about the Claimant's risk; support in developing "self-soothing" techniques; and completing worksheets around the generalised impact of sexual offending.

33. The Panel recognised that in her live evidence before the Panel Miss Gray was "less firm in her recommendation" that the Claimant needed to be in closed conditions to complete the above work:

> *"I know his previous POM thought he should go to open. I gave quite a lot of thought to it, I know there's pros and cons of both views, but I weighed everything up and felt my plan was the best ... . He certainly has the capacity to think deeply and put down thoughts in writing. I think he could evidence insight while maintaining his denial, but I think he's more able to identify protective factors than risk factors. My sense is that he still externalises responsibility for change. I don't think he'd abscond from open. My main concern is about him being open and honest about what is happening in his life. If he can do what I'm suggesting, he might not need to stay in open as long as he would have to if he went there now'.*

34. Miss Gray went on to acknowledge that the work could be effected in open conditions: there was no core risk reduction work to be done in closed conditions.

35. The Panel noted that Mr Pryke had remained neutral in his report as to whether or not the Claimant should remain in closed conditions, in accordance with current policy. In his evidence he said that the Claimant's risk would be manageable in open conditions. That seemed to him to be "… the logical next step" in circumstances where the risk of the Claimant's absconding was low.

36. The Panel recorded that Ms Milton "followed a similar route to Mr Pryke." She had remained undecided as to whether or not the Claimant should be moved to open conditions. Having heard the evidence adduced before the Panel, she recommended a move to open conditions.

37. The Panel recognised that both psychologists agreed that the Claimant had "… a lot invested in the maintenance of [his] position as somebody who was wrongly convicted, and that [he] would be unlikely to want to undermine that position by committing further offences."

38. Against that analysis of the background by the Panel, it proceeded to set out under the heading "the [P]anel's assessment" that the risk with which it was concerned was the risk of future sexual offending against young children. The Panel agreed with the psychologists and the statistical RM2000 prediction that the risk of the Claimant's committing offences of that kind should be seen as medium, although it might increase in certain circumstances. It went without saying that a repeat of the Claimant's previous offences would be likely to cause serious harm to any victims. The Panel noted that there was no evidence that the Claimant had at any stage during his sentence displayed any sexual interest in children or any sign of sexual preoccupation. On the other hand, it noted that the Claimant's criminal behaviour had continued over a long period within a trusted family environment, and that there must be a risk of those factors resurfacing if the Claimant were exposed to young children in the community. The Panel noted:

"rigid thinking is still apparent. Lack of insight into your offending and your risk factors remains present (due to denial). Grievance thinking (directed at your victims) is significantly reduced but has not altogether disappeared."

39. The panel noted that the principal risks to children were associated with relationships which may bring the Claimant into contact with them. It noted that to an extent those risks would be mitigated by conditions of licence. But such conditions would not be guaranteed to eliminate risk. Despite the Claimant's current good intentions, the Panel noted that there must be a significant risk that he might fail to comply fully with the conditions. The Panel found that, whilst the Claimant would be unlikely to reoffend whilst in open conditions, it was necessary for it to look beyond the short term. The Panel was not satisfied that at present the Claimant possessed the necessary skills to understand and manage his risk once he was on permanent licence in the community.

40. In the wake of that analysis, the Panel proceeded to evaluate the effectiveness of plans to manage the Claimant's risk, noting that since he was not seeking release on licence there was no plan for the management of his risks in the community. The Panel noted that it would be important for the Claimant once he was in open conditions (and preferably before then) to make his own plans for his own future life in the community and to agree an appropriate risk management plan with his COM. Whilst he was in closed conditions the Panel noted that his risk could be managed by confinement in prison whereby he would have no contact with the public. In open conditions the Claimant's risk would be managed by the usual open prison regime which, if all went well, would include a series of "carefully controlled releases on temporary licence."

41. The panel proceeded to conclude that the decision it had to make was finely balanced. A great deal had changed since the last review when Miss Campana had set out her belief that structured risk reduction courses were necessary if the Claimant was to progress: the Claimant should be greatly encouraged by the changes:

"It is now recognised that (a) [structured risk assessment] *courses ... are not now necessary or appropriate in your case (b) it is unnecessary and counter-productive for professionals and Parole Board panels to keep trying to get you to discuss the offences which you continue to deny and (c) your denial can be regarded as a protective factor. All of that is in complete contrast to the situation as it existed at the time of your last review."*

42. The Panel concluded that the Claimant's risk would be manageable in open conditions but that there was a need for the Claimant to remain at Warren Hill to improve his skills. The Panel found the benefit of being at Warren Hill over the past year had been limited by COVID restrictions. It hoped that a further period there might offer the Claimant greater opportunities for reflection and for planning for the Claimant's future beyond open conditions:

"Unless you can do that there will be a significant risk, once you are on permanent licence in the community, that you will find yourself breaching your licence conditions and being returned to custody. It is therefore very much in your best interests to remain at HMP Warren Hill on the basis proposed by Miss

Gray. You should be grateful to her for suggesting a possible route for progression. That route has the advantage that you already have good relationships with Mr Pryke and your Key Worker. The panel would suggest a meeting between yourself, Mr Pryke, your Key Worker and Psychology at HMP Warren Hill to agree a plan (including milestones and timescales if possible) based on Miss Gray's proposals.

Whilst the panel agrees that your risk of absconding from open conditions is low and that you are likely to comply with the open prison regime and the conditions of any temporary releases on licence, it is not convinced that any open prison would be able to provide you with the support which you will need if you are to progress to release on permanent licence. As Miss Gray observed, if you are able to follow her suggestions you may very well find that you need a significantly shorter period in open conditions than if you are transferred there at this stage. You should not therefore regard this decision as a 'knock-back'. It is the gateway to a new start and the best route to progression."

Legal framework

43. Section 239, Criminal Justice Act 2003 concerns The Parole Board. Insofar as is relevant, the section is set out below:

"(2) It is the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners.
(3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of [the Crime (Sentences) Act 1997 ("the 1997 Act")], consider—
(a) any documents given to it by the Secretary of State, and
(b) any other oral or written information obtained by it;
and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.
(4) The Board must deal with cases as respects which it gives directions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act on consideration of all such evidence as may be adduced before it.
(5) Without prejudice to subsections (3) and (4), the Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times.
...
(6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the Secretary of State must have regard to—
(a) the need to protect the public from serious harm from offenders, and
(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.
..."

44. The Secretary of State for Justice ("SSJ") has given to the Board directions in accordance with s.239(6). These were updated in June 2022 but the applicable directions at the time of the decision in this case were those published in 2015:

> *"1. A period in open conditions can in certain circumstances be beneficial for those indeterminate sentence prisoners (ISPs) who are eligible to be considered for such a transfer.*
> *2.* ***Open conditions can be particularly beneficial for such ISPs, where they have spent a long time in custody, as it gives them the opportunity to be considered for resettlement leave*** *(although there is no automatic entitlement to such leave and any decision to grant such leave will depend upon a careful assessment of risk[…]).*
> *3.* ***The main facilities, interventions, and resources for addressing and reducing core risk factors exist principally in the closed prison estate. The focus in open conditions is to test the efficacy of such core risk reduction work and to address, where possible, any residual aspects of risk.***
> *…*
> *5.* ***A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.***
> *…*
> *7. 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.*
> *[…]*
> *9. In assessing risk in all the above matters, the Parole Board shall consider the following information, where relevant and available, before recommending the ISP's transfer to open conditions, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:-*
> *a) the ISP's background, including the nature, circumstances and pattern of any previous offending;*
> *b) the nature and circumstances of the index offence and the reasons for it, including any information provided in relation to its impact on the victim or victim's family;*

c) the trial judge's sentencing comments or report to the Secretary of State, and any probation, medical, or other relevant reports or material prepared for the court;
d) whether the ISP has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;
e) the nature of any offences against prison discipline committed by the ISP;
f) the ISP's attitude and behaviour to other prisoners and staff;
g) the category of security in which the ISP is held and any reasons or reports provided by the Prison Service for such categorisation, particularly in relation to those ISPs held in Category A conditions of security;
h) the ISP's awareness of the impact of the index offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of sentence plan targets;
i) any medical, psychiatric or psychological considerations (particularly if there is a history of mental instability);
j) the ISP's response when placed in positions of trust, including any outside activities and any escorted absences from closed prisons; and
k) any indication of predicted risk as determined by a validated actuarial risk predictor model or any other structured assessment of the ISP's risk and treatment needs [emphasis added].

Submissions

45. Insofar as Ground 1 is concerned Mr Bedford accepted that the Panel was entitled to depart from a majority view of experts. However if it did it was incumbent on the Panel to give full and good reasons for doing so. In this regard the Claimant relied on *R (O'Sullivan) v Parole Board* [2009] EWHC 2370 (Admin) at [18] and *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [40]. In *O'Sullivan*, Irwin J set out that it was open to any panel to disagree with all of the expert evidence which is placed before them, given the "reservoir of expertise and knowledge" of a Parole Board panel, but they would have to give "full or appropriate reasons why transfer to open conditions should not take place". In *Wells,* Saini J set out, "The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting." It was submitted that the requirement for reasons was particularly acute where two professionals with the same qualifications such as two chartered and registered forensic psychologists arrived at different conclusions and the Panel aligned itself with one of them; see *Crawford v Parole Board of Scotland* [2021] CSOH 44, where it was held that in such circumstances it was inappropriate for the panel simply to say it preferred one such witness over another.

46. In written submissions on behalf of the Claimant the evidence was characterised in this way. It was said that the Panel was faced with three recommendations in favour of a transfer to open conditions and one recommendation against. It was submitted that two psychologists whose qualifications, experience and expertise were similar arrived at a large amount of agreement in their assessments but they differed when it came to whether the Claimant should remain at Warren Hill or whether he should progress to open conditions; yet the Panel had not set out why it eventually preferred the view which Miss Gray had expressed in her written evidence - that further work in

the closed estate would bring most benefit - when she had made the concession she had in oral evidence about work being possible in open conditions. On that basis, it was submitted that the Decision was unlawful because of an absence of adequate reasoning for preferring the views of one witness over those of all the others.

47. Ground 2 was advanced on the basis that the Panel was required to apply the Directions; see *R (Grantham) v Parole Board and Secretary of State for Justice* [2019] EWHC 116 (Admin) at [19]. It was submitted that paragraph 3 of the Directions highlighted that the focus in open conditions was on testing the efficacy of core risk reduction work and addressing any residual aspects of risk, and paragraph 5 explained that the Panel's emphasis should be on the risk reduction aspect of the risk *versus* benefit assessment and on the need for the prisoner to have made significant progress in changing attitudes and tackling behavioural problems in closed conditions. The Panel had found expressly in its conclusion that the Claimant's risk had been reduced sufficiently so as to be manageable in open conditions; that the Claimant's risk of absconding from open conditions was low; and that the Claimant was likely to comply with the regime in an open prison and the conditions of any temporary releases on licence. The Claimant's complaint was that the only, or at least the principal, reason why the Panel did not make a recommendation for open conditions was that it hoped that a further period at Warren Hill would allow the Claimant "… greater opportunities for reflection and for planning [his] future beyond open conditions in due course." It did not think that a move to an open prison would provide sufficient benefit for the Claimant. Against those foundational submissions, it was argued that the Panel had failed to reflect in its decision making that testing of risk reduction and consolidation / residual risk reduction work (core risk reduction work having been on all accounts completed) ought to take place in the open rather than closed estate. It did not give any consideration to the potential benefit of the availability of release on temporary licence and resettlement support in the open estate, although it had noted elsewhere the Claimant was not at that stage ready for immediate release on licence. The panel in its decision making "lost its primary statutory focus on risk reduction".

48. In developing the grounds in oral argument, Mr Bedford described Grounds 1 and 2 as being "all of a piece". He conceded that the test that the Panel had set itself in order lawfully to apply the Directions was unchallengeable. However, by the test the Panel had set itself it could not have come to the conclusion that it was "… necessary **(in the sense of being the only way in which the Claimant could acquire the relevant insight)**" to remain in closed conditions [emphasis added].

49. It was then argued that, because Miss Gray accepted that keeping the Claimant in closed conditions was not the only way he could acquire the relevant insight, the Panel's reliance on her evidence in concluding that it must be necessary for the Claimant to remain in closed conditions was unintelligible. Mr Bedford accepted that the evidence of both Ms John and Miss Gray was that it would take longer for the Claimant to be ready for release from custody if he had been transferred immediately to open conditions. He submitted that the Panel had set itself a test which precluded it from being able to consider the fact that the Claimant would spend less time in prison overall if he stayed in closed conditions. Further, the decision to retain the Claimant in closed conditions for a further period of 12 months was arbitrary- based on the date

when the Parole Board would next meet and not based on the work he had to complete prior to release.

Discussion

50. I agree with Mr Bedford that the most intellectually straightforward way to look at the two grounds is to consider the elements of the Decision relevant to both grounds together. The Panel asked itself as part of the test it had to apply whether, whilst the Claimant's risk would be manageable in open conditions, it was necessary for him to remain in closed conditions to improve the skills needed for his risk to be safely managed in due course in the community. Importantly, the Claimant accepted the Panel was entitled to set itself that test so as to enable it to apply a legal framework which reflected the Directions as set out in [44.] above.

51. The Panel took into account, when considering that test, the views of the experts concerning the assessment of the Claimant's current risk. Indeed, the Panel agreed with the psychologists' assessment of the Claimant's risk. The Panel considered the risk that would be present if the Claimant were moved to open conditions. This was one issue which the psychologists had considered, along with the question whether he could complete the work they deemed necessary in open conditions or whether closed conditions were necessary for that work. The Panel did not disagree with the experts in those regards.

52. The Panel, however, in my judgment properly drawing on its expertise and knowledge, considered it was "necessary to look beyond the short term" when considering risk. The open prison regime would be managed so that if "… all goes well, [it] will include a series of carefully controlled releases on permanent licence." The Claimant himself expressly conceded, accepting the view of the experts, that he was not ready to be released on licence. Significantly, the Panel took into consideration Miss Gray's view (with which Mr Bedford agreed; see paragraph 49. above) that if the Claimant were moved to open conditions, his rehabilitation before release on licence would be likely to be longer than if he followed their suggested route for progression while in Warren Hill. The Panel expressly looked at what was "necessary" by reference to what might happen "beyond the short term" to reduce the risk of the Claimant breaching the terms of his licence when he was released, and to reduce the risk of his being returned to custody in circumstances where Ms John had assessed the Claimant's risk as being manageable in open conditions; whereas, within the community, he would be deemed a high risk of harm to children. The Panel's reasoning set out how it had taken into consideration Miss Gray's concern that the Claimant needed to be open and honest about what was happening in his life, and that if he were this would be a factor meaning he might not need to stay in open conditions as long as he would have to if he went there now. It found that there was a need for him to remain at Warren Hill to improve his skills, not because the work proposed by the psychologists could not be fulfilled in open conditions, but because a further period there might offer the Claimant greater opportunities for reflection and planning for his future beyond open conditions in due course. The reasoning continued - unless he could do that there would be a significant risk of him, once on permanent licence in the community breaching licence conditions and being returned to custody. It found that open conditions would not be able to provide him with the support he needed to progress to release on permanent licence. The Panel set out that an advantage of remaining in Warren Hill was that the Claimant could start work

immediately with Mr Pryke, his key worker and the psychology department at Warren Hill. The Panel's noting that it was "going against the recommendations of three of the four professional witnesses" was not a finding that it was appropriate to reject, nor that it had rejected, the evidence of those witnesses. It was a record of its acknowledgement of what was necessary by reference to the bigger picture, namely the quickest route to release on permanent licence whereby risk in the community would be reduced as much as possible.

53. The Panel's conclusion that there was a need for the Claimant to remain at Warren Hill to improve his skills was thus a conclusion with a focus on a different issue from the focus of the issues considered by the experts. Their focus was on whether the Claimant's current risk could be managed in open conditions and whether the work proposed in the joint report could be completed in open conditions. This was tacitly conceded by Mr Bedford through the gloss he added to the word "necessary" in the parenthesised words in § 48. above. The Panel's reasons make it clear that it, on the other hand, was not confining itself to what was "… necessary (in the sense of being the only way in which the Claimant could acquire the relevant insight)". Its application of the evidence to the test showed that it had interpreted "necessary" lawfully in the context of the Directions, in particular, paragraphs 3 and 5. The Panel was entitled to take into consideration the matters it did, in accordance with the test it set itself, reflecting the Directions at see [44.] above, including that the Claimant would be likely to be released earlier if he remained in closed conditions at that time.

Conclusion

54. There was accordingly no failure by the Panel to apply the test it had set itself and no consequent failure to apply the Directions (Ground 2) and its reasons were adequately expressed (Ground 1). Accordingly in my judgment it is appropriate to dismiss the Claim.