Neutral Citation Number: [2015] EWHC 927 (Div)

Case No: CO/5297/2014

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2015

**Before** :

**LORD JUSTICE BEAN**
**MR JUSTICE MITTING**

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**Between :**

| | |
|---|---|
| **The Queen on the application of JOHN GILBERT** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR JUSTICE** | **Defendant** |
| **- and -** | |
| **THE PAROLE BOARD OF ENGLAND AND WALES** | **Interested Party** |

**Amanda Weston and Leonie Hirst** (instructed by **Prisoners Advice Service**) for the **Claimant**
**Tom Weisselberg QC and Naina Patel** (instructed by **Treasury Solicitor**) for the **Defendant**
**The Interested Party** did not appear and was not represented
Hearing dates: 17 March 2015

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# Approved Judgment

**Lord Justice Bean :**

This is the judgment of the court.

1. On 25 April 2008 the Claimant pleaded guilty to wounding with intent to cause grievous bodily harm. He was sentenced under section 225 of the Criminal Justice Act 2003 to imprisonment for public protection ("IPP") with a minimum term of 4 years 6 months less 291 days spent on remand, giving a "tariff" of 3 years 265 days. The tariff expired on 9 January 2012, that is to say over three years ago.

2. At a parole review in November 2012, the Parole Board recommended the Claimant's transfer to open conditions, which the Defendant accepted. The Claimant was transferred on 18 January 2013 to HMP Stanford Hill, an open prison. His sentence plan included provision for town visits with progression to home leave on 'release on temporary licence' (ROTL).

3. For about five months the Claimant successfully complied with open conditions and had three separate days of ROTL without incident. On 2 June 2013, however, the Claimant missed the last train that would have returned him to prison by his due time of 7pm. His account of the events which followed was this: as it was his understanding that the prison would not accept late returns on a Sunday, in accordance with the prescribed procedure, he called the number the prison had provided for him to ring in the event of a problem while on ROTL. The first two times he rang the number the line was engaged, and on the third occasion there was no answer. He also tried to call a telephone number given in his licence booklet, but again there was no reply. There is no police station in Lewes; he surrendered to custody at Eastbourne police station, 20 miles away from Lewes, the next morning. He was returned to closed conditions on 14 June 2013.

4. In July 2013, the Defendant referred the Claimant's case to the Parole Board for a statutory review under section 28 of the Crime (Sentences) Act 1997, to consider whether or not it would be appropriate to direct the Claimant's release, and, if not, to provide advice, *inter alia,* as to whether the Claimant should be transferred to open conditions.

5. On 10 September 2013 the Defendant further referred the Claimant's case to the Parole Board for advice on the Claimant's continued suitability for open conditions, in accordance with the provisions of section 239(2) of the Criminal Justice Act 2003. The two referrals were subsequently combined, and an oral hearing for the Parole Board to consider both referrals was listed for 9 July 2014.

6. On 21 May 2014, the Defendant introduced an "absconder policy" with immediate effect. We shall return to its details later, but note at this stage that its effect was that the Claimant's failure to return to prison on 2 June 2013 meant that he was no longer eligible for transfer to open conditions unless he could establish 'exceptional circumstances'.

7. The Parole Board issued a memo to its members, PBM 10/2014, on 29 May 2014 to provide guidance on how panel members should approach cases of prisoners, such as the Claimant, who were affected by the absconder policy.

8. The Parole Board issued directions for the oral hearing in the Claimant's case on 4 June 2014, including the following:

> "In view of PBM 10/2014, it is likely that the Secretary of State may be considering amending their referral to the Parole Board. Directions are issued now for the urgent clarification of the full terms of the referral for this review from the Secretary of State, after they have viewed the legal and personal representations."

9. The Claimant's representatives submitted representations to the Defendant on 2 July 2014, arguing that the absconder policy should not be applied to the Claimant and asking for the Defendant to comply urgently with the Parole Board's direction. The Defendant did not respond to these representations, but responded to the Parole Board's direction seeking clarification of the terms of the referrals by an email of 2 July 2014 stating that the panel chair should be advised that the Board should consider Mr Gilbert's case "in accordance with the existing referral note". Accordingly, when the panel convened for the oral hearing in the Claimant's case their task included considering (a) whether or not to direct the Claimant's release; and, if not, (b) whether or not to recommend his re-transfer to open conditions.

10. The parole reports of both the Claimant's Offender Manager and his Offender Supervisor supported the Claimant's return to open conditions. The Offender Manager explained the role of ROTL in his decision to recommend re-transfer to open conditions rather than release, as follows.

> "It is my assessment that his behaviour will need to be tested within Open Conditions and to complete successful Town Visits and Release On Temporary Licence (ROTL) to ensure his general behaviour and potential risk of reoffending can be tested effectively prior to his eventual release into the community… I feel a further period served in open conditions which would include achieving successful town visits and ROTLs with no further incidents such as those outlined previously would be a key step in his progress onto eventual release.
>
> For this reason I would respectfully recommend Mr Gilbert to be granted a progressive move and return to an Open Prison. Mr Gilbert has previously undertaken four Town Visits but no Release on Temporary Licence overnight stays. I feel this needs to be tested prior to his release in the community. Once the ROTLs have been tested fully and with success, a recommendation for release would be applicable."

11. At the Parole Board hearing on 9 July 2014, the Claimant's Offender Manager and Offender Supervisor gave evidence that the Claimant had completed all the work that was required of him in closed conditions. They recommended that he spend a further period in open conditions rather than be released, and in particular that he should undertake further ROTL visits to test his compliance prior to release into the community. The Offender Supervisor also confirmed to the panel that Mr Gilbert held one of the most trusted jobs in the prison and enjoyed the maximum degree of

unsupervised movement permitted to prisoners within the closed prison environment. The panel recorded that "the Secretary of State did not submit a view and was not represented" at the oral hearing.

12. On 14 July 2014, the Parole Board issued a decision recommending the Claimant's return to open conditions. The panel's decision included the following passages [emphasis added]:

> "**You are assessed as a high risk of serious harm to the public and this is unlikely to be reduced until you have been tested in the community.** It is also noted that on any progression to Approved Premises would require you to have a single room due to the nature of your index offence.
>
> You are assessed as posing medium risk of general offending, medium risk of violent offending and high risk of harm to the public. Given the serious nature of your index offences and your entrenched history of offending linked to substance abuse, the panel considered that the assessments were a fair reflection of your risks. The panel considered that a return to the abuse of either alcohol or drugs would escalate your risk assessment.
>
> You do present a risk of abscond, based on your past history of bail breaches in the community and the circumstances that led to your return to closed conditions. However, both your offender supervisor and your offender manager did not think you were at significant risk of future abscond and had learned from the recent experience. **The panel accept that the latest episode was a minor error of judgement which does not raise your risk of future absconding** and that previous poor compliance was at a time when your judgement was impaired through substance abuse.
>
> The panel also thought that being in [a] stable relationship with access to appropriate accommodation would be protective factors for you in the future and that is further explored below.
>
> You have never worked in a structured manner due to your previous chaotic lifestyle and have never had a stable address in the community. These factors will be important when ensuring that your risks are suitably managed in the community.
>
> Your relationship with your wife has been under strain with the uncertainty of your release date and return to closed conditions and you have started the process of a legal separation, with the possibility of future divorce depending on how your sentence progresses. However, there appears to be no firm plans as yet due to the uncertainty of your progression……
>
> You will be allocated a new offender manager immediately after the oral hearing, whom you have yet to meet. Your

offender manager thought you would cope with this change well but it will be another possible de-stabiliser for you to cope with.

The plans for your release have been significantly adapted in recent times. Your offender manager had only learned on the morning of the hearing that you would be seeking release. When in open prison you had been expecting to begin resettlement leave to an Approved Premises in Sussex with a long term aim of settling with your wife in Sussex. Now that your relationship future is less certain, the release plan now includes Approved Premises in Staffordshire, where you have no current connections and no long term plans to settle. The Approved Premises placement is also complicated by the risk assessment concerning your index offence having been committed whilst you were in a hostel, and special arrangements would be in place.

You felt that direct release would give you the same opportunities for testing and resettlement that would be offered through the open prison route. Your risk management plans would benefit from further testing before they could be considered, as robust. The short period that you spent in open prison had not afforded you the opportunity to fully plan for a safe release. The proposed licence conditions were accepted by you and appeared fair and proportionate to the risks you presented.

You are given credit for your progress as a result of the offending behaviour work you have undertaken to address thinking skills, drug use and anger management. You progressed to open prison in 2013 and were reportedly doing very well, but were only at the start of planning for your resettlement. Unfortunately you failed to return to the prison following a town visit one evening and were returned to closed conditions.

**In view of the Secretary of State's current interim policy on prisoners who have previously absconded from open prison, this panel makes a finding that the circumstances surrounding your abscond, although avoidable, were not an attempt to escape, but represent a minor error of judgement on your part, which you fully accept, and your risk of future abscond does not appear to be increased as a result.**

The panel carefully considered whether your risks could be safely managed in the community at the current time. It balanced your evidence, with that of other witnesses. It was, however, concerned that the current instability of your relationship and the plan to release you to an area where you

> have no desire to settle, under the supervision of a new offender manager who you have yet to meet, did not offer a robust support package that would be able to safely monitor and manage your high risk of causing serious harm. Failure to cope with stress together with an unstable relationship and uncertain accommodation plans were, in the opinion of the panel, the most likely scenarios where you could relapse into drug and alcohol misuse, which would raise the imminence of further serious offending.
>
> However, the benefits for you in a return to open conditions were to allow you the opportunity to resolve the position regarding your long term plans and relationship, establish a job or voluntary work and enable further testing of your resolve to avoid both drugs and alcohol in the community.
>
> The panel concluded that the risk of harm you present to the public remains too high for release to be directed."

13. The Claimant's representatives submitted further representations to the Defendant on 22 July 2014 about the application of the absconder policy to the Claimant in light of the Parole Board's findings and recommendation.

14. On 11 August 2014, the Defendant published the 'absconder policy' setting out the exceptional circumstances criteria, as an interim policy amendment to PSO 6300 *Release on Temporary Licence.*

15. On 15 August 2014, the Defendant issued his decision refusing the Claimant a transfer to open conditions.

16. The Claimant's representatives submitted representations to the Defendant dated 1 September 2014, challenging the decision on the basis of the exceptional circumstances criteria specified in the published absconder policy and decision letter.

17. The Defendant responded to the Claimant on 9 October 2014 asking for further time in which to make a decision on the Claimant's appeal.

18. On 3 December 2014 the Claimant was transferred from enhanced Category C conditions at HMP Coldingley to HMP Warren Hill, to participate in the 'Progression Regime' together with six other indeterminate sentenced prisoners.

19. On 5 December 2014 the Defendant refused the Claimant's "exceptional circumstances" appeal.

*Categorisation of prisoners*

20. The Secretary of State's policy on the categorisation and recategorisation of adult male prisoners is set out in PSI 40/2011. PSI 40/2011 defines four security categories (A-D). Category D is "prisoners who present a low risk, can reasonably be trusted in open conditions and for whom open conditions are appropriate."

21. The first principle of categorisation is that "all prisoners must have assigned to them the lowest security category consistent with managing their needs in terms of security and control and must meet all the criteria of the category for which they are assessed (i.e. for Category D this will mean that they are low risk of harm, can reasonably be trusted not to abscond and for whom open conditions are appropriate, ie will usually be within the time to serve limit)." (paragraph 3.1)

22. Specific guidance on categorisation and allocation to the open estate is provided at paragraphs 29-34 of Annex B to PSI 40/2011. Paragraph 30 provides that ISPs will be considered for Category D in line with the provisions of PSO 4700 (PSI 36/2010). Paragraph 31 states that:

> "When considering a prisoner for categorisation to Category D, governors must bear in mind whether the low physical security and low staff: prisoner supervision levels are sufficient to reasonably manage any risks presented by the prisoner. The low security in this part of the estate may give those who wish to abuse that security the opportunity to carry on with their criminal activities. The environment and opportunities available in open prison may not be suitable for a prisoner who is many years away from possible release. Governors must also be aware of the potential damage to public confidence in the Prison Service's ability to safeguard the public by keeping prisoners in custody, if a prisoner with many years yet to serve were to abscond".

*The Parole Board*

23. The Defendant must refer the cases of prisoners serving life sentences who have served their minimum term to the Parole Board at least once every two years, for the Parole Board to consider whether to direct the prisoner's release: see s 28 of the Crime (Sentences) Act 1997. The section is in practice applied to prisoners serving IPP. The decision on release is for the Board, not the Secretary of State. This is in contrast with decisions on the treatment of serving prisoners, for example transfer to open conditions, on which the Board gives advice or makes recommendations to the Secretary of State.

24. Section 28(6) states that the Board shall not give a direction for release of a prisoner unless "the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".

25. Section 239 of the Criminal Justice Act 2003 provides, so far as material::

> "The Parole Board
>
> (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…….
>
> (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."

26. If the outcome of a parole review is a recommendation for a move to open conditions, the Public Protection Casework Section ("PPCS") of the National Offender Management Service ("NOMS") must make the final decision on whether to accept or reject this recommendation on behalf of the Defendant within 28 days of the decision being issued, in accordance with paragraph 3.46 of Prison Service Instruction ("PSI") 36/2012, *Generic Parole Process.*

27. Section 6 of PSI 36/2012 specifies the process to be followed by the PPCS on behalf of the Defendant, in determining whether to accept or reject a Parole Board recommendation for open conditions. Sections 6.2 and 6.5 state:

> "6.2 In those cases where the Parole Board has made a positive recommendation, the process is as follows:
>
> - The Parole Board, having considered the prisoner's dossier containing all relevant reports, makes a recommendation for transfer to open conditions.
>
> - The respective PPCS Team Manager considers the Parole Board's recommendation and decides (on behalf of the Secretary of State) whether to accept or reject that recommendation, taking into account the Secretary of State's Directions to the Parole Board (see Annex D) and the guidance to PPCS Team Managers at Annex L. The Team Manager must ensure that all of the papers considered by the panel when reaching its decision, including any reports submitted on the day of the hearing and any post-programme reports are considered.
>
> - The OMU [Offender Management Unit] Manager (or equivalent) must then arrange for the prisoner to be informed of the Parole Board's recommendation, reasons, including their advice on outstanding risk areas and to also inform them of the Secretary of State's decision for accepting or rejecting the Parole Board recommendation……
>
> 6.5 If the Team Manager is considering rejecting a recommendation to transfer a prisoner to open conditions, the case should be discussed with the Head/Deputy of Casework immediately and if necessary advice sought from legal

> advisors. A case can only be rejected with the approval of the Head of OMPPG. The parameters for rejecting a Parole Board recommendation for transfer to open conditions are very limited. The criteria for rejection are:
>
> - the panel's recommendation is based on inaccurate information
>
> - the panel's recommendation is against the recommendation of most of the report writers, especially if the offender manager's report and psychologist report favour retention in closed conditions."

28. Further guidance to PPCS Team Managers is set out at Annex L of PSI 36/2012, including:

> "PROCESS FOR CONSIDERING OPEN RECOMMENDATIONS
>
> 1. .. To help you consider whether a recommendation to move a prisoner to open conditions should be accepted or rejected, you should use the following criteria as an initial guide: Parole Board recommendation at odds with recommendation of some or all reports
>
> • Where most (e.g. 2 out of 3 reports or 3 out of 5 reports) of the available evidence contained in the key reports points towards open conditions then the recommendation should be accepted.
>
> The new pro-forma should be completed.
>
> • Where most of the available evidence contained in the reports points towards closed conditions then these cases will require further scrutiny using the existing open recommendation proforma as it is likely that the recommendation should be rejected.
>
> • Where there is a conflict between report writers with some recommending closed and some open, provided these conflicts have been addressed by the Parole Board then the case should be accepted. Account should be taken of any oral evidence that addresses the conflicts. Where the conflicting views have not been addressed then the case will require further scrutiny as it is likely that the recommendation should be rejected.

29. Annex D of PSI 36/2012, sets out the Defendant's Directions to the Parole Board, issued in August 2004, relating to the transfer of life sentence prisoners to open conditions. The relevant portions of the Directions state:

Introduction

1. **In most (but not all) indeterminate sentenced prisoner (ISP) cases, a phased release from closed to open prison is necessary in order to test the prisoner's readiness for release into the community**. It allows the testing of areas of concern in conditions that more closely resemble those that the prisoner will encounter in the community often after having spent many years in closed prisons. ISP's have the opportunity to take resettlement leave from open prisons and, more generally, open conditions require them to take more responsibility for their actions.

2. The main facilities, interventions, and resources for addressing and reducing core risk factors exist principally in the closed ISP estate. In this context, 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.

3. A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Boards 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.

Directions

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

- . all information before it, including any written or oral evidence obtained by the Board;

- each case on its individual merits without discrimination on any grounds.

5. 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 sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions would 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;

> c) the extent to which the ISP is considered trustworthy enough not to abscond…. …… [emphasis added.]

30. PSO 6300 states the purpose of release on temporary licence (ROTL), under Rule 9 of the Prison Rules 1999 (consolidated version 2013), as follows:

> "Release on temporary licence is the mechanism that enables prisoners to participate in necessary activities, outside of the prison establishment**,** that directly contribute to their resettlement into the community and their development of a purposeful, law-abiding life. The decision to allow temporary release must always be balanced by an active consideration, by means of rigorous risk assessment for maintaining public safety and the public's confidence in the judicial system."

31. The Parole Board policy on open conditions, set out in Annex I of The Oral Hearings Guide dated March 2012, states [emphasis added]:

> ANNEX I
>
> PAROLE BOARD POLICY – OPEN CONDITIONS
>
> Background
>
> **"The Home Secretary's Directions…state that most lifers should spend a period in open conditions prior to release.**
>
> **The point of open conditions is not simply one of rehabilitation or curing possible institutionalism. It offers the only chance to observe a prisoner putting into practice that which he/she has learned in theory.** In other words, a prisoner may well make all the right noises on an accredited programme, but the structured and sheltered nature of closed conditions, where all decisions and responsibilities are taken by others, means that prisoners cannot demonstrate that they can fend for themselves in conditions more akin to those they will face on the outside. **Open conditions offers this opportunity as far as possible. It is the only true testing ground.**
>
> Policy
>
> The overriding factor is risk to the public. The Parole Board confirms that those serving indeterminate sentences may potentially remain in prison for their natural life. It is not the role of the Parole Board to seek to help prisoners to progress towards release because of perceived shortcomings by other agencies. The Board's role is to advise the Secretary of State in line with the Directions he has imposed.
>
> **A. RELEASE FROM CLOSED CONDITIONS**

The Board may not direct the release of any prisoner serving a sentence of life imprisonment or indeterminate sentence for public protection, unless it is satisfied that it is no longer necessary in the interests of public protection that they continue to be detained.

**In the majority of cases, the Board cannot ultimately be satisfied about risk until and unless a successful period of testing has been completed.** Regardless of the length of tariff, where offending behaviour has been addressed in closed conditions, the prisoner has had no opportunity to demonstrate by his behaviour in conditions similar to those existing in the community that he/she can apply lessons learned in closed conditions.

**It will be unusual for an indeterminate prisoner to be released direct from closed conditions.** Circumstances where that may be appropriate could include:

1. Where the Board is considering representations against recall;

2. Where the prisoner has already successfully completed a sufficient period of testing in open conditions; AND the Board considers that the reason for removing the prisoner from open conditions was unrelated to risk;

3. Where the case is considered on compassionate grounds.

4. Where there are other grounds that dictate that any or further testing in open conditions is not required to satisfy the Board about the prisoner's level of risk.

In determining whether the prisoner may be released from closed conditions, the Board will take into account:

- Whether a previous period of testing in open conditions was cut short. If so, the expectation will be that the Board will recommend a return to open conditions for the prisoner to complete testing and monitoring;

- That testing should not take place in the community. Accordingly it is not appropriate to balance risk against benefits when release is considered. Panels must acknowledge that testing, where the Board is not satisfied that risk is acceptable, may only take place in a prison environment;

- Where a prisoner is in closed conditions and has successfully completed all the offending behaviour work thought necessary, **it is nevertheless required in**

> **the majority of cases for a testing period in open conditions to be completed before the Board can ultimately be satisfied that risk is acceptable.** Panels should not be swayed by a legal representative's argument that those who have completed offending behaviour work in closed conditions must be released**,** unless the case falls within the "exceptional" category.
>
> Reasons
>
> Where the Board directs release from closed conditions in 2 and 4 above, the reasons must state why release without a [further] period of testing in open conditions is appropriate.
>
> Every case shall be considered on its merits and nothing above detracts from the principle that if the Board is satisfied in any case that the risk to the public is acceptable, then it must direct the prisoner's release. "

*The Indeterminate Sentence Manual*

32. Instructions and guidance on the management of ISPs are contained in PSO 4700 (Serving the Indeterminate Sentence), chapter 4 of which was replaced by PSI 36/2010.

33. Paragraph 4.2.3 of PSI 36/2010 provides that an ISP will normally only be re-categorised to Category D / open conditions after a positive recommendation by the Parole Board has been accepted by, or on behalf of, the Secretary of State for Justice.

34. Paragraph 4.8.1 states that in most mandatory lifer cases, a phased release from closed to open prison is necessary in order to test readiness for release into the community on life sentence, and that a similar approach will apply to many other indeterminate sentences cases although decisions will need to be taken on a case by case basis. The intention is that the ISP will undergo final assessment in conditions as near as possible to those in the community, as long as appropriate risk management plans are in place (paragraph 4.8.2).

35. PSI 36/2010 also recognises that "in some circumstances, the risk assessment carried out upon transfer to the open prison and/or the change of security conditions may discover the degree of potential risk to the public is higher than was thought to be the case, or an ISP's behaviour in open conditions may give rise to doubts about his/her continued suitability for open conditions or ROTL" (paragraph 4.8.4). Examples of situations which may give rise to a cause for concern include doubts about the extent to which relevant risk factors have been adequately addressed and behaviour which indicates that the ISP is an abscond risk.

*Statistics on release of indeterminate sentence prisoners*

36. Before the introduction of IPP sentences under the Criminal Justice Act 2003 ISPs were those who had been sentenced to life imprisonment (mandatory in cases of murder, discretionary in almost all other cases). The IPP legislation came into force

in April 2005; it was amended to restrict the circumstances in which it could be imposed in 2009, and IPP sentences were abolished with effect from December 2012.

37. Only a small proportion of ISPs are released in any one year. From July 2005 to June 2010 the figures were between 1.5% and 2%; then 3.9%, 5.3%, 5.8% and 3.1% for the four years up to June 2014. The sharp fluctuations are no doubt largely attributable to the changes in the IPP legislation; but it should be noted that the figure has never exceeded 6%.

38. On the other hand, the Defendant's evidence tells us that 38% of the 444 prisoners serving IPPs and 17% of the 289 "lifers" released in 2012 were released from closed conditions; the equivalent figures in 2013 were 38% of the 431 IPP prisoners and 14% of the 329 "lifers" released. Mr Weisselberg QC for the Defendant submits that this is proof that release from closed conditions is not impossible. There is no evidence before us as to the characteristics (for example, the nature of the index offence) which distinguish those prisoners serving indeterminate sentences who are released direct from closed conditions from those who are not.

*The absconder policy*

39. There were three serious incidents in the summer of 2013 of offences committed by prisoners released on temporary licence; one of these was a case of murder. Understandably the Secretary of State commissioned a review of the ROTL policy. On 10 March 2014 he announced a package of measures to improve the consistency, risk assessment and monitoring of releases on temporary licence which were to be implemented over the forthcoming months and to be operational by autumn 2014. These included a more consistent and robust response to failure by prisoners to comply with the terms of the temporary licence.

40. Following further instances of prisoners failing to return from ROTL and a series of high profile absconds from open conditions in May 2014, which led to many letters and enquiries from members of the public expressing concern about the current arrangements, the Secretary of State determined that interim measures needed to be adopted in order to protect the public and maintain confidence in the system of temporary release and transfers to open conditions. As the Defendant's skeleton argument puts it, the common theme to both policies was "the concept of a very strong presumption against either transfer to open conditions or ROTL for any prisoner with a history of escape, abscond or serious ROTL failure during the current sentence so as to ensure that the public was protected (by the presumption acting as a deterrent to further incidents) and to maintain confidence in the arrangement more generally".

41. The new policy concerning eligibility for open conditions on 21 May 2014 was announced by way of an internal memorandum to prison Governing Governors and Directors of Contracted Prisons from Ian Mulholland, Senior Responsible Officer for the ROTL Review Project. This stated that with immediate effect:

> "Any prisoner, irrespective of security category, in a closed prison who on their current sentence has:

> a) absconded or attempted to abscond from open conditions; and/or
>
> b) failed to return from a period of ROTL; and/or
>
> c) been convicted of a criminal offence that took place when they were on ROTL; and/or
>
> d) escaped or attempted to escape from a prison or escort
>
> will, in future, be ineligible for a transfer to open conditions and will not be eligible for ROTL save in exceptional circumstances. Guidance will be issued in the coming days about what will constitute exceptional circumstances.
>
> In order to transition to this policy, you must ensure that…….any indeterminate sentence prisoners previously approved for open conditions and awaiting transfer who meets criteria at 3a, b, c or d remains in closed conditions, pending further advice to Governors/Directors in the coming days."

42. The Memorandum of 21 May 2014 and guidance on exceptional circumstances were published on 11 August 2014 as Consolidated Interim Instructions amending Prison Service Order 6300 *Release on Temporary Licence*, as follows:

> "Exclusion from transfer to open conditions and from ROTL for any prisoner with a history of abscond, escape or serious ROTL failure during the current sentence.
>
> In the absence of exceptional circumstances, prisoners who are in closed conditions are ineligible for a transfer to open conditions; or to be afforded category D or "suitable for open conditions" status; or to take ROTL, if they have, during the current sentence:
>
> a. Absconded or attempted to abscond from open conditions; and/or
>
> b. Failed to return from a period of ROTL*; and/or
>
> c. Been convicted of a criminal offence that took place when they were on ROTL; and/or
>
> d. Escaped or attempted to escape from a prison or escort
>
> * The definition of a failure to return is as follows – where a prisoner has failed to return to an establishment from ROTL and Unlawfully at Large (UAL) contingency plans have been activated, including notification to the police, unless the prisoner surrenders to prison custody later the same day, or other exceptional circumstances apply (e.g. where following further enquiries, the Governor/Director is satisfied that the

prisoner was unable to return as required due to circumstances beyond their control).

*Exceptional circumstances*

Transfer to open conditions:

No exception will be made in relation to any prisoner serving a determinate sentence of any description.

There is a very strong presumption that an ISP who has absconded from open conditions as part of their current sentence will not be eligible to return to open conditions. However, exceptionally, the prisoner might be assessed as to their suitability for open conditions once they have completed their tariff at the next, and each successive, parole review but only if the Secretary of State considers that the case meets the following criteria:

- the prisoner has made significant progress in reducing their risk of harm and risk of abscond such that a further abscond is judged very unlikely to occur;

AND they meet one or more of the following exceptions

- there are compelling circumstances beyond their control which make a placement in open conditions necessary; or

- a placement in open conditions is absolutely *necessary*, in that their need to provide evidence of reduced risk for their parole reviews and their need for resettlement work cannot be met in a *progressive regime in closed conditions*; or

- preventing the offender returning to open conditions would in all the circumstances be manifestly unjust/unfair.

It will be for NOMS to make the assessment as to whether the test of exceptional circumstances is met in each given case of an ISP with an abscond history, so that the Secretary of State will ask the Parole Board for advice on transfer as part of the ISP's next parole review only where NOMS decides that the test is met. Thus, Public Protection Casework Section (PPCS) will make it very clear where a case is being referred to the Board only for the purposes of holding an Article 5-compliant review to determine whether the offender should be released - and not for advice on transfer to open conditions.

> The progressive regime in closed conditions referred to above will be specifically designed for ISPs with an abscond history who are unable to satisfy the tests of exceptional circumstances, in order for the Secretary of State to seek the advice of the Parole Board on their suitability for open conditions. NOMS is planning for it to be up and running by the autumn of 2014. The regime is being designed so as to encourage prisoners to take more personal responsibility to produce the evidence which they need to secure release from custody on completion of tariff, with which they will be supported by relevant interventions and by appropriately trained staff. There will be a secure perimeter fence, in accordance with Category C conditions. There will be no entitlement to ROTL other than in exceptional circumstances.
>
> NOMS will ensure that report writers draw from evidence in the progressive regime when providing Parole Board Panels with their assessment and recommendations for the offender's post-tariff parole review. Again, it will be for NOMS to assess whether an offender is suitable for a place in the progressive regime in Category C conditions, and NOMS will produce guidance for report writers to ensure that they understand that the progressive regime operates in parallel to an open conditions regime from which an ISP with an abscond history is excluded."

43. The Consolidated Interim Instructions were published on the Ministry of Justice website on 11 August 2014. Prison staff were asked via a notification on the intranet to ensure that details of the main changes were displayed where all prisoners could read them, so that they would be aware of the changes, and of how to access a copy of the detailed instructions if they wished.

*The Progression Regime*

44. The Secretary of State has recently introduced a Progression Regime. It has been designed for ISPs with an abscond history who are ineligible for transfer to an open prison and who will not be eligible for temporary release.

45. The Defendant states that "the regime does not seek to operate as a pre-cursor to open conditions but as an alternative to open conditions. The regime will not seek to test risk of abscond as the majority of prisoners will be released directly from the regime. The design of the Progression Regime has been informed by an analysis of recent cases where the decision of the Parole Board has been to release ISPs from closed conditions. The regime therefore seeks to reintroduce some of the freedoms, responsibilities, and obligations of daily life to both support offenders and test their readiness for release, with the aim of providing the offender with the opportunity to demonstrate new behaviours and to recognise and avoid behaviours associated with offending."

46. For each ISP, the regime is staged and structured around an individual progression compact and development plan based on the Enhanced Behaviour Monitoring

("EBM") Framework (an approach usually used within the open estate), with prisoners only progressing to the next stage when it is agreed at a regime board linked to the EBM Framework.

47. The institutional regime is based on an enhanced Category C 'core' day which provides a level of freedom 'out of cell' and within the establishment not usually enjoyed by Category C prisoners, in which ISPs are encouraged to become less reliant on staff prompting them to take part in the routine.

48. The regime will include the following features:

- Prisoners are to be responsible for getting up on time, washing, dressing, food preparation and going to work without escort. Evenings will be structured for meetings, Night School, Open University work, charity work, studying, chaplaincy meetings/groups and completion of the evidence for their portfolios, whether this is for forthcoming parole or in relation to the enabling environment.

- Work is a core feature of this regime in order for prisoners to develop the necessary skills to take up employment upon release. All prisoners will work and all jobs will be performance managed on their delivery and they will receive bonuses linked to a structured performance model including attendance and work ethic.

- A 'Resettlement Campus' will provide tailored activities to address the factors which will make their release more successful, including 'through the gate' services linked to accommodation, or other identified needs. At HMP Warren Hill, prisoners will buy goods from a shop rather than being ordered and delivered by staff as in other prisons. A Café which will provide training for prisoners will also provide refreshments during visits, the frequency and duration of which will increase as prisoners progress through the three stages of the regime.

- The community will be allocated a budget to manage for cleaning materials and consumables and will have peer-led prisoner information points to provide advice. There will be a Community Council chaired by prisoners who will produce action plans and minutes and propose events that are linked to charitable and reparation activity.

- Prisoners will be expected to take responsibility for maintaining, identifying, and re-building protective relationships, which may involve family members or other supportive individuals. This will involve prisoners planning how the relationships important to their resettlement will be re-established and/or maintained.

49. Prisoners who had already received approval from the Secretary of State to be transferred to open conditions or a Parole Board recommendation at the time of the policy change in May, were assessed for the Progression Regime as a priority. The

assessment process for suitability is managed administratively within NOMS and does not involve the Parole Board.

50. In December 2014, there were 26 offenders at HMP Warren Hill prior to its re-designation as the establishment for the Progression Regime. 27 offenders have been transferred since the Progression Regime started. The current capacity of the unit is 45. It is estimated that by the end of 2015 the regime will hold 197 prisoners at capacity at different establishments.

51. Evidence recently adduced in this claim indicates that the Claimant is doing very well indeed under the Progression Regime. It is rare, in judicial review cases brought by prisoners, for counsel for the Secretary of State to argue that the evidence indicates release on licence from closed conditions to be a real possibility: but that is what occurred at the hearing before us.

*The Claimant's case*

52. Ms Weston submits that both (i) the 'absconder policy' itself and (ii) the decision to refuse the Claimant a transfer to open conditions are unlawful. She argues that:

    i) The absconder policy, as set out in the Consolidated Interim Instructions of 11 August 2014, is inconsistent with the Secretary of State's Directions to the Parole Board, which remain in force, and thus irrational and unlawful;

    ii) The absconder policy is in any event unlawful and irrational on wider grounds. It is for the Parole Board, not the Secretary of State, to be satisfied as to the risk to the public posed by a particular prisoner. The policy, and/or the Defendant's manner of applying it, is irrational in so far as it fails to require the Defendant to have regard to any views which the Parole Board may have expressed in a particular case as to the suitability of transfer and/or potential risk to the public arising from such a transfer.

    iii) By applying the absconder policy to prevent the Claimant's transfer to open conditions the Defendant is in breach of his duties imposed by public law and/or ECHR Article 5 to provide a reasonable opportunity for the Claimant to demonstrate to the Parole Board that he no longer presents an unacceptable danger to the public (see ***R(Kaiyam) v Secretary of State for Justice*** [2015] 2 WLR 76, a decision of the Supreme Court given on 10 December 2014);

    iv) The Defendant's application of the policy to the Claimant, in the decision of 15 August 2014 refusing to transfer him to open conditions despite the recommendation of the Parole Board (following an oral hearing) that he should be so transferred, was unfair and unlawful, in that, as Ms Weston put it, "the rules were changed half way through the match".

*Inconsistency*

53. Ms Weston's first ground is inconsistency. She submits that the absconder policy, which precludes categories of prisoner from a transfer to open conditions save in exceptional circumstances, is incompatible with the emphasis in the Secretary of State's long-standing Directions to the Parole Board on the necessity of a period in

open conditions for most ISPs and the reasons given for that necessity. Although the absconder policy was introduced on 21 May 2014, no amendment has to this day been made to the Directions. Moreover, the Directions are not simply a routine internal document. They are issued pursuant to an express power in s 239(6) of the 2003 Act.

54. Mr Weisselberg's principal submission in response on this issue in oral argument was as concise as it was striking. The Directions were issued by the Secretary of State. He has the power to amend or revoke them; therefore he has the power to ignore or contradict them. They are not directions to him but by him, and he cannot be bound by them.

55. We cannot accept this submission. The Secretary of State could indeed amend or revoke the Directions to the Board. But so long as they remain in force they are binding on the Board and also binding on the Secretary of State, in the sense that he cannot lawfully tell the Board to ignore them or his officials to frustrate them.

56. We are also not impressed with the argument that, since the Secretary of State has a complete discretion as to whether or not to refer to the Parole Board in any prisoner's case any question other than the decision on whether to release him, the Directions are, in the words of Mr Weisselberg's skeleton argument, "irrelevant to a prisoner with an abscond history, because that prisoner's case will be reviewed by the Board without any such directions being before it". The Board's most important function is to decide – not advise - whether or not a prisoner is ready for release into the community. It is inconsistent to have in force statutory Directions to the Board instructing them that "in most (but not all) indeterminate sentenced prisoner (ISP) cases, a phased release from closed to open prison is necessary in order to test the prisoner's readiness for release into the community", while at the same time introducing a policy which excludes a prisoner from eligibility for such phased release on the grounds that he has failed to return from a day's ROTL.

57. The argument in the last paragraph would in any case be inapplicable to the case of the Claimant, where the Parole Board were permitted to consider the issue of recommendation for transfer to open conditions without objection from the Defendant. But both Mr Weisselberg and Ms Weston expressly asked us not to decide this application for judicial review purely on the narrow ground of the exact sequence of events in the Claimant's case: we were told that there are a number of other pending or threatened claims challenging the absconder policy, and it would be of little assistance to those advising either the Secretary of State or claimants in other cases if we confined ourselves to highly fact-specific grounds.

58. Mr Weisselberg points to the use of the words "most (but not all)" in the Directions, and to the fact that the categories of exceptional circumstances under the policy include cases where a period in open conditions "is absolutely necessary, in that their need to provide evidence of reduced risk for their parole reviews and their need for resettlement work cannot be met in a progressive regime in closed conditions". But again, this does not remove the inconsistency. It is irrational to say in two policy documents in force at the same time (a) in most cases phased release via open conditions will be necessary to test whether the prisoner can safely be released into the community, but (b) if the prisoner has failed on one occasion to return from ROTL, only in exceptional circumstances will it be necessary (or "absolutely

necessary") to operate a phased release via open conditions to test whether the prisoner can safely be released into the community.

59. We therefore uphold the claim for judicial review of the policy on the ground of inconsistency with the Secretary of State's Directions to the Board.

*Other grounds of challenge to the absconder policy*

60. In those circumstances it is unnecessary to consider Ms Weston's second and third grounds of attack on the policy. We will only say that (a) the Secretary of State was plainly entitled to react to a series of high-profile ROTL failures by tightening the rules on eligibility for ROTL; and (b) it may be that the Progression Regime will be found over time to be an alternative method of testing the suitability of at least some ISPs for release, although these are early days yet, and we do not express a concluded view on the subject.

61. In particular we do not decide what would occur in the event that the Secretary of State gave Directions to the Parole Board on the exercise of its function in advising him on the suitability of prisoners for transfer to open conditions which were inconsistent with the Board's own policy on the exercise of its statutory power to decide on whether to direct release. That would be a most unhappy situation: but it does not arise in this case.

*The handling of the Claimant's case*

62. Even if we had upheld the lawfulness of the policy generally, we would have held that its application in the Claimant's case was unfair. His case was referred to the Parole Board to consider both whether to direct release and whether to recommend re-transfer to open conditions. Following the introduction of the interim absconder policy on 21 May 2014 the Board gave directions enquiring of the Secretary of State, in effect, whether the latter referral was withdrawn. The answer was that the case should be considered in accordance with the existing referral note, and the Secretary of State made no submissions to the Board at or before the oral hearing. In those circumstances the Board's recommendation should have been considered by the Secretary of State on its merits, rather than being rejected on the grounds that the Claimant was no longer eligible for transfer.

*Remedy*

63. The Claimant is entitled to: (a) an order that within 21 days the Defendant reconsiders in accordance with this judgment his rejection of the recommendation of the Parole Board dated 14 July 2014 that the Claimant be transferred to open conditions; (b) a declaration reflecting the terms of our judgment on the inconsistency ground, which will be in the following terms:

> "It is declared that the Defendant's policy of excluding from transfer to open conditions any prisoner with a history of abscond, escape or serious ROTL failure as set out in section 1 of his Consolidated Interim Instructions dated 11 August 2014 is inconsistent with paragraph 1 of the Defendant's Directions to the Parole Board under section 32(6) of the Criminal Justice Act 1991 issued in August 2004 and set out in

Annex D of PSI 36/2012 and is accordingly unlawful to that extent while such Directions remain in force."

64. We grant the Defendant's application for permission to appeal against that declaration, but not his application for permission to appeal against the order to reconsider his rejection of the Parole Board's recommendation for the Claimant's transfer to open conditions. The former raises issues of general importance; the latter, for the reasons given in paragraph 62, does not. We refuse the application for a stay pending appeal.