[2022] PBRA 124

the Parole Board
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Application for Reconsideration by the Secretary of State for Justice

In the case of Alcharbati

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board, dated 8 August 2022, to direct the release of Mr Alcharbati (the Respondent).

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are:
   - The Decision Letter;
   - The Application for Reconsideration;
   - The Dossier, which consists of 657 numbered pages, ending with the Decision Letter;
   - Response on behalf of the Respondent dated 7 September 2022.

4. I have also been referred to certain material which was the subject of a (refused) Non-Disclosure Application on behalf of the Applicant, pursuant to Rule 17 of the *Parole Board Rules* 2019 as amended. Since it forms no part of either the decision or the Application for Reconsideration. I have not considered this material further.

Background

5. On 14 December 2018, when he was 42 years old, the Respondent was sentenced to 7 years' imprisonment for 6 offences of disseminating terrorist publications and 1 offence of possession of a document containing terrorist information. He is now aged 46. His Parole Eligibility Date was in February 2022, his Conditional Release Date and Sentence Expiry Date are both in February 2024.

6. He posted links to extremist Islamic videos and ISIS inspired videos glorifying terrorism. The Sentencing Judge found, contrary to the Respondent's assertions, that there was a clear pattern and focus to the posts and that his repeated claims that his intention was just to share news was not credible. In his evidence to the panel the Respondent maintained that he had been trying to raise awareness of the situation in another country. The panel pointed out that many of the videos were

linked to terrorism rather than matters directly related to that country. He accepted the material was of an extremist nature, though he struggled to detail whether he held views supportive of the material at the time.

7. Included in the material found on his internet devices was a document about explosives. In his evidence to the oral hearing panel the Respondent said he had been curious about explosives. Despite his denials, the Sentencing Judge was satisfied he had viewed the file.

8. A significant aspect of the Respondent's case is that he has a diagnosis of mood affective disorder, first made in about 2008. He has a poor record of compliance with medication, and was twice sectioned, in 2013 and 2014. He maintains that the index offences were committed because he was mentally unwell. The sentencing judge determined that there was no credible evidence that he was suffering a manic episode at the time the offences were committed. A psychiatrist reported at the time of his sentence that it would be reasonable to assert there was a link between his mood disorder and his religious beliefs. A perspective of his mental state at the time of his offences is largely reliant on his own account.

9. The Respondent's account to the oral hearing panel, as the panel analysed it, amounted to an assertion that he did not himself hold extremist views, however he now recognises that he was posting extremist material and thereby promoting extremism. The panel considered it reasonable to conclude that, at the time of the index offences, he had developed an interest in extreme Islam.

Request for Reconsideration

10. The application for reconsideration is dated 30 August 2022.

11. The grounds for seeking a reconsideration are as follows:

Ground 1: The panel have placed insufficient weight on the Secretary of State's view and have failed to fully explore the benefit of further interventions being completed in custody.

a) The Applicant's suggestion at the oral hearing was that a period on a Progressive Regime would allow for a full assessment of ongoing concerns in relation to sincerity of change, time to explore the Respondent's attitude to his past behaviour, and the opportunity to embed resettlement plans. The complaint is that the panel failed sufficiently to explore this view and failed to place appropriate weight on it.
b) The Respondent has not completed work further to the programme he undertook in September 2019.
c) The panel accepted that further work was necessary to understand the risk in this case and also on the Respondent's sincerity of change.
d) The Applicant therefore submits that it was irrational for the panel to view the risk to be no more than minimal and fail appropriately to consider the need for consolidation work to be completed in custody.

Ground 2: The panel have over-relied on the Respondent's self-report.

a) The panel acknowledged the Respondent's contradictory evidence throughout the hearing.
b) The panel were unable to determine the Respondent's intent or motivation for his offending. His account differs from the Sentencing Judge's findings. The panel erred in relying on his self-report to the degree that it did.
c) It was irrational not to consider alternatives to release in circumstances where so much emphasis is placed on self-report, an intrinsically limited form of evidence.

Ground 3: The panel have misplaced weight on risk factors

a) The panel considered extremist beliefs to be a risk factor yet failed to explore the Respondent's current views on extremism.
b) Risk assessments assessed the Respondent as posing a "*High risk*" of serious harm to the public. It is therefore irrational for the panel to state that the risk is no more than minimal, when there is uncertainty, contradictions and significant unknowns.
c) The panel placed too much weight on the evidence of the Community Offender Manager (COM), specifically in her ability to identify warning signs of an increase of risk in the community. There is no guarantee he will retain the same COM on release.
d) The panel concluded that the likely risk of further extremist offending would be low, so long as the Respondent remains mentally well. A condition of mental health engagement is not included in the licence conditions – the COM stated that the issue would be addressed by the standard conditions to be of good behaviour and follow supervision instructions. The panel placed too much weight on this being sufficient to manage the Respondent's risk. His mental health is the main risk factor; the panel did not place sufficient weight on his mental health, as is reflected in the lack of monitoring or support within the Risk Management Plan (RMP).
e) The panel stated that the RMP is more likely than not to be effective. This is insufficient to pass the test for public protection.

12. These are all grounds based on irrationality.

Current parole review

13. The Applicant referred the Respondent's case to the Parole Board in June 2021. This was the Respondent's first parole review. The case was first listed before the panel on 5 April 2022. The hearing was adjourned. The final hearing, lasting 7 hours, took place on 29 July 2022.

14. The oral hearing panel consisted of two independent members and a psychiatrist member of the Parole Board. The COM, the Prison Offender Manager (POM) and the prison psychologist gave evidence, as did the Respondent. The Applicant and the Respondent were each represented by counsel, whose instructing solicitors, as well as a further POM and an escorting officer, attended as observers. The hearing took place by video link.

The Relevant Law

15. The panel correctly sets out in its decision letter the test for release. The test is that the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the Respondent should be confined.

16. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

> *"When consideration is being given to release on licence of a prisoner serving the custodial term of a determinate sentence, the issue for the Board is whether it is no longer necessary for the protection of the public that the prisoner be kept in custody. To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration of that exercise ignores the fact that the statutory test has no temporal element. It is, therefore, wrong to say that the Board is not empowered to consider risk after the expiry of the appropriate custodial term. If a prisoner will pose a danger after the expiry of that term, that is bound to be relevant to the issue of the safety of the prisoner's release prior to that point.*
> *The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."*

17. The Applicant's counsel made the above points in her written submissions after the hearing. They will therefore have been at the forefront of the panel's mind.

Parole Board Rules 2019 (as amended)

18. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

19. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

20. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

"the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

21.This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

22.The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

23.In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. … [T]his approach is simply another way of applying Lord Greene MR's famous dictum in* Wednesbury *… but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

The reply on behalf of the Respondent

24.The Response, dated 7 September 2022, deals in detail with the Application. In what follows I take account of the arguments raised.

Discussion

25.The question for me is not whether I agree or disagree with the panel's decision. It is whether the panel's decision to direct release is irrational in the sense discussed above.

26.A general point first. There is no suggestion that the panel did not consider everything it should have done, nor that it considered irrelevant matters. The complaint, with regard to each ground, is that the view the panel took, the weight it gave to the relevant factors, was irrational. It is for the panel to weigh the factors, and only if its conclusions are such that no reasonable panel, properly addressing the issues, could come to them, can the reconsideration process intervene.

27. **Ground 1**. The assertion here is that the panel placed insufficient weight on the Secretary of State's view and failed to fully explore the benefit of further interventions being completed in custody.

28.The panel devoted a significant amount of space in the Decision Letter to analysing the Applicant's view. It cannot be said to have overlooked or ignored what he

submitted. The status of the Applicant's submissions needs some consideration. I do not suppose he is arguing that, just because he is the Secretary of State, his view has some special status. He is one of the parties to the Parole Board's proceedings; the Respondent, the prisoner, is the other. It would be fundamentally unjust and contrary to principle to give greater weight to the submissions of one party than to those of the other simply because one of them is, and the other is not, a government minister.

29. The Applicant's view is, presumably, based on the same materials relating to risk as the panel saw. He is obliged to place before the Parole Board all information available to him which is relevant to risk. The Applicant seeks to place before the Parole Board his view of the case, based on the papers, rather than the professional opinions of those who have actually met and worked with, and will in future work with, the prisoner. Whether the Applicant has the power to control the evidence received by the Parole Board in this way is currently being litigated in the High Court.

30. The Applicant can expect no more, and no less, than a dispassionate analysis of the view he advances and the evidence that may, or may not, support it. The panel was obliged to decide the Respondent's case on all the available material, including a 7 hour hearing in the course of which he gave evidence. It did so.

31. As to the complaint about the alleged failure to explore the benefit of further interventions being completed in custody, this misses the point. The question whether a prisoner satisfies the test for release does not depend on whether he has completed all available work. It is frequently argued on a prisoner's behalf that he should be released because there is no further risk-reduction work for him to do in custody. This is irrelevant, as is the suggestion on behalf of the Applicant that because there is follow-up work to be done after the completion of the appropriate programme in 2019 (the follow-up did not take place as expected because of the pandemic), the Respondent should not be released. The panel carefully considered the outstanding work and was satisfied that it could and should be completed in the community. Meanwhile, the panel's assessment was that the Respondent satisfied the test for release, because his risk of re-offending was not imminent.

32. The complaint is that the panel failed to consider alternatives to release such as a period in a progressive regime. If the panel was satisfied, as it was, that the Respondent satisfied the test for release, the question of alternatives did not arise. The Parole Board is not concerned in sentence planning.

33. **Ground 1** is not made out.

34. **<u>Ground 2</u>**. The assertion here is that the panel over-relied on the Respondent's self-report. For reasons discussed above, I think this Ground is best approached in the terms of **Wells**: I should test the panel's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied, or whether there is some gap in the evidence or leap to the conclusion.

35. The Applicant points out that the panel was unable to determine the Respondent's intent or motivation for his offending. I have set out the panel's findings above, and summarise the Sentencing Judge's findings below.

36. The panel's starting point was, entirely properly, the Sentencing Judge's findings.

37. The Sentencing Judge found the following facts, following a trial:
    - The Respondent's intention was to encourage acts of terrorism.
    - The posts were not random. There was a clear pattern and focus to the posts, a focus on ISIS and martyrdom in particular.
    - The Respondent knew it was wrong to post ISIS propaganda. The posts accorded with his own views.
    - The intention was to get people going, an intention to encourage acts of terrorism.
    - The posts reveal the Respondent's mindset: a marked antipathy to the regime in another country; antipathy towards various countries and political and religious groups; his belief in jihad, holy war, and support for the aims and activities of an extremist terrorist group, including martyrdom.
    - The Respondent, notwithstanding his denials, did view the document entitled "*The Easy Explosives*".
    - The Respondent has an agreed diagnosis of mood affective disorder. At various times he has suffered manic episodes. There is no credible evidence that he was suffering a manic episode at the time of the offences.
    - The Respondent is not a reliable historian about his mental state.

38. Having completed the appropriate intervention in September 2019, though he was unable to remember the details of it, the Respondent completed follow-up assessments relating to his extremism in December 2019 and February 2022. The psychologist concluded that, although it was likely that the Respondent held some extremist views at the time of the offences, there was no evidence in custody, since he had been mentally well, of him continuing those views. The psychologist considered the assessment to be a structured assessment; three such assessments had been completed between April 2019 and February 2022, and in the psychologist's view the Respondent represented no more than a minimal risk to the public.

39. There was therefore other evidence, beyond the Respondent's self-report, to support the panel's finding that the Respondent satisfied the test for release. Of course, self-report is always a significant part of an assessment of a person's state of mind. However, in this case, the panel also had evidence, about extremist behaviour or ideation (or rather, the lack of both) in custody, and the professional opinion of the psychologist as to the conclusions as to risk that could safely be drawn from the evidence.

40. I therefore find, in the terms of **Wells**, that the panel's decision can be safely justified on the basis of the evidence. Ground 2 is not made out.

41. **Ground 3.** The complaint here is that the panel have misplaced weight on risk factors. The first issue raised is that the panel failed to explore the Respondent's current views on extremism. Based on the psychologist's evidence, and that of the

COM, and close questioning of the Respondent himself, the panel was satisfied that the likely risk of extremist offending would be low, so long as the Respondent remains mentally well. That is a conclusion available to the panel on the evidence.

42. The next issue raised is that, bearing in mind the risk assessments that said the Respondent posed a high risk of serious harm to the public, it is irrational for the panel to state that the risk is no more than minimal. The Applicant asserts that risk cannot be deemed to be no more than minimal where there is uncertainty, and there are contradictions and significant unknowns.

43. Risk assessments carried out by the Parole Board involve (at least) two elements. One is an assessment of the harm that would be caused by future offending behaviour by the prisoner; another is an assessment of the risk of future offending behaviour. The panel in this case acknowledged the high risk of harm were the Respondent to re-offend. It should be noted that the evidence was that this risk was not imminent. The panel maintained the view, again solidly evidence-based, that the risk of future offending was low, provided the Respondent's mental health did not worsen. If his mental health did begin to deteriorate, there would be sufficient warning signs to enable appropriate action to be taken. Those supervising the Respondent would be fully aware of the importance of monitoring his mental health.

44. The Applicant submits that the Respondent's mental health is the main risk factor. The panel (which included a psychiatrist) carefully considered the issue. It cannot be said that the panel's conclusion was irrational in the sense discussed above.

45. The panel was satisfied that the Risk Management Plan proposed would suffice to protect the public. The panel gave full and carefully considered reasons, supported by the evidence, for this conclusion.

46. Ground 3 is not made out.

47. Overall, the position remains this: the Applicant disagrees with the conclusions reached by the panel, but each conclusion is one to which the panel was entitled to come on the evidence, and cannot be categorised as irrational in the sense defined above.

Decision

48. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Patrick Thomas KC
13 September 2022