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[2023] PBRA 195

Application for Reconsideration by Akbar

Application

1. This is an application by Akbar (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 19 September 2023. The decision of the panel was not to direct release.

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, and/or (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 current dossier consisting of 1451 pages; the application for reconsideration submitted by the Applicant; and the response by the Secretary of State (the Respondent).

Background

4. On the 30 April 2007 the Applicant was sentenced to life imprisonment in relation to an offence of conspiring to cause explosions likely to endanger life and/or injure property. The minimum term fixed by the judge was 17 years and 6 months. The Applicant was aged 23 at the time he was sentenced and is now 40 years old.

5. The circumstances of the index offence were as follows. The Applicant and four co-defendants held meetings to discuss placing improvised explosive devices at locations such as the Bluewater shopping centre and the Ministry of Sound nightclub. The group purchased a quantity of ammonium nitrate fertiliser and aluminium powder with the intent of creating an improvised explosive device. The Applicant told one of his co-defendants that he was willing and able to bomb the Ministry of Sound nightclub. Other targets considered included the London underground, synagogues, public houses and utility facilities (gas and water).

6. The sentencing judge said that the Applicant "*became a committed terrorist, believing in violence to the innocent and unsuspecting to achieve political and ideological aims*". The judge described the Applicant as "*resourceful, intelligent and disturbingly devious*". Further, he said that intercepted conversations showed the Applicant's "*thorough enthusiasm for terrorist activity in the UK and [his] frustration that it was not happening as quickly as [he] would have liked".*

Request for Reconsideration

7. The application for reconsideration is dated the 31 October 2023.

8. The grounds for seeking reconsideration are set out below.

Current parole review

9. This was the Applicant's first parole review. The Applicant's tariff expired on the 29 September 2021.

Oral Hearing

10. The review was conducted by an independent Chair of the Parole Board, a psychologist member of the Parole Board and a judicial third member of the Parole Board.

11. Oral evidence was given by the Prison Offender Manager (**POM**), a Community Offender Manager (**COM**), a Deputy Director of the Foreign Commonwealth and Development Office (FCDO), a member of ERG 22+ a report writer and National Specialist Lead, CR-ARC (a specialist Probation Officer) and a police officer. The Applicant was represented by a barrister.

12. A dossier consisting, at the time of the hearing, of 1341 pages was considered by the panel.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 19 September 2023 the test for release.

Draft Judicial Review Application

14. Appended to the application for reconsideration in this case was an application which it is understood the Applicant proposes to submit to the High Court for relief by way of Judicial Review. The Applicant's legal advisers asked that the draft application be considered in addition to the grounds for reconsideration set out below. I have considered the draft application to the High Court. The Application repeats much of the argument set out in support of this application for reconsideration. The Applicant's legal advisers also argue, in some detail, that the Applicant's detention amounts to unlawful detention contrary to Article (5) 1 of the ECHR, is grossly disproportionate contrary to Article 3 of the ECHR and amounts to unlawful discrimination contrary to Article 5 of the EHCR.

15. None of these issues are capable of remedy or consideration within the remit of the Parole Board reconsideration process which is governed by the Parole Board Rules 2019 (as amended). Whilst the decision as to the content of any application for reconsideration is a matter for individual legal advisers and applicants, the reconsideration procedure is governed by the overriding objective applicable in all court and tribunal matters. That objective aims to enable courts and tribunals to deal with cases justly and at a proportionate cost. This includes ensuring that cases are dealt with expeditiously and fairly and allotting cases an appropriate share of the court or tribunal's resources.

16. The eliding of arguments and applications relating to other jurisdictions has the effect of over complicating issues and can place an unfair burden upon those processing and administering courts and tribunals. Where applicants are legally represented, every effort should be made to deliver succinct, focused and relevant arguments and representations. The unnecessary burdening of applications with material of relevance to an entirely different jurisdiction is unlikely to be helpful or to accord with the principles of the overriding objective.

Legal Considerations

Parole Board Rules 2019 (as amended)

17. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).

Irrationality

18. 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."*

19. 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.

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

Procedural unfairness

21. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

22. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

(a) express procedures laid down by law were not followed in the making of the relevant decision;
(b) they were not given a fair hearing;
(c) they were not properly informed of the case against them;
(d) they were prevented from putting their case properly; and/or
(e) the panel was not impartial.

23. The overriding objective is to ensure that the Applicant's case was dealt with justly.

24. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Respondent

25. The Respondent has made submissions. I have taken account of those submissions. In essence the Respondent argues that the Applicant's case was very similar to that of **Hindawi**. That the decision in **Hindawi** determined that the fact that licence conditions (similar to those available in the UK) may not be available in a country receiving a prisoner (who is subject to a risk management plan), could not on its own be a reason to refuse to consider release. The Respondent submits that in this case the panel found that there were a number of factors (beyond the unavailability of licence conditions) whose absence would elevate risk. The Respondent argues therefore that this was a case, very similar to **Hindawi**, where there was a risk of serious harm in Pakistan which could not be adequately monitored or managed by the arrangements available in Pakistan.

26. The Respondent secondly argues that it was not irrational for the panel to find that the Applicant might be removed or travel to Pakistan in the light of his status as a prisoner subject to deportation.

27. Thirdly, the Respondent argue that the panel took account, appropriately, of the entirety of the evidence relating to the monitoring and risk management arrangements in Pakistan and found them inadequate.

Reconsideration grounds and discussion

Ground 1

28. The Panel erred in law by, in effect, heightening the statutory release test, and insisting upon a parity of parole-type arrangements in an overseas jurisdiction, contrary to **R (Hindawi) v Parole Board [2012] EWHC 3894 (Admin)**.

Discussion

29. In its decision the panel made clear that to make a direction for release it had to be satisfied that it was no longer necessary for the protection of the public that the Applicant be confined. It was common ground, supported by references in the case of **R Hindawi [2012] EWHC 3894 (Admin)**, that "*the public*" included risks to the public outside the jurisdiction of the UK.

30. At paragraph 4.2.10, of its written decision, the panel addressed the issue of the management of the Applicant's risk outside the jurisdiction of the UK. The panel determined that "*something equivalent to the risk management plan"* which had been suggested in respect of the Applicant's management in the UK would be necessary to manage the Applicant's risk elsewhere.

31. The panel had considered the views of the professionals who had given evidence in the hearing and considered the written evidence and reports in the dossier. The panel determined that it was likely that the Applicant's risk could be safely managed in the community, in the UK. This determination was contingent upon the Applicant being subject to the very robust and specialised licence conditions and other arrangements which were within the proposed UK risk management plan.

32. The panel then carefully explored the measures that would be implemented by the authorities in Pakistan to keep the public safe. The panel had been advised of some possible measures available in Pakistan and took evidence from experts. It was clear, however, that there was an absence of any definitive information or reassurance as to what measures would be implemented and by whom. At paragraph 3.16 of the decision those measures, suggested by witnesses in the hearing, were listed by the panel. Some evidence was provided by British based experts with a knowledge of Pakistan. The Applicant's legal advisers had also sought independent evidence from an attorney in Pakistan. That evidence was also further summarised by the Panel at paragraph 3.18 of the decision.

33. The panel's analysis of the position in Pakistan was set out in their conclusion. They indicated the following "*we do not know which, if any, of the measures will be enforced, by whom and over what time period. Further, we do not know the details of the information sharing protocols that exist between the UK and Pakistan, or how they would operate in practice, to alert each party to any extremist risks posed by [the Applicant] to Pakistan or any other country, including the UK, while he was residing in Pakistan".*

34. In light of the fact that the risk management plan was inevitably drafted in the UK, by UK professionals, it was unsurprising that the panel looked for measures similar to those suggested as necessary to manage risk in the UK. However the overriding tenor of the decision was an assessment of whether adequate measures (whatever their form) were available to manage risk in Pakistan and would therefore be sufficient to meet the statutory test for release. The panel found that they did not. There is no evidence of the panel seeking "*strict parity"* of parole arrangements in their reasoning. On the contrary the panel analysed in detail the arrangements which may be in place in Pakistan in the event of a direction for release. I can detect no evidence of irrationality in the analysis by the panel of the risk management measures in Pakistan or of their conclusions. Their decision was clear, there was insufficient evidence of measures and arrangements which could safely manage the Applicant's risk in Pakistan and accordingly the test for release was not met.

35. I therefore reject the contention that the panel, in assessing risk, did other than apply the statutory test to the analysis of the risk management plan and other risk management factors which would be in place in Pakistan, in the event of a direction for release.

Ground 2

36. The panel erred in law by irrationally proceeding upon the factual assumption that the Applicant would travel to and/or be removed to Pakistan, where to do so posed a risk to the safety of the public.

Discussion

37. At paragraph 1.6 of the panel's decision, the panel noted as follows "*[The Applicant] is a foreign national prisoner. He is the subject of a deportation order to Pakistan which he has not challenged and therefore his appeal rights are exhausted*".

38. The overwhelming weight of evidence before the panel indicated that the Applicant was, on balance, likely to be removed to Pakistan or might elect to return to Pakistan. The Applicant had not appealed the order for deportation, he also had family connections and a home with family in Pakistan. I therefore reject the suggestion that the panel's view (that he was likely to be removed to or travel to Pakistan) was irrational. It was based upon persuasive and credible evidence.

39. As to the arguments submitted by the Applicant's legal advisers supporting this contention:

39.1. Firstly, it was argued that "*It is obviously irrational*" to contend that the Applicant might return to Pakistan voluntarily.

It is clearly not unknown that those subject to deportation arrangements can, in some circumstances, elect to remove themselves voluntarily. Whether this would occur in this case was not, on the evidence before the panel highly likely, however it was far from irrational to consider the possibility.

39.2. It was secondly argued that deportation was a discretionary power and therefore it was irrational to assume that it would be exercised by the Secretary of State (if the Applicant's removal posed a risk).

A Parole Board panel's factual conclusions are reached on the balance of probabilities. As noted above, the panel had before it evidence that the Applicant was subject to a deportation order, he had not appealed the order and he had family connections and an offer of a home and employment in Pakistan and apparently wished to return. In the light of the background to this case, the panel could not, in my determination, be said to have reached an irrational decision in concluding on the balance of probabilities that the Applicant was likely to be deported. The decision-making process of the Secretary of State, whether discretionary or not, was not a factor which the panel could realistically predict or rely upon. The panel, appropriately in my determination, made assessments of risk on the basis of the two most likely outcomes, namely the Applicant being in the UK, or the Applicant being outside the UK and most likely in Pakistan. The panel's

role was not to second guess any decision by the Secretary of State, but to analyse risk, and apply the statutory test for release.

39.3. It was argued thirdly that the panel should have taken account of the various tests, required to be applied by the Secretary of State, in implementing a removal.

Again, I reject this proposition. The panel realistically posited two scenarios. The possibility of the Applicant being in the UK and measures to manage risk in the UK, and the possibility of the Applicant being elsewhere (most likely Pakistan) and again the measures to manage risk. The panel had no role or duty to analyse the decision-making process of the Secretary of State. Parole Board panels are bound by the relevant rules and decisions affecting parole. The panel faithfully applied those considerations, the panel would have been acting inappropriately if any attempt were made to predict the outcome of any decision-making process of the Secretary of State beyond the obvious and credible alternatives of the Applicant being in the UK or in Pakistan. As indicated above, on balance, these two posited scenarios were credible and realistic.

39.4. The Applicant further argues that it would be "*simply unthinkable that the Secretary of State for the Home Department would exercise a discretionary power of deportation, where to do so posed a security risk"*.

As clearly indicated in the decision, the panel's role was to apply the statutory test for release, and in doing so the panel appropriately made an independent assessment of the likely risk to the public based upon the evidence within the dossier. The panel's role was not to abrogate the decision making process to any other body, indeed to do so would be both irrational and procedurally inappropriate.

39.5. The Applicant's legal adviser argues that the removal of the Applicant to Pakistan was not a realistic prospect on the basis of potential Human Rights issues arising from such a removal.

Again, the panel's role was not, and could not, embrace considerations unique to the Secretary of State and the UK courts relating to potential Human Rights abuses that may be suffered. The panel rightly proceeded on the basis, set out in detail in their decision, that on balance there were two potential scenarios as to the Applicant's progression. The panel analysed both with care and set out, in detail, their findings.

40. I determine that none of the above supporting arguments are indicative of irrational decision making by the panel.

Ground 6

41. The Panel's assessment of risk in Pakistan was irrational.

Discussion

42. In the submission, the Applicant's legal adviser lists the arguments placed before the panel detailing the suggested arrangements in Pakistan for the management of the Applicant's risk. In summary they amounted to family ties, accommodation and

employment opportunities. Also referenced were various possible monitoring arrangements; namely governments sharing information, questioning on arrival by government agencies, the existence of an intelligence agency (ISI), the possibility of being proscribed under internal legislation and finally "*extra legal*" measures which might be deployed by the military establishment.

43. The overall argument by the Applicant's legal adviser is that "*With all due respect to the National Probation Service, it might be thought to be a surprising conclusion that the notoriously extensive, well-resourced, and robust Pakistani security apparatus were thought to be less effective at controlling an extremism-related risk than the United Kingdom National Probation Service".*

44. The panel considered with care the measures said to be in place in Pakistan to manage risk. The panel's overall conclusion was clearly articulated in the decision as follows "*the Panel has explored what Pakistani authorities would do upon [the Applicant's] return to Pakistan and what, if any, measures would be available/actioned by way of monitoring and support. The Panel is aware that HMPPS [His Majesty's Prison and Probation Service] cannot act overseas and has no effective power to recall someone who has left the UK jurisdiction. In addition, Pakistan does not have a Probation Service and therefore the Panel carefully considered the range of measures as presented by [the attorney based in Pakistan] and [a UK expert]. It is clear that Pakistani authorities have counter terrorism powers and capabilities at their disposal, but what is not known is whether the authorities have any interest in [the Applicant's] case and what, if any, measures would (as opposed to could) be implemented in [the Applicant's] case. It is encouraging that restrictions could be imposed on [the Applicant's] travel, speech and business but it is unclear whether this would be countrywide or globally. Also, it is unclear which law enforcement and intelligence agencies would be involved in [the Applicant's] case, what forms of monitoring they would use and over what time period*."

45. Of fundamental significance in the decision was the fact that the position in Pakistan is that there exists no equivalent of licence conditions, no specialist monitoring arrangements by an organisation with similar powers and responsibilities of the probation service and importantly no power of recall to custody in the event of an elevation of risk.

46. In my determination the panel conscientiously and carefully considered the viability of the elements of a risk management plan, in the event of the Applicant being in Pakistan. The bulk of the measures suggested as being available to manage risk in that country amounted to military and security agencies whose role appeared to be akin to the investigation of offending rather than the specialist monitoring of risk. The panel were bound to reach their conclusions on the basis of the evidence presented at the hearing. I find no evidence that their conclusions were irrational in the legal sense or that there was any evidence of procedural irregularity.

Decision

47. For these reasons this application must fail.

HHS Dawson
14 November 2023