

[2021] PBRA 191

**Application for Reconsideration by the Secretary of State for Justice
in the case of Siddiq****Application**


1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of a panel dated the 20 November 2021 to direct the release of Siddiq (the Respondent).
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a. The dossier containing 602 numbered pages including the decision letter (DL) the subject of this application, and representations made to the panel on paper by the parties after the hearing and prior to the decision.
 - b. The application for reconsideration.
 - c. The Respondent's response to the application.

Background

4. On 22 February 2019 the Respondent, who is now 40, was sentenced to 4 years 6 months imprisonment for offences contrary to the Prevention of Terrorism Act 2006 and the Regulation of Investigatory Powers Act 2000. His case was referred to the Parole Board on 15 September 2020. It was directed to oral hearing on 16 February 2021. In July and September 2021 further reports were directed for the hearing then fixed for 5 October 2021. On 24 September 2021 submissions were sent by the Applicant's legal representative in advance of the hearing. On 28 September 2021 the hearing (by video link because of the restrictions imposed by the pandemic) was adjourned to 15 November 2021 for a 5 hour hearing at which 5 witnesses gave evidence. The DL was issued on 20 November 2021.

Request for Reconsideration

5. The application for reconsideration is dated 11 December 2021.
6. The Respondent's reply is dated 21 December 2021.
7. The grounds for seeking a reconsideration are that the decision was irrational. In summary they are as follows:

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- Ground 1. The panel implied that it would not have directed release if a place had been available at a Category C prison for the Respondent between the date of the hearing and his conditional release date (CRD). Decisions must be based on the assessment of risk rather than the availability or otherwise of programmes or regimes within the prison system.
- Ground 2.
 - i. The panel's decision conflicts with the recommendations of the professional witnesses, thus there was no "evidence" that his risk could be safely managed in the community.
 - ii. The panel itself described the Respondent as 'rigid' and 'mistrustful'.
- Ground 3. The DL seems to rely solely on the availability of a place at designated premises from January 2022 and other licence conditions rather than taking account of the other factors concerning the risk that he may inflict serious harm on members of the public between then and May 2022. There was considerable evidence pointing away from a direction for release:
 - 1. He had not been open and honest with professionals.
 - 2. He had not been forthcoming about his future plans.
 - 3. His condition of mild autism means that he is ripe for "re-radicalisation".
 - 4. Members (not blood relatives) of his family whose house had been searched by Counter-Terrorism officers, may represent a risk factor not properly considered by the panel.
 - 5. His previous offending had been masked for a time by his ability to use protected IT which made tracing his activity very difficult. There is no condition on the licence which properly addresses the possibility that he might do so again.
- Ground 4. The recent addendum security report (pp532-3 of the dossier) which contained material relevant to the Respondent's potential risk was not mentioned at the hearing and the Respondent should have been questioned by the panel about its contents.

Current parole review

- 8. The case was referred to the Parole Board by the Applicant on 15 September 2020. The direction to release was made by a 3-member panel – 2 judicial members and a psychologist member. Both the Respondent and the Applicant were represented at the hearing. His Conditional Release date (CRD) is in May 2022 and his Sentence Expiry date is in February 2023.

The Relevant Law

Parole Board Rules 2019

- 9. Under Rule 28(1) of the Parole Board Rules 2019 the only type of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. This is therefore an eligible decision.

Irrationality

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10. 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."

11. 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.

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

13. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontroversial and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

14. 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.

15. In summary the Respondent submits:

Ground 1.

- i. The panel's questioning of the COM's preference for the Respondent to be transferred to a Category C prison and its comment about the practical reality of this being achieved before the CRD cannot be

translated into a conclusion that if there had been a guarantee of such a place the decision would have been different.

- ii. The panel had no jurisdiction to consider questions of transfer of this kind – merely to decide whether in its opinion the Respondent represented a significant risk of serious harm.

Ground 2.

- iii. The panel’s reasoning in the DL is clear and rational.
- iv. It is clear that the panel carefully considered the evidence both written and oral. This is borne out by the length of the DL which summarises that evidence clearly.
- v. The DL clearly refers to the work already carried out by the Respondent in custody and to a joint psychologists’ report from 2020 which set out the understanding the Respondent had gained from his previous attitudes and behaviours and his need to reflect carefully before expressing religious views in ways which might be misinterpreted. Similar views were expressed by the Imam who had given evidence. The DL rationally applied those pieces of evidence to its decision-making. The previous witnesses whose evidence was clearly accepted by the panel made it clear that it was not the religious beliefs of the Respondent but the way in which he had expressed them when committing the index offences which was objectionable and potentially dangerous.
- vi. In short it is clear that the panel had weighed the evidence and recommendations of the COM, psychologist and POM against the evidence of the two earlier psychologists and the Imam and the Respondent himself.
- vii. The panel’s reasoning was clearly based on the combination of the clear change in attitude of the Respondent combined with the belief that were there to be any significant shift in that Respondent’s attitude it would be observed and could be dealt within the umbrella of the stringent proposed licence conditions – and any further conditions then thought necessary - or by recall.

Ground 3.

- i. The focus in the Applicant’s grounds on the designated address is misconceived. It is clear that the panel, while considering such an address to be an essential ingredient of licence conditions considered – and imposed - many other conditions and had well in mind the close cooperation between the various agencies with some degree of oversight of the Respondent if released.
- ii. The question of the Applicant’s possible isolation and/or the seeking out of unsuitable associates was fully ventilated at the hearing. It was an issue ventilated by both parties in their closing written submissions. The absence of a specific reference in the DL cannot render the decision irrational.
- iii. The suggestion within the grounds that the Applicant was being deceitful about his knowledge of when or whether his wife and children will return the UK is unjustified. He clearly indicated that he does not know when they may and in any event expressed the hope that he could re-establish himself in the community on his own before they joined him.



- iv. The possibility of his being "isolated" in the community and thus open to undesirable influences was also ventilated at the hearing
- v. The question of "mild autism" or "autistic traits" was also fully ventilated both in the dossier and at the hearing. It is clear that whether his mindset is, or is not, within the autistic spectrum he is a person who makes up his own mind for himself.
- vi. The search of the Respondent's family members' home by police officers revealed nothing. The issue was fully ventilated at the hearing. It was therefore an irrelevance by the time the DL came to be written. No doubt that was the reason that no condition relating to that address was sought in the proposed licence conditions.
- vii. The absence of a licence condition concerning possible passwords to internet-enabled devices is covered by the condition concerning the requirement to reveal his possession of any such device. Were he to be in possession of such a device and to refuse access to it by the police he could be prosecuted in any event and be liable to recall.

Ground 4. The panel did consider the material referred to in the recent Security Report. It had been the subject of submissions made on the Respondent's behalf in advance of the hearing. It is clear from page 11 of the DL that the panel had considered it and its possible relevance.

Discussion

16. The hearing, unusually, was attended by representatives for both the Applicant and the Respondent, both of whom made representations to the panel in writing after the hearing. It is worth setting them down in summary before turning to the criticisms made of the DL.

17. The Applicant submitted in summary:

- a. That the professional consensus was that as at November 2021 the Respondent had not demonstrated sufficient change in his thinking to justify a direction for release. The three report writers suggested that a period in Category C conditions between now and the CRD would assist in the process of reducing his risk.
- b. That the Respondent's continuing reluctance to discuss family and personal relationships provides one example of this.
- c. That since in any event the Respondent will be subject to licence conditions for 9 months following his CRD May 2022 that period would provide the necessary transitional control of the Respondent's behaviour and the opportunity for him to build a closer working relationship with his COM.
- d. The fact that his risk has been assessed as "high" to members of the public, known adults and children and that there is no support from the professionals for release should mean that the panel should be 'cautious' about recommending release.

18. The Respondent's legal representative submitted in summary:

- a. That the Respondent's submissions should be considered together with the written submissions made in advance of the hearing.
- b. That the author of the assessment of risk for extremist offenders said in the report prepared for the panel: "*the current assessment does not indicate that*

[the Respondent] would imminently engage with an extremist group or cause or intend to commit a terrorist offence imminently."

- c. That thus far the Respondent had engaged with his sentence plan targets by engaging in programmes and that all witnesses acknowledged the progress he had made as a result. He was said by one witness not to be an impulsive individual who realises that such action would further imperil his family life.
- d. There was no evidence before the panel of any attempts by the Respondent to "radicalise" others. The Imam who gave evidence to the panel was clear that in his views the Respondent's views were not "extremist".in particular in respect of "Jihad".
- e. It was now clear to the Respondent that the expression of views to others whether online or otherwise, even if not intended to encourage the causing of serious harm to others, could be misinterpreted.
- f. The Respondent was clear that he wishes to minimise contact with other people on release and to keep his COM informed of any contacts.
- g. The Respondent would have the support of family members, and increased contact with his family (they are currently abroad).
- h. His commitment to the two programmes while in prison meant that he had already been subjected to close scrutiny and was prepared to be so scrutinised on release.

19.The DL is extensive - running to 15 pages, the last four of which contain the 28 licence conditions imposed. This no doubt reflects the length of the hearing and the careful examination of the issues by the panel.

20.I have focused on the paragraphs which set out the extent of change (pp4-10), the grading of the risk factors within the dossier and the evaluation of the effectiveness of plans to manage risk (p10-11), and the Conclusion and decision (p11).

21.I have considered the grounds/sub-grounds submitted individually and as whole.

22.As to Ground 1 while it is clear, as the Applicant submits, that the comment concerning the availability of Category C conditions was perhaps superfluous and thus unhelpful, I accept the submission on behalf of the Respondent that the comment was just that and not a/the deciding factor in the ultimate decision.

23.As to Ground 2 I accept the submissions of the Respondent. This was a lengthy, clearly argued and reasoned decision following a lengthy hearing in which the panel had had the assistance of two legal representatives both at and after it.

24.As to Ground 3 again I accept the Respondent's submissions.

25.As to the '*recent security report*' – Ground 4 - this referred to something that had occurred at the latest in June 2019 and possibly earlier. It seems that there was no further information available on that topic since then and the more recent reports contained no hint of any apprehensions on that score.

26.In the end, as the DL makes clear, the panel's decision was confined to an assessment of the risk of serious harm to members of the public during the months to May 2022. As a consequence, for the panel to conclude that release was inappropriate it had to consider that that risk was "significant" during that period. It

clearly concluded that – in particular with the extensive licence conditions proposed and implemented – that for the period in question that risk was not significant and that any sign that it was becoming significant would become clear in time for appropriate action to be taken. It is clear too that the panel considered the index offending, the Respondent’s history, his character and mental attributes and concluded that although a self-willed, possibly slightly autistic, individual who will ultimately make his own decisions whether to act or desist from acting in a particular way, the risk that he would do so in the next few months until his release – in particular when under the close supervision of the various agencies involved and living and sleeping at designated premises - to result in the conclusion that for that period he would not represent a significant risk of serious harm to the public.

Decision

27. Having considered the helpful submissions from both parties on the question of “irrationality” both generally and as the principle applies to decisions by Parole Board panels, I have concluded that while a decision the other way could very likely have been justified as rational, on the evidence it is impossible – using the criteria set out in the cases above - to characterise this particular decision as irrational. Accordingly, the application for reconsideration is refused.

Sir David Calvert-Smith
23 December 2021