



Case No: AC-2024-LON-003789

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

Neutral Citation Number: [2024] EWHC 3390 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

(Heard remotely via MS Teams)

Tuesday, 3 December 2024

BEFORE:
RICHARD CLAYTON KC
(sitting as a Deputy Judge of the High Court)

BETWEEN:

THE KING
(on the application of **Roger Khan**)

Claimant

-and-

SECRETARY OF STATE FOR JUSTICE

Defendant

MR J BUNTING KC and **MR A SPERLING** (instructed by SL5 Legal) appeared on behalf of the Claimant.

LORD MURRAY (instructed by Government Legal Department) appeared on behalf of the Defendant.

JUDGMENT

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THE DEPUTY JUDGE:

1. In this case, the claimant challenges the defendant's decision made on 15 November 2024 to refuse him early release from prison as being unlawful and in breach of article 8 of the Human Rights Act.
2. This is, in fact, the third decision made by the defendant to refuse the claimant early release and came before me as a rolled-up hearing on 22 November 2024. At that hearing, I granted permission and quashed the decision. I now give reasons for that decision and, indeed, earlier today I approved a draft order sent to me by the parties.

Factual background

3. In 2011, the claimant was convicted of attempted murder and sentenced to 30 years' imprisonment. He is due to be released on licence on 10 November 2025 but has never accepted his conviction. He remained detained at HMP Standford Hill, an open prison, following his transfer in February 2023, when he has been released into the community on temporary licence for a substantial period since the summer of 2023.
4. The claimant suffers from a number of complex health and medical needs: first, severe chronic obstructive pulmonary disease with a very abnormal lung function and severe emphysema; secondly, intestinal lung disease, a progressive fibrotic lung disease with clear progression since 2017, despite treatment; thirdly, respiratory failure which requires supplementary ambulatory oxygen; and, fourthly, chronic kidney disease.
5. Unfortunately, he is terminally ill with a life expectancy of less than three months. The claimant is at immediate and real risk of death due to a risk of infection and the need for critical life-maintaining equipment which is not always prioritised in prison due to the circumstances I discussed in some detail with counsel during the hearing.
6. On 12 July 2024, the defendant refused the claimant's first application for early release on compassionate grounds. A letter from Dr Katherine Myall dated 24 May 2024 also confirmed that his illness would shorten his life expectancy. The claimant is permanently wheelchair bound and is dependent on an oxygen tank. His application was also supported by medical evidence from Dr Laura-Jane Smith, a consultant

respiratory physician, dated 9 October 2024 which estimated his life expectancy to be months and not years.

7. On 21 October 2024, one of the defendant's officers submitted a second application on behalf of the claimant for early release on compassionate grounds. The application was supported by the prison governor who said,

"The diagnosis for [the claimant] is of a life-limiting condition that is likely to continue to deteriorate [and could potentially be accelerated by remaining within a custodial setting]. Given current age and fragility I believe a release on compassionate grounds are justified as the risks posed can have a suitable risk management plan within the community and current location within an open prison with access to the ROTL has evidence that these risks can be managed within the community".

8. On 23 October, the defendant's case manager set out in a letter that the claimant's case for early release was borderline and recommended refusal. On 24 October 2024, the Deputy Head for Reconsideration and Specialist Casework in the public protection casework section, again, recommended that the claimant's application be rejected.
9. Chamberlain J directed that the parties exchange skeleton arguments, in anticipation of an urgent hearing for the Claimant's application for interim relief. However, the defendant stated that she would give fresh consideration to the application and on 30 October 2024 McGowan J by consent ordered that the first application be withdrawn, that the hearing scheduled for 30 October 2024 be vacated and the defendant pay the claimant's costs.
10. On 7 November 2024 the claimant's solicitors issued a second set of judicial review proceedings to challenge the decision made on 30 October 2024. On 8 November 2024, Dr Smith sent a letter to the claimant's solicitors outlining the medical provisions that could and could not be provided within the prison. She supported his application and concluded that a refusal to allow his early release was denying the claimant optimal care for his severe life-limiting disease and denying him optimal end-of-life care.
11. On 8 November 2024 Kerr J ordered expedition and a one day rolled up hearing which was listed to be heard before me on 19 November 2024. However, on 15 November 2024 at 2pm the claimant's solicitors wrote to indicate that the defendant had made a new third decision refusing to release the claimant. As a result, the claimant obtained

legal aid to judicially review this third decision and the Court took steps to relist this rolled up hearing before me on 22 November 2024.

The legal framework

12. The power to release prisoners on compassionate grounds is contained in section 248 of the Criminal Justice Act 2003. Section 248(1) states:

"(1)The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds".

13. In relation to section 248, the claimant makes two submissions. First, he submits that the courts have specifically warned against fettering discretion in this kind of case; in the *Attorney General's Reference (No. 69 of 2013)* [2014] 1 WLR 3964, Lord Thomas CJ stated at paragraphs 32 and 33 that the Secretary of State has to take account of all exceptional circumstances relevant to the release of a prisoner on compassionate grounds and observed that it is a term with wide meaning that can be elucidated, as the common law develops on a case-by-case basis.
14. The claimant also relies on *R(Neophytou) v Governor of HMP Berwyn* where the learned Judge applied authorities where wide interpretations were given to both the words "exceptional" and "compassionate". The meaning of "exceptional circumstances" discussed in *Neophytou* was propounded by Lord Bingham CJ in *R v Kelly* [2000] QB 198 at 208, where he said,

"We must construe exceptional as an ordinary familiar English adjective and not as a term of art. It describes a circumstance which is such as to form an exception which is out of the ordinary course or unusual or special or uncommon. To be exceptional, A circumstance need not be unique or unprecedented or very rare, but it cannot be one that is regularly or routinely or normally encountered.

15. The meaning of "compassionate grounds" was considered by Stanley Burnton J, as he then was, in *R (A) v Governor of Huntercombe Young Offenders' Institute* [2006] EWHC 254 (Admin) in the context of a similar provision in section 102(3) of the Power of Criminal Courts (Sentencing) Act 2000. Stanley Burnton J said at paragraph 36:

"The Governor thought that compassionate grounds would only exist if there was serious or terminal illness or something of equal severity. I do not think that compassion arises only in the cases of death or illness. There are compassionate grounds whenever there is pain or suffering or distress or misfortune".

16. The defendant did not contest those submissions. I, therefore, accept the claimant's submissions in relation to the proper construction of section 248.

The policy

17. The Policy in question here is the early release on compassionate grounds policy. The proper approach to construing policy was set out in *Tesco Stores v Dundee City Council* [2012] PTSR 983, where at paragraph 19 Lord Reed discussed policy in the planning context:

"That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1WL 759, 78 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean".

18. I next turn to the terms of the Policy itself. The first aspect of the Policy Framework I want to refer to is its "purpose", and the relevant passages begin at 1.4:

"The fundamental principles underlying the approach to ERCG are:

(a) The early release of the prisoner will not put the safety of the public at risk. In all applications for ERCG, the

Secretary of State must be satisfied that the prisoner can be safely managed in the community.

(b) There is a specific purpose to be served by early release. There must be a clear reason to consider the early release of the prisoner before they have served the sentence imposed on them by the sentencing court.

(c) A decision to approve ERCG will not be based on the same facts that existed at the point of sentencing and of which the sentencing or appeal court was aware."

19. I then turn to the specific guidance which applies to prisoner's health which states in these terms, at para 4.17:

"Applications may be made where the prisoner is incapacitated or has health conditions such that the experience of imprisonment causes suffering greater than the deprivation of liberty intended by the punishment. Conditions could include paralysis, those who have experienced severe strokes, respiratory illnesses [like the claimant] cardiovascular disease and different types of dementia. This is not an exhaustive list but is intended to provide examples of the types of illness that may be considered to meet the criteria for ERCG.

4.18: ERCG may also be considered for prisoners suffering from a terminal illness who are in the last few months of life and medical advice provides that the prisoner would be better accommodated at a hospice/hospital or in some cases, a domestic setting providing the necessary care can be provided".

20. In relation to the policy, the claimant submits there is nothing in the guidance to limit the possibility of release to the adequacy of medical treatment in prison and criticises the defendant for suggesting that is the position. I note, however, that, during his oral submissions, the defendant sought to develop the relevance of prison treatment in slightly different terms. The defendant submitted that in relation to the policies, the court must have regard to context and made two particular submissions: first, that the policy should be construed in the light of the very few prisoners who were in fact released in accordance with that policy and, secondly, that the respect to be accorded to the sentencing function of the criminal courts underlines the exceptional character of the policy in question.

21. In submitting that the policy should be interpreted narrowly, the defendant's counsel then took me to the relevant material and there is no doubt that the numbers of individuals released under this policy are few in number.
22. In this context, however, I derive assistance from the approach that Lord Bingham took in *R(West) v Parole Board* [2005] 1WLR 350. In that case a similar approach was advanced by the Government to justify the very few oral hearings before the Parole Board. One issue before the House of Lords was the fairness of the Government's failure to allow all prisoners oral hearings. In that context, Lord Bingham said at paragraph 66 as follows. First, said Lord Bingham,

"The figures we have been given appear to me to indicate there is a longstanding institutional reluctance on the part of the Parole Board to deal with these cases orally. It would not be surprising if a consequence of that reluctance was an approach, albeit unconscious and unintended, which undervalued the importance of any issues of fact that the prisoner wishes to dispute. If the system is such that oral hearings are hardly ever used, there is a risk that the court cases will be dealt with by making assumptions. Assumptions based on general knowledge and experience tend to favour the official version as against that which the prisoner wishes to put forward. Denying the prisoner the opportunity to put forward his own case may lead to a lack of focus on him as an individual. This can result in unfairness to him however much care the panel members may take to avoid it".

23. As I understand it, Lord Bingham's view is that reliance on figures alone does not provide a reliable indicator of the proper interpretation of the policy in question. I, therefore, reject the defendant's first submission as to how the policy should be interpreted.
24. Secondly, the defendant submitted that the respect to be accorded to the sentencing function of the criminal courts underlines the exceptional character of the way in which the policy should be applied. She submits that the effective interfering with the custodial sentence imposed by the court meant that the threshold for release under the

policy is intentionally very high. However, that submission was specifically rejected in the case to which I have earlier referred. In *Neophytou* at paragraph 7, the court said that

"At the material time the Secretary of State had a relevant policy, *Early Release on Compassionate Grounds (ERCG)*, ('the Policy'), which was implemented on 13 May 2022 and re-issued on 16 August 2023. The Policy is addressed to HM Prison & Probation Service ... [et cetera] ... The Policy does not, however, affect ... the legal meaning of 'exceptional circumstances' or 'compassionate grounds': see *R (Bruton) v Secretary of State for Justice* [2017] 4 WLR 152, at [42]".

25. The defendant did not seek to address me specifically to the effect that the reasoning in *Neophytou* was plainly wrong (see *R v Greater Manchester Coroner ex parte Tal* [1985] Q.B. 67) or to the effect that, although puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of coordinate jurisdiction unless there is a powerful reason for not doing so (see *Willers v Joyce (No 2)* 2018] A.C. 843). Indeed, the defendant advanced no grounds for contending that the reasoning in *Neophytou* was incorrect. Accordingly, I reject the defendant's submissions concerning how the policy should be construed. I, therefore, approach the proper interpretation of the policy by focusing on the language itself, holding that the language is to be interpreted and purposively in a broad sense and certainly not to be construed like a statute or a contract.
26. I next turn to the question of the application of these legal principles of the facts of this case.

The application of the policy

27. The defendant submitted at the outset that the claimant failed to make out a clear purpose for his release. It was common ground that a number of additional issues arose: whether the defendant fettered his discretion, as the claimant alleged, whether the defendant's decision was irrational, whether the defendant breached article 8,

whether there was a risk that the claimant's release was a risk to the public and whether the reliance on the adequacy of medical care was determinative of exceptional release.

28. To a substantive extent, these grounds of challenge overlap and my conclusion that a judicial review should be granted reflects the cumulative reasons I give in this judgment. In particular, I would stress that I have carefully considered all of the parties' submissions (both written and oral) and the fact I do not refer to a specific submission in this judgment should not be understood as meaning that I have not considered it.

(1) Clear purpose

29. The defendant submits that there needs to be a clear reason to be released from the sentence of the court. The specific purpose, she submits, lacked clarity and required her to make assumptions based on available evidence. The defendant complains in relation to the application of 14 November 2024 where the claimant had confined himself to saying he would benefit from spending his final weeks with his family with the support of specialist care only available in the community.
30. The claimant, however, submits the purpose of the release is quite clear, that the claimant should die with dignity in the family home, get better care and avoid the deficiencies of the health system in the prison.
31. In my judgment, the purpose of the claimant's release is readily apparent and I reject the defendant's submission to the contrary.

(2) Whether the defendant fettered her discretion

32. The claimant's submission focused on the view that the decision letters assumed that inadequate medical facilities in prison were a prerequisite for granting early release. The first set of reasons were those given in the proforma document which Ms Goodrham prepared and considered which addressed the adequacy of medical care. The second set of reasons in the decision letter sent to the claimant solely focused on the adequacy of medical care in prison. It did not consider whether medical care would be better in the community or whether releasing the Claimant would allow him to die with dignity. Nonetheless, this was said to be determinative of the decision. The third set of reasons appears in Ms Goodrham's witness statement and indicates that the

decision maker considered the adequacy of medical care in the prison as being a determinative factor.

33. The claimant submits that in her witness statement Ms Goodrham misstated what the policy, in fact, said, and, with respect, I agree that submission. Secondly, she treated that issue as key to the decision the defendant reached.
34. Furthermore, in my judgment, any comparison of the medical care provided inside and outside the prison is, any event, an issue is, which is outside the scope of the defendant's policy. In my judgment, making a comparison of medical care within and without the prison is not a factor which the policy in fact embraces. Accordingly, I hold that the defendant's approach fettered her discretion and took account of an irrelevant consideration.

(3) Whether the decision was irrational

35. I begin my consideration of this issue by addressing the legal principles to be applied to a rationality challenge. It was common ground that the correct test was that propounded by Saini J in *R (on the application of Wells) v Parole Board* [2019] EWHC 2710 (Admin). In that case, Saini J said at paragraph 31:

" A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?

32. 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 regard 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".

33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: 'no reasonable body could have come to [the decision]') but it is preferable in my view to approach 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?

34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.

35. I should also emphasise that under the modern context-specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the Decision: see Judicial Review (Sixth Edition), Supperstone, Goudie and Walker at para.8.12".

36. The next issue I should consider is how these principles are to be applied to the facts in the case before me. Here, we are concerned with a series of three refusals by the Secretary of State culminating in the final third decision which is subject to this challenge.
37. The claimant submitted that, where a decision is taken in the face of an earlier legal challenge, the court will examine that later decision with particular circumspection. The claimant relies on two particular authorities in support of his submission: first, pointing to the Court of Appeal decision in *Carlton-Conway v London Borough of Harrow* [2002] EWCA Civ page 927. That was a rationality challenge to the decision of a planning officer. After the claim was brought, the planning officer submitted joint reports for a decision by the planning committee. The committee granted the application. The submission was made that no relief should be granted because the planning committee had carried out a first decision and approved the decision. However, the Court of Appeal rejected this approach. It held there was no evidence of improper purpose but just a risk of it, but, nonetheless, quashed the decision.
38. The defendant, on the other hand, submits that this application applies to a more rigid process in planning and the appellant guidance which cannot be read across directly to the particular context which I am now considering.
39. The second case to which the claimant referred was the well-known immigration case of *R v Secretary of State for the Home Department ex parte Turgut* [2001] 1 All ER 119. *Turkoglu* was a pre-Human Rights Act rationality challenge to a decision made to return an immigrant to Turkey. By the time the case came before the Court of Appeal, there were four decisions coming to the same conclusion. The leading judgment was given by Simon Brown LJ, as he then was, and he addressed the relevance of this issue

at 729E. In his view, the breadth of deference to be granted to a decision maker is narrow when the context is human rights related, where the court has access to all the same information as the decision maker had and where there is a risk of having rationalised the decision to maintain a pre-existing stand.

40. The claimant further submitted that the reality of this case is that those responsible for defending the earlier decisions, which the defendant conceded, were directly involved in the third decision and their involvement called into question the lawfulness of that later decision.
41. In my judgment where a fresh decision taken in the context of contesting an ongoing legal challenge, this requires the court to look upon that decision with circumspection. I would, however, emphasise that a circumspect approach is only a starting point and the defendant may well be able to rebut that presumption by providing persuasive and cogent evidence to the effect that the final decision made in the context of a series of decisions is, nevertheless, thoroughly, properly and independently reasoned. In my judgment, however, the defendant on the facts of this case has failed to rebut that initial starting point.
42. On the other hand I reject the claimant's submission that, where there is a series of decisions involving prior involvement of a small team comprising four individuals, their earlier participation in the decision making process can render the final decision unlawful. The structural consequence of using specialist small teams to facilitate decision making in particular contexts cannot, in my judgment, in and of itself, render the decision unlawful.
43. I now turn to the claim that the defendant's decision on its facts was irrational. The claimant submitted that Ms Goodrham's witness statement is difficult to understand. As indicated above, the contemporaneous decision is in proforma form. Ms Goodrham states that the permission bundle gave particular attention to particular witness statements, referring to the bundle lodged in support of the second judicial review claim, especially, those documents flagged as essential reading. The claimant also submits that approach was inconsistent with her email to Polly Churcher, although it seems that in her decision letter that section was removed. However, in her witness statement (supported by her statement of truth), Ms Goodrham says something

different- that she was not consider the second decision refusing the claimant early release: which she seeks to justify on the basis that any consideration by her of that second decision might create a risk of apparent bias and imperil her independence.

44. In these circumstances I have concluded that limited weight should be given to the reasons advanced in Ms Goodrham's witness statement and any margin of discretion that should be accorded to her must be narrow. In any event, in my judgment, the defendant's conclusion was irrational for the reasons I have discussed in paras 47 and 48 below, such that there is an unexplained evidential gap and/or legal leap in her reasoning which fails to justify the conclusion she reached.

(4) Whether the defendant breached article 8

45. The defendant does not dispute that her decision interfered with the claimant's article 8 rights. The only issue that I have been asked to determine is whether the interference is disproportionate. Applying the structured and rigorous proportionality test established, for example, by Lord Sumption in the *Bank Mellat* case, [2014] AC 700 para 20, I find that the defendant's interference was disproportionate.

(5) Whether the claimant's release was a risk to the public

46. The claimant next submits that the defendant's decision on risk was inconsistent, unfair and irrational. The claimant submits that first decision concluded the risk could not be managed in the community. The claimant challenged that decision as irrational. He submits that the Secretary of State implicitly accepted that and conceded this issue in the second decision, in other words that the Secretary of State's position accepted that the claimant's early release would not put the public at risk in that second decision. The claimant emphasises that the defendant conceded this point in the second decision but not in the first or third decision.
47. Despite the vigorous and powerful oral submissions the defendant makes, I have concluded that the defendant's stance towards the claimant's release in relation to the sequence of decisions she made was profoundly unsatisfactory. The defendant appears to have failed to treat like with like, appears to have acted unfairly by failing to alert the claimant in advance of an adverse criticism she proposed to make when the point appeared not to be in issue between the parties, appears to have breached the public law principle of consistency and amounts to an irrational decision because it contained

unexplained evidential leaps or legal gaps in its reasoning when purporting to find that the claimant posed a risk if he was now released, despite his very poor state of health.

48. In the final analysis, however, the defendant's position cannot stand because Ms Goodrham states in her witness statement that she read the very material lodged in the second application which concerned the second ERCG in which the defendant conceded there was no risk in the community before making a decision which reopened that question. In other words, I take the view that her evidence, taken as a whole, makes the position she has adopted about the three decisions unsustainable. Before making the third decision, Ms Goodrham had, in fact read the two previous decisions and, with respect, it is plain that the defendant conceded the point in the second decision but purported to reverse this finding in third decision, without any prior indication that she proposed to do so.

(6) Whether the reliance on the adequacy of the medical care was determinative of the exceptional release

49. The claimant makes the further submissions to the effect that the defendant's reliance on the adequacy of the medical care was determinative of the exceptional release. The expert evidence from Dr Myral in May 2024 was that the claimant had months to live. That letter recorded a direct request from the prison healthcare team in the claimant's prison which actively supported his early release. The claimant's own evidence supported early release and none of that was disputed by the defendant. The claimant alleged that his oxygen treatment in prison was insufficient, that other conditions were unable to be managed in prison, that the prison transport was unreliable, that his specialist recommended a seven week, five day a week out-patient programme in 2023 and this was not provided, that he was reliant on a radio and that he could not use the radio if he was out of breath or otherwise unconscious, that he could receive care from his partner and sister-in-law in the community, that he cannot fully isolate himself in prison and has to go to healthcare, which is a full room, and in that respect he was positively supported by two further witness statements which the defendant failed to mention in the decision, namely those of the claimant's partner, Mary, and Emily Bolton.

50. Against that background, there was expert evidence given in the form of two letters from the King's College Hospital expert, Dr Laura-Jane Smith. Large parts of that evidence were, in fact, accepted by the general practitioner on whom the decision maker relies, Dr Rafiq. In any case, Dr Rafiq's evidence, in my judgment, is inadequate for the purposes of giving expert evidence for a number of reasons: he never met or assessed the claimant, he never worked at the claimant's prison, he was not a specialist and he, in fact, accepted that incarceration was life threatening.
51. In my judgment, the complete failure to consider the undisputed medical evidence about the deficiency in the prison healthcare provision, still less to provide any reasons for rejecting it, leaves the court in the position that there are unexplained evidential gaps in the decision. The evidence, with respect, plainly and obviously compels a different conclusion, the decision, accordingly, is therefore irrational and disproportionate.

Conclusion

52. Accordingly, for all these reasons, I grant the claimant permission and judicial review of the decision. I also grant relief and have awarded that relief in the terms I approved in the draft order sent to me earlier today,
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