

[2022] PBRA 123

## Application for Reconsideration by Akbar

### Application

1. This is an application by Akbar ("*the Applicant*") for reconsideration of a decision of the Parole Board dated 14 July 2022 following an oral hearing on 15 June 2022. The decision 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, (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 dossier, now consisting of 891 pages including the decision, the application for reconsideration dated 4 August 2022 and the Secretary of State's reply dated 22 August 2022 supplemented by an email dated 23 August 2022.

### Background

4. On 30 April 2007 the Applicant was sentenced to life imprisonment for conspiracy to cause an explosion likely to endanger life or cause serious injury to property. The minimum term before release could be considered was set at 17½ years less the time he had spent on remand. This minimum term expired on 29 September 2021.
5. The Applicant was one of a group who planned to carry out terrorist attacks in public places using improvised explosive devices. He was described by the sentencing judge as a committed terrorist, believing in violence to the innocent and unsuspecting to achieve political and ideological aims; and as being "*resourceful, intelligent and disturbingly devious*". He had been brought up in the UK from the age of 8 with his family; he had achieved good A level results and gone to university. It appears that he was radicalised after leaving school. He was aged about 20 when the index offence was committed.
6. While he has been in custody the Applicant's conduct has been excellent. He has undergone a range of interventions to challenge his criminal conduct and address his risk. He is now 39 years old. He has long since accepted responsibility for his criminal conduct and ceased to express extremist views. All the professionals qualified to assess risk took the view that his risk could be safely managed in the

UK by the proposed risk management plan. The panel accepted that his risk could be safely managed in the UK.

7. However, the Applicant is not a UK citizen. He accepts that he is a foreign national prisoner ("an FNP") liable to deportation. The Secretary of State for the Home Department ("the SSHD") has served a deportation order on him for the country of which he is believed to be an established citizen: I will call this for convenience the "receiving state". The Applicant has not challenged the deportation order; he now has no right of appeal against it. His family retain links to the receiving state and he has put forward plans to cater for the eventuality that he will be deported and live there.
8. Although it is always a matter of discretion for the SSHD whether to enforce an order for deportation, it appears likely that if the Parole Board direct release the Applicant will be deported to the receiving state. On 13 May 2022 the Parole Board was informed that the Foreign Commonwealth and Development Office ("the FCDO") had agreed to his return to the receiving state. It was said that the receiving state was facilitating his emergency travel document and *"therefore, they do not see him as a threat to [the receiving state's] national security and are content with him returning"*.
9. There is a scheme – known as the TERS scheme – through which the Secretary of State for Justice ("the SSJ") may authorise removal of an FNP whose tariff has expired without a direction from the Parole Board. The scheme is administered for the SSJ by the Public Protection Casework Section ("PPCS"). I will have to say more about this scheme later. The Applicant made an application for removal under this scheme. However, on 13 June 2022 PPCS refused the application. It stated that it had taken into account the index offence in assessing suitability for removal under TERS and refused release on the grounds that *"approving your removal to [the receiving state] with a lack of monitoring would cause the public to lose confidence in the scheme's ability to protect the public from your remaining risk"*; and *"the [SSJ] would be seen to authorise a removal in the absence of the Parole Board directing that you meet the test for release ... This decision could be heavily criticised for not ensuring that your risk is considered manageable and the subsequent impact this could have on the public"*.
10. The panel declined to release the Applicant because the panel considered that the Applicant's risk to the public would not be manageable if he was deported to the receiving state.

### Request for Reconsideration

11. The application for reconsideration is dated 4 August 2022 and is drafted and signed by his counsel. There are two grounds of appeal supported by detailed argument running to some 17 pages. In summary, the grounds are as follows.
12. Ground one. The panel proceeded upon the irrational factual assumption that the SSHD would remove the Applicant to the receiving state where to do so posed a risk to the safety of the public (whether in the UK or in the receiving state). The only rational conclusion available to the panel was that the Applicant would not be removed in those circumstances, which would have obviated the need to consider

the risk to the public in the receiving state. The panel should have given effect to its assessment that the Applicant's risk could be managed on licence in the UK by directing his release in the UK.

13. Ground two. The panel's assessment that the Applicant's removal to the receiving state would present an unacceptable risk to the public outside the UK was irrational and arrived at in a manner which was procedurally unfair for the following reasons, which are relied on individually and cumulatively.
- a. The effect of its approach was to heighten the statutory release test as it applies to an overseas jurisdiction. The panel was in effect seeking parity of parole-type arrangements in an overseas jurisdiction in order to satisfy the statutory release test. This was an irrational approach.
  - b. The panel gave no or negligible weight to the means available to authorities in the receiving state to monitor and manage any residual risk which he may have posed there. It was irrational to do so.
  - c. The panel made a number of factual conclusions – including in respect of matters critical to the panel's assessment of his risk in the receiving state – in the absence of any evidence in support of those factual conclusions. This was irrational and procedurally unfair.
  - d. The panel gave no or no negligible weight to the important protective factors available to the Applicant in the receiving state. This was irrational.
  - e. The panel placed significant weight on the evidence of a psychologist which she accepted was outside her expertise and which involved opinions expressed without proper evidential foundation.
  - f. The panel wrongly failed to seek further evidence – which it had directed to be provided – from the Secretary of State for Foreign, Commonwealth and Development Affairs, concerning the likely arrangements for the supervision of the Applicant in the receiving state, including how the authorities in that state would respond in the event that any concerns arose regarding his conduct indicating a heightened risk. It was irrational and procedurally unfair to do so.

## Current parole review

### (1) Case Management and hearing

14. The Applicant's case was referred to the Parole Board on 24 December 2020. It was referred only to consider the question of release after expiry of the minimum terms; as a terrorist prisoner the Applicant was not eligible for transfer to an open prison.
15. In the light of ground 2(f) of the appeal I will summarise the attempts made by the panel to obtain evidence from UK government sources about likely arrangements for the supervision of the Applicant in the receiving state. The panel sought such information in a series of directions beginning on 6 December 2021; initially its direction was addressed to the Community Offender Manager ("the COM"), asking the COM to include, if possible, exploration with relevant agencies and consideration of any diplomatic assurances regarding monitoring or control. No adequate answer was provided; and after a hearing was adjourned on the day on 15 March 2022 further directions were given for reports from the Home Office the FCDO on the means available to the receiving state to monitor the risk of the Applicant following deportation. The report writers were directed to attend as witnesses.

16. The process of seeking compliance with these directions was tortuous, but the information supplied can be summarised as follows.
17. Firstly, the panel did receive on 27 May 2022 generic information as to the relevant legislation in the receiving country, said to have come from a counter terrorism police liaison officer in the receiving state. This indicated that the receiving state had anti-terrorism legislation under which a person who had at any time been linked to a proscribed organisation could be referred to local police and enforcement agencies and subjected to restrictions on such matters as travel, finances, speech and ownership of arms. It was said that such a person could be monitored to ensure identification if seeking recruitment to a governmental organisation. The information did not go beyond a description of the legislation.
18. Secondly, the panel received a reply dated 6 June from a senior lawyer working within counter-terrorism police in the UK which said that they were unable to help with the position in the receiving state. The reply suggested that the panel would be best served by approaching the FCDO:
- “who is best placed to access and provide the type of information sought, including information as to the present risk of terrorism in [the receiving state], the counter-terrorism policing measures likely to be used by [the receiving state] and the information concerning [the Applicant] which has, or will be, shared with [the receiving state]. This information, together with what is known about [the Applicant’s] present level of threat, is available to the FCDO and we suggest they are the most appropriate party to assist the Parole Board in this instance”.*
19. Thirdly, the panel received a letter dated 9 June 2022 from an employee of the UK in the receiving state concerned with immigration enforcement. This said only that a person deported by the UK would be met by in the receiving state by its law enforcement. It said that there was no current relationship between the UK and the receiving state which would allow it to predict or confirm how he would be managed by the authorities there.
20. As noted above, the case was heard on 15 June 2022 by a three-member panel. The chair was an independent member with legal qualifications and judicial experience. One co-panellist was a psychologist. The other co-panellist was an independent member. The panel had a dossier running to 855 pages, including submissions received after the hearing. The panel took evidence from counter terrorism police and probation leads, from the Prison Offender Manager, a Psychologist and the COM as well as the Applicant. Both the Applicant and the SSJ were represented. There was no undisclosed material.
21. Notwithstanding the panel chair directions for a report and witness from the FCDO, no witness attended. An application for revocation of the direction had been rejected by the panel chair. Neither the provider of the information on 27 May 2022 nor the author of the letter dated 9 June 2022 were available to be questioned. Since the hearing was by video link and telephone, it does not appear that there should have been any difficulty in a witness attending; no difficulty was suggested by or on behalf

of the FCDO. It appears that no explanation for non-attendance was given to the panel.

22. On behalf of the Applicant counsel submitted that there was sufficient evidence as to the nature of arrangements in the receiving state for the panel to be satisfied that the Applicant could safely be released there. He pointed to the evidence in the dossier, which included, in addition to the documents I have identified above, an expert report from a lawyer in the receiving state. But he also pointed to the absence of an FCDO witness; he said that whether it was necessary for the panel to obtain that evidence would depend on the view the panel took of the evidence currently available.
23. At the hearing the witnesses qualified to assess risk were supportive of release; but the Psychologist felt that she was unable to give a definitive answer as to a recommendation for release in The receiving state; and the COM, while supporting release there, expressed reservations as to the ability of family members to provide emotional support or see warning signs if he was in the receiving state.
24. It is also relevant to mention that for some time the panel chair understood that a risk assessment would be undertaken for the purposes of the TERS scheme. It emerged, however, that under the TERS scheme there was no assessment of risk in the receiving state: there were five set criteria, but none of these involved a risk assessment as such. The explanation, too long to quote in these reasons, is at pages 773-775 of the dossier. One of the set criteria was whether the removal of the prisoner from prison would undermine the confidence of the public in the criminal justice system; and this was the criterion which led PPCS to refuse the application under the TERS scheme, for reasons which I have quoted in paragraph 9 above.

## (2) The Panel's Reasons

25. The panel produced detailed reasons running to some 23 close-typed pages reviewing thoroughly the reports and evidence it received before setting out its conclusions. As noted above, the panel considered the Applicant's risk manageable in the UK but not in the receiving state.
26. The panel's concerns were related to the Applicant's likely situation in the receiving state. It considered that his proposed residence in a gated community would involve "*seclusion from mainstream society*" and that there would likely be hostility on the part of neighbours and the wider community which would impact on his ability to obtain employment, start a family, establish a peer group and find a sense of belonging. Problems of this kind were liable to activate identified risk factors, including feelings of anxiety, depression, loneliness and abandonment (paragraphs 4.1 and 4.4).
27. The panel was doubtful about the level of support which could be expected from family members and about their willingness to report any concerns to the authorities in the receiving state. The Applicant had suggested he might obtain counselling and support for desistance from NGOs in the receiving state; but the panel noted that there was no evidence of this and stated that it would be "no substitute" for the support which would be available in the UK (paragraphs 4.2, 4.3 and 4.4). The panel expressly said that it did not expect "absolute parity of parole arrangements" for an

FNP; rather that the statutory test had to be applied on a case-by-case basis (paragraph 4.7).

28. The panel rejected a submission by counsel for the Applicant that the panel should proceed on the basis that the SSHD would not deport the Applicant to the receiving state if the panel considered his risk there to be unmanageable. The panel said that the SSHD and the SSJ were not bound to accept the Parole Board's assessment that removal to the receiving state would pose an unacceptable risk; and in any event that the SSHD would not necessarily act irrationally if it removed him even if it did accept the Board's assessment.
29. The panel noted the submission of counsel for the Applicant that whether the evidence of an FCDO witness was necessary would depend on its view of the evidence presently available. It said that it considered the presently available evidence to be sufficient for consideration of the statutory release test since it perceived no inconsistency between the note dated 9 June 2022 and the evidence of Counter Terrorism police, including oral evidence. (The oral evidence had confirmed the position stated in the reply dated 6 June – see reasons, paragraph 3.18).

### The Relevant Law

30. The Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner be confined. Although the test appears to have been omitted from the box at the top of the panel's decision, and is not quoted word for word in its decision, the panel made numerous references to the "statutory test" and I consider it is plain that this is the test which it applied at the point of decision.
31. The risk to the public which the Parole Board must assess is not limited to the public in the UK but extends to the public elsewhere. The Parole Board is therefore required to assess the potential risk of an FNP in any country to which he is removed: see **Clift (R on the application of) v Secretary of State for the Home Department** [2007] 1 AC 484 (especially at para 37 per Lord Bingham) approving **R v Parole Board ex pte White** [1994] Times, 30 December.
32. The Applicant is serving an indeterminate sentence. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28 (2)(a) of the Parole Board Rules 2019.
33. As noted above, the grounds relied on are irrationality and procedural unfairness.
34. The concept of irrationality is derived from public law. The test is whether the 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". See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
35. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural

unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality.

### **The reply on behalf of the Secretary of State (the Respondent)**

36. At my specific request the Secretary of State made submissions in reply dated 22 August 2022, supplemented by an email dated 23 August 2022. I will deal with these where appropriate in the following discussion.

### **Discussion**

#### **Ground 2(f)**

37. I propose to begin with ground 2(f). It is a striking feature of this case that the panel chair sought important information in directions over an extended period of time; that the panel did not receive information relating to risk which a senior lawyer told them ought to be available; and that a direction of the panel for attendance of a witness was not met without any apparent explanation. It is particularly striking that neither the National Security Casework Team of PPCS nor the National Security Division of the Probation Service – involved by reason of the extremely serious nature of the index offence seem to have been able to foster compliance with these directions or secure the attendance of a witness.

38. Referrals concerning FNPs who are subject to deportation can raise difficult issues for the Parole Board. To make a proper assessment of risk the Parole Board will generally need information relating to risk in the receiving state. Although it is an inquisitorial body it has no investigative staff of its own: it obtains necessary information by receiving reports, especially from the COM, and by giving directions, usually to governmental organisations for further reports and evidence. The kinds of information the Parole Board is likely to need to make a proper assessment include those set out in the helpful letter of the senior lawyer dated 6 June which I have quoted above.

39. Proper risk assessment involves a joint and collaborative approach by different agencies and professionals working together co-ordinated (from the Parole Board's perspective) by the COM and PPCS. Where an FNP's risk has to be assessed in a receiving state the agencies involved are likely to include the UK's government department and agencies responsible for its work in that state, especially in relation to counter-terrorism and crime. Their cooperation is essential. In many states it will be possible to give more than generic information; there will be professionals able to make an assessment of some or all of the matters which relate to risk. If the giving of full and frank information to the Parole Board is thought to involve sensitive issues an application under rule 17 of the Parole Board Rules 2019 can be made.

40. I invited submissions from the SSJ as to what assistance the Parole Board could reasonably expect from organs of government in making such an assessment. It was submitted that it was reasonable for the Parole Board to request information; but there was no answer as to what assistance the Parole Board could reasonably expect. In general terms, the level of assistance which I consider ought to be

available is set out in the last paragraph. I accept (as the SSJ also submitted) that information might not always be available and that it will depend on the country concerned.

41. In this case it seems highly likely that there were UK personnel employed by or linked to the FCDO who could make an assessment and answer questions relating to risk: the senior lawyer thought so, and I see no reason why the panel should have disagreed with him. A professional who may have been able to do so (either alone or in co-operation with others) provided generic information for the report dated 27 May 2022 about legislation in the receiving state, but no assessment of any kind. Moreover, no witness attended. If a witness had attended, he might have been asked questions on the issues set out by the senior lawyer and other issues relating to processes and conditions in the receiving state of which the witness might have experience.
42. It is regrettably not uncommon for a panel convening for an oral hearing to find that key directions have not been complied with (although complete failure to produce a witness without explanation is in my experience very unusual). Sometimes it will be possible for the panel to proceed with the hearing and adjourn before reaching a decision to enable a direction to be complied with; it may then be able to decide the case on the papers or at an adjourned hearing. Sometimes adjournment of the whole hearing is inevitable. Usually when a hearing is adjourned compliance is achieved. In this case the panel proceeded with the hearing and decided afterwards that the information it had was "sufficient". In effect, though not in terms, it revoked its direction..
43. I have considerable sympathy for the panel, seeking to resolve a referral which was already 18 months old; but I have reached the conclusion that it was irrational and unfair not to pursue the directions for involvement of the FCDO. My reasons are as follows.
44. (1) The reason the panel gave for saying that the information it had was "sufficient" was that it "perceived no inconsistency" between the note dated 9 June and the evidence of counter-terrorism police. The counter-terrorism police who attended were from the UK; they re-iterated the position stated in the letter dated 6 June from the senior lawyer, which (as I have quoted) was that FCDO could provide information relating to risk in the receiving state. The note dated 9 June (which emanated from FCDO) provided no significant information at all. To my mind, reading these two documents together demonstrated that the panel was indeed missing valuable information; they were inconsistent in the sense that the note dated 9 June did not provide the kind of assessment which the senior lawyer said the FCDO should be able to provide. I do not think the panel's reason for saying that it had sufficient information follows from the documents it has quoted.
45. (2) Information from FCDO was, for the reasons I have explained above, key to the assessment of risk of an FNP such as the Applicant if returned to the receiving state. The panel chair had been right to seek it; the senior lawyer had been right to point to its availability; and it may either have tended to confirm or dispel doubts of the COM and Psychologist..



46.(3) In my view fairness to the Applicant also required the obtaining of this information. His counsel was also placed in a difficult position at the oral hearing by the failure to comply with the direction. He and his client had provided information about circumstances in the receiving state which might have been enough to satisfy the panel that he could be released; it was understandable for him to wish the hearing to proceed, while reserving his position. Once granted the panel's doubts about whether the Applicant's risk could be managed in the receiving state, fairness required that it pursue its direction; a fair course would have been to require a report, assess it and consider whether a further hearing was required to enable the writer to be questioned.

47.(4) The panel's reasons for concluding that the Applicant's risk could not be safely managed in the receiving state appear to centre upon its doubts as to what are sometimes called "internal controls"; it thought that his internal resolve might break down given difficulties he might face in the receiving state and he might return to his earlier frame of mind. I have asked myself whether these reasons might be said to render it unnecessary to have information from the FCDO. I do not think they do. An assessment of risk must be made in the round, having regard to external and internal controls, for they play into each other: in the end, the panel made very limited findings as to external controls, when it is possible that there will be significant controls of this kind. The professionals who gave evidence had reservations or doubts as to the position in the receiving state. It is impossible to know whether an assessment from the FCDO would have impacted on their evidence, and how.

48.I therefore uphold the application for reconsideration on ground 2(f).

### Grounds 2(a)-(e)

49.I can deal much more briefly with grounds 2(a) – (e).

50.As regards ground 2(a), I do not accept that the panel heightened the statutory release test as it applies in respect of an overseas jurisdiction. The panel set out its approach in paragraph 4.7 of its reasons: it stated that it in the case of an FNP the statutory release test had to be applied on a case-by-case basis. It accepted a submission of the Applicant's counsel that it should not insist on (as he put it) "absolute parity" of parole arrangements for an FNP. In my view its approach was correct. It is true that in paragraph 4.2 it referred to family support only being "*part of a wider risk management plan irrespective of country of residence*"; but I do not read this as meaning that it required a risk management plan in the sense of a probation-led plan. The problem the panel faced, as described above, was that it had no assessment at all as to how authorities in the receiving state would deal with him.

51.As regards ground 2(b), there was some evidence before the panel as to the legal framework available within the receiving state for dealing with terrorist offenders, and the panel mentioned this in paragraph do 3.29 of its reasons. It had, however, no information at all as to whether and how the receiving state used this legal framework; as far as the evidence went, the framework might have been a dead letter. It does appear that the panel placed little weight on this framework; it did

not return to it in its conclusions. Given the state of the evidence, it had little basis for reaching conclusions about the use of the legal framework.

52. As regards ground 2(c), it is clear that the panel had significant doubts about aspects of the Applicant's proposed arrangements in the receiving state: I have summarised these in paragraph 26 above. These proposed arrangements were discussed at the hearing; the Applicant had an opportunity to give evidence about them. The panel's doubts were matters of evaluation and assessment rather than matters of primary fact; and I do not think it can be said that the panel's doubts were irrational. I am far from suggesting that the panel's conclusions were the only ones they could have reached; but I do not think they can be said to have been irrational or unfair.
53. As regards ground 2(d), I do not accept that the panel was irrational in its approach to protective factors in the receiving state. It considered the key protective factors in its conclusions; its concern that these protective factors might cease to be operative was a major reason for its decision. Again, I can see that a different panel might have reached different conclusions, but I do not think this panel can be said to have been irrational in its approach to protective factors.
54. As regards ground 2(e), the Psychologist was within her expertise in expressing opinions about the Applicant's personality, risk and protective factors. The panel was entitled to ask her about how her opinions related to the Applicant's risk if he was returned to the receiving state. She was entitled to answer that question and express doubts. If the panel had treated her as having some expertise in conditions in the receiving state, it would have been wrong to do so; but I do not read its decision in this way, and I do not think it fell into error in the way it took her evidence into account.
55. In summary, I do not uphold grounds 2(a)-(e). I do, however, consider that the issues which underly these grounds should be considered afresh following compliance by the FCDO with directions given by the Parole Board.

## Ground 1

56. Ground 1 takes its point of departure from the statutory test, which requires the Parole Board to consider whether it is necessary for the protection of the public that the Applicant be confined. The panel has found that it is necessary for the protection of the public that he be confined because of the prospect that he may be deported, and his risk may be managed in the receiving state. But if he is not to be deported his risk will not be managed in the receiving state; he will remain in the UK on strict licence conditions prohibiting travel abroad without permission. So, it is critical to know whether he may be deported.
57. On analysis there are two limbs to the Applicant's argument. Firstly, it is argued that if the Parole Board directs release, and the SSHD has to decide whether to deport, the SSHD is bound to decide not to deport given that the Parole Board does not consider the Applicant's risk to be manageable in the receiving state. Secondly, it is argued that, since PCCS reached the conclusion on the TERS application that it should not release the Applicant without a Parole Board release decision, SSHD would by parity of reasoning decline to deport given that the panel did not consider

release to be manageable in the receiving state. It is not argued that the SSHD was legally bound to refuse to deport; rather that the only sensible factual conclusion was that the SSHD would not deport.

58. In response the Secretary of State submits that the TERS scheme and the Parole Board process are separate schemes. A decision under one scheme does not mandate a decision under the other. It is said that the removal of the Applicant under the TERS scheme was refused because it would undermine the confidence of the public in the criminal justice system and this "was not due to the absence of a Parole Board decision that he met the test for release". It is argued that it does not follow from the refusal that the SSHD would not deport; and it is pointed out that the SSHD does not carry out a risk assessment similar to that of the Parole Board before deporting.
59. Contrary to the way ground 1 is put, the panel did not make a factual assumption that the SSHD would remove the Applicant to the receiving state if the Parole Board released him. Its conclusion was only that the SSHD might lawfully and rationally decide to do so, and therefore that the risk to the public in this event had to be assessed.
60. In my view the panel reached the correct conclusion. Once the prisoner is released the decision whether to deport rests with the SSHD. There is no rule of law that the SSHD must only deport an FNP where the Parole Board is satisfied that risk can safely be managed in the receiving state. The panel was correct to say that once the prisoner is released what weight the SSHD places on the question of risk, and on the Parole Board's assessment of risk, are matters for the SSHD. In this case there is evidence that the receiving state is willing to receive the Applicant and does not appear to regard him as a risk to its national security. A decision not to deport would potentially commit the UK to managing an FNP for many years. I do not think it can be said that the only rational decision for the SSHD to take would be to refuse deportation.
61. I turn then to the question whether the SSHD will decline to deport because that is the view that PCCS took when refusing the application under the TERS scheme.
62. As a general rule the TERS scheme and the Parole Board process run separately under separate statutory provisions. The Parole Board directs release under section 28 of the Crime (Sentences) Act 1997 after risk assessment; but under section 32A the SSJ may remove from prison an FNP who is liable to deportation "whether or not the Parole Board has directed P's release under section 28". Under section 32A there is no requirement for PCCS to make a risk assessment; indeed, as I have explained, the evidence before the panel was that no such risk assessment is carried out under the TERS scheme.
63. In this case, however, the reasons of PCCS for refusal of the use of the TERS scheme explicitly relied to a significant extent on the absence of a Parole Board decision for release. PCCS expressly stated that releasing the Applicant in the absence of such a decision might undermine public confidence in the scheme: see paragraph 9 above. Contrary to the submission of the Secretary of State, the refusal was to a significant extent due to the absence of a Parole Board decision that he met the test

for release. This must have been an exceptional decision: if PPCS applied this reasoning generally, it would render the TERS scheme pointless.

64. I can see no reason why the SSHD should be bound to take the same decision. The SSHD would be applying different legislation in a different context. The decision of PPCS was made shortly before the oral hearing and can be revisited at any time. The decision of the SSHD would be made only if the Parole Board has first made a release decision and may potentially commit the UK to managing an FNP for many years even though the receiving state is apparently willing to take him back. Granted this difference of context it is not difficult to see why the SSHD might proceed with deportation.

65. It may be thought that there is an element of circularity about this whole process. The panel assesses risk in the receiving state because the SSHD may deport; but if the panel assesses risk to be unacceptable there will be no release decision and the SSHD will not be able to deport. It seems to me that this is inherent in the process; but the SSHD can of course approach PPCS to take a fresh decision under the TERS scheme if the SSHD (presumably in consultation with the FCDO) consider that removal to the receiving state is appropriate.

66. This leaves the question whether the panel ought to have enquired of the SSHD whether, given the panel's view about risk in the receiving state, the SSHD would or would not deport if he were released. I do not think the SSHD can or should be bound in advance in this way. The decision whether to deport will fall to be taken at some point (or points) after a release decision in the circumstances then prevailing.

## Decision

67. For the reasons given above I uphold ground 2(f) of the Application for Reconsideration. I reject all the other grounds of the Application.

**HIS HONOUR DAVID RICHARDSON**  
**14 SEPTEMBER 2022**