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[2024] PBRA 228

Application for Reconsideration by Abdallah

Background

1. This is an application by Mr Abdallah ('the Applicant') for reconsideration of the decision of a panel of the Parole Board not to direct his release on licence. The decision was made by a panel of the Board ('the panel') who had conducted a number of oral hearings in the case.

2. The Applicant is serving an extended determinate sentence, imposed on 15 July 2016, for two offences under the Terrorism Acts. The facts of those offences will be explained below. The sentence comprised a custodial term of 5.5 years and an extended licence period of 4 years. The effect of that sentence was that the Applicant would become eligible for early release on licence on 26 November 2019, and if not released early by the direction of the Parole Board ('the Board') he would be automatically released on licence on 26 November 2020. His sentence would expire in November 2024.

3. The Applicant was not released early. He was therefore automatically released on licence on 26 November 2020. He was recalled to prison on 18 January 2021 and has remained in prison since then. His sentence will expire very shortly.

The application

4. Rule 28(1) of the Parole Board Rules 2019 (as amended) provides that applications for reconsideration of panel decisions may be made, either by the prisoner or by the Secretary of State for Justice, in eligible cases. The Secretary of State is the Respondent to any reconsideration application made by a prisoner, and will be referred to as 'the Respondent' throughout this decision.

5. Rule 28(2) specifies the types of cases in which reconsideration applications may be made. They include cases, like the Applicant's, where the prisoner is serving an extended determinate sentence.

6. A reconsideration application may be made on one or more of the following grounds:

   (a) that the panel's decision contains an error of law;

(b) that it is irrational;
(c) that it is procedurally unfair.

7. In this case an application for reconsideration has been made by the Applicant's counsel on his behalf on the grounds of irrationality and procedural unfairness. No error of law is suggested. The application has been made within the prescribed time limit. It is therefore an eligible case.

8. I am one of the members of the Board who are authorised to act as 'Reconsideration Panels' to make decisions on reconsideration applications, and this case has been allocated to me. I have not found it necessary to receive any oral evidence and I have considered the application on the papers.

9. I have considered both 'open' and 'closed' documents for the purpose of this appeal. 'Closed' documents are those which cannot be disclosed to the Applicant or his legal representatives.

10. The panel issued both an 'open' decision and a 'closed' one, and I am issuing both an 'open' decision and a 'closed' decision on this application for reconsideration.

11. The 'open' documents which have been provided to me and which I have considered for the purposes of this application are:

(a) The dossier of papers provided by the Respondent in the Applicant's case: the dossier now runs to page 1953 and includes the panel's 'open' decision;
(b) The representations submitted by the Applicant's counsel in support of this application; and
(c) Brief representations submitted on behalf of the Respondent.

History of the case

12. The Applicant is now aged 31. He was aged 23 when sentenced. He has had an eventful life. He has both Libyan and British nationality: his father is from Libya and his mother from Algeria. The family seem to have moved between Pakistan (where the Applicant was born), Libya and the UK.

13. The Applicant grew up in the Libyan community in Manchester, to which the family (including the Applicant's older brother) had moved when he was two months old. It seems that he made regular trips to Libya to visit family there, and when he was aged 17 he was living in Libya for what he has described as a 'gap' year.

14. Whilst he was still in Libya the armed uprising against Colonel Ghaddafi's regime began and the Applicant, then aged 18, became involved in fighting against the regime. There were a number of extremist groups involved in the fighting. The group which the Applicant joined was one such. Its aim was for Libya to become a state governed by extreme Islamist principles.

15. In August 2022 the Applicant was shot in the back while fighting. He is now paralysed from the waist down and confined to a wheelchair. He has been diagnosed as suffering from PTSD as a result of his experiences.

16. On returning to the UK (via Tunisia and Berlin) he again lived with his family in Manchester. It was whilst living there that, when he was aged 21, he committed the two offences for which he is serving his sentence (the 'index offences'). In November 2014 he was arrested and charged with the offences, and remanded in custody. He was later granted bail until his trial and conviction.

17. The index offences related to his involvement with others in encouraging or enabling like-minded young men to travel to Syria and fight for ISIS against the Assad regime in Syria. The first charge (under section 6 of the Terrorism Act 2006) related to various activities including arranging the provision of weapons for his brother and others to fight in Syria and making travel arrangements to enable them to do so. The second charge (under section 17 of the Terrorism Act 2000) related to the making of arrangements for money to be made available for the purpose of terrorism.

18. The Applicant's case was that he only ever had a 'defensive purpose' (i.e. to protect innocent people in Syria from an oppressive regime) as opposed to an offensive one (aimed at overthrowing the Assad regime). That, if accepted, would have amounted to 'defence of others' which, like self-defence, amounts to a defence in law. It was, however, rejected by the jury.

19. The legal principle applicable to the Applicant's actions was accurately described as follows by the prosecution in their Opening Note:

> *"The law says if the action would involve serious violence against a person or endanger the life of someone other than the person committing the actions … and involves the use of firearms, it is terrorism whether or not the use or threat is designed to influence the government or intimidate the public or a section of the public. To put that another way, being part of an effort to threaten or to change a foreign government - even an undemocratic, tyrannical or illegal government - is covered by the definition of terrorism. It is not open to a private citizen to engage in an armed attempt to bring about regime change, here or in any other part of the world."*

20. When the judge came to sentence the Applicant, he gave a very detailed explanation of the facts of the case. He said that there was substantial material to support the proposition that the Applicant had adopted Jihadist sympathies and motivations, and indeed that they remained in place. He referred to a number of pieces of evidence leading to that conclusion.

21. The Attorney General referred the case to the Court of Appeal, arguing that the Applicant's sentence was unduly lenient, and the Applicant argued that it was manifestly excessive. The Court of Appeal approved the trial judge's analysis of the evidence, and decided that the sentence should remain as it was.

22. The Applicant has continued to maintain his innocence of the offences for which he was convicted.

23. In his early years in prison the Applicant completed two major programmes designed to reduce his risk to the public. He made some progress but several psychological assessments indicated that he still posed a significant risk to the public, hence he was not considered suitable for early release on licence.

24. As noted above, on 26 October 2020 he was automatically released on licence. He was required to reside at a probation hostel ('AP'). There were some concerns about his behaviour there, and on 18 January 2021 he was recalled to prison. The most significant of probation's concerns was that he had made three threats to get other people to harm another resident. He referred to 'his boys' and a family friend as people who could carry out his threats for him, and he said that these people would come with a car 'strapped full of guns'. These threats were recorded by the AP manager. When asked about them by the panel, the Applicant said that the words recorded were not his exact words and 'sometimes the way he spoke wasn't the best way'.

25. Following the Applicant's recall the Respondent referred his case to the Board to decide whether to direct his re-release on licence. On 23 January 2021 a MCA panel of the Board reviewed his case and directed that it should proceed to an oral hearing.

26. This review of the Applicant's case by the Board has been long drawn out. The reasons for that have included (a) several non-disclosure applications made by PPCS on behalf of the Respondent, necessitating adjournments, and (b) on two occasions the oral hearing had to be adjourned because of technical problems and the fact that the evidence took longer than expected.

27. On 25 November 2021 the Applicant gave evidence to the Public Inquiry into the suicide bombing at the Manchester Arena in May 2017. He was required to give evidence because he was known to have been an associate of the bomber. In his evidence he maintained the same stance as at his trial about the offences of which he was convicted.

28. In May 2023 the Applicant was moved, because his behaviour had caused concern to the authorities, to a 'Separation Centre' where his behaviour was reported to have been much better than it had been. The purpose of the Separation Centre was to prevent him from having an adverse influence on other prisoners, which it was believed he had done in the normal prison.

29. The Applicant's solicitors argued that the Applicant's transfer to a Separation Centre was unnecessary but their arguments were not accepted.

30. One of the matters which the panel had to consider was whether the improvement in the Applicant's behaviour was due to a change of attitude on his part or simply to the more restrictive conditions in the Separation Centre. This will be discussed below.

31. The hearings of the Applicant's case took place on 8-9 April 2024, 1 July 2024 and 31 July 2024. The hearing on 8-9 April took place face to face, and the July hearings took place by video link. The panel comprised a Judicial Chair, an Independent Member of the Board, a Psychiatrist Member and a Psychologist Member. The dossier at the time of the last hearing contained 1897 numbered pages.

32. The Applicant was represented by his counsel and solicitor, and the Respondent was represented by counsel and two other representatives. A Special Advocate (instructed to represent the Applicant's interests in relation to intelligence information which could not be disclosed to the Applicant or his solicitors and counsel) was also present.

33. The witnesses who gave oral evidence were:

(a) The Applicant;
(b) His Prison Offender Manager ('POM');
(c) His Community Offender Manager ('COM');
(d) A prison psychologist; and
(e) An independent psychologist instructed by the Applicant's solicitors.

34. Release on licence was supported by the independent psychologist but not by the other professional witnesses, as will be explained below.

35. The panel was not satisfied that the test for re-release was met, and therefore did not direct the Applicant's release.

The Relevant Law

The test for re-release on licence

36. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

37. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. The grounds on which an application may be made are as set out above (error of law, irrationality or procedural unfairness).

38. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:

(i) A paper panel (Rule 19(1)(a) or (b)) or
(ii) An oral hearing panel after an oral hearing, as in this case (Rule 25(1)) or
(iii) An oral hearing panel which makes the decision on the papers (Rule 21(7)). case.

Irrationality

39. The power of the courts to interfere with a decision of a competent public authority on the ground of irrationality was defined in **Associated Provincial Houses Ltd v Wednesbury Corporation 1948 1 KB 223** by Lord Greene as follows: *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The Parole Board is a public authority for that purpose, and the Wednesbury test therefore applies to applications to the High Court for judicial review of a panel's decision. It also applies to applications to Reconsideration Panels of the Board for reconsideration of a panel's decision on the ground of irrationality.

40. In **R (DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** ('the Worboys case') a Divisional Court applied this test to Parole Board decisions in these words: "*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*." The same test of course applies to '*no release'* decisions.

41. In **R (on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** Mr Justice Saini set out what he described as a more nuanced approach in modern public law. This approach 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*". This formulation of the test was adopted by a Divisional Court in the case of **R (on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin)**.

42. As was made clear by Mr Justice Saini, this is not a different test from the Wednesbury test. The interpretation of (and application of) the Wednesbury test in parole hearings (as explained in the Wednesbury and DSD cases) was of course binding on Mr Justice Saini. It is similarly binding on Reconsideration Panels.

43. It follows from these principles that in considering an application for reconsideration a Reconsideration Panel cannot substitute its own view of the evidence for that of the panel who heard the witnesses. It will only direct reconsideration on the ground of irrationality if the Wednesbury test is satisfied.

Procedural unfairness

44. 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 from the issue of irrationality which focusses on the actual decision.

45. Examples of procedural unfairness which may be a ground for quashing a panel's decision on this ground are where :

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

46. These are not the only possible grounds for a finding of procedural unfairness but they are the ones most commonly alleged. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The request for reconsideration in this case

47. As noted above this application was submitted on 18 October 2024 by the Applicant's counsel on his behalf. It was made on the following grounds:

Ground 1: The Panel erred in relying upon, and giving weight to, the findings of the Manchester Arena Inquiry, and thereby acted in a manner which was procedurally unfair.

Ground 2: Even if the Panel were entitled to rely upon, and to give weight to, the conclusions of the Manchester Arena Inquiry, the Panel erred in the manner in which it relied upon those findings (in particular, in connection with the expert psychological evidence), and thereby acted in a manner which was procedurally unfair and/or irrational.

Ground 3: The Panel erred in relying upon, and giving weight to, disputed security intelligence, in respect of which inadequate disclosure had been given, and thereby acted in a manner which was procedurally unfair.

Ground 4: The Panel's conclusion that [the Applicant] posed an imminent risk of radicalising others was in error, in that it involved an unreasonable and unreasoned departure from the expert evidence, and was in any event contrary to the available evidence, and was therefore both procedurally unfair and irrational.

The Respondent's position

48. As noted above, as a party to any parole proceedings the Respondent is entitled to submit representations to the Board in response to an application by a prisoner for reconsideration of a panel's decision. The Secretary of State made brief representations which will most conveniently be explained below.

Discussion

Ground 1: the Manchester Arena Public Enquiry

49. The Manchester Arena bombing took place on 22 May 2017. The perpetrator was Mr Salman Ramadan Abedi. His older brother Hashem had been a party to the planning of the attack and is now serving a sentence for his participation.

50. Like the Applicant, Mr Abedi had grown up in Manchester (where they were boyhood friends) and had gone to Libya and joined in the fighting against the Ghadaffi regime. He had not, apparently, been injured there.

51. The Inquiry into the bombing was conducted by Sir John Saunders, who is a retired High Court judge. He heard a substantial amount of evidence about the Applicant's association with Mr Abedi. This was relevant to the Inquiry because one of the matters which had to be investigated was how and when Mr Abedi had been radicalised into Islamist extremism.

52. The Applicant was summoned to give evidence to the Inquiry, which he did (though only after raising various objections). In his evidence he denied that he had had anything to do with the planning of the bombing. Sir John accepted his evidence about that. He continued to deny the offences of which he had been convicted, and denied that he had been involved in Islamic extremism. Sir John did not accept his evidence about those matters.

53. Sir John found that, although there was no evidence that the Applicant had been involved in the planning of the bombing with Mr Abedi, (a) he was one of the major influences in the process of radicalising Mr Abedi into violent Islamist extremism and (b) it was likely that their continued relationship made a significant contribution to consolidating Mr Abedi's Islamist ideology as he was contemplating the bombing, and stiffened his resolve to carry out an atrocity of some kind.

54. Sir John was assisted by a great deal of information about the Applicant which was made available to him by the police. He was also assisted by an expert in Islamic extremism, whose evidence on many points was challenged by the Applicant's counsel.

55. The matters which led Sir John to his conclusions can be summarised as follows:

(a) The Applicant's convictions and the findings of the trial judge and the Court of Appeal about his Islamist extremism. The Court of Appeal had stated that he was properly described as being *'active in a terrorist group based in Manchester in 2014'* and that he organised the terrorist activities of the group and provided practical and emotional support to its members.

(b) It appeared that the Applicant's engagement in the conflict in Libya and the injury which he sustained there gave him something of a 'hero' status among impressionable young men from a Muslim background who were susceptible to Islamist propaganda.

(c) Police enquiries revealed that between July and November 2014 the Applicant communicated regularly with Mr Abedi by mobile phone. Between 5th November 2014 and 28th November 2014, over 1,000 text messages were exchanged between the two. In the course of those messages, there were several references to martyrdom, the maidens of paradise, and a senior figure within Al-Qaeda and his death.

(d) The expert witness analysed the messages passing between the Applicant and Mr Abedi and concluded that the Applicant was one of the major influences in the process of radicalising Mr Abedi into violent Islamist extremism.
(e) While the Applicant was on remand in custody he telephoned Mr Abedi on a number of occasions.
(f) While the Applicant was on bail the two men spent a good deal of time together.
(g) When the Applicant was in prison after being sentenced there were telephone calls between the two men (two on an illicit mobile phone) and Mr Abedi visited him on one occasion: a further visit was arranged but Mr Abedi did not attend.
(h) In December 2021 the Applicant had a conversation with a prison officer in which the Applicant said that Mr Abedi had talked about killing people in a public space, but he had not taken it seriously. He said he was very shocked when he discovered that 'one of his boys' had carried out the bombing.

56. The Applicant's counsel argued at the parole hearing that the panel should not attach any weight to Sir John's findings. He relied on the common law rule of evidence (established in the well-known case of **Hollington v Hewthorn (1943) KB 58**) that a judgement or other decision of a court or tribunal and findings of fact by any such body were not admissible in subsequent proceedings as the truth of that decision or those findings.

57. The panel did not agree. They stated in their decision:

"The Board's function is to assess the risk posed by the prisoner and its paramount concern is public protection. In making this assessment the Parole Board may receive in evidence any information whether or not it would be admissible in a court of law (Parole Board Rules 2019 as amended) Rule 24(6). The panel considered that it was for the panel to place such weight on these findings which they thought fair and appropriate when making its assessment of the risk posed to the public in the context of applying the statutory test for release …".

The panel therefore proceeded to give weight to Sir John's findings.

58. The first ground advanced by the Applicant's counsel in support of this reconsideration application is that the panel were wrong, and that under the rule in **Hollington and Hewthorn** they should not have attached any weight to Sir John's findings.

59. I agree with the panel's view and I will explain in more detail why that is the case. It is convenient to start with a brief explanation of how the Parole Board, which was created as an advisory body more than 50 years ago, was transformed into a judicial one.

60. That change was the result of Parliament's deference to several decisions of the European Court of Human Rights ['ECtHR]. It came about in two stages. First, in 1991 the law was changed in relation to prisoners serving discretionary life sentences. Then, in 2003, it was changed in relation to those serving mandatory life for murder.

61. The ECtHR decisions established that the original parole system in the UK was incompatible with Article 5(4) of the European Convention on Human Rights and Freedoms. Under Article 5(4) any decision about the lawfulness of an individual's detention by the State must be made by a court and not by a politician.

62. Courts can be expected to reach their decisions by an objective application of the relevant legal principles to the facts as established by the evidence. Politicians, with the best will in the world, are liable to be influenced by public opinion - or what they believe public opinion is likely to be. Public opinion is not a safe or reliable basis for making decisions affecting the liberty of a subject. The public are unlikely to have an accurate and complete understanding of the relevant facts and legal principles: they may also be easily influenced by extensive publicity given to views expressed by those with particular interests.

63. The ECtHR accepted that the Board, if it was given the responsibility for making parole decisions, might qualify as a 'court' for the purposes of Article 5(4) but only if (a) it was independent of the executive and the parties, and (b) it had in place an appropriate set of judicial procedures to ensure fairness to both parties (the prisoner and the Secretary of State). Under the UK system as it had been, the Board did not make the decisions and obviously did not satisfy those criteria.

64. Parliament duly changed the Board's status to bring the UK system into line with Article 5(4). It did so not only in relation to prisoners serving life sentences but also in relation to prisoners serving other types of sentence whose cases are referred by the Respondent to decide whether they should be released on licence.

65. For present purposes the important point is obviously the requirement that the Board, like any other 'court' (i.e. judicial tribunal), should operate with 'an appropriate set of judicial procedures to ensure fairness'. But that does not mean that the Board's procedures have to be the same as those of other judicial tribunals. That is because the Board's functions are radically different from those of other judicial tribunals. Its 'paramount' function (as the Panel put it) is the protection of the public (by keeping in prison all prisoners whose risk to the public requires their continued confinement). The other side of the coin is, of course, that the Board should direct the release on licence of prisoners whose continued confinement is no longer necessary.

66. Because of the Board's particular functions it has always been accepted that in some respects its judicial procedures have to be different from those of other judicial tribunals. Thus for example:
    (a) Parole proceedings are normally conducted in private;
    (b) The panel, and not the parties, decide which witnesses are to be called;
    (c) The panel do most of the questioning of the witnesses (this is a largely inquisitorial process as opposed to an adversarial one as operated by other judicial tribunals);
    (d) The Board is bound to proceed on the basis of the prisoner's conviction(s) and has no authority (or resources) to reinvestigate the case;
    (e) The panel can in some circumstances attach weight to unproven allegations (see **R (on the application of Pearce and another (2023) UK SC 4**); and

(f) The panel can attach weight to information which would not be admissible in a court of law (see Rule 24(6) to which the panel referred).

67. It is not difficult to see why these departures from the procedures of other judicial tribunals are necessary: (e) and (f) are both necessary because without them the Board would be hampered in its task of assessing a prisoner's risk to the public and, if it is not fully informed, it might well end up directing the release into the community of a dangerous criminal (thereby failing in its responsibility to protect the public).

68. In a terrorist case, for example, it would clearly be highly undesirable not to allow the panel to attach weight to information which, whilst not provable to the criminal or civil standard of proof, nevertheless shows that there is a real risk of the prisoner committing further terrorist offences and thereby causing serious harm to members of the public.

69. It is for these reasons that I agree with the panel that the decision in **Hollington v Hewthorn** cannot apply to parole proceedings.

70. Counsel submits, as a separate limb to Ground 1, that

"Despite concluding that the Panel was entitled to "place such weight upon these findings which they thought fair and appropriate when making its assessment of the risk posed by the prisoner to the public" the Panel did not conduct any reasoned exercise to (i) determine what weight was due to the findings of the Manchester Arena Inquiry (i.e. interrogate those conclusions, by reference to the evidence available, to determine whether they were deserving of particular); and/or (ii) actually consider the unfairness to the Applicant of accepting the findings of the Manchester Arena Inquiry in effect 'as read'. That is a separate and additional sense in which Panel's approach to the Manchester Arena Inquiry conclusions were unfair."

71. I cannot accept that this ground is made out. The panel gave detailed reasons for deciding to attach weight to the Inquiry findings, and I have examined those reasons and cannot find any fault with them.

72. The panel began by noting the experience of the distinguished Inquiry Chair who had heard extensive evidence. It is of course necessary, in deciding whether to attach any weight to a judge's findings, to scrutinise his reasoning to see whether any of his reasons were flawed: we all make mistakes, even the most distinguished judges. However, the fact that the Inquiry Chair was as experienced as Sir John, and perhaps more importantly the fact that he had heard a great deal of evidence which he could evaluate, were factors to be taken into account in the decision whether to attach weight to his findings.

73. The panel then pointed out that Sir John's findings were made on the balance of probabilities (rather than to the criminal standard of proof). A finding on balance of probabilities (i.e. that something is more likely than not to be true) is the standard applicable in civil proceedings, which include parole proceedings. The panel's findings in this case were therefore made to that standard. A finding of fact on balance of probabilities is very different from a criminal conviction.

74. The panel next pointed out that in deciding whether to attach any weight to Sir John's findings they had been able to examine the record of the Applicant's evidence to the Inquiry. They were also able to examine the detailed submissions made on his behalf to the Inquiry and to take account of them.

75. Another important point which the panel made was that the Inquiry's findings on the crucial question whether the Applicant had ever had an extremist mindset needed to be viewed in conjunction with those of the trial judge and the Court of Appeal (they might have added the jury) all of whom were unanimous that he had had such a mindset. The Court of Appeal had stated succinctly: *"[The Applicant] organised the terrorist activities of the Manchester group. He provided practical and emotional support to the members of the group".*

76. It is thus apparent that the panel did conduct the necessary exercise to determine whether it was fair to attach weight to Sir John's findings. There was a mass of evidence to support them. The panel were fully justified in attaching weight to them when reaching their overall conclusion about the Applicant's mindset up to the time when he had been sentenced. They stated:

> *"On the basis of all the information before it the panel concluded that [the Applicant] had held an extremist mindset and continued to do so at the time of his being sentenced, and that he had not been open and frank with the panel on this question … The critical question for the panel became whether there had been any change in [his] mindset since embarking on his sentence".*

They then moved on to deal with the evidence concerning the Applicant's progress during his sentence.

77. **For the above reasons I cannot uphold counsel's submissions on Ground 1.**

Ground 2: The independent psychologist

78. Ground 2 is based on the proposition that the panel rejected the recommendation of the independent psychologist because they had already made a decision adverse to the Applicant.

79. The legal principles on which Counsel relies are as follows:

> *"It is axiomatic that a fact-finder must not reach a factual conclusion before surveying the entirety of the evidence relevant to the particular factual issue. In **Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367**, the Court of Appeal considered the lawfulness of an approach to fact-finding whereby the fact-finder reached an adverse conclusion on credibility, before considering whether expert evidence affected that conclusion.*
>
> *'The Court of Appeal found such an approach to be wrong in principle. Wilson J (as he then was) summarised the relevant issue as follows: it is one of the central features of the argument before this court that the adjudicator fell into legal error in appraising parts of the evidence adduced on behalf of the appellant bit by bit*

and, in particular, in addressing the doctor's evidence only after she had conclusively rejected the central features of the appellant's case as incredible.

'That complaint was upheld by the Court of Appeal. Wilson J stated: It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto … What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence.

'To similar effect, Buxton LJ explained: The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing...

'The 'Mibanga principle' (as it is sometimes called) was approved by the Court of Appeal in ***MN v Secretary of State for the Home Department [2020] EWCA Civ 1746*** *(summarised as "It is an error of approach to come to a negative assessment of credibility and then ask whether that assessment is displaced by other material") …"*

80. This is certainly an important principle but I do not believe it applies to this case.

81. The recommendation of the independent psychologist was at variance with that of all the other professional witnesses. Those were two prison psychologists (Ms G and Ms F), the POM and the COM. Ms F, the POM and the COM gave oral evidence at the hearing, as did the independent psychologist. Ms G's report was included in the written evidence in the dossier.

82. I can see no reason to suppose that the panel did not consider the whole of the evidence before coming to any decision. They did of course have to assess the evidence of the various witnesses. In particular they had to assess the conflicting evidence of the independent psychologist and the other professional witnesses. That exercise involved testing the evidence of the witnesses and identifying any weaknesses in their evidence. It is clear to me that the exercise revealed a number of significant weaknesses, which the panel set out in their decision, in the evidence of the independent psychologist.

83. The Panel did not find the independent psychologist a compelling witness. Among the weaknesses in her evidence was, in the panel's view, that she did not properly engage with the circumstances of the index offences and indeed she appeared to come close to suggesting that the Applicant was not guilty of those offences. Another weakness, pointed out by the Respondent's counsel, was that she repeatedly asserted that the Applicant did not always express himself in the way he meant and that his more damaging statements (most of which he agreed he had made) 'required interpretation'.

84. The panel were of course fully entitled to contrast the evidence of the independent psychologist with other parts of the evidence in the case and to put those to her. They were clearly not impressed by her responses.

85. I am not surprised that they preferred the recommendations of the other witnesses to that of the independent psychologist. Her apparent suggestion that the Applicant was not guilty of the index offences was a problem: as I explained above, a panel of the Board cannot go behind the prisoner's conviction(s).

86. **For these reasons I cannot uphold counsel's submissions on Ground 2.**

Ground 3: Disputed security evidence

87. There was a good deal of prison security evidence presented by the Respondent to the panel.

88. Most of the security evidence for the period June 2021 to September 2023 was presented in the form of redacted versions of the actual security reports which were added to the dossier. The redactions were merely the removal of the reliability gradings and the precise dates of the reports. The full reports without the redactions will have been seen by the panel but not by the Applicant or his representatives.

89. The remaining security evidence was presented in the form of 'gists' (i.e. summaries of the information in the security reports). Again, the full reports will have been seen by the panel but not by the Applicant or his representatives.

90. At the hearing the Applicant's counsel submitted that no reliance should be placed on the security intelligence as *"at most a summary of the evidence had been provided, with no disclosure of the primary evidence upon which it was based, with no disclosure of the reliability gradings".*

91. In fact, for the period June 2021 to September 2023 (which covered periods before and after the Applicant's transfer to the Separation Unit in May 2023), most of the 'primary evidence' (i.e. the actual security reports) had been disclosed but without the security gradings.

92. The panel did not accept counsel's submissions and decided that weight could be placed on the security intelligence. They stated:

"In the panel's assessment the sheer volume of the intelligence and its consistency over the period of time between the date of recall and return to custody and the transfer to the Separation Unit meant that significant weight should be put upon it and even more so given that as submitted by [the Respondent]

(a) The intelligence suggesting [the Applicant's] extremism and radicalising behaviour was consistent with his index offence, the characterisation of that offence by both the sentencing judge and the Court of Appeal, the reported acceptance by [the Applicant] in the DPP report that he had been ideologically aligned with ISIS when he carried out his offence and the conclusions of Sir

John Saunders of [the Applicant's] extremist mindset and radicalising behaviour as regards [Mr Abedi] and

(b) The intelligence relating to threats and facilitation of violence was consistent with [the Applicant's] history of making threats and drug use, attested to in the circumstances leading to his recall…".

93. The Respondent had submitted, as related in the panel's decision, that

> *"Overall … the security intelligence in the dossier painted a concerning picture of [the Applicant] retaining an Islamist mindset and his seeking to impose his ideology on fellow inmates and others, his drug use and association with [Organised Crime Group] links and history of making threats of violence, although the Respondent acknowledged that the evidence was ungraded and some of the evidence misattributed [the Applicant's] behaviour to drug use when it was due to medical conditions."*

94. That takes us to counsel's complaint that there had been no disclosure of reliability gradings. No such gradings were recorded in the documents at pages 1037-1067. There had obviously been gradings but it was the Respondent's policy not to disclose those to the prisoner on the basis that disclosure of individual ratings might convey information to him which he would not need to know, and disclosure might have an adverse effect on the prevention of disorder or crime or the health and welfare of an individual. The gradings had therefore been removed from pp 1037-1067.

95. The Respondent's policy applies to both types of ratings used by her officials. The more detailed type assesses reliability on the '5x5x5' basis. The less detailed type assesses reliability on the scale of 'High/Medium/Low'. The Respondent's current policy appears to be not (unless directed to do so) to disclose the 5x5x5 ratings to the Board. She does disclose the High/Medium/Low ratings to the Board.

96. The Applicant's counsel submits that the panel should have directed the Respondent to disclose all the ratings (and in particular the 5x5x5 ratings) to the Applicant so that he could respond more effectively to any disputed allegations contained in the security reports on pages 1037-1067 and in the 'gists' of the other security reports.

97. There are some cases in which fairness to the prisoner overrides the Respondent's interest in keeping the ratings confidential. In those cases the Panel Chair will make a direction (with which the Respondent will be legally obliged to comply) for their disclosure to the prisoner. However, I am not persuaded that such a direction was necessary or appropriate in this case.

98. In the most important period (June 2021 to September 2023) most of the actual security reports have been disclosed in the dossier, so the Applicant has been able to see exactly what was reported, and to respond to it. Where the actual reports have not been disclosed in those cases or others, the Respondent provided 'gists' of their contents which I agree with the panel were adequate to enable the Applicant to respond to the allegations being made (as indeed the Applicant and his counsel did).

99. Even if a rating for an individual item was low, that would not in itself mean that no weight could be attached to that item: it would be necessary to evaluate its content and context. I can find no fault with the panel's approach of relying on the sheer volume and consistency of the intelligence (in other words it was highly unlikely that all of the entries painting the above picture were wrong). The panel does not seem to have thought much of the suggestion that the Applicant was linked to an Organised Crime Group in the UK, but they otherwise accepted that the picture painted by the Respondent was an accurate one. This was of course a finding on the balance of probabilities, and I am satisfied that it was justified.

100. Both the panel and the Applicant's counsel made reference to the decision of the Supreme Court in **Pearce**. I am satisfied that the panel's approach was consistent with the principles laid down in that case.

101. It follows that **I do not believe that there is any valid criticism of the way in which the panel dealt with the intelligence information and I cannot uphold this ground.**

Ground 4: An imminent risk?

102. This ground raises the familiar but complex issues relating to a prisoner who will pose a continuing risk of serious harm to the public after his sentence has expired. The Applicant's counsel helpfully summarised the legal position as established in the case of **R Dych v Parole Board (2023) WLR 4387.**

103. As counsel points out, the panel could only take into account two categories of risk: (a) those risks which, in the Panel's view, may have arisen prior to the sentence expiry date and (b) risks arising at any time which were, in the Panel's view, causally related to the prisoner's confinement in prison prior to the sentence expiry date. Counsel submits that those risks could only exist if the Applicant posed an 'imminent' risk to the public during the period before his sentence expires, and he points out that none of the professional witnesses were of the opinion that he did pose such a risk. An imminent risk is one that could result in serious harm being caused at any time.

104. The panel's decision on this topic was as follows:

> *"The panel has been mindful throughout that to direct release the panel has to be satisfied that it is no longer necessary for public protection that [the Applicant] remained confined and the risk period under consideration is indefinite extending beyond [the Applicant's] sentence expiry date [in] November 2024.*
>
> *"Fundamental to its decision in this case has been the panel's conclusion that, contrary to [the Applicant's] assertions he did have an extremist mindset at the time of his offence and subsequently demonstrated a propensity to radicalise others, in particular through his radicalisation of the Manchester Arena bomber ….*
>
> *"Further fundamental to its decision has been the panel's conclusion that, absent any testing in the less restricted conditions outside the Separation Centre where [the Applicant] is currently detained, it cannot be satisfied that there has been*

any genuine change in [the Applicant's] extremist mindset or in his willingness to radicalise others …. [The Applicant] has not been open or frank with the panel as to his extremist mindset at the time of his offending which in itself demonstrated a concerning lack of insight into his risk and the panel did not find his contrary evidence, either as to his mindset at the time or since.

"The panel concluded that [the Applicant] does retain an extremist mindset and continues to pose a risk of radicalising others. He continues to pose a risk of radicalising others in any Approved Premises or any others with whom he may come into contact."

105. It is apparent from the above passage that in the panel's view (an eminently reasonable one) there was a significant continuing risk of the Applicant seeking to radicalise other individuals inside and then outside the confines of a prison, with the potential result that members of the public might suffer serious harm.

106. In these circumstances counsel's argument falls away. Although the panel did not specifically state that in their view the Applicant posed an imminent risk to the public, that is the effect of their findings. The panel were fully justified, for the reasons explained in this decision, in differing from the views of the professional witnesses about the imminence of risk. The professionals did not have the benefit of the panel's very clearly expressed reasons for finding that the Applicant posed a continuing risk of serious harm to the public.

Decision

107. As explained above I am unable to accept that any of the grounds advanced by the Applicant's counsel can succeed, and **I must refuse this application.**

108. I would like to add one comment. As I have explained above, the panel's findings adverse to the Applicant were on the balance of probabilities, i.e. the panel considered it more likely than not that the Applicant retained an extremist mindset and might radicalise others.

109. The Applicant is an intelligent man and I hope he will understand that when somebody has been convicted of terrorist offences and found to have had an extremist mindset, the Board has to be extremely cautious about his risk of future offending. To justify a decision to release him the Board would need to have clear evidence that he no longer poses a risk to the public. In this case I have not been able to see any real evidence to demonstrate the necessary reduction in the risk which he posed at the outset of his sentence.

110. Having said that, the Applicant is to be released very soon at the end of his sentence, and I hope very much that once in the community he will be able to demonstrate that he does not now pose a risk to the public and that he will be able to lead a satisfying and law-abiding life in the future, putting the past behind him.

Jeremy Roberts
21 November 2024