

[2022] PBRA 104

Application for Reconsideration by the Secretary of State for Justice in the case Lopez

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 4 July 2022 to direct the release of Lopez (the Respondent).
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 oral hearing decision, the dossier, and the application for reconsideration.

Background

4. The Respondent was sentenced to life imprisonment on 14 October 2003 following conviction after trial for the murder of his wife. His tariff expired in October 2018. The Respondent maintains his innocence.
5. The Respondent was aged 36 at the time of sentencing. He is now 55 years old.

Request for Reconsideration

6. The application for reconsideration is dated 25 July 2022 and has been drafted and submitted by the Public Protection Casework Section acting on behalf of the Applicant.
7. It submits that the decision was irrational. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Applicant in July 2021 to consider whether it would be appropriate to direct his release. If the Parole Board did not direct release, it was invited to advise the Applicant whether the Respondent should be transferred to open conditions.



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9. The case proceeded to an oral hearing on 22 June 2022 before a two-member panel. The Applicant was not represented at the hearing and there were no written submissions on his behalf within the dossier. The Respondent was legally represented throughout and written submissions seeking release were also made prior to the hearing. Oral evidence was given by the Respondent's Prisoner Offender Manager (POM) and his Community Offender Manager (COM).
10. The Respondent originates from Country A but came to the United Kingdom via Country B. It appears that there are extradition proceedings outstanding in relation to a number of alleged armed robberies in Country B. He is also liable for deportation to Country A. Extradition takes precedence over deportation, so the Respondent would only be considered for deportation (to Country A) if the extradition proceedings (to Country B) did not proceed. It is reported that the Respondent's appeal rights in respect of his immigration status have been exhausted. Neither extradition nor deportation can take place unless the Respondent's release is directed by the Parole Board.
11. The Respondent's POM and COM did not support release. The panel directed the Respondent's release.

The Relevant Law

12. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).
14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
15. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

16. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

17. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

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

The reply on behalf of the Respondent

19. Submissions dated 29 July 2022 were submitted by solicitors acting on behalf of the Respondent. These set out the Respondent's position that the decision to direct release was not irrational.

Discussion

Eligibility

20. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

Irrationality

21. The Applicant submits that the panel's decision to release was irrational. In doing so reliance is placed upon the recent decision of the High Court in **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1281 (Admin)**. This case involved a Mr Johnson as an interested party, and for ease of reference, I shall refer to the case as **Johnson** hereafter.

22. As a preliminary matter, **Johnson** concerned an extended determinate sentence whereas the Respondent is serving a life sentence. Nonetheless, the main principles from the judgment insofar as they relate to the statutory test for release may be applied to this case as the wording of the test for release is the same, even though those tests are derived from different statutes: extended determinate sentences under section 246A(6)(b) of the Criminal



Justice Act 2003 (as amended) and life sentences under section 28(6)(a) of the Crime (Sentences) Act 1997.

23. As this case concerns a life sentenced prisoner, the statutory test is set out in section 28(6)(a) of the Crime (Sentences) Act 1997 as follows:

"The Parole Board shall not give a direction [for release]...unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

24. The primary issue before the High Court in **Johnson** was the period over which a panel should consider risk: specifically (as Mr Johnson was serving an extended determinate sentence) whether the panel was concerned with the manageability of risk until his conditional release date (at which point he would automatically be released) or beyond that date. The High Court held (at para. 29) that:

"To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration...ignores the fact that the statutory test has no temporal element."

25. In other words, as the statutory test is silent as to the period over which risk must be considered, it was the view of the High Court that this means an extended sentence prisoner must remain confined unless and until his release will not adversely affect public protection regardless of any date on which he would otherwise automatically be released without a Parole Board direction: no wording with the sense of 'until the prisoner would otherwise be released by operation of his sentence' is implied into the statutory test.

26. Of course, unlike Mr Johnson, the Respondent is serving a life sentence and therefore the panel must, as is standard practice, consider risk over an indefinite period without having to navigate the intricacies of **Johnson** in this respect.

27. The court in **Johnson** went on to consider two aspects of risk assessment in further detail. First, it considered the 'balancing exercise': the benefits of early release to the prisoner versus the risk to the public. Second, it considered the imminence of risk.

28. Regarding the balancing exercise, the court in **Johnson** (at para. 19) endorsed the earlier findings in **R(King) v Parole Board [2016] 1 WLR 1947** thus:

"The statutory test to be applied by the Board does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The goal of the test is simple. It is to protect the public."

29. In other words, panels must not undertake a risk-benefit analysis when considering release. That is not the same as saying that a prisoner cannot enjoy the benefits of release provided that the public is protected.



30. Next, regarding imminence of risk, **Johnson** states (at para. 31):

"If an offender poses no risk, the protection of the public will not require his confinement. That does not mean the Board is to ignore anything other than immediate or imminent risk..."

31. In other words, the Board must consider risk over the long term as well as risks that may arise immediately or imminently on a prisoner's release. This requires the Board to consider whether risks might arise in the longer term as well as in the shorter term. This view is particularly relevant for prisoners (like Mr Johnson) serving extended determinate sentences. However, for life sentenced prisoners (like the Respondent) the Board will, as a matter of course and as it always has done, consider risk over an indefinite period.

32. The Applicant first raises the 'balancing exercise'. It is submitted that the rationale behind the decision to direct the Respondent's release unduly favours the benefits to him over the risk to the public.

33. The panel acknowledged that the proposed Risk Management Plan (RMP) was 'nominal' in the sense that it was predicated on the Respondent's removal from the UK, and that his access to the community would most likely be if and when he was returned to Country A (either directly or via Country B), where he would be subject to no oversight or restrictions. The panel also noted that the Respondent would, if released, not be at liberty in the UK and would spend a further period of detention before being extradited or deported. Combining this with the fact that the Respondent was not suitable for offending behaviour programmes, it directed his release.

34. Put simply, the panel's reasoning seems to be this: if there is nothing for the Respondent to do in custody to reduce his risk and he can only be removed from the UK (whether by extradition or deportation) if his release is directed, then there is no point in leaving him languishing in a UK prison, especially since the British public will be protected by him remaining detained until he leaves. The Applicant raises no issues of public protection beyond the UK's shores.

35. The panel's decision is not focussed on benefits to the Respondent. A decision to release will always be beneficial to a prisoner as he will no longer be in custody. It would be wrong to infer that a decision to release cannot be lawful if it results in a benefit to the prisoner. I do not find that the decision gives primacy to any purported benefits accruing to the Respondent. The decision does not state any benefits and the Applicant does not give any examples of any such benefits other than a weak implication that the Respondent would be better off outside prison than within.

36. Moreover, this is not a case in which the Respondent would be released (as in most cases) to lead his life in the community which would clearly be beneficial. In the circumstances of this case, the Respondent would be detained and removed to stand trial in another country which could result in a further custodial sentence. The professional witnesses who considered the Respondent to have core risk reduction work outstanding and needed to address his internal



controls prior to release did not consider management of risks within this broader and unusual context.

37. When considering public protection, the panel concluded that the Respondent's risk to the public would be managed by his continued detention and eventual removal.
38. The panel did not undertake a balancing exercise of risks and benefits in this case. The primary reason it directed release was that release would not involve a risk to the public. It did not mention any benefits and consequently the submission that the panel balanced one against the other is unsustainable.
39. The legal test of irrationality is such that the decision must be so illogical that no sensible person (i.e. no other panel) could arrive at it. I find that this test is not met. The panel's logic is clear and the fact that the Applicant disagrees with it does not mean that it becomes irrational as a matter of law. I can easily foresee instances in which other panels would have reached the same conclusion that releasing a prisoner to further detention while awaiting removal is sufficient to protect the public.
40. The Respondent goes on to take issue with the panel's conclusion that the Applicant did not present an imminent risk of serious harm in the community (as his risks were most likely to manifest in the context of a long-term intimate relationship). It is submitted that the decision is irrational as the panel erroneously relied upon the lack of imminence of risk and thereby failed to apply the principle in **Johnson**.
41. For a prisoner serving an extended determinate sentence, the logic in **Johnson** is sound. If the Board must consider risk to the public without the temporal constraints attached to the sentence, a lack of imminence of risk might lead a panel to direct release prior to a prisoner's conditional release date even if the prisoner would be much riskier in the longer term. However, for a life sentenced prisoner, the panel must consider risk over an indefinite period of which imminence is only one facet.
42. In any event, the decision does not rely upon on imminence. It takes it into account as part of its overall reasoning along with several other factors which led to the conclusion that the Respondent met the test for release. The decision's logic was very clear. The legal test for irrationality sets a high bar and this case does not meet it.

Decision

43. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
10 August 2022