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[2023] PBRA 210

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

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 4 October 2023 directing the release of Garcia (the Respondent) following an oral hearing on 4 September 2023.

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. This decision is eligible for reconsideration.

3. I have considered the application on the papers. These are the application, the response to the application, the decision, the dossier and the closed documentation.

4. None of the grounds for reconsideration refer to the closed material or contain criticisms of the decisions made by the panel on that material. I therefore asked the parties and the Special Advocate instructed to represent the Respondent's interests on consideration of the closed material whether they wished me to read the closed material. The Applicant invited me to read the material so I did. I found the closed material helpful to read as background information but it was not essential to my decision. The Applicant, together with the owner of the closed material, will need to consider in each individual case how important it is for a reconsideration member to see the closed material, bearing in mind that this material is only normally disclosed on a need to know basis.

Background

5. The Respondent was sentenced on 30 March 2007 to life imprisonment with a minimum term of 17 ½ years to serve for an offence of conspiracy to cause an explosion likely to endanger life and property. The minimum term had been set by the trial Judge at 20 years but was reduced to 17 ½ years by the Court of Appeal. The Respondent was 24 when sentenced.

Request for Reconsideration

6. The application for reconsideration is dated 14 November 2023.


INVESTORS
IN PEOPLE
Bronze

7. The grounds for seeking a reconsideration are that the decision contains errors of law in that the panel failed to take into account relevant considerations in reaching its decision. Further it is argued that a number of the conclusions which the panel reached in coming to their decision to release were irrational.

Current parole review

8. This is the first parole hearing for the Respondent. His case was referred to the Board on 9 May 2019. As is obvious there have been extensive delays in the hearing being effective. Some delays were unavoidable, others should not have happened.

9. The panel consisted of two judicial members and a psychologist. They heard evidence from the Respondent, two joint Prison Offender Managers (POM), one Community Offender Manager (COM) and two psychologists, one who works for the Prison Service, and one independent psychologist instructed by the Respondent. Both the Applicant and Respondent were represented by Counsel who provided submissions in writing after the conclusion of the oral hearing.

The Relevant Law

Parole Board Rules 2019 (as amended)

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

Error of Law

11. The Secretary of State asserts that the panel made errors in law in that it failed to take into account relevant considerations when making its decision. The Secretary of State submits on the basis of the decision of the House of Lords in **Tesco Stores -v- Secretary of State for the Environment [1995] 1 WLR 759** that it is an error of law for a parole panel to fail to take into account a 'material consideration' in reaching its decision on release. The Tesco case was an appeal relating to a planning decision and 'material consideration' is a phrase taken from the Town and Country Planning Act. The Court held in that case that material consideration meant any consideration relevant to whether or not to grant planning permission. I accept, and will consider this application on the basis that, if the panel failed to take into account a consideration relevant to whether or not to release the Respondent, that is capable of amounting to an error of law. That does not mean that it is necessary for a panel to include a mention of every relevant consideration in their decision as it is often possible to infer from the contents of the decision that they did have a particular consideration in mind. It is important that decisions do not become excessively long because panels feel they have to mention every possibly relevant consideration.

12. What is clear from the decision in the Tesco case is that, provided the tribunal has considered each relevant consideration, then the weight to be attached to that

consideration is entirely a matter for the tribunal. The legal requirement is to take account of every relevant consideration. The amount of weight given to any consideration can only be challenged on the basis that the decision of the tribunal as to weight was Wednesbury unreasonable.

13. Another possible mistake of law would be if the panel adopted the wrong legal test for release as happened in the case of **R (on the application of Wells) v the Parole Board [2019] EWHC 2710 (Admin)** (the Wells case). In his application for reconsideration the Applicant accepts that the panel in this case applied the correct test.

Irrationality

14. 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."

15. 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.

16. The test set out in paragraphs 11 and 12 above has been adopted by Judges dealing with reconsideration applications, because it was the test used by the Divisional Court in the DSD case. That case is an important authority in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R(on the application of Secretary of State for Justice -v- Parole Board [2022] EWHC 1282 (Admin) (the Johnson case)** adopted the '*more modern*' test set out by Saini J in the Wells case to which I will refer later.

17. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation (1948) 1 KB 233 (CA)** which defines irrationality, expressed in the context of Parole Board cases, as "*no reasonable panel could have reached the impugned decision"*. That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.

18. In the Wells case Saini J set out '*a more nuanced approach*', as he called it, at para 32 of his judgment when he said *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied".* What needs to be emphasised

is that this is not a different test to the Wednesbury reasonableness test. Saini J emphasised at para 33 that "*this approach is simply another way of applying"* the Wednesbury irrationality test. In the Wells case Saini J combined the irrationality challenge with a reasons challenge and concluded that the panel in that case had not given proper reasons for disagreeing with the largely agreed evidence in that case.

19. What all the authorities establish is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration - or a Judge dealing with a Judicial Review in the High Court - to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate the evidence. It is only if the reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on the evidence, that he or she should allow the application.

20. It has been necessary to give this detailed consideration of the law surrounding an irrationality challenge because of the submissions put forward by the Secretary of State in this case. Having set out what is contained in Paras 14 and 15 above the Secretary of State then asserts there are two other bases on which a decision will be irrational. He says, "*A decision will also be irrational where: a. 'manifestly disproportionate or inadequate weight has been accorded to a relevant consideration' (R (Gallagher) v Basildon DC [2011] PTSR 731 at §§31 and 41), and b. A decision maker attaches no weight to evidence put before the court (R v Mid Hertfordshire Justices ex parte Cox (1996) 160 JP 507 per Laws J at p.9."*

21. In so far as it is suggested that these are additional stand alone grounds of irrationality I reject that submission. They can only found the basis for a reconsideration if they come within the Wednesbury irrationality test as I have set it out above. They are simply examples of ways in which a decision could be irrational. If the facts of those cases are considered it will be seen that the facts are such that there can be no doubt they meet the Wednesbury unreasonableness test. No reasonable tribunal could have reached the decisions that the tribunals reached in those cases. As the Respondent points out in his submissions, in **R (Governing Body of X) v Ofsted [2020] EWCA Civ 594**, the Court of Appeal emphasised that a complaint that a tribunal placed too little weight or too much weight on certain evidence is never on its own a proper basis for a public law challenge, which the Applicant's claim for reconsideration is. It would need to be demonstrated that the weight attached by the panel was outside the range of reasonable responses for the challenge to be successful.

22. When considering whether this decision is irrational, I will keep well in mind that it is the decision of a panel who are expert at assessing risk; just as importantly, the panel had the opportunity to question the witnesses and to make up their own minds what evidence to accept. I did not see the witnesses and it is very important that I do not substitute my judgment for theirs.

23. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It*

would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."

The Reply on behalf of the Respondent

24. The Respondent has submitted a response to the application dated 21 November 2023. The submissions are helpful but include in them an argument that the panel should have concluded that the prison psychologist was biased against the Respondent. That was not the conclusion of the panel and, as there is no suggestion that the panel were irrational in their assessment of the prison psychologist, I shall pay no regard to those submissions. It would not be helpful to the Respondent for him to submit successfully that the panel was irrational in its assessment of the prison psychologist.

25. In the course of the preparation for the hearing, the panel had directed that an agreed document be prepared by the two psychologists setting out areas of agreement and disagreement with reasons for them. This proved impossible, and I will not go into the reasons here or attribute blame for it. A direction for the preparation of this kind of document is common in all litigation and is common in parole hearings. It is helpful for clarifying issues before the hearing and shortening the evidence at the hearing. It is very difficult to understand how it can be that two experts cannot achieve this. It should not happen and all steps should be taken to avoid it in the future.

Discussion

26. This case was complex. There were a number of non-disclosure applications and a closed hearing in which a special advocate represented the interests of the Respondent. It was a difficult case because it involved a prisoner who had been convicted of a very serious terrorist offence. While he claimed that his extremist mindset had now changed, the panel had to be aware of the possibility of deception on the part of the Respondent. If they were deceived and the Respondent, having been released, committed a terrorist attack, the consequences would be very serious. The panel were aware of the risk of deception and the potential consequences of releasing someone who might go on to carry out an attack. They conducted a very detailed analysis of the evidence before reaching their decision to release. Whether the Respondent's extremist mindset had changed and, if it had, whether it would revert back if released were central to the considerations of the panel.

27. As I have already said it is not my function to reach my own decision on the evidence; it would not be possible in any event without being able to see the witnesses and consider their answers. My function is to decide whether the panel erred in law or reached a decision on the facts which was Wednesbury unreasonable.

28. The Applicant has set out a number of grounds supporting his application for reconsideration. I shall consider them both individually and cumulatively.

29. The first ground is that the panel were irrational in concluding that the Respondent's lack of truthfulness, as found by the panel, in the oral hearing had no bearing on risk to the public.

30. The first question is whether the panel did reach that conclusion. At para 2.31 the panel expressly said that "*All these are matters* [lies concerning allegations made about the Respondent's conduct in 2009] *which the panel will need to consider very carefully when it is assessing [the Respondent's] truthfulness about other matters".* At para 2.157 when considering lies which the panel found the Respondent had told about the activities of some of his friends in the 2003 conspiracy the panel said "*The panel now has to consider whether covering up for his friend, assuming that is what [the Respondent] has done, has any significant bearing on his own risk of serious harm to the public if he is released".*

31. The panel, as it was bound to do, having decided that the Respondent had lied, carefully considered what the reasons for the lies were and then considered how the lies impacted on whether the Respondent was telling the truth about his intentions if released and his current mindset and whether he would comply with his risk management plan if released.

32. The panel concluded on the balance of probabilities that the Respondent had lied during the hearing about his and another person's involvement in a plan to threaten or harm a soldier in 2009. This matter had been investigated at the time and no action had followed. The panel further concluded that the Respondent had lied about the involvement of one of his current friends in the index offence which occurred in 2003.

33. In addition the Applicant relies on the fact that the Respondent has told lies about whether another friend of his called S attended a training camp in Pakistan in 2003. At the oral hearing the Respondent accepted that S had attended the training camp which is said to be different to what he had told at least one other person. It is clear because they mention them that the panel had all those matters well in mind when reaching its decision.

34. The panel did not ignore those lies. What they did as set out in their decision is to determine what impact those lies had on the risk of releasing the Respondent. The panel had to decide whether the fact that he had told lies meant that they could not rely on any part of his evidence; in particular, when he claimed that he no longer held an extremist mindset and had changed. In reaching that decision the panel considered what they believed was the reason for the lies. At 2.28 of the decision the panel said *"If someone says something that is not true, no doubt the rest of his evidence needs to be viewed with some caution. However that does not necessarily mean that everything else he says is not true. He may well have particular reasons for telling the particular untruth, and it is necessary to see what those reasons are likely to have been."* The panel concluded that the likely explanation for the lies was to avoid prosecution of himself and a friend for a serious offence and to protect the same friend by denying that he had anything to do with events in Pakistan in 2003. In considering whether those lies meant that the Respondent was lying about the change in his extremist mindset, the panel took into account what was the evidence of all the professionals, with some reservations from the prison psychologist, that his change in mindset was genuine. Accordingly, the panel having considered all the evidence concluded that despite the lies that the Applicant had told, particularly during the hearing, their conclusion was that the Respondent did not lie to them about his change of mindset. There is nothing irrational in my judgment in how the

panel approached this question and the decision they made. It is also wrong to say that the panel ignored the concerns of both psychologists about the telling of lies by the Respondent. The detail with which the panel considered the lies and the proper inferences to be drawn from them indicates that they did consider them and their effect on their decision extremely carefully. The possible reasons for the lies considered by the panel were not speculation, as is suggested by the Applicant, but were inferences which were properly open to the panel to draw on the evidence.

35. The other decision that the panel had to make was whether the risk management plan would be effective in controlling any potential risk that remained. It is important for a risk management plan to work that the prisoner can be relied on to be honest with his COM. The panel having considered evidence from the COM concluded that they were satisfied that the plan was sufficient to control the Respondent's risk and they did not consider that because of the lies that the Respondent had told he could not be trusted to comply with the requirements of the plan.

36. The Applicant submits that the panel should have concluded as a result of the lies that the Respondent was being deceptive when he said that his mindset had changed. The panel had the possibility of deception well in mind as is seen from 2.185 to 2.190 of the decision. It is an important and difficult part of the function of the expert panel to assess whether they are being told the truth. There can be no absolute guarantee that any panel can get this right all the time but this panel asked itself the right questions and the conclusion they reached was in no way irrational. See 3.106 of the decision.

37. Accordingly for those reasons Ground 1 fails.

38. Ground 2 is that the conclusion of the panel that family or current associations did not pose any significant concerns was irrational and the way in which it was reached was in breach of the law.

39. I will consider the issues relating to the family first. Two of the Respondent's brothers had been involved in terrorist behaviour in the past. One of them was dead and the other had been absent from a date just after the Respondent's conviction, a long time ago.

40. The evidence from the COM was that the remainder of the family were pro-social and supportive of the Respondent living a law abiding life. There was no evidence to contradict this evidence and the panel could only properly have come to the conclusion that the family was pro social. It certainly wasn't irrational to reach that conclusion. The Applicant complains that the evidence from the COM was insufficient to reach this conclusion. The COM will have conducted what inquiries that she considered necessary with police colleagues and others before she reached her conclusion. That would be very important for her to do as part of the preparation of a risk management plan. The Applicant was an active participant in this hearing and had he thought that the family were not pro social or that the evidence that they were pro social was inadequate then he should have provided evidence to support that conclusion. As it is, the evidence only went one way.

41. The Applicant in support of his contentions relies on the fact that during a prison visit the Respondent allowed one of his nieces to sit on his knee and at one stage put his arm round his two nieces. This was first raised by the Applicant because he believed incorrectly that this behaviour was contrary to prison rules. He has now discovered that it wasn't and has apologised for his mistake. The evidence about that was given by the prison psychologist who did not think that this behaviour was sexually inappropriate but thought that it was crossing boundaries that should not have been crossed. This she said demonstrated a risk that the Respondent might radicalise his nephews and nieces if he became re-radicalised and that the family were not prepared to stand up to him.

42. The Applicant asserts that the panel should not have regarded the concern as being shown to be unfounded because what happened was not contrary to prison rules. The Applicant now says that the concern is that boundaries within the family were inadequate. What is suggested is that, as there had been a previous sexual assault within the family not involving the Respondent, he should have been stopped from having any physical contact with his nieces. As I understand it, this was never expressly said by the prison psychologist but, even if it had been, the panel were perfectly entitled to accept the evidence of the independent psychologist who considered that not only should this conduct not have been stopped but it could be interpreted as being healthy. See 3.52 of the decision. I agree with the Respondent that the attempt of the Applicant to suggest that the conclusions of the panel about the family were irrational is untenable.

43. As for current associations of the Respondent, the Applicant contends that three of them, Mr. J, Mr. S and Mr. A, represent a risk factor because of their historic connections with terrorism. The panel considered in detail what those connections with terrorism were, see para 2.126 of the decision and onwards. At para 2.152 the panel concludes "*The panel has no reason to suppose that [the Respondent's associates] holds a mindset that is supportive of terrorism or that any of them currently subscribe to jihadist or Islamist beliefs supportive of terrorism.*"

44. The Respondent said that he was having no further connection with Mr A since concern had been expressed about that connection in prison reporting. The panel were entitled to rely on that evidence if they accepted it as truthful and there was no evidence to contradict it. The COM had made enquiries about the three men including discussing them with police colleagues. The colleagues that she consulted, because of the nature of the Respondent's offending, would no doubt have access to confidential information. It was the COM's job to concern herself with matters which might increase risk if the Respondent was released. She did not consider that they posed a risk having made those enquiries. The COM is part of a specialist team who are responsible for high profile offenders if they are released into the community.

45. The panel also relied on the fact that, as accepted by the Applicant, all three of these associates visited the Respondent in prison having been cleared by the authorities to do so. The Applicant now argues that the panel in taking account of this fact has placed undue weight on it because the panel did not know the reason for these checks. In a case where a prisoner has been convicted of a serious terrorist offence and has been suspected of plotting to threaten or harm a soldier from inside prison the panel was entitled to infer that part of the checks on visitors would be to

find out whether they had a terrorist mindset. The Respondent was undergoing programmes to change his mindset. In my judgment the panel were entitled to infer that the prison would have concerns if he was having visits from people who had a terrorist mindset themselves.

46. There was evidence on which the panel could rely that associations now with any of these men would not increase the risk of the Respondent re-offending or being re-radicalised. In my judgment this conclusion was not outside the range of reasonable conclusions open to the panel. Accordingly, the decision of the panel was not irrational. It is also contended that this part of the decision contains errors of law presumably on the basis that the panel didn't consider one or more material consideration in making this decision. In my view no mistake of law has been identified and accordingly this ground also fails.

47. Ground 3 is an assertion by the Applicant that the panel were irrational in dismissing the findings of the prison psychologist and failing to consider important aspects of her report. The Applicant alternatively submits that there was an error of law in that the panel ignored material considerations in the psychologist's report.

48. In considering the evidence both written and oral of the prison psychologist the panel had to contrast it with the evidence of the independent psychologist instructed on behalf of the Respondent. It also had to consider the written report of another prison psychologist, some of whose conclusions were different from those reached by the main prison psychologist. The panel had the benefit of having as a member of the panel an experienced psychologist. The evidence of the prison psychologist was reported in the decision in extensive detail. It cannot be properly argued that it was ignored by the panel. The finding of the panel was that the basis of her opinion had been removed because it relied heavily on the accuracy of gists of prison intelligence contained in the dossier. The prison psychologist did rely on information contained in the dossier as gists of security information. At para 3.24 the panel records the prison psychologist as saying that she had relied very heavily on the security intelligence. She was further quoted by the panel as saying "*her working assumption was that the intelligence was accurately recorded and, if it was recorded, that meant it was of concern and she assumed the content inferred was provided".* The prison psychologist asserted that the Respondent had obtained favourable reports by staff conditioning and staff splitting. For sensible reasons the panel did not agree with that view. The prison psychologist also considered that there were problems with the Respondent's personality which needed addressing.

49. The independent psychologist significantly disagreed with what the prison psychologist said. The panel, while accepting that the prison psychologist was not motivated by bias, did disagree with the prison psychologist on a number of fundamental points. They disagreed with the weight that the prison psychologist had placed on the intelligence reports. They considered whether her reliance on the accuracy of those reports were fundamental to her decision. The prison psychologist said it wasn't but after very careful consideration the panel decided that her reliance on them was fundamental. The panel had considered the gists and had reached different conclusions about their accuracy and materiality to the reliance on their accuracy which the prison psychologist used in forming her opinion. Those differences were capable of effecting the views of the prison psychologist and the panel concluded that they were fundamental to the prison psychologist's

conclusions. They were entitled in my judgment to reach that view. It was certainly not irrational. When an expert tribunal including a psychologist has heard evidence from two competing psychologists, it is very difficult to argue that the tribunal was wrong to prefer the evidence of one to the other.

50. Further it is argued there is an error of law in the decision of the panel in that they failed to take into account two aspects of the prison psychologist's evidence namely key personality traits which might effect the Respondent's risk and secondly how his presentation is affected by his prison environment. Alternatively ignoring these parts of her evidence has led to an irrational decision.

51. I do not consider it correct that the panel ignored these two parts of her evidence. At 3.32 and 3.33 the panel set out the psychologist's views of the Respondent's personality factors which she wished to see '*worked through and bottomed out'.* They also considered the evidence of the independent psychologist who concluded that the Respondent does not have a personality disorder. Another prison psychologist carried out a test to decide whether the Respondent has a personality disorder. She concluded that he did not and did not conclude that he required any specific treatment to assist him although there were matters he needed to be careful about and ways in which he needed to develop.

52. I do not accept that the panel were not well aware of the need to consider how the Respondent's presentation could be affected by being in a prison environment. This is a factor in practically every parole hearing and it is really difficult to see how it could have materially affected the panel's consideration of risk.

53. In my ruling on ground 3, I have ignored the suggestions of bias of the prison psychologist made by the Respondent in his submissions. The panel did not accept that and they were entitled to form that view. For all those reasons ground 3 fails.

54. It is necessary for me to look at each of the grounds for reconsideration put forward by the Applicant individually but also consider their cumulative effect. It is possible for there to be a finding that individually the decision on each of the matters was not irrational but putting all of them together the decision to release was irrational.

55. I have considered that, but in my view, this is not one of those cases. The decision is very comprehensive. The panel have clearly considered all the arguments and have given the arguments of the Applicant anxious consideration. As I have said, it is a worrying case but the panel were satisfied that the Respondent's terrorist mindset had changed and with the help of the risk management plan, which they approved, he did not need to remain confined. That decision in my judgment was neither unlawful or irrational.

Decision

56. For the reasons I have given, I do not consider that the decision was irrational or contained an error of law and the application for reconsideration fails.

Sir John Saunders
19 December 2023