`Neutral Citation No: [2023] NIKB 9	*Ref:* **COL12053**
	ICOS No: **2022/109303**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **10/02/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY
VALDOMAR DA CONCEICAO SILVA
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

_____

Mr Mark O'Hara (instructed by Harte Coyle Collins Solicitors) for the Applicant
Ms Lara Smyth (instructed by Carson McDowell Solicitors) for the Proposed Respondent

_____

COLTON J

Background/introduction

[1] The applicant is currently serving a life sentence for the murder of his wife on 12 August 2010.

[2] His tariff expiry date was 22 August 2022. He is therefore eligible for release from prison on licence should a panel of Parole Commissioners for Northern Ireland direct his release. The proposed respondent determined the applicant's application for release on licence on 1 September 2022 and decided not to direct his release by a written decision dated 20 September 2022.

[3] It is this decision which the applicant seeks to challenge in these proceedings.

[4] The court has the benefit of well-argued and reasoned skeleton arguments on behalf of the applicant from Mr Mark O'Hara and from the proposed respondent by Ms Lara Smyth. The court is obliged to both of them for their focussed and helpful submissions.

The proceedings

[5] In his Order 53 Statement the applicant seeks an Order of Certiorari quashing the impugned decision, namely the decision not to direct his release, a declaration that that decision was irrational and of no force or effect and an Order of Mandamus compelling the proposed respondent to expeditiously convene a differently constituted panel to reconsider his application for release on licence in light of a judgment or declaration of the court.

[6] In short, the applicant relies on the ground of irrationality. It is argued that the proposed respondent's decision is not justifiable when viewed against the evidence. In classic irrationality language Mr O'Hara argues that the decision "demonstrates a material error of reasoning which robs the decision of logic."

[7] On receipt of the Order 53 application the court had the benefit of a well-marshalled skeleton argument from Mr O'Hara and an equally well-argued and reasoned pre-action protocol response on behalf of the proposed respondent.

[8] Having received that material the court took the view that the issues between the parties were well joined and that all the relevant material was available to the court for the purposes of determining this application. This is not a case which would require affidavit evidence as the detailed reasoned decision of the proposed respondent stands or falls in its own right.

[9] Accordingly the court directed that this was an appropriate case for a "rolled-up" hearing and in light of the fact that the matter concerns the applicant's liberty was dealt with on an expedited basis.

Relevant legal principles

[10] Before considering the decision under challenge it is useful to set out the legal principles applicable to a challenge to a decision of this type. In truth it is well-trodden ground in this jurisdiction. This court set out the applicable principles in the case of *Mervyn Moon's Application* [2021] NIQB 69 as follows:

> "**Applicable Principles**
>
> [9] Essentially the appropriate legal principles are not in dispute.
>
> [10] The statutory test under Article 6(4)(b) of the 2001 Order provides that the PCNI should not direct a prisoner's release on licence unless `satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.'

> [11] This determination involves an evaluative judgement to which the concept of a burden of proof is inapt (see *R v Lichniak* [2002] UKHL 47 at [16] per Lord Bingham):
>
> > 'I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment.'
>
> [12] Within the cohort of those convicted of murder 'there will be those … who may reasonably be judged very unlikely to resort to violence again': *Lichniak* at [15].
> …
>
> [17] In analysing that decision it is apparent that the panel properly identified the legal test to be applied under Article 6 of the Life Sentences (Northern Ireland) Order 2001. As set out above, this provides that the Commissioner should not direct the release of a prisoner **unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined**. Although serious harm is not defined in the 2001 Order it has been defined by statute in Article 3 of the Criminal Justice (Northern Ireland) Order 2008 as 'death or serious personal injury, whether physical or psychological.' It seems this is a reasonable definition to be applied by the panel in its consideration of the applicant's release."

[11] Later in the same judgment the court cited with approval the comments of Sir Brian Leveson in the well-known case *R(D) & Anor v Parole Board & Anor* [2018] EWHC 694 at para 117. The judgment continues:

> "[25] In analysing the panel's reasoning the court bears in mind the comments of Sir Brian Leveson in the well-known case of *R(D) and another v Parole Board and another* [2018] EWHC 694 at paragraph 117 when he said:
>
> > '117. The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the

> submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.
>
> 118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain. In *R (Alvey) v Parole Board* [2008] EWHC 311 (Admin), at [26] Stanley Burnton J, neatly encapsulated the position as follows:
>
> > 'The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however, strong its view, for that of the Parole Board. It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment.'
>
> [26] The court therefore is cognisant of the expertise of the panel and considers that its decision should be read fairly in the context of that expertise."

[12] Mr O'Hara refers the court to the judgment of Saina J in *R (on the application of Wells) v Parole Board* [2019] EWHC 2710 (Admin) as a useful way of approaching the test of rationality in this context. The judgment contains the following:

> "[30] As is obvious, a rationality challenge in public law is always a substantial challenge for a claimant; and particularly so, when dealing with a specialist quasi-judicial body which will have developed experience in assessments (sic) of risk in an area where caution is required.
>
> [31] A modern approach to the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1940] 1 KB 223 (CA) test is not to simply ask the crude and unhelpful question: was the question irrational?"

[13] Mr O'Hara places particular emphasis on the following passage:

> "[32] A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."

[14] The judgment carries on as follows:

> "[33] I emphasise that this approach is simply another way of applying, Lord Greene MR's famous dictum in *Wednesbury* (at 230) 'no reasonable body could have come to [the decision]' but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"

[15] And finally at paragraph [35]:

> "[35] I should emphasise that under the modern context specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the decision; see Judicial Review (6th Edition), Supperstone, Goudie and Walker at para 8.12."

[16] In her submissions Ms Smyth takes no issue with the legal principles and also refers the court to the useful judgment of Mr Justice Scoffield in *Maughan's Application* [2021] NIQB 7. In that decision Mr Justice Scoffield refers to the judgment of McCloskey J in *Re Hegarty's Application* [2018] NIQB 20. Both judgments

reaffirm the inclination of the court towards a high threshold for judicial intervention in an irrationality based challenge to a decision of this type coupled with the heightened standard of scrutiny which applies in a case involving the liberty of the citizen. In his judgment McCloskey J quotes with approval the opinion of Lord Kerr in *Re Corey* [2014] AC 516 in the context of the release on licence of a life sentence prisoner where he gave the following warning to judges hearing a challenge to a decision of a parole body:

> "Put simply, the legislator has placed in the hands of a panel of experts the difficult decision as to when life sentence prisoners should be released. Their role should not be supplanted by a judge who does not have access to the range of information and skills available to the commissioners."

[17] For the sake of completeness Ms Smyth draws the court's attention to the comments of Scoffield J in the *Maughan* decision where he highlighted the importance of a panel exercising its own independent judgment in respect of risk, and the legitimate entitlement to depart from the views expressed by professionals either orally or in reports.

The panel's decision

[18] Having set out the relevant principles the court now turns to the arguments of the parties.

[19] In doing so the court is careful to analyse the detailed and reasoned decision of the Parole Commissioners.

[20] Firstly it is clear that it understood and applied the appropriate legal test namely that set out under Article 6(4)(b) of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order") which requires the panel not to direct the release of a prisoner unless it is satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[21] At the hearing before the panel on 1 September 2022 the applicant was represented by both counsel and solicitor. In the course of the hearing, the panel heard oral evidence from "Mr A" from the Home Office, "Mr B" the PBNI officer, and the applicant.

[22] The panel also had a "parole dossier" prepared for the applicant's case and also heard submissions on behalf of the applicant's counsel.

[23] Developing his argument Mr O'Hara refers to aspects of the applicant's case which were accepted and recognised by the proposed respondent including:

(i) Aside from the index offence the applicant has "36 … an effectively clean criminal record. He certainly has no history of adjudicated violence."

(ii) The applicant's behaviour in prison has been "39 … exemplary. He has no adjudications and has passed all drug tests."

(iii) The applicant was no longer considered to be assessed as a significant risk of serious harm ("SROSH") pursuant to a risk management meeting conducted by the PBNI on 24 September 2019.

(iv) The applicant was assessed by HMP Maghaberry Psychology as being of "… a low general risk of violence to the public" in a pre Violence Risk Assessment, report dated 6 March 2020. In the same report his perceived risk is viewed as "… likely to be in the context of an intimate relationship. While not in a relationship risk of violence is not imminent, this may increase if he is in a relationship." The impugned decision acknowledges that "41 … the VRA which was carried out in 2020 suggested that he was a low risk of general harm."

[24] In its reasoned decision the panel expressly acknowledged the positive factors in respect of the application as set out above.

[25] The psychology report to which Mr O'Hara refers also states:

> "… The potential warning signs that may indicate increased risk include alcohol use, a change in work performance and noticeable changes in his behaviour including appearing depressed and pre-occupied.
>
> 10.1 Mr Silva's level of risk is likely to increase as a result of feelings of inadequacy, betrayal, jealousy, the belief that he has lost everything and the fear of losing a significant attachment; more specifically if he was in a relationship that was ending or if there was suspected or actual infidelity. This is likely to make it more difficult for him to experience periods of heightened emotion and an inability to regulate and manage his emotions and utilise effective coping strategies. Mr Silva appears to become pre-occupied to the point of obsession in his relationship when he believed he may lose his wife and his feelings became exacerbated when she left him. This appears to have impacted on his ability to develop emotion focussed coping strategies to deal with relationships and inter-personal problems."

[26] The report concluded that:

> "It would be beneficial for Mr Silva to complete the Building Better Relationships (BBR) programme to address his violence in the context of a relationship."

[27] At the stage of the hearing the applicant was nearing completion of the Building Better Relationships ("BBR") programme. An interim report authorised by HMP Psychology Services, dated 24 August 2022 indicated that applicant's engagement and progress was positive.

[28] The author of the report did not express an opinion on the applicant's suitability for release.

[29] The panel was in receipt of a letter dated 25 August 2022 from the Department of Justice which indicated its formal position in respect of the applicant's case that it was unable to support the applicant's release. The letter pointed out that the applicant had yet to complete any form of pre-release testing to evidence confidence in being able to safely return him to the community.

[30] The PBNI also indicated that it did not support the applicant's release at that stage. A report dated 20 April 2022 set out the PBNI's professional view of the risk the applicant posed in the following way:

> "(a) The applicant was assessed as presenting a high likelihood of general re-offending within a 2 year period (his ACE score remained at 35);
>
> (b) Whilst the applicant was not assessed as SROSH under PBNI's assessment tool, the risk analysis suggested that a risk of serious harm existed because of the following factors:
>
> (i) cause of death of the victim
>
> (ii) victim typology
>
> (iii) use of weapon with intent to endanger fear
>
> (iv) premeditation in the fact that Mr Silva went armed
>
> (v) misuse of alcohol
>
> (vi) rumination
>
> (vii) jealousy.

(c) The risk posed by the applicant could not be managed in the community at this time. In order to address the risk, the following were considered necessary:

(i) completion of ongoing work with NIPS Psychology

(ii) completion of a Violence Risk Assessment which would indicate ongoing treatment needs in relation to violence

(iii) engagement with pre-release testing."

[31] In relation to the PBNI report the panel's decision records that in the course of oral evidence the PBNI witness indicated inter alia that:

"17 … we would want to see Mr Silva completing the VCR course and then we would want to see him applying the skills he had learned by going through the pre-release scheme. These skills would relate to the risk areas in the case including relationships, alcohol, jealousy, rumination etc. We would also want a new Violence Risk Assessment which would identify any further treatment needs if necessary …

21 … he confirmed that the ACE score was 35 which was in the high category. Any further reduction was likely to result from pre-release testing. He said there was nothing else Mr Silva could do to lower that score at the moment.

22 In response to Mr O'H, Mr B said that Mr Silva was a model prisoner. I also confirm that the Violence Risk Assessment from 2020 had concluded that he was a low general risk. Mr O'H queried whether there would be a need for a further VRA and Mr B repeated his view that this would be necessary to determine if any further work needed to be done."

[32] After acknowledging the positive factors highlighted above the panel indicated that it agreed with the probation officer's opinion and expressly addressed the argument made on behalf of the applicant vis-à-vis the efficacy of pre-release testing. The key passages in the decision under challenge are as follows:

"42. However, the circumstances of the index offence are of course a matter of grave concern. While they may

well have been out of character, he nevertheless armed himself with a knife and a dumb bell in order to confront his best friend who was having an affair with his wife. Having done this thankfully without injury to anyone, he could have left the scene and returned home. However, he remained at the scene and when his wife reappeared, he candidly told us that he lost his temper and chased her and then stabbed her to death. His account of the incident over the years has been relatively consistent but it appears to us that he set out that day to inflict injury. We do not accept that he just wanted to frighten. If that was his intention, why did he need the dumb bell and a knife?

43. There were also allegations of violence and coercive behaviour in the marriage. While he denied this, he did admit to arguments and rows, one of which resulted in a physical altercation between himself and his wife.

44. In light of the above, it is clear to us and to those charged with managing his risk that relationships will be the crucial risk factor for him in the years ahead. It is true that pre-release testing will be unlikely to provide evidence that he can apply his skills learned in the BBR programme in a relationship context. However, Mr B in his evidence suggested that there were other risk factors including the use of alcohol, feelings of jealousy, and ruminative thinking that could be tested in the context of the pre-release scheme. He also thought that it would be appropriate once the BBR was completed for a new Violence Risk Assessment to be carried out both to assess the current level of risk but also to identify if there are any further areas of treatment that are required.

45. We agree with the approach laid out by Mr B. Mr Silva has just within the last few weeks served his tariff. He has almost completed the first substantive piece of risk reduction work that has been offered to him. While it appears that he has done well on this, we have not had a post programme report yet. The VRA that was done is now more than 2 years old. It would be vital in our view for this to be reviewed before release is considered.

> 46. It is also our view that while pre-release testing will not test his reaction to difficulties in a new relationship, it nevertheless will test how he reacts to the inevitably stressful moments that he will encounter as he returns to a community type setting after 12 years in a custodial environment."

[33] Finally it should also be noted that the panel expressly considered whether the prisoner could be released with appropriate licence conditions at paragraph [50]. However, having considered all of the evidence before it, the decision records that the panel applied the statutory test under Article 6(4)(b) of the 2001 Order and concluded that it was not satisfied that it was no longer necessary for the protection of the public from serious harm that the applicant should be confined. In accordance with its statutory duty, the panel therefore directed that the applicant should not be released.

The parties' arguments

[34] Mr O'Hara's criticism of the decision is that the risks identified before the panel are all grounded in the context of an intimate relationship. He argues that the panel was particularly influenced by the PBNI witness to the effect that pre-release testing would be essential in assessing any future risk.

[35] He argued that the proposed respondent's acceptance of the PBNI's witness suggested approach is not supported by the evidence. This is because the risk identified in relation to the applicant's future conduct relates to his behaviour in the context of an intimate relationship. The completion of the BBR programme, pre-release testing and an up-to-date VRA it is argued will not and cannot test the applicant in that context. The risk factors identified by Mr B in terms of the use of alcohol, feelings of jealousy and ruminative thinking were all identified in the context of an intimate relationship. Outside such a relationship these factors did not exist as significant risks. It is on this basis that Mr O'Hara argues that there is an error of reasoning in the proposed respondent's approach which robs its decision of logic.

[36] Ms Smyth counters by arguing that the applicant adopts too narrow and artificial a view of the concept of risk. It may be correct that pre-release testing and the other steps recommended by the proposed respondent will not test the applicant in the context of an intimate relationship. This does not inevitably lead to a conclusion that he should therefore be released. There was ample evidence before the panel to assess and address the risks which had been properly identified.

Conclusion

[37] As one would expect the experienced Parole Commissioners panel has set out a detailed and reasoned decision in relation to the applicant's application for release on licence.

[38] The following emerges from that reasoned decision:

(a) The panel correctly identified the appropriate legal test.

(b) The panel had the benefit of detailed expert reports on the degree of risk presented by the applicant and steps that could be taken to assess and minimise that risk.

(c) The applicant had the benefit of representation from solicitors and counsel. In addition, the panel had the benefit of hearing the applicant give evidence.

(d) The panel expressly acknowledged the positive factors relating to the applicant.

(e) In its decision it expressly addressed the complaint now raised in this application to the effect that the risk the applicant posed only arose in the context of an intimate relationship, something which could not be tested by pre-release testing.

(f) The panel considered all of the relevant evidence before it.

(g) Within its written decision the panel provided clearly expressed, rational and detailed reasons as to why, notwithstanding its consideration of the positive factors of the applicant's case and indeed the potential limitations of pre-release testing to assess the applicant's behaviour in intimate relationships, it was not satisfied that it was no longer necessary for the protection of the public from serious harm that the applicant be confined.

(h) The panel was not required to adopt the views of the psychologist who prepared the report relied upon by the applicant. That report was prepared two years prior to the hearing and expressed no view on the applicant's suitability for release. It did not express a view on the appropriateness of pre-release testing. It did recommend that the applicant complete the BBR course. At the time of the hearing the BBR course had not yet been completed.

(i) The panel's decision was not confined to the requirement that the applicant start on the pre-release scheme. It also recommended that he complete the BBR course after which a new Violence Risk Assessment be undertaken.

[39] Applying the legal principles set out earlier in this judgment the court concludes that the decision under challenge was one that was clearly rationally available to the panel on the evidence before it.

[40] The court notes with concern that notwithstanding the very clear recommendation of the panel on 20 September 2022 that the applicant "be immediately started on the pre-release scheme", this has not yet occurred. There may be justifiable reasons for this. However, the court requests that the applicant's solicitors make the relevant authorities aware of the court's concern in this regard.

[41] The court recognises the focussed submissions on behalf of the applicant, which were not without some merit. Notwithstanding this the court considers that based on the detailed and reasoned decision promulgated by the panel the application was one which ultimately was unarguable and without any reasonable prospect of success.

[42] In the circumstances leave to apply for judicial review is refused.