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Case No: CO/1547/2022

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27 May 2022

Before :

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE GARNHAM

- -

Between :

THE QUEEN on the application of SECRETARY OF STATE FOR JUSTICE	**Claimant**
- and –	
THE PAROLE BOARD OF ENGLAND AND WALES	**Respondent**
- and -	
LESLIE JOHNSON	**Interested Party**

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- -

Sir James Eadie QC and Jason Pobjoy (instructed by **GLD**) for the **Claimant**
Nicholas Chapman (instructed by **GLD**) for the **Respondent**
The Interested Party appeared in person by videolink from prison.

Hearing date: 25 May 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 27 May 2022.

Lord Justice William Davis and Mr Justice Garnham:
These are the written reasons for the decision we announced at the conclusion of the hearing on 25 May 2022.

Introduction

1. Leslie Johnson is now aged 58. In 1997 he was convicted of rape of a male under the age of 16 and two associated offences of indecent assault. The offences involved two boys. He was sentenced to 8 years' imprisonment. In 2006 he breached the notification requirement imposed at the time of the 1997 conviction. In 2016 he pleaded guilty on the day of his trial to 7 offences of sexual assault of a male child under 13. The offences were committed between 2011 and 2014. There were two victims who were aged between 10 and 12 at the time of the assaults. On 22 July 2016 Mr Johnson was sentenced to an extended determinate sentence. The custodial term was 6 years 4 months. The extended licence period was 4 years.

2. Mr Johnson became eligible for release on parole on 11 October 2020. The oral hearing of his case was delayed until 8 February 2022. On 14 February 2022 the Parole Board ("the Board") decided to direct Mr Johnson's release on parole. Because the decision was eligible for reconsideration, the decision was provisional at that stage. The Secretary of State for Justice ("SSJ") applied for reconsideration of the decision.

3. The decision was reconsidered by a judicial member of the Board. On 16 March 2022 the application was refused. The SSJ now applies for permission to apply for judicial review of (a) the decision of the Board of 14 February 2022 to release Leslie Johnson and (b) the decision of 16 March 2022 refusing the application for reconsideration.

4. On 6 May 2022 Mr Justice Swift ordered that the claim for judicial review should be considered at a rolled-up hearing. We shall give permission to apply for judicial review so that we can move immediately to consider the substantive merits of the claim.

The decisions

5. The panel of the Board which conducted the oral hearing on 8 February 2022 had a dossier consisting of 470 pages of historic material and current risk assessments. We have been provided with that dossier. The panel had reports from two psychologists, Sophie Carter and Lucy Humphrey. Lucy Humphrey gave evidence at the hearing. The risk assessments conducted by those psychologists identified risk factors as follows:

    - Trauma resulting from physical and sexual abuse sustained by Mr Johnson as a child at the hands of more than one adult male, this trauma being a key risk factor underpinning other risk factors.
    - Sexual offending involving multiple victims and multiple offence types.
    - Limited awareness on the part of Mr Johnson of the impact of his actions upon the victims. This included continued denial of the offences of which he was convicted in 1997.
    - Problems with coping with stress evidenced by incidents whilst in custody showing that he can "flip" when stressed.
    - Denial of any sexual interest in young males despite repeated offences against young male victims.
    - Lack of support in the community.

- Problems with supervision evidenced by the commission of the offences between 2012 and 2014 when Mr Johnson was subject to sex offender registration but did not inform the relevant agencies of his contact with children and by the previous conviction for breach of a notification requirement.

6. The panel agreed with the assessment of the risk factors provided by the psychologists. The panel noted the conclusion of Lucy Humphrey that there had been no reduction in the role of these risk factors in relation to future offending. Her view was that Johnson presented a medium risk of sexual reoffending and a high risk of serious harm. The risk was not imminent but the likelihood of reoffending would increase rapidly if he became destabilised when exposed to stress. She observed that Mr Johnson had committed offences in 2012 to 2014 when subject to sex offender registration. Her conclusion was that the risk he presented was not manageable in the community. She considered that work to address Mr Johnson's trauma was core risk reduction work which needed to be completed whilst he remained in custody.

7. Mr Johnson's community offender manager, Danielle Crook, also gave evidence. In her opinion his risk of sexual re-offending was high. Although the risk was not imminent, she considered that Mr Johnson could offend between a release in February 2022 and the date of his conditional release on 21 November 2022 at the expiry of the custodial term, notwithstanding the apparently robust controls built in to a risk management plan.

8. The panel acknowledged the concerns expressed by the witnesses about the work needed to treat Mr Johnson's trauma. However, the panel did not consider that it was necessary that this work should be completed before release. The critical finding of the panel was that any re-offending by Mr Johnson would follow the pattern of his previous sexual offending, namely against children who had been known to him for some time in the context of family or quasi-family relationships. Thus, "there would be a period of grooming before any further offending….therefore…that risk was not imminent". This was repeated in the panel's conclusions: "The Panel's view was that Mr Johnson presented a high risk of serious harm but that risk was not imminent and was very unlikely to occur in the short time prior to (his release in November 2022)".

9. The panel further accepted that Lucy Humphrey and Danielle Crook did not support release. However, the panel considered that the proposed risk management plan in the community was robust and supportive and would be sufficient to manage Mr Johnson's risk of harm in the period up to 21 November 2022. The ultimate decision was described as "finely balanced". The conclusion was that it was no longer necessary for the protection of the public that Mr Johnson should remain confined. The risk of harm presented by Mr Johnson could be managed in the community with licence conditions directed in particular at preventing him having contact with children.

10. The SSJ's application for reconsideration of the decision of 14 February 2022 was based on three interconnecting grounds. Each ground referred to the alleged irrationality of the decision. First, he argued that the panel had failed properly to apply the test for release and had failed to consider all of the evidence relating to risk. The submission was that the panel, in considering only the immediacy of further offending, applied the wrong test. Second, the SSJ said that the panel failed fully to explain why they did not follow the recommendations of Lucy Humphrey and Danielle Crook. Whilst the panel was entitled to reach a decision contrary to the recommendation of

professionals, it was required to give clear reasons for doing so. Third, the reasoning of the panel was, in part, contrary to their own findings.

11. The judicial member of the Board who considered the SSJ's application dealt with each ground in turn. In relation to the first ground, the judicial member said this:

> "*…in cases of extended sentences, the Parole Board's considerations of risk are circumscribed. Where an oral hearing panel are requested to consider release during the period of parole eligibility (between PED and CRD), the Panel are empowered only to consider risk as it applies between any potential release by the Panel and the CRD. The panel in this case correctly identified this requirement and the decision was based upon the consideration of risk during this prescribed period"*

The CRD (conditional release date) in this case was 21 November 2022. The judicial member concluded that the panel considered appropriately the likelihood of offending in the period up to that date. He said that the proposition that the panel should have considered public protection beyond that date was wrong. He stated:

> *The panel are not empowered or under a duty to consider public protection beyond the CRD. Legislation imposes a licence period by statute which addresses public protection beyond the CRD date. For that reason, the panel correctly and appropriately were only empowered to consider risk as between any release date and the CRD.*

On the particular facts of Mr Johnson's case the judicial member said that the panel were entitled to consider that there would be a high likelihood of a period of grooming prior to any sexual offence being committed.

12. As to the second ground the judicial member identified four factors to which the panel referred and which he determined were a satisfactory explanation for the panel's decision not to follow the recommendation of the professionals. These can be summarised thus. The risk of serious harm would be unlikely to occur within the period leading up to 21 November 2022. Were Mr Johnson to become destabilised in that period, there would be warning signs. His recent conduct and behaviour indicated that he would engage properly with those supervising him in the community.

13. As to the final ground the judicial member said that the submissions of the SSJ were in part repetition of the arguments put in relation to the first two grounds. Insofar as they were directed to specific evidential issues, the judicial member found that the panel had reached a rational view based on all of the evidence.

The legal framework

14. The Parole Board for England and Wales was established in 1968. Its current statutory basis is under Section 239 of the Criminal Justice Act 2003. Its purpose, so far as it relevant to these proceedings, is to carry out risk assessments about certain prisoners to decide whether a prisoner may safely be released into the community. A risk assessment will be based on detailed written evidence in a dossier. Where necessary (as occurred in this case) oral evidence will be adduced at an oral hearing. Where the Board makes a release decision, the SSJ is required to give effect to that decision.

15. The procedure of the Board in carrying out its purpose now is set out in the Parole Board Rules 2019. These Rules created the system of reconsideration of a decision as occurred in this case. A decision to release will be provisional. Where there is an application for a reconsideration, it only will be upon the determination of the reconsideration that the decision will be final. The two grounds on which a party (whether the SSJ or a prisoner) may rely are irrationality and procedural unfairness. In this instance the sole ground relied on by the SSJ was that the decision was irrational. There is nothing in the 2019 Rules which excludes the jurisdiction of the court to consider a challenge to the decision by way of judicial review.

16. One group of prisoners in relation to whom the Board must exercise its jurisdiction is those serving an extended determinate sentence. When Mr Johnson was sentenced the operative provision was Section 226A of the Criminal Justice Act 2003 (as amended). This provided:

> ***Extended sentence for certain violent or sexual offences: persons 18 or over***
> *(1) This section applies where—*
> *(a) a person aged 18 or over is convicted of a specified offence (whether the offence was committed before or after this section comes into force),*
> *(b) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences,*
> *(c) the court is not required by section 224A or 225(2) to impose a sentence of imprisonment for life, and*
> *(d) condition A or B is met.*
> *(2) Condition A is that, at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B.*
> *(3) Condition B is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years.*
> *(4) The court may impose an extended sentence of imprisonment on the offender.*
> *(5) An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of—*
> *(a) the appropriate custodial term, and*
> *(b) a further period (the "extension period") for which the offender is to be subject to a licence.*
> *(6) The appropriate custodial term is the term of imprisonment that would (apart from this section) be imposed in compliance with section 153(2).*
> *(7) The extension period must be a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences, subject to subsections (7A) to (9).*
> *(7A) The extension period must be at least 1 year.*
> *(8) The extension period must not exceed—*
> *(a) 5 years in the case of a specified violent offence, and*
> *(b) 8 years in the case of a specified sexual offence.*
> *(9) The term of an extended sentence of imprisonment imposed under this section in respect of an offence must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence."*

The current provisions are set out in the Sentencing Act 2020 at Sections 279 to 282. Substantively the scheme was not altered by the 2020 Act.

17. The provision governing Mr Johnson's early release on licence was Section 246A of the Criminal Justice Act 2003 (as amended). The relevant parts of the provision are:

> *"(1) This section applies to a prisoner ("P") who is serving an extended sentence imposed under section 226A…*
> *(3)….it is the duty of the Secretary of State to release P on licence in accordance with subsections (4) to (7).*
> *(4) The Secretary of State must refer P's case to the Board—*
> *(a) as soon as P has served the requisite custodial period, and*
> *(b) where there has been a previous reference of P's case to the Board under this subsection and the Board did not direct P's release, not later than the second anniversary of the disposal of that reference.*
> *(5) It is the duty of the Secretary of State to release P on licence under this section as soon as—(a) P has served the requisite custodial period, and*
> *(b) the Board has directed P's release under this section.*
> *(6) The Board must not give a direction under subsection (5) unless—*
> *(a) the Secretary of State has referred P's case to the Board, and*
> *(b) the Board is satisfied that it is no longer necessary for the protection of the public that P should be confined.*
> *(7) It is the duty of the Secretary of State to release P on licence under this section as soon as P has served the appropriate custodial term, unless P has previously been released on licence under this section and recalled under section 254 (provision for the release of such persons being made by section 255C).*
> *(8) For the purposes of this section—*
> *"appropriate custodial term" means the term determined as such by the court under section 226A or 226B (as appropriate);*
> *"the requisite custodial period" means—*
> *(a) in relation to a person serving one sentence, two-thirds of the appropriate custodial term, and*
> *(b) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under sections 263(2) and 264(2)."*

This provision was amended by the Sentencing Act 2020 but not in a way which alters materially its terms.

18. It follows that, when he was sentenced, the judge determined that there was a significant risk to members of the public of serious harm from further specified offences (in this instance serious sexual offences) being committed by Mr Johnson. The extended determinate sentence for which provision was made in Section 226A of the 2003 Act (as amended) was introduced in 2012 when the indeterminate sentence of imprisonment for public protection was abolished. As appears from Section 246A(7) of the 2003 Act (as amended) the SSJ is obliged to release on licence a prisoner sentenced to an extended determinate sentence when the custodial term expires. The prisoner then will remain liable to recall for the period of extended licence. Release on licence prior to the CRD is not permissible unless the Board is satisfied that "it is no longer necessary for the protection of the public that P should be confined." This is the statutory test which was first introduced in the Criminal Justice Act 1991 in relation to release of a

discretionary life prisoner. It has been reproduced in identical language in succeeding statutes governing the Board's function in relation to the release of prisoners.

19. This statutory test is not the same as the test applied when imposing an extended determinate sentence (or any other sentence to which the dangerousness provisions apply). As was explained in *R (Sturnham) v Parole Board (No 2)* [2013] 2 AC 254 the threshold for imposing the sentence is higher than the threshold test for release. 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. See *R (King) v Parole Board* [2016] 1 WLR 1947 at [31]:

> *"….as a matter of ordinary language, the words necessary for the protection of the public do not entail a balancing exercise in which the risk to the public is to be weighed against the benefits of release to the prisoner or the public. The concept of protecting the public does not involve any kind of balancing exercise. It simply involves safeguarding the public from the danger posed by the prisoner….the goal to be achieved is clear, namely the protection of the public; and the means by which it is to be achieved, namely by continued confinement of the prisoner, is equally clear. If the Board concludes that confinement is necessary because there will be a (more than minimal) risk of harm if the prisoner is released, then confinement of the prisoner will be required to avoid that risk."*

King was a case concerned with an identically worded statutory test in a different context. However, the principles to be applied were the same as in the present case. One consequence of the judgment in *King* was that guidance issued by the Board which appeared to be at odds with the judgment was withdrawn.

The submissions of the parties

20. The SSJ made three submissions. First, he argued that the Board were wrong in law to conclude that they could not take into account the risk to the public after the CRD. The statutory test which the Board was obliged to apply contains no temporal limitation. He acknowledged that the approach taken by the Board was in line with its 2021 guidance which, in relation to extended determinate sentences, stated:

> *Panels are not assessing risk after the CRD/automatic release date as the prisoner will be released at that stage in any event.*

He submitted that this guidance was wrong in law. Second, he said that the failure to take account of the need to protect the public after 21 November 2022 was irrational. Third, irrespective of whether the risk after 21 November 2022 was a relevant consideration, the decision was irrational within the parameters set by the panel in its decision. In particular, the proposition that Mr Johnson only would present a risk of harm following a period of grooming failed to address the fact that grooming of itself could cause harm. Moreover, there was no rational basis for concluding that the period of grooming necessarily would be lengthy. The SSJ also said that the decision was not in accordance with the evidence and the panel failed to explain how and why it did not reach conclusions in accordance with the evidence.

21. The Parole Board (as is usual in proceedings challenging a decision of the Board) adopted a neutral stance. It did not argue for a particular outcome. Rather, via counsel it invited us to consider whether the Board's jurisdiction in relation to an extended determinate sentence is restricted to the period between the expiry of the requisite custodial period (the two thirds point in the custodial term) and the expiry of the appropriate custodial term (the point at which the prisoner is entitled to be released). The 2021 guidance was formulated on that basis. Further, the Board suggested that there may be scope for departure from the hard-edged focus on public protection imputed to Parliament in *King*. Our attention was drawn to a passage of the judgment of Lord Mance in *Sturnham* which was said to support this proposition. The alternative approach would be to say that the test of "necessity" should involve balancing competing interests whilst giving preponderant weight to the need to protect the public. In that regard the Board noted that the review of the Parole System announced in March by the SSJ was predicated on the assumption that the current system involved a balancing exercise. In his foreword to the review the SSJ cited *R v Parole Board ex p Bradley* [1991] 1 WLR 134 in support of this proposition.

22. Mr Johnson attended the hearing via a video link from prison. He had a solicitor's representative with him who assisted him in navigating the papers. He made two points in brief oral remarks. First, he said that Danielle Crook, his offender manager, had had relatively little contact with him. Her preparation of OaSys risk assessments and her evidence to the panel should be considered in the light of her lack of knowledge of him and his case. Second, he said that he had not had the opportunity to undertake the work in relation to childhood trauma as advised by the professional witnesses. He should not be penalised for that.

Discussion

23. We are satisfied that the decision of 14 March 2022 was irrational whatever view we take of the powers of the Board in relation to a risk after the expiry of the appropriate custodial term of an extended determinate sentence. That was the conclusion which the judicial member should have reached when conducting the reconsideration. We acknowledge that this Court should hesitate before interfering with the decision of a body such as the Board. We adopt what was said by Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [30] – [32]:

> *"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 of risk in an area where caution is required…..*
> *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."*

On the facts of this case, we conclude that, notwithstanding the experience and expertise of the Board and the panel which considered Mr Johnson's case, the decision cannot be justified.

24. The risk factors accepted by the panel were legion. Of particular significance were: Mr Johnson's limited awareness of the impact of his offending on his victims; his denial of any sexual interest in young males despite his history of offending; his lack of support in the community of the kind which might assist him in avoiding contact with children; his commission of the offences for which he was sentenced in 2016 when he was supposedly subject to some control. The key risk factor which underpinned the other risk factors was the effect of childhood trauma on Mr Johnson. The unequivocal view of the prison psychologist was that work to address this trauma was core risk reduction work which needed to be completed in custody. Mr Johnson's offender manager considered that he could offend in the period between any release and the expiry of the appropriate custodial term.

25. Notwithstanding all of these matters the panel concluded that the proposed risk management plan would be sufficient to manage the risk of harm in the community presented by Mr Johnson. No or no satisfactory explanation was given for this conclusion. It was not supported by the professionals dealing with Mr Johnson. Their evidence rebutted the conclusion. Yet the panel did not explain why their evidence and their opinion should be set to one side in favour of release. The only rationale provided was that, in the period prior to the expiry of the appropriate custodial term, there would be a period of grooming preceding any further offending. This ignored the obvious fact that the process of grooming of itself is an offence capable of causing harm. Further, the inferential conclusion that the grooming would occupy the whole of the unexpired period of the appropriate custodial term had no evidential basis.

26. We reach this view on the basis of the published decision of the panel. We rely in particular on the matters set out at [8] and [9] above. We were provided with a full transcript of the hearing on 8 February 2022. One passage in the transcript suggests that there may have been an underlying misapprehension about what would happen when the appropriate custodial term expired. A panel member raised this point:

> "The choices before us at this hearing are he stays in prison until November and comes out without a risk management plan, albeit still subject to the terms of a sexual offences prevention order and the notification requirements. Or two, his release is directed, and he goes to approved premises, and sometimes before his sentence expiry date, he comes out. And the risk that we are principally concerned with, looking back over the last 20 years, 25 years, is that he, in that time, forms a relationship with a woman with young male children and reoffends. Now, against that background, is the public really, does the public really need the protection from him until November, or would it not be better protected if he were to come out now with all the conditions which would be attached to his coming out…"

The rationale for that observation was that a release at the expiry of the appropriate custodial term would not involve any risk management plan. We are sure that this proposition was erroneous. It follows that there was no factual basis for suggesting that the public would be better protected by early release. The extent to which this misapprehension infected the eventual decision we cannot say from the decision itself. However, it is a further indication of the irrationality of the decision.

27. It follows that both the decision of 14 February 2022 and the decision of 16 March 2022 must be quashed by reason of irrationality within the reasoning of the decisions.

28. We must go on to consider whether the decisions were erroneous in law by reason of the Board's conclusion that it was precluded from taking into account the risk to the public after the expiry of the appropriate custodial term. That is necessary because it is an issue of general significance beyond the facts of this case.

29. We consider that the guidance issued by the Board as cited at [20] above is not in accordance with the law. When consideration is being given to release on licence of a prisoner serving the custodial term of an extended determinate sentence, the issue for the Board is whether it is no longer necessary for the protection of the public that the prisoner be kept in custody. To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration of that exercise ignores the fact that the statutory test has no temporal element. It is true that the SSJ is bound to release the prisoner at the expiry of the custodial term even if the protection of the public would be best served by keeping the prisoner confined. However, that is simply the operation of the sentence imposed. Unless the prisoner is subject to an indeterminate sentence, there will be cases where the prisoner must be released even though they present a risk of harm to the public. Protection of the public then will be by operation of the licence provisions. This factor does not mean that, when considering the release of a prisoner who has served the requisite custodial period, the Board should not assess the risk posed by that prisoner after the expiry of the appropriate custodial term.

30. This proposition can be demonstrated by reference to the circumstances of Mr Johnson's case. He is an offender who uses grooming techniques to facilitate his offending. Were he to be released, there is a significant risk that he would engage in those techniques once more. Even if the grooming were not to cause harm in itself and even if it occupied a considerable period, it would put children at risk of harm once it had achieved its ends. Thus, it would be necessary to confine him for the protection of children albeit that the harm may not occur until after the expiry of the appropriate custodial term.

31. It follows that it was wrong to say (as the judicial member who conducted the reconsideration exercise did) that the Board were not empowered to consider risk after the expiry of the appropriate custodial term. If a prisoner will pose a danger after the expiry of that term, that is bound to be relevant to the issue of the safety of the prisoner's release prior to that point. In his submissions counsel for the Board asked rhetorically whether it was Parliament's intention that an offender subject to an extended determinate sentence who posed no risk should be detained for as long as possible. If that was Parliament's intention (which seems unlikely), it was not translated into the relevant statutory provisions. What Parliament did intend was that an offender was to be confined unless and until it was no longer necessary for the protection of the public. If an offender poses no risk, the protection of the public will not require his confinement. That does not mean that the Board is to ignore anything other than immediate or imminent risk which is what occurred in this case.

32. In any event, the conclusions of the judicial member at [11] above were reached on the assumption that it was appropriate to find that the risk presented by Mr Johnson only would eventuate after the expiry of the appropriate custodial term i.e. after the CRD to use the terminology of the judicial member. For the reasons we have given, this assumption was ill-founded. The evidence did not support it; rather the reverse.

33. We are satisfied that *King* as cited at [19] above is an accurate statement of the law in relation to the statutory test. Nothing in *Sturnham* (which preceded *King* and was cited in the leading judgment in *King*) serves to undermine that proposition. As we have said *Sturnham* was concerned with the difference in thresholds between imposition of the sentence and release. The nature of the statutory test was secondary. We do not find that there is any dissonance between *King* and *Sturnham*.

34. We note Mr Johnson's comments about his offender manager. Even if her view could be impugned, the opinion of Lucy Humphrey was to the same if not stronger effect. Discounting the offender manager's opinion would not affect the outcome. Whether Mr Johnson had had a full opportunity to undertake work in relation to his trauma could not affect the issue of public protection i.e. the sole matter with which the Board was concerned.

Conclusion

35. For the reasons we have given the decisions of the Board dated 14 February 2022 and 16 March 2022 are quashed. We are satisfied that, in considering whether to direct the release of a prisoner serving the custodial part of an extended determinate sentence, the Board must not engage in a balancing exercise. The decision must be taken purely by reference to the need to protect the public. *Bradley* as referred to at [21] above was decided by reference to common law principles and before the introduction of the statutory test. We conclude that the guidance issued by the Board in 2021 to which we have referred does not properly reflect the duty of the Board in relation to prisoners subject to an extended determinate sentence. When applying the statutory test, the Board must consider the need to protect the public. The nature and the extent of the risk posed by a prisoner beyond the expiry of the appropriate custodial term are capable of affecting the need for public protection during the currency of that term.