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[2023] PBRA 11

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing dated the 16 December 2022 to direct the release of the prisoner Pyle (the Respondent).

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the application for reconsideration, the Response to the application by the legal representatives of the prisoner (the response), the decision letter dated 16 December 2022 and the dossier that was considered by the panel.

Background

4. The Respondent was sentenced to an extended sentence for indecent assault on a female child under the age of 14. He was sentenced concurrently at the same time for a large number of similar offences as well as offences of causing a female child to engage in sexual activity and making indecent images. These were specimen offences and spanned a significant number of years because the victims were his female family members. The sentence was for 5 years custody with an extended one year on licence. His Parole Eligibility Date was 2 July 2022, his Conditional Release Date is in March 2025 and his Sentence and Licence Expiry Date is in August 2028. This was the first review of his sentence.

Request for Reconsideration

5. The application for reconsideration is dated 6 January 2023.

6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds applicants that being

unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

7. The grounds for seeking a reconsideration are as follows:

(a) Irrationality

a) The Applicant states that the Panel was provided with significant evidence that the Prisoners risk had not reduced. The Panel accepted that *'he has demonstrated no attitudes or insight into his offending'*, however have failed to evidence their decision making in assessing his risk to be manageable in the community.
b) The Panel placed over-reliance on the Risk Management Plan and external controls to manage risk, rather than ensuring his risk is manageable by addressing concerns relating to his attitude to his offending.
c) The Panel failed to acknowledge the Prisoner's reluctance to complete future offending behaviour work, instead state *'as an untreated sex offender there is an inherent risk in release but there is some evidence that the impact of treatment is minimal'*. The Applicant submits that the Panel have placed improper weight on offence focussed work being completed in the community and failed to consider key pieces of evidence such as the risk the offender poses to the public without completing such work.

(b) Error of Law

a) The Applicant submits that the panel has made an error in law in assessing the time period of risk to be 6 years. In **R (Secretary of State for Justice) v Parole Board and Leslie Johnson [2022] EWHC 1282** at paragraph 29, the High Court held that "… *the statutory test has no temporal element*". and accordingly, the panel is obliged to consider the nature and the extent of the risk posed by a prisoner beyond the expiry of the appropriate custodial term.

Current parole review

8. The referral by the Secretary of State to the Parole Board to consider release on licence is dated September 2021. An oral hearing was directed by a Parole Board panel in March 2022, and the hearing listed for 8 December 2022. The panel consisted of two independent members and a judicial member. The hearing took place over a video link. The Respondent was represented by legal representatives. The Secretary of State did not attend.

9. The panel took into account a dossier of 209 pages and took oral evidence from the Respondent's Prison Offender Manager (POM), Community Offender Manager (COM) and prison psychologist who had undertaken a psychological risk assessment in June 2022. A copy of the completed report was in the dossier.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release.

11. The Parole Board will direct release if it is no longer necessary for the protection of

the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A).

13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Illegality

14. An administrative decision is unlawful under the broad heading of illegality if the panel:

    (a) misinterprets a legal instrument relevant to the function being performed;
    (b) has no legal authority to make the decision;
    (c) fails to fulfil a legal duty;
    (d) exercises discretionary power for an extraneous purpose;
    (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    (f) improperly delegates decision-making power.

15. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

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

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

17. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding

whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

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

Other

19. 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

20. The Respondent's legal representatives have provided a detailed response to the application dated 16 January 2023. In summary, the representations submit that the decision was not irrational, reminding me of the relevant case law in relation to irrationality. For reasons that will become clear below, I have not provided my consideration of their representations on this ground in my consideration.

21. In relation to the ground of illegality, the response appears to acknowledge that the period of risk identified in the decision letter was not accurate. They submit that this is *'simply a mistake'* on behalf of the panel, and that during the oral hearing there was reference to the panel considering an indefinite period of risk. The response further submits that even if the panel was wrong in its consideration of the risk period, the decision would have been no different.

Discussion

22. I first considered the ground of illegality. It is obviously of utmost importance that the Parole Board abides by primary and secondary legislation, case law, and its own Rules, along with the Rules of natural justice.

23. The application is correct in pointing out that, further to the case of *Johnson* (see above), the test for release no longer has a period of time for the panel to consider risk and its management. Prior to the *Johnson* case, decisions made by the Parole Board on referrals by the Secretary of State to consider initial release in extended sentences took the period of risk from Parole Eligibility Date (PED) to Conditional Release Date (CRD). This was because the prisoner would in any way be released at CRD. In the case of the Respondent, his PED was in the past, and his CRD is some years in the future. Prior to the case of *Johnson* therefore, in this case, a panel would have calculated the period of risk to be considered for the test for release to be from the date of the decision to CRD.

24. The Parole Board Guidance following the *Johnson* case is that where the panel is considering the test for release for extended sentence and determinate sentence prisoners, the period of consideration is indefinite. At the time of this reconsideration, *Johnson* continues to be the presiding case for the risk period.

25. I am not entirely sure how the panel in this case came to the conclusion that the period of risk was 6 years. This would not have been correct even prior to the *Johnson* case as the period from PRD (or date of decision letter if PRD is in the past) to CRD would not have been 6 years. I consider it very likely that the panel considered the entirety of the sentence, this was 6 years, from sentence start to sentence end.

26. In any event, the period of risk is incorrect. Since the period of risk to be considered is inevitably linked to the test for release, it calls into question whether the panel correctly applied the test for release.

27. Taking into consideration the submissions made in the response to the application, I looked carefully at the decision in case the 6-year figure was merely a typing mistake and the panel in fact had considered an indefinite period of risk. Regrettably I could find nothing that reassured me that the panel had the correct timeframe in mind when making its decision. The parts of the decision letter that would have assisted me in particular would have been under the sections analysing management of risk in the future, and the conclusion. Regrettably these sections are very short and do not provide me with any information about period of risk being considered.

28. Furthermore, on the issue of a simple error, while I agree that this is not beyond the bounds of possibility, in my opinion is that it would be very unusual. The reason for my opinion is that the template does not populate this time period automatically. It has to be typed in deliberately by the panel chair. Given that 6 years is the period of sentence, I consider that it is, on the balance of probabilities, the time frame that the panel deliberately typed in as the period of risk. In other words, they had the wrong period in mind.

29. The response to the application submits (presumably in the alternative) that even if the panel was wrong in its consideration of risk period, it would not have changed the decision. I cannot agree with that submission. 6 years compared to an indefinite period is significant. The differences in the consideration of any panel looking at an indefinite period of risk would include imminence of risk rising, period of time over which offending took place, both external and internal risk management strategies including future living plans. In this case the panel accept that the Respondent was a person with no insight, who had not undertaken relevant offence focused work, that the offending had taken place over a considerable period of time, and that the risk of future offending in a similar way remained. These are all matters that are highly relevant to period of risk to be considered. Despite accepting these points, the panel provides almost no analysis of these issues in its decision letter. This does not give me any reassurance that even if the panel was considering 6 years as a risk period, it would have made the same decision.

30. I find that the panel made an error of law in applying the test for release. Because

I have made that finding and will grant the Application, I did not go on to consider the ground of irrationality.

Decision

31. Accordingly, I consider that the decision dated 16 December 2022 contained an error in law. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Chitra Karve
20 January 2023