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[2023] PBRA 213

Application for Reconsideration by Robinson

Application

1. This is an application by Robinson (the Applicant) for reconsideration of a decision of a panel of the Parole Board following an oral hearing on 26 October 2023. The decision letter is dated 08 November 2023.

2. The panel did not direct release.

3. 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.

4. I have considered the application on the papers. These are the dossier of 452 pages (which includes the decision letter) and the application for reconsideration that runs to 8 pages.

Background

5. The Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) on 6 September 2012 for offences of false imprisonment and sexual assault. The minimum term set by the sentencing Judge was 4 years (with allowance for time on remand) and expired in July 2016.

6. On 1 July 2019 the Applicant was released (from open conditions) at the direction of the Parole Board and was recalled on 16 March 2020 after he was arrested for an offence of harassment of his neighbour and her partner. He subsequently pleaded guilty to this and was sentenced to 8 weeks.

7. His case was considered in September 2021 following this recall where no direction for release was made. However, that panel recommended that the Applicant move to open conditions.

8. The recommendation was accepted by the Secretary of State for Justice (the Respondent) and, the next month, the Applicant transferred to an open prison where he has remained since.

Request for Reconsideration

9. The application for reconsideration is dated 28 November 2023. The application was made on the published form CPD 2, but the grounds were set out in a separate document prepared by the Applicant's lawyer.

10. The ground for seeking a reconsideration is that the decision was an irrational one.

11. These are not broken down, and are set out in a narrative form. It appears that the complaints are:

    (a) The panel wrongly considered that sexual preoccupation was only a recently identified risk factor of his,
    (b) The panel wrongly considered that he had not undertaken any risk reduction work on sexual preoccupation; and
    (c) The panel wrongly concluded that there was outstanding core risk reduction work required.

12. It is said that this makes the decision irrational.

Current parole review

13. The case was referred to the Parole Board by the Respondent in August 2022. It was considered by a single member at the Member Case Assessment (MCA) stage in November 2022 who directed an oral hearing.

14. The oral hearing was heard remotely on 26 October 2023. The panel heard evidence from the Prison Probation Officer and a stand-in Community Probation Officer, as well as from the Applicant himself.

15. The Applicant was represented by a solicitor, the same solicitor who prepared the application for reconsideration.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 8 November 2023 the test for release. The panel did not make any recommendation as to whether the Applicant was suitably located in open conditions, but the implication of para 4.5, that he needed to be further tested on temporary releases, indicates that the panel was of the view that the Applicant should remain in open.

17. 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)

18. 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)).

19. 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)).

20. Unlike with an application to set aside a decision (r28A(4)(a)) where a material error of law can be relied upon, an error of fact is not a ground for reconsideration (apart from in the narrow sense set out in para 64 **R v SSHD [2004] EWCA Civ 49**). This has been confirmed by **Smith [2023] PBRA 32** (para 30).

Illegality

21. Although this was not pleaded in the application for reconsideration, I have included it here.

22. 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.

23. 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

24. 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."

25. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

27. The Respondent stated that he did not wish to make any representations.

Discussion

28. I shall start with one point, which is that reference is made in the grounds to previous reports and decision letters that were not in the dossier. There is no provision in the Rules for fresh evidence to be relied on (**Nightingale [2019] PBRA 40**). In any event, there is no application for such evidence to be admitted. In those circumstances, I do not consider that I can have regard to it.

29. I note that, in any event, much of this relates to events before a previous recall which was initiated by further offending by the Applicant. In those circumstances, this would only be of limited weight in any event.

30. The real complaint appears to be with the way that the panel approached their decision, and whether they either failed to give reasons for their conclusion in relation to sexual pre-occupation, or reached a conclusion on that risk factor that was irrational. Both of these (if material) would be errors of law (paras 9-10 **R (Iran) v SSHD [2005] EWCA Civ 982**).

31. There is a close relationship between irrationality and aspects of illegality. In relation to this, Saini J in **R (Wells) v Parole Board 2019 EWHC 2710** said (para 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*".

32. I shall start with consideration of the question of whether there was core work outstanding. Generally, this would be taken to be work that would needed to be undertaken in closed conditions.

33. In this case the panel set out (para 2.11) that the professionals were of the view that there was no core work outstanding. It is also recorded (para 2.16) that whilst there was a written report to that effect from a psychologist, she had not 'interviewed or assessed' the Applicant. This conclusion that had been reached by the professionals on this point formed a central plank in their respective assessments that the Applicant met the test for release.

34. A further reason given by the panel for not accepting the view of the psychologist was that it was not based on a risk assessment (para 3.16). There was no risk assessment prepared for this review. The last one was from September 2020 which recommended a move to open conditions. This identified a number of areas where the Applicant should engage in 1-1 work with a psychologist.

35. The panel were provided, however, with a report from April 2021 by a psychologist who had undertaken that 1-1 work. This report concluded that the Applicant had engaged well and completed all the aims set for him, other than developing his understanding of how his attitudes towards sex and relationships have developed. For obvious reasons, this report did not include an assessment of risk.

36. The fact that a previous panel had a risk assessment does not mean that the MCA member considering the case on the next review should automatically direct one. There will be a number of cases where that is not necessary and would just introduce a delay, as well as being a waste of resources. However, it would generally be of assistance to have a short line saying why it is the case that no report is being directed.

37. Moving on, the panel do then give further reasons for their conclusion in para 3.16, which relate to the lack of evidence that the Applicant had addressed the question of sexual pre-occupation, but this relates back to the question of whether there was any core work outstanding.

38. It is trite law that a panel is not obliged to follow the recommendations of the professionals. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

39. I consider that this applies to any view of the professionals, at least as it relates to a material point in issue such as what core work outstanding (if any) there is.

40. In assessing this it is pertinent to note that the report from the psychologist as to what outstanding core work was required came about following directions from the panel Chair in advance of the hearing that directed a written report. In those circumstances I consider that there was a heightened duty on the panel to give reasons why that report was not accepted, and to explain why it was not necessary for that witness to be called so that that point could be explored further.

41. It does not appear that the Applicant was put on notice that this may be in issue, although the grounds do not make complaint of that, and I do not take this into account.

42. Drawing the above together, it seems to me that the real question is whether the decision letter contains sufficient reasons for the Applicant, or for anyone else reading it, to understand why it is that the panel did not follow the recommendations of the professionals.

43. It is clear from the decision letter that the panel approached its task conscientiously. It carefully analysed the written and oral evidence. The summary in Part 4 contains a helpful 'balance sheet' approach setting out the factors in favour of, and against, release that make it clear why the decision was reached.

44. However, having given the case the anxious consideration required in a situation where the liberty of the individual is at stake, I do consider that there are insufficient reasons in explaining why it is that the views of the professionals that there is no core work outstanding (and, more widely, why release could not be directed) were rejected.

45. As stated, the panel was perfectly entitled to reject the views presented by the professionals, provided the reasons for doing so were adequate.

46. I do not consider that it was sufficient to say that the view of the psychologist (supported by the other two witnesses) as to what core work there may be was not based on a meeting with the Applicant.

47. I also consider that, given that he was previously recommended for a move to open conditions and the recommendations of the professionals, more reasons were required to be given as to why there was still core work outstanding.

48. The panel gave further reasons for not directing the Applicant's release at 3.17 that relate to his alcohol misuse. It could be said to be a distinct reason for not directing his release (and therefore make any errors in relation to the question of sexual pre-occupation not material). However, I do not think it would be fair to reject the application on that basis. The conclusion as to core work was clearly a significant part of the panel's decision. If that part cannot stand, the decision as a whole cannot.

Decision

49. In those circumstances I felt bound to conclude that the decision to not direct release was (in the sense set out above) irrational. 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.

Daniel Bunting
21 December 2023