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[2024] PBRA 107

Application for Reconsideration by Roberts

Application

1. This is an application by Roberts (the Applicant) for reconsideration of a decision of the Parole Board at an oral hearing dated 23 April 2024 not to direct his release.

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 is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are:

   a. The dossier now comprising 481 pages including the Decision sought to be reconsidered.
   b. Submissions dated 6 May 2024 on behalf of the Applicant in support of his application.
   c. The Chair's notes of the hearing. The grounds submitted invited me to listen to the recording of the hearing. I asked for the recording but was informed that there had been a malfunction and there was in effect no recording.

Background

4. The Applicant is now 62 years old. In May 2002 he was sentenced to imprisonment for public protection for offences of false imprisonment, possession of an offensive weapon and possession of an article with intent to damage or destroy property. His "tariff" expired on 3 May 2007. This hearing was the 8th hearing since that date. The panel at the hearing under consideration did not direct his release but recommended his transfer to open conditions.

Request for Reconsideration

5. The application for reconsideration is dated 6 May 2024.

6. The grounds for seeking a reconsideration are, in summary, as follows:

7. Under the heading of "irrationality":

a. All three of the professional witnesses who gave evidence at the hearing recommended release.

b. The decision letter (DL) contains a number of erroneous factual findings the sum of which contributed to the decision. These concerned:

   i. The Applicant's possession of *"snips"* in the Applicant's cell in April 2023 and November 2023 following his return from work. The evidence given at the hearing by the Prison Offender Manager (POM) was that the *"snips"* were a legitimate item at the Applicant's then workplace and were not a *"weapon".*
   ii. The discovery of a USB stick in his cell following his transfer back to closed conditions. The panel failed to conduct or direct any enquiry into the content of the USB in order to discover whether its contents were relevant to the Applicant's risk of serious harm.
   iii. The discovery that he had a mobile *"smart"* phone in his possession at his community work placement. The panel failed to conduct or direct any enquiry into the use, search history or saved items on the *"smart"* phone.
   iv. The discovery of an item in a sweets tube on his arrival back in closed conditions. The panel failed to conduct or direct any enquiry into the item in the sweets tube.

c. In order to use one or more of the matters referred to at b (i-iv) above as factors pointing away from a direction for release it was incumbent on the panel to cause further enquiries to be made into the facts before reaching the adverse conclusions they reached concerning them.

d. The Applicant relies on a number of authorities in support of this ground. (See below).

Current parole review

8. The case was most recently referred to the Parole Board by the Secretary of State for Justice (SoSJ) (the Respondent) in March 2023.

9. The case was heard by a three-member panel on 11 April 2024 and the decision issued on 23 April 2024.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

11. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).

12. 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)).

Irrationality

13. 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."

14. 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.

15. The DSD case is an important case 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 a *'more modern'* test set out by Saini J in BR (**Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

16. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that *"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.

17. In the **Wells** case Saini J set out *'a more nuanced approach'* at paragraph 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".

18. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

19. What is clearly established by all the authorities 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 all of the evidence. It is only if a 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 all of the evidence, that he or she should allow the application.

20. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

21. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

22. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

23. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

> *"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

24. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

25. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed, or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

26. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;
    (c) they were not properly informed of the case against them;
    (d) they were prevented from putting their case properly; and/or
    (e) the panel was not impartial.

27. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

28. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

29. 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.*"

30. In addition to these authorities the Applicant has referred me to *R (Gallagher) v Basildon DC* [2011] PTSR 731, in which the court stated that a decision will be irrational where "*manifestly disproportionate or inadequate weight has been accorded to a relevant consideration*".

The reply on behalf of the Respondent

31. No submissions have been made by the Respondent with respect to this application.

Discussion

32. While of course the views and recommendations of professional witnesses must be carefully considered they are not binding on the Board. Indeed it is only recently that a *"ban"* on the expression of such views by those witnesses was rescinded. The DL – at paragraphs 4.4 to 4.6 explains carefully and rationally why the panel decided not to follow them. A combination of the admitted continuing resentment the Applicant harbours against the woman referred to as TR in the DL which represents a continuing risk to her (and anyone who might seek to come to her aid) were she to be targeted by him, and the Applicant's repeated and continuing flouting of the rules which led to his being returned from open conditions provided sufficient justification for the panel's decision not to direct his release.

33. As to the matters of fact of which complaint is made, applying the principles set out in the cases summarised above I have studied the dossier and the DL and read the notes of the evidence given by the Applicant and the professional witnesses on the four matters summarised at paragraph 7 b above.

34. The *"snips"*. While the evidence was that these were incapable of being used without adaptation as weapons, the Applicant had brought them in twice knowing that he should not do so. They had sharp blades and could have been converted into offensive weapons. The fact that it happened twice could have reasonably given rise to the conclusion that the Applicant was prepared to break the rules and be confident that he could *"talk his way out of it"*. I have reviewed the DL and its summary of these events at paragraph 2.7 and the following summary of the evidence by the previous Prison Offender Manager (POM).

35. The *"USB stick".* This was the subject of an adjudication. The Applicant admitted that he had it in his possession and had watched pornography which he watched through his games console. His POM expressed his concern over this and other deliberate breaches of the rules in his report of December 2023. The panel, at paragraph 2.9, accurately summarised the evidence concerning the USB stick, including the fact that the Applicant had described it as a Secure Digital folder. It was concealed inside an artificial sweetener tube. As to the analysis of its content the panel relied on the Applicant's account that it contained pornographic material. The issue which concerned the panel was not its content but the fact that the Applicant had chosen on this (and other) occasions to break prison rules.

36. The "*smart*" phone. The Applicant's explanations for the reason for his having the smart phone and his claims that he was entitled to have it with him were rejected by the panel in particular because other prisoners had such phones which they stored in lockers and were able to recharge back at the prison. Thus the panel found his claims of ignorance unconvincing. In addition the panel was concerned that since the Applicant still nurses a strong sense of grievance against Ms TR his possession of the phone may well have been connected to this grievance, although there were mixed opinions among the professional witnesses as to the extent of the risk he still posed to this person. The various views on this situation are set out at paragraphs 2.11-13 of the DL, concluding with its acceptance of the OASys assessment of a high risk of serious harm to Ms TR.

37. The sweets tube. I have searched the dossier and the Chair's notes of the hearing for a separate reference to a sweet or sweetener tube to that referred to at paragraph 32 above and have been unable to find it. Likewise the only reference to a sweet or sweetener tube in the DL concerns the USB stick the subject of paragraph 2.9.

38. The professionals were unanimous in their view that the Applicant was and will continue to be a serial rule breaker, basing his conduct solely on whether he believes that he is either entitled to behave in a particular way or that if caught he will be able to talk his way out of the situation. They believed however that if that sort of behaviour manifested itself following release it could be dealt with without the risk of serious harm he might then begin to pose becoming unmanageable. The panel disagreed and explained why it did so clearly, and rationally in my judgement within the parameters set by the authorities cited above at paragraphs 13-24 above, at paragraph 4.4 of the DL.

39. As to the complaint that the panel should have adjourned the hearing if it was not prepared there and then to direct release, the agreed facts concerning the *"snips",* the *"USB stick"* and the "*smart*" phone were quite sufficient for the panel to draw the conclusion which it did. Each of the events constituted examples of the Applicant's proclivity to choose which rules he would obey and which he would ignore, and then try to excuse or mitigate his behaviour in the hope that he would not face the possible consequences of his actions. Crucially of course the panel had the chance to see and hear the Applicant give evidence.

40. Finally I have considered the question of whether the absence of a recording of the hearing might constitute a *"procedural irregularity"* such as to justify an order for reconsideration. There is no requirement within the Parole Board Rules for a recording to be made of parole board hearings. Thus there can be no question of the absence of a recording constituting an error of procedure. I have however studied the 15 pages of handwritten notes made by the panel chair to check whether the notes might lend support to one or more of the contentions advanced on behalf of the Applicant. I have found nothing within the notes which could do so.

Decision

41. For the reasons I have given, I do not consider that the decision was irrational or procedurally irregular. Accordingly, this application for reconsideration is refused.

Sir David Calvert-Smith
29 May 2024