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[2024] PBRA 162

Application for Reconsideration by Tresize

Application

1. This is an application by Tresize (the Applicant) for reconsideration of a decision of an oral hearing panel dated 8 July 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 the oral hearing decision, the dossier consisting of 229 pages and the application for reconsideration. In addition, I listened to the recording of the hearing.

Request for Reconsideration

4. The application for reconsideration is dated 30 July 2024. It has been drafted by solicitors on behalf of the Applicant. It submits that the decision was procedurally unfair. The Applicant maintains that he did not have a fair hearing, was not properly informed of the case against him and was prevented from putting his case properly.

5. The submissions are supplemented by written arguments from the Applicant to which reference will be made in the Discussion section below. No submissions were made regarding irrationality or error of law.

6. The grounds for seeking reconsideration are that CCTV evidence was viewed by the panel in the absence of the Applicant and conclusions drawn by the panel without the Applicant having had the opportunity to deal with any challenges during the hearing. The grounds also submit that the decision was made in the absence of important evidence such as a Psychological Risk Assessment (PRA) and reports detailing the work engaged in by the Applicant.

Background

7. The Applicant received a sentence of life imprisonment on 26 July 2007 following conviction for murder. The tariff was set at 13 years (less time spent on remand) and expired on 9 August 2019. He was released on 16 March 2020 by the Parole Board after a hearing. He was recalled on 25 September 2023 and returned to custody on 4 October 2023.

8. The Applicant was 18 years old at the time of sentencing and is now 35 years old. This is his first review since his recall.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in October 2023 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

10. The case proceeded to an oral hearing via videoconference on 5 June 2024. The panel consisted of two independent members and a psychologist member. It heard evidence from the Applicant, his Prison Offender Manager (POM) and Community Offender Managers (COMs). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate. After the hearing the case was adjourned to enable the panel to watch the CCTV to which reference had been made in the hearing and to receive further information about accommodation. Thereafter the Applicant's representative submitted written representations and the case was concluded on the papers.

11. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the release decision that is open for reconsideration.

The Relevant Law

12. 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 correctly set out in the decision letter dated 8 July 2024 together with 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)

13. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

14. 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)).

15. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Procedural unfairness

16. 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.

17. 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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

18. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

19. The Respondent has not submitted any representations in response to this application.

Discussion

20. CCTV evidence – On the face of the application the complaint regarding CCTV evidence may appear to have some justification. The decision letter does not set out the arrangements for viewing the CCTV or the opportunity offered to the Applicant to make further oral submissions or provide further explanation during or after its viewing by the panel. This would appear to be unfair particularly as the panel's opinion is that the Applicant "*appears to deliberately punch*" his partner whereas the Applicant's account at the hearing was that the action demonstrated a push and had not been described as a punch by any other professional who had viewed the CCTV. The submission of 28 June 2024 on behalf of the Applicant was drafted without knowledge of the panel's interpretation of the CCTV evidence and did not therefore provide an opportunity for the Applicant to provide further

explanation or interpretation as and/or when the panel were viewing or had viewed the CCTV.

21. I have said that on the face of it the complaint may have appeared to have some justification because having listened to the recording it is clear throughout that the panel was concerned that fairness could require a further oral hearing for further submissions after the CCTV had been seen by the panel. However, that initial observation by the panel appears not to have been taken further but instead the case concluded on the papers after the viewing and written representations.

22. In this case what was required of the panel was a decision on the appropriateness of recall and a consideration of whether or not it would be appropriate to direct the Applicant's release. The Applicant had been released on licence after a parole board hearing in 2020 as it was determined at that time that he met the test for release. He had been on licence for about three years and 6 months and had appeared to be doing well. He was charged with common assault in 2023 and recalled. Bearing in mind the nature of the index offence and the nature of the new offence, this was concerning.

23. In considering the question of recall, the panel considered the Calder principles (R (*Calder) v Secretary of State for Justice* [2015] EWCA Civ 1050). Under those principles the Respondent is entitled to recall a prisoner if the conclusion is reached on reasonable grounds that the prisoner has intentionally breached the terms of his licence and the safety of the public would be at risk if the offender remained on licence. In the circumstances of his recall, given that he had been arrested in respect of a further offence, again involving violence but in a domestic context, the panel considered that the risk remained and that his recall was appropriate.

24. The panel had to make an assessment of risk to the public on the basis of all of the evidence. In making that assessment the panel relied upon the risks presented in relationships together with risks associated with drinking and concluded that further work needed to done before re-release could be considered. Both the POM and the COM also identified further risk reduction work to be undertaken. In considering the question of risk whilst the panel took into account the new matter which had resulted in recall, the panel did not take into account the nature of the assault. The fact of the incident involving an assault was of importance but whether that was a push or other means was not an important consideration for the panel. No reference was made to the nature of the assault nor any finding made to resolve whether it was by way of a punch or a push. The Applicant was not therefore disadvantaged by any observation of the panel contrary to his account of the nature of the assault.

25. I am satisfied that there was no unfairness in the panel's analysis or conclusions. The Applicant had been able to put forward his explanation at the hearing so the panel would have been clear as they watched the CCTV about the Applicant's view. The POM and COM had also made observations to the panel. The panel's view of the nature of the contact was not material to its final decision. I am satisfied that the overriding objective that the Applicant's case as a whole was dealt with justly, was satisfied.

26. Absence of a Psychological Risk Assessment (PRA) – the second ground submitted by the Applicant is that the panel should have directed a PRA to assess risks and

whether core risk reduction work was required. I disagree, the matters raised in the application as needing further investigation were fully and carefully considered by the POM and COM. Both professionals were aware of the different circumstances between the index offence and the recent offence, both had interviewed the Applicant and considered the CCTV and spoken to him about the circumstances of the offence leading to his recall. Both concluded that risk reduction work was required. The Applicant did not disagree with that conclusion and the panel had before it all the evidence necessary to make a fair and reasoned decision. Although the POM said that a PNA (programme needs assessment) would be required, she was nevertheless able to give her conclusions on risk, the work to be undertaken and a recommendation supporting re-release. The decision letter suggests in its conclusion that a future panel may require a PRA, however one does not appear to have been requested before, during or in post hearing submissions on behalf of the Applicant. I do not agree that a PRA report was necessary in this case and there was no procedural unfairness identified by the failure to get one.

27. Absence of evidence – the third ground submits that the panel did not have reports of work the Applicant had undertaken and did not consider the serious illness affecting the Applicant's partner. The panel clearly considered all the evidence presented for the hearing. The panel also had the benefit of hearing from the Applicant as to the work he had undertaken, particularly the in-cell work on alcohol abuse and the continuation of his relationship with his partner and the illness she had suffered. The panel did not reject or dismiss any of that evidence and there is no unfairness identified in not seeking reports or further evidence to support the Applicant's account. There is no explanation as to why the further material relied on by the Applicant was not put before the panel nor was there evidence that the Applicant had asked for an adjournment to obtain that further material for the panel.

28. Omitting to put information before a panel is not a ground for procedural unfairness, this is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before it. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

29. The application is supported by a letter from the Applicant setting out his disagreement with the panel's interpretation of the incident on CCTV, the further courses to be undertaken, the nature and depth of his relationship with his partner, his hopes for the future and his concern that he did not feel he had had the chance to speak on his own behalf as much as he wanted to.

30. I have listened to the recording of the hearing and I am satisfied that the panel offered the Applicant every opportunity to answer questions and make submissions through his advocate. He was not rushed or curtailed in any respect and the panel made every effort to try to resolve the technical issues which prevented the CCTV being shown in the hearing. He was represented throughout by a legal representative who did not make any complaint about the conduct of the hearing.

He, through his representative, was able to make further representations after the hearing. His written representations reflect his disappointment and show his disagreement with the decision as he repeats matters already dealt with by the panel. The reconsideration mechanism is not another chance to re-argue matters properly, fairly and fully already considered by a panel with conclusions soundly based on the evidence.

31. In my judgement notwithstanding the failure to offer the Applicant a further opportunity to address the panel, the hearing was not unfair. The panel took into account all relevant matters and considered them in proper detail. Where they had made observations on which the Applicant had not been able to respond they did not take those observations into consideration in their analysis of the questions of recall or re-release. Having listened to the transcript I am satisfied that there is no evidence to support the submission that the Applicant was prevented from putting his case properly. The overriding objective of fairness was met in this case.

Decision

32. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Barbara Mensah
27 August 2024